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Recrimination: An Examination of the Recrimination Doctrine

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RECRIMINATION

AN EXAMINATION OF THE RECRIMINATION DOCTRINE

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I. INTRODUCTION

Under the doctrine of recrimination a defendant in a divorce action establishes a good defense by showing that the complainant is himself guilty of misconduct constituting a ground for divorce.[1] In other words "[I]f both parties have a right to a divorce, neither of the parties has."[2] This doctrine is capable of producing some remarkable results, as the following three cases illustrate: *Mathewson v. Mathewson*,[3] *Dunn v. Dunn*[4] and *Wells v. Wells*.[5]

The parties in the *Mathewson* case married in 1853 and cohabited until 1861, when respondent (husband) left petitioner and enlisted in the Union Army. Except for two letters which she received shortly after respondent left, petitioner heard nothing from or about respondent for twenty-seven years, and during this period she assumed that he was killed in the Civil War. In 1872 petitioner wedded J. P., and the two cohabited until 1892. In 1889 respondent returned to the area with a wife and children, and petitioner learned of his re-

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1. 1 W. NELSON, NELSON ON DIVORCE AND ANNULMENT § 10.01 (1945); G. CLARK, DOMESTIC RELATIONS 60 (1954).
Since recrimination is considered an affirmative defense, the defendant should formally plead recrimination if he wishes to rely upon the doctrine. 24 AM. JUR. 2d *Divorce and Separation* § 319 (1966); 27A C.J.S. *Divorce* § 114 (1959). However, it is generally recognized that the court may apply recrimination although it has not been pleaded if the plaintiff's own pleading or evidence discloses that he is guilty of a matrimonial offense. Young v. Young, 94 N.J. Eq. 155, 119 A. 92 (1922); 1 W. NELSON, *supra* § 10.10. Furthermore, in a few states which have a strong equity tradition the court may invoke the doctrine, whether pleaded or not, whenever plaintiff's guilt is in any manner brought to its attention. Street v. Street, 48 Del. 272, 101 A.2d 803 (1963); Courson v. Courson, 208 Md. 171, 117 A.2d 850 (1955); McElwee v. McElwee, 171 Ore. 462, 139 P.2d 208 (1943); A. JACOBS & J. GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS 445 (4th ed. 1961).
2. 27A C.J.S. *Divorce* § 67 (1959).
3. 18 R.I. 455, 28 A. 801 (1894).
4. 156 Miss. 132, 125 So. 562 (1930).
5. 73 N.J. Super. 545, 180 A.2d 356 (1962).

appearance in 1890. In 1892, following a consultation with an attorney, petitioner ceased cohabitation with J. P. and filed for a legal separation from respondent, charging desertion and cruelty. After noting that petitioner had continued cohabitation with J. P. for two years after learning that respondent was alive, the Supreme Court of Rhode Island applied the recrimination rule and affirmed a judgment dismissing the petition, saying:

> By continuing to live with him [J. P.] after the return of the respondent, she certainly forfeited all legal claim to the support of the latter . . . and hence is in no position to complain of the wrongs committed by him. . . . It appearing, then, that the petitioner, whether equally guilty with the respondent or not, has been guilty of conduct which would be a sufficient ground for divorce, she is not entitled to the relief prayed for in her petition.[6]

The plaintiff in the *Dunn* controversy married defendant in 1902, and the two lived together until 1906, when defendant (wife) deserted plaintiff. Approximately one year later plaintiff saw defendant on one occasion and learned that she was living with another man as the latter's wife. After another year passed, plaintiff, relying upon the advice of friends that he was free to remarry, wedded J. T. He subsequently fathered a daughter by her, and dwelled with her for eighteen years. When he finally learned of the continued validity of his marriage to defendant, plaintiff separated from J. T. and sued for a divorce from defendant, relying on the ground of desertion. The Supreme Court of Mississippi affirmed a decree of dismissal, speaking as follows:

> In the case at bar, the appellant [plaintiff] admitted that he contracted a second marriage and cohabited with his second wife for a number of years, knowing all the while that his first wife was alive . . . but he contends that the principle of recrimination is not available to defeat his right to a divorce, for the reason that he, in good faith, believed that he had the legal right to contract a second marriage. . . . The proof offered to show good faith discloses no mistake of fact, but merely a mistake of

6. 18 R.I. at 455, 28 A. at 801-02.

> law, and consequently is not available as justification for his matrimonial offense.[7]

The parties in the *Wells* case were married in 1929, and they dwelled together until 1933, when defendant (wife) deserted plaintiff. In 1944 plaintiff, having heard nothing from or concerning defendant for eleven years, concluded that she was probably dead and married R. W. In 1961 plaintiff learned that defendant was still living and that she had not divorced him. He thereupon sued for a divorce on the ground of desertion. However, he continued to cohabit with R. W. while waiting for the divorce action to be heard. Although the suit was uncontested, the New Jersey Superior Court invoked the defense of recrimination on its own initiative and dismissed the case. Quoting from the opinion:

> Both logic and the apparent trend of the authorities lead to the same result where the complaining party, though innocent at the outset, continues to cohabit with the defendant after learning of the illegality of the relationship.[8]
>
> The court is of the opinion that the defense of recrimination under the facts of this case has been established.
>
> . . . [E]ven though the plaintiff and Ruby [R. W.] may have cohabited innocently at the time of their marriage, since the presumption of innocence has been destroyed and since plaintiff and Ruby have continued their marital relations after learning of Mattie's [defendant's] physical existence, the court can reach no other conclusion than that these parties committed adultery.[9]

A doctrine which leads to results of the kind indicated above would seem to merit close examination. The purpose of this paper is to undertake such an examination. The material comprising this study is (excluding the Introduction and Conclusion) divided into four major sections. The first part

7. 156 Miss at 132, 125 So. at 562-63.
8. 73 N.J. Super. at 548, 180 A.2d at 358, *quoting from* Endres v. Grove, 34 N.J. Super. 146, 148, 111 A.2d 638, 640 (1955).
9. 73 N.J. Super. at 548, 180 A.2d at 358. This decision, after being affirmed by the Appellate Division of the Superior Court, was reversed in 1964 by the Supreme Court of New Jersey on the ground that the trial court should not have raised the issue of recrimination on its own initiative. 41 N.J. 594, 198 A.2d 442 (1964).

discusses the present status of recrimination in American and English law. The second section treats of the "legalistic" (or technical) reasons advanced by the courts to justify application of the doctrine. Since one of these reasons is the rule's historical respectability, section two includes a discussion of the history of recrimination. Part three deals with the policy-oriented reasons offered by the courts in support of the rule. And section four considers the various statutory and judicial reforms of the doctrine which have been accomplished in recent years.

II. PRESENT STATUS OF RECRIMINATION IN THE UNITED STATES AND ENGLAND

The recrimination principle currently exists in the divorce law of all American jurisdictions but five.[10] However, the doctrine does not take the same form in all jurisdictions. On the contrary, nine different concepts of recrimination are discernible in American divorce law. These nine concepts—or variations—may be stated as follows:

(1) *A plaintiff seeking a divorce on the ground of adultery shall be denied relief if it is disclosed that he is also guilty of adultery.* Sixteen states have enactments so providing.[11] The acts of Arizona and Florida are illustrative:

> A. In an action for divorce on the ground of adultery, if the plaintiff has been guilty of the same offense . . . it shall be a defense and bar against the action.[12]
>
> No divorce shall be granted unless one . . . of the following facts appears:

10. The five exceptions are: COLO. REV. STAT. ANN. § 46-1-4 (1960); NEV. REV. STAT. § 125.120 (1963); N.D. CENT. CODE § 14-05-10 (1965); OKLA. STAT. ANN. tit. 12, § 1275 (1961); WASH. REV. CODE § 26.08.150 (1966). These statutes discussed in pt. V(D) *infra*.

11. ALA. CODE tit. 34, § 26 (1959); ALAS. STAT. § 56-5-11 (1958); ARIZ. REV. STAT. ANN. § 25-313 (1956); DEL. CODE ANN. tit. 13, § 1528 (1953); FLA. STAT. ANN. § 65-04 (1964); ILL. ANN. STAT. ch. 40, § 11 (Smith-Hurd 1956); IND. ANN. STAT. § 3-1202 (1965); ME. REV. STAT. ANN. tit. 166, § 55 (1954); MINN. STAT. ANN. § 518.08 (1947); MO. ANN. STAT. § 452.030 (1952); N.J. REV. STAT. § 2A:34-7 (1952); N.Y. DOM. REL. LAW § 171 (1964); ORE. REV. STAT. § 107.070 (1965); PA. STAT. ANN. tit. 23, § 52 (1955); TENN. CODE ANN. § 36-811 (1955); TEX. REV. CIV. STAT. art. 4630 (1960). The Minnesota act differs significantly from the others, for it states that the court "may" (rather than "shall") deny a divorce to an adulterous applicant. This wording gives the court discretion to apply or ignore the recrimination doctrine, as it chooses. The statute is set out in pt. V(A) *infra*.

12. ARIZ. REV. STAT. ANN. § 25-313 (1956).

> (3) That defendant has been guilty of adultery, but if it appears that . . . both parties have been guilty of adultery, no divorce shall be granted.[13]

Remarkably enough, only three[14] of the sixteen states having this type of enactment actually limit application of recrimination to the situation where both parties are guilty of adultery. Notwithstanding the restrictive wording of their statutes, the courts of the remaining thirteen jurisdictions recognize the defense in other fact situations as well—generally in any instance in which both spouses are guilty of a divorce ground.[15] The courts of these jurisdictions apparently take the view that recrimination is a part of their common law and that the statute declaring the rule to be applicable in the adultery-versus-adultery situation was not intended to imply that the doctrine is inapplicable in other situations.[16] Thus in *Huster v. Huster*,[17] where the defendant-wife based a plea of recrimination on her husband's alleged desertion, the court said:

> The doctrine of recrimination . . . ultimately came to America as unwritten law. In New Jersey the

13. FLA. STAT. ANN. § 61.041 (Supp. 1968). Notwithstanding the mandatory phrasing of this enactment, the Supreme Court of Florida has ruled that recrimination is a discretionary doctrine in Florida. Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946). Discretionary application of the recrimination doctrine is discussed more fully in pt. V(A) *infra*.

14. Delaware, New York and Pennsylvania. Although Pennsylvania limits the defense of recrimination to the situation where both parties are guilty of adultery, Ditroia v. Ditroia, 202 Pa. Super. 7, 193 A.2d 877 (1963), the statute which lists the grounds for divorce in Pennsylvania provides that eligibility for divorce (whatever the ground relied upon) is limited to "the innocent and injured spouse." PA. STAT. ANN. tit. 23, § 10 (1955). The enactment of this statutory restriction clearly amounts to the adoption of a doctrine very similar to that of recrimination.

15. For example, recrimination has been successfully pleaded: (a) in Alabama where defendant was guilty of abandonment and plaintiff of adultery, Lyall v. Lyall, 250 Ala. 635, 35 So. 2d 550 (1948); (b) in Florida, Illinois, Minnesota and Texas where both parties were guilty of cruelty, Carlson v. Carlson, 144 So. 2d 340 (Fla. 1962); Elston v. Elston, 344 Ill. App. 233, 100 N.E.2d 635 (1951); Jokela v. Jokela, 111 Minn. 403, 127 N.W. 391 (1910); Beck v. Beck, 63 Tex. 34 (1885); (c) in New Jersey where defendant had committed adultery and plaintiff statutory desertion, Arnaboldi v. Arnaboldi, 101 N.J. Eq. 126, 138 A. 116 (1927); and (d) in Oregon where defendant was guilty of desertion and plaintiff of adultery, Earle v. Earle, 43 Ore. 293, 72 P. 976 (1903).

16. To construe a statute in this manner is to ignore a well-recognized canon of statutory construction, namely, "*Expressio unius est exclusio alterius*," which means that the express mention of one thing implies the exclusion of another. 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4915 (1943).

17. 64 N.J. Super. 29, 165 A.2d 305 (1960).

> doctrine is statutory insofar as adultery stands in bar of a charge of adultery. However, the statute is not exclusive; it does not nullify the unwritten law. . . . [T]he recrimination doctrine is firmly embedded as part of our statutory and unwritten law.[18]

(2) *A person applying for a divorce on any ground must be refused relief if it is revealed that he has committed the same offense of which he complains.* Five states have statutes providing for the imposition of this rule.[19] The enactments of Arkansas and Wyoming are representative:

> If it shall appear to the court that . . . both parties have been guilty of the adultery, or such other offense or injury complained of in the bill, then no divorce shall be granted or decreed.[20]

> No divorce shall be decreed in any case where it shall appear that . . . the party complaining shall be guilty of the same crime or misconduct charged against the defendant.[21]

Of the five jurisdictions with this kind of enactment, Wyoming is the only one which in practice restricts recrimination to the case where both spouses have committed the same transgression.[22]

(3) *A divorce petitioner must be "the party not at fault" or "the innocent party" or the "non-wrongdoer."* The enactments of Kentucky, New Hampshire and Wisconsin are illustrative of those operative in the seven jurisdictions[23] following this statutory approach:

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18. *Id.* at 308 (citations omitted). The wife's recrimination was unsuccessful, since she was unable to establish that plaintiff was guilty of desertion.

19. ARK. STAT. ANN. § 34-1209 (1947); DEL. CODE ANN. tit. 13, § 1528 (1953); GA. CODE ANN. § 30-109 (1961); MICH. STAT. ANN. § 25.90 (1957); WYO. STAT. § 20-55 (1959).

20. ARK. STAT. ANN. § 34-1209 (1947).

21. WYO. STAT. ANN. § 20-55 (1959).

22. In the following cases recrimination has been applied in bar of a divorce even though the parties did not commit the same transgression: Evans v. Evans, 219 Ark. 325, 241 S.W.2d 713 (1951) (defendant guilty of gross indignities and plaintiff of adultery); Rowell v. Rowell, 209 Ga. 572, 74 S.E.2d 833 (1953) (defendant guilty of stautory cruelty and plaintiff adultery); Melinn v. Melinn, 329 Mich. 96, 44 N.W.2d 886 (1950) (defendant guilty of cruelty and plaintiff of adultery); Wilson v. Wilson, 89 Neb. 749, 132 N.W. 401 (1911) (defendant guilty of adultery and plaintiff statutory cruelty).

23. D.C. CODE ANN. § 16-403 (1961); KY. REV. STAT. ANN. § 403.020 (1963); MO. ANN. STAT. §§ 452.010, -.090 (1952); N.H. REV. STAT. § 458.7 (1955); N.C. GEN. STAT. § 50-5 (1950); PA. STAT. ANN. tit. 23, § 10 (1955); WIS. STAT. § 247.101 (1955).

> A divorce may be granted to the *party not in fault* for the following causes:[24]
>
> A divorce from the bonds of matrimony shall be decreed in favor of the *innocent party* for either of the following causes:[25]
>
> The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for a divorce . . . except that where it appears from the evidence that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the parties whose equities on the whole are found to be superior.[26]

(4) *The court must deny relief to any divorce applicant who is shown to be guilty of misconduct constituting any recognized ground for divorce.* Although but four jurisdictions have statutes expressly providing for this form of recrimination—which represents the broadest concept of the doctrine—over half the states actually belong in this class.[27]

The District of Columbia statute requires that the petitioner be an "innocent spouse" only in the case where the parties have lived apart for two years or more, pursuant to a decree of legal separation, and petitioner now seeks to have the decree enlarged into a judgment of absolute divorce.

Section 7 of the Divorce Law of the Virgin Islands (Bill No. 14) (1944) restricts the right to a divorce to "the injured party," but this phrase has been construed as requiring merely a showing that the petitioner has been wronged, not a showing that the petitioner himself is guiltless. Burch v. Burch, 195 F.2d (3d Cir. 1952).

Nelson states that statutes restricting divorce eligibility to the innocent spouse impose a rule distinct from the recrimination doctrine. 1 W. NELSON, NELSON ON DIVORCE AND ANNULMENT, § 10.02 (1945). This may be true in an abstract sense, but these enactments seem sufficiently akin to recrimination in spirit and purpose to warrant regarding them as a type of recrimination legislation. 24 AM. JUR. 2d *Divorce and Separation* § 231 (1966).

24. KY. REV. STAT. ANN. § 403.020 (2) (1963) (emphasis added). The Kentucky act separately provides in subsection 3 of this same section for application of recrimination in the situation where an habitually intoxicated spouse applies for a divorce on the ground of his mate's habitual drunkeness (of at least one year's duration).

25. N.H. REV. STAT. ANN. § 458.7 (1955) (emphasis added).

26. WIS. STAT. § 247.101 (1955).

27. A. JACOBS & J. GOEBEL, *supra* note 1 at 448. Included in this group are seven jurisdictions whose codes make no reference to recrimination. Arnold v. Arnold, 257 Iowa 429, 133 N.W.2d 53 (1965); Nichols v. Nichols, 257 Iowa 458, 133 N.W.2d 77 (1965); Sackman v. Sackman, 203 A.2d 903 (Md. 1964); Saltzgaver v. Saltzgaver, 182 Md. 624, 35 A.2d 810 (1944); Reddington v. Reddington, 317 Mass. 760, 59 N.E.2d 775 (1945); Benedict v. Benedict, 17 Ohio Supp. 92 (1946); Opperman v. Opperman, 77 Ohio App. 69, 65 N.E.2d 655 (1945); Pakuris v. Pakuris, 95 R.I. 305, 186 A.2d 719 (1962); Thomas v. Thomas, 83 R.I. 251, 115 A.2d 526 (1955); Jeffords v. Jeffords, 216 S.C. 451, 58 S.E.2d 731 (1950) (*semble*); Walker

The California enactment typifies those of the few jurisdictions[28] having this kind of statute:

> Divorces must be denied upon showing:
>
> . . .
>
> (4) Recrimination.
>
> Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.[29]

Surprisingly enough, of the four states having this type of enactment, only one—South Dakota—actually applies recrimination in the mechanical manner prescribed by the statute. The other three—California, Idaho and Montana—treat recrimination as a discretionary doctrine to be used or disregarded by the court as it deems best in the case before it.[30]

(5) *The court must deny a divorce to a petitioner relying on the ground of adultery if it appears that the petitioner is guilty of any cause for divorce.* Hawaii is the only state with this type of statute. Provides the Hawaii enactment:

> No divorce for the cause of adultery be granted:
>
> . . .
>
> (d) Where there is reasonable cause to believe that the libellant has been guilty of any act which would entitle the defendant, if innocent, to a divorce. The fourth ground [ground (d)] for refusing a decree above mentioned shall not be applied to an application for a divorce for any other cause than that of adultery . . . .[31]

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v. Walker, 92 Vt. 443, 104 A. 828 (1918). A possible eighth jurisdiction is Connecticut. Detroit News, Jan. 7, 1965, at 6A, col. 2-3.

Also included in this group are a number of jurisdictions with statutes that *appear* to restrict the application of recrimination to the case where both spouses are guilty of adultery (see note 15 *supra*) and a few states with statutes that *seem* to limit application of the doctrine to the situation where the plaintiff has committed the same transgression of which he complains (see note 22 *supra*).

28. CAL. CIV. CODE §§ 111, 122 (West 1954); IDAHO CODE ANN. §§ 32-611, -613 (1958); MONT. REV. CODE ANN. §§ 21-118, -128 (1961); S.D. CODE §§ 14.0713, -.0718 (1939).

29. CAL. CIV. CODE §§ 111, 122 (West 1954).

30. The discretionary-use-of-recrimination approach is discussed in pt. V(A) *infra*.

31. HAWAII REV. LAWS § 324-26 (1961).

(6) *Adultery—and no other transgression—is a recriminatory defense against all other divorce grounds.* The statute of West Virginia, the one jurisdiction with this kind of enactment, declares:

> [A] divorce [shall not] be granted for any cause when it appears that . . . the plaintiff has, within three years before the institution of the suit, been guilty of adultery not condoned.[32]

Notwithstanding the restrictive language of the statute, it appears that recrimination can operate in West Virginia even though plaintiff is not guilty of adultery. Since divorce cases are tried in a court of equity in West Virginia,[33] the court has the authority to invoke recognized canons of equity in appropriate fact situations. Among these canons is the following maxim: "He who seeks the aid of a court of equity must enter the court with clean hands."[34] Relying on this equity principle, the West Virginia Supreme Court of Appeals invoked recrimination in bar of relief in *Wolfe v. Wolfe*,[35] where the divorce applicant (wife) was found to be guilty of cruelty but not of adultery. Said the court: "A party in a suit for divorce, as in all other equity cases, must come with hands unsoiled and clean. Before relief can be obtained, a complaining party's own conduct must be beyond substantial reproach."[36]

(7) *A divorce applicant who is himself guilty of a marital offense may be denied (or granted) a divorce in the court's discretion.* Seven American jurisdictions have adopted this position by judicial decision,[37] and three have done so by statute.[38]

England's Matrimonial Causes Act, discussed later in this paper,[39] also gives the court discretion to award or deny a

32. W. VA. CODE ANN. § 48-2-14 (1966).
33. "The circuit court, on the chancery side thereof, shall have jurisdiction . . . for divorces." W. VA. CODE ANN. § 48-2-6 (1966).
34. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26 (2d ed. 1948).
35. 120 W. Va. 389, 198 S.E. 209 (1938).
36. *Id.*, 198 S.E. at 215.
37. Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. Cir. 1944); Matlow v. Matlow, 89 Ariz. 293, 361 P.2d 648 (1961); De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598 (1952); Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946); Howay v. Howay, 74 Idaho 492, 264 P.2d 691 (1953); Burns v. Burns, 145 Mont. 1, 400 P.2d 642 (1965).
38. KAN. STAT. ANN. § 60-1606 (1964); MINN. STAT. ANN. § 518.08 (1947), § 518.06 (Supp. 1967); MISS. CODE ANN. § 2735.5 (Supp. 1966).
39. Pt. V(A) *infra.*

divorce in cases where the complainant is shown to be guilty of recriminatory misconduct.[40]

(8) *A petitioner is entitled to a divorce even though himself guilty of conduct constituting grounds for divorce, if his misdeeds are less reprehensible than those of his spouse.* Under this rule, known as the doctrine of comparative rectitude, a divorce is denied only when the parties appear equally to blame.[41] States Nelson:

> Some courts have taken the position that . . . power or discretion exists to weigh the relative faults of the parties and to grant a divorce to the one less at fault, notwithstanding the other has also been guilty of conduct which is a ground for divorce.[42]

Arkansas, Louisiana, Texas, and Utah have adopted this doctrine by court decision.[43]

(9) *The recrimination principle has application except when the plaintiff bases his suit on a non-culpatory ground, such as voluntary separation or incompatibility.* Five states provide by statute that recrimination has no application in a divorce action based on voluntary separation[44] and seven jurisdictions have so determined by judicial decision.[45] Courts in two jurisdictions have ruled that in a suit grounded on

40. Matrimonial Causes Act, 14 & 15 Geo. 6, c. 25, § 4 (1950).

41. "Where the court finds that the parties are equally at fault it will refuse to grant relief to either party." 24 AM. JUR. 2d *Divorce and Separation* § 228 (1966). *See also* Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952).

42. 1 W. NELSON, NELSON ON DIVORCE AND ANNULMENT § 10.03 (1945).

43. Ayers v. Ayers, 226 Ark. 394, 290 S.W.2d 24 (1956); Longinotti v. Longinotti, 169 Ark. 1001, 277 S.W. 41 (1925); Smith v. Smith, 139 So. 2d 813 (La. 1962); Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952); Watts v. Watts, 390 S.W.2d 30 (Tex. 1964); Marr v. Marr, 191 S.W.2d 512 (Tex. 1945); Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 (1956); Hendricks v. Hendricks, 123 Utah 178, 257 P.2d 366 (1953).

44. ALA. CODE tit. 34, § 22 (1) (1964), *construed in* Fuqua v. Fuqua, 268 Ala. 127, 104 So. 2d 925 (1958); ARK. STAT. ANN. § 34-1202(7) (1947), *construed in* Young v. Young, 207 Ark. 36, 178 S.W.2d 994 (1944); KY. REV. STAT. ANN. § 403.020 (1963), *construed in* Ward v. Ward, 213 Ky. 606, 281 S.W.801 (1926); VA. CODE ANN. § 20-91 (Supp. 1967); WIS. STAT. § 247.101 (Supp. 1967).

45. Unger v. Unger, 174 A.2d 84 (D.C. Mun. Ct. 1961); Finnegan v. Finnegan, 76 Idaho 500, 285 P.2d 488 (1955); Jolliffe v. Jolliffe, 76 Idaho 95, 278 P.2d 200 (1954); Raymond v. Carrano, 112 La. 869, 36 So. 787 (1904); Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960); Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965); Jones v. Jones, 261 N.C. 612, 135 S.E.2d 554 (1964); Guillot v. Guillot, 42 R.I. 230, 106 A. 801 (1919); Fields v. Fields, 399 S.W.2d 958 (Tex. 1966); Helfer v. Helfer, 342 S.W.2d 8 (Tex. 1960).

incompatibility the court may invoke or ignore the recrimination doctrine as it deems best.[46]

In summary, thirty-four jurisdictions have legislation providing for application of recrimination in some form,[47] eleven have adopted some concept of the doctrine by court decision,[48] and five have abolished recrimination altogether.[49] Significantly, over half the states recognize the broadest concept of the doctrine—the rule requiring the court to deny the petition of an applicant shown to be guilty of misconduct constituting any ground for divorce.

III. Legalistic Reasons Advanced in Justification of Recrimination

One may reasonably inquire why the recrimination doctrine has been so well received in this country. The courts have defended the doctrine with at least eight different arguments. Four of these arguments—which may be termed "legalistic"—are the following: (a) The doctrine has many centuries of judicial acceptance to bear witness to its soundness.[50] (b) An applicant for a divorce must come into court with clean hands. (c) When the parties are *in pari delicto* (equal fault) the court should aid neither. (d) Marriage is a contract, and the plaintiff, having himself breached the contract, has no standing to demand relief. An examination of these theories will disclose that one of them constitutes a meritorious defense of recrimination.

A. Historical Acceptance

Recrimination undeniably has acquired historical respectability. Declares one writer: "The obvious argument in sup-

46. Shearer v. Shearer, 356 F.2d 391 (3d Cir. 1965); Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950); Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946).

47. Alabama, Alaska, Arizona, Arkansas, California, District of Columbia, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Wyoming have such legislation.

48. Connecticut, Iowa, Louisiana, Maryland, Massachusetts, New Mexico, Ohio, Rhode Island, Utah and Vermont have adopted recrimination by court decision. South Carolina's position on the doctrine is not clear. *See* Jeffords v. Jeffords, 216 S.C. 451, 58 S.E.2d 731 (1950).

49. Colorado, Nevada, North Dakota, Oklahoma and Washington have enacted such statutes. For citations to these statutes see note 10 *supra*.

50. *See* Conant v. Conant, 10 Cal. 249 (1858); Courson v. Courson, 208 Md. 171, 117 A.2d 850 (1955).

port of the rule is its vitality for over two thousand years; one comes to think of it as something inevitably fundamental."[51]

But though recrimination has ancient origins, its form and effects in the law of past societies were quite different from their modern counterparts. Thus the doctrine operated in the Mosaic law, but only under the following narrowly defined circumstances:

> If any man take a wife and go in unto her and hate her, and give occasions of speech against her, and bring up an evil name upon her, and say, I took this woman, and when I came to her I found her not a maid . . . [and this accusation is proven to be untrue] the elders of that city shall take that man and chastise him; and they shall amerce him in an hundred shekels of silver, and give them unto the father of the damsel, because he hath brought up an evil name upon a virgin of Israel; and she shall be his wife; he may not put her away all his days [regardless of how she subsequently behaves].[52]

During the first century A.D. the recrimination principle found its way into the Roman law, but it manifested itself there only in a highly specialized form, namely in the doctrine *compensatio criminalis*.[53] Application of this doctrine did not bar either spouse from obtaining a divorce; a Roman husband or wife could legally discard his or her mate without resorting to the courts.[54] The effects of the *compensatio criminalis* rule were purely economic in character. The doctrine developed in the following manner: A statute enacted in 9 A.D. (during the reign of Augustus) enabled a Roman divorcee whose husband had discarded her without good cause to recover her dowry within one year after the divorce. The specific remedy provided was the *actio rei uxoriae*. If she instituted such an action, her ex-husband could reduce

51. Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 379 (1967).

52. 22 *Deuteronomy* 13:19.

53. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 KAN. CITY L. REV. 213 (1942); Comment, *A Comparison of Recrimination and the Doctrine of Comparative Rectitude and Their Incidents*, 3 BAYLOR L. REV. 55 (1950).

54. *See* Forster v. Forster, 1 Hag. Con. 144, 161 Eng. Rep. 504 (1790). *See also* Sherman, *The Doctrine of Recrimination in Massachusetts*, 33 B.U.L. REV. 454 (1953).

his liability (that is, retain part of the dowry) by showing that she was guilty of adultery or some other marital offense. By establishing adultery he could keep 1/6 of the dowry, and by proving some other misconduct he could retain 1/8.[55] On the other hand, if the husband was guilty of adultery and the wife was innocent of any improper behavior, then the latter could demand *immediate* restitution of her dowry; similarly, if the husband was guilty of some lesser marital infraction (and the wife's hands were clean), then the wife could compel return of her dowry within six months.[56] Inevitably, cases arose in which both spouses were at fault, and the statute made no provision for this exigency. When faced with this situation the Roman courts decided that the parties' offenses compensated for (cancelled out) one another and that neither spouse should be penalized.[57] Quoting Papinian's comment on the case of Titius and Maevia:

> Since husband and wife accuse the other, it has been found that both of them have given cause for repudiation. This ought to be accepted thus: namely, that neither should be punished by that law which both have broken. For equal faults mutually compensate each other.[58]

Applying this principle, the courts permitted the wife to recover her entire dowry (instead of allowing the husband to retain 1/6 or 1/8 of it), but granted the husband a full year to make restitution (instead of ordering him to perform immediately or within six months).[59] This was the extent to which recrimination operated in the Roman law. Application of the principle merely affected the manner in which the parties' property was divided between them.

In the twelfth century the recrimination concept was adopted from the Roman law by canonists, who incorporated it in an addition to Corpus Juris Canonici.[60] An entire section of this work, known as the Connubia, was devoted to devices calculated to protect a wife (and in some instances,

55. R. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 691 (1903).
56. Beamer, *supra* note 53, at 218.
57. Note, *Divorce—Recrimination as a Defense*, 29 MICH. L. REV. 232 (1930).
58. DIGEST 24.3.39.
59. Beamer, *supra* note 53, at 218-19.
60. Beamer, *supra* note 53, at 220.

the children) from being cast loose in a society in which unattached women had no place.[61] One of the protections given the wife was the rule that a wife accused of adultery in a proceeding for a divorce *a mensa et thoro* (legal separation) could defeat her mate's suit by showing that the latter had also committed adultery.[62]

> If one having denied conjugal obligations to his wife apprehended in adultery, if he commits adultery with another, ought it to be brought about that he should continue to regard his wife with marital affection? To the above we reply, where equal delicts mutually compensate for each other, the man guilty of such fornication cannot refuse the consortium of his wife.[63]

Since the Catholic Church did not recognize a divorce *a vinculo matrimonii* (absolute divorce) under any circumstances,[64] the canon law application of recrimination did not have the effect of preventing otherwise eligible parties from marrying again. Use of the doctrine could merely determine the outcome of a legal separation proceeding.[65]

In England ecclesiastical courts, applying the canon law, exercised jurisdiction over matrimonial actions from the reign of William the Conqueror until 1857, when the Matrimonial Causes Act of 1857 was passed.[66] During most of this period recrimination played the same limited role in English marriage law that it did in the law of other Catholic nations.[67] However, during the years between the English Reformation (beginning about 1525) and the turn of the seventeenth century, the effect of the doctrine's application was to prevent the spouses from contracting another marriage. This is explained by the fact that even though the English ecclesiastical courts pronounced their judgments in the form of divorces

61. Beamer, *supra* note 53, at 221.
62. J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS § 92 (1931); Conant v. Conant, 10 Cal. 249 (1858) (dictum).
63. Extra, 1.5 t. 16, c.7.
64. Note, *Divorce—Recrimination—Unclean Hands*, 13 ORE. L. REV. 335, 339 (1934).
65. 2 J. BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 166 (1891).
66. 7 ENCYCLOPEDIA BRITANNICA *Divorce* 516, *Ecclesiastical Law* 891 (1964). During the brief period of Oliver Cromwell's Protectorate divorce jurisdiction did not lie in the ecclesiastical courts. *Id.*
67. 2 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE §§ 84-85 (4th ed. 1864).

a mensa et thoro, the populace nevertheless treated these judgments as licenses to remarry, and the authorities tolerated this practice.[68] However, in the 1602 divorce case of *Rye v. Foljambe,*[69] the Star Chamber decided—and emphasized—that the only kind of divorce possible in England was a divorce *a mensa et thoro.* Following this decision the indissolubility of marriage could no longer be doubted. Thus from 1602 until 1857, when the Matrimonial Causes Act of 1857[70] provided grounds for absolute divorce, application of the recrimination doctrine merely prevented the complainant from obtaining a legal separation. Since the procurement of a separation decree did not enable the petitioner to remarry, usually a spouse's motive for seeking such a decree was to obtain a favorable determination of his support obligations (or rights). Consequently, the ecclesiastical court's invocation of recrimination to deny the applicant a legal separation was a matter of real importance to the applicant only insofar as the ruling affected his property rights or obligations.[71] Thus the English canonical courts' use of recrimination after 1602 can validly be equated to the Roman courts' use of the doctrine *compensatio criminalis.*

Three English ecclesiastical cases, *Forster v. Forster,*[72] *Beeby v. Beeby,*[73] and *Proctor v. Proctor*[74] are mainly responsible for the introduction of recrimination into modern Anglo-

68. "But in whatever form their [the ecclesiastical courts'] decrees were pronounced; the community, with the apparent approval of the Church and State, relied upon them as justifying a second marriage." Beamer, *supra* note 53.

"There is some evidence that during the last half of the sixteenth century the law and practice was that a divorce for adultery in the ecclesiastical court would so far dissolve the marital relation that the parties might marry other persons." J. MADDEN, *supra* note 62, § 81.

"The Ecclesiastical Courts . . . had no power to pronounce a divorce a vinculo if there had been a valid marriage. For a short time after the Reformation the Ecclesiastical Courts seem to have considered that they had this power." W. HOLDSWORTH, *The Ecclesiastical Courts and Their Jurisdiction,* in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255, 299 (1908).

69. 1 Moo. K.B. 682 (1602).

70. Matrimonial Causes Act, 20 & 21 Vict., c. 85 (1857).

71. If the suit was brought by the husband, usually his primary purpose was to relieve himself of the common law duty of support. If a recriminatory defense was set up by the wife, her sole purpose was to prevent the loss of that support. It may be seen that the charge and counter charge were based on property considerations.
SHERMAN, *supra* note 54, at 462.

72. 1 Hag. Con. 144, 161 Eng. Rep. 504 (1790).

73. 1 Hag. Ecc. 789, 162 Eng. Rep. 755 (1799).

74. 2 Hag. Con. 292, 161 Eng. Rep. 747 (1819).

American law.[75] All three cases were decided by the same judge, Sir William Scott (who later became Lord Stowell).

The *Forster* case was a divorce action (*a mensa et thoro*) brought by a husband on the ground of his wife's adultery. The latter's principal defense was a plea of "justification," grounded on the allegation that plaintiff was guilty of adultery. After concluding that there was sufficient evidence to support defendant's charge of adultery against plaintiff, the court ruled that the doctrine of recrimination was applicable and that it operated to bar plaintiff from relief. Quoting from the opinion:

> Something has been said as if this [recrimination] ought not to be the law: with that question I have nothing to do; for I must take the law as it is, and I shall therefore content myself upon that matter with observing that it appears a good moral and social doctrine, which I have not the inclination, if I had the power, to innovate. It is unquestionably the rule of this Court.[76]

The facts in the *Beeby* case were similar to those in the *Forster* controversy. To the husband's action for a legal separation on the ground of his spouse's adultery the wife pleaded in bar that petitioner was likewise guilty of adultery. The court, after deciding that both spouses were guilty of the misconduct charged against them, ruled that plaintiff was debarred from relief by operation of the recrimination doctrine. Stated Sir William Scott:

> The doctrine, that this [recriminatory offense] if proved is a valid plea in bar, has its foundation in reason and propriety: it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first

75. "[I]t is due to a series of cases beginning in 1790 with Forster v. Forster, and all decided by Lord Stowell, that the doctrine of recrimination really secured a firm foothold in the judicial legislation of modern times." Beamer, *supra* note 53, at 226.
76. 1 Hag. Con. at 146-47, 161 Eng. Rep. at 505.

violated his marriage vow, should be barred of his remedy.[77]

In the *Proctor* case, another suit in which the husband sought a divorce *a mensa et thoro* on the ground of his wife's adultery, plaintiff admitted the truth of defendant's countercharge that subsequent to her trangression plaintiff had also committed adultery. The court ruled that plaintiff, having committed a recriminatory offense, was not entitled to a legal separation. Quoting from the opinion:

> It was a doctrine not peculiar to the canon law that it looked with disfavour to a complaining party who was himself an offender in the same way; for the civil law, certainly, did the same, to the extent of not barring the wife's demand of dower against such a husband. . . . Certain it is that the general maxim of compensation, as applied to mutual moral failings, was forged in that [civil law] mint.[78] Whether the inconveniences of the rule, as it now operates (considered as they ought to be in opposition to those which might follow the reversal of it), are such as nevertheless ought to produce a reversal, is a question into which this Court has neither a right nor a duty to inquire.[79]

Although an absolute divorce was not procurable in any English Court between 1602 and 1857, it was possible (although expensive and difficult) to obtain such relief from Parliament.[80] During this period there were at least four parliamentary divorce cases in which the respondent attempted to recriminate: *Duke of Norfolk's Case*,[81] *Major Campbell's Case*,[82] *Major Bland's Case*,[83] and *Simmons' Case*.[84] It is obvious from the disposition of these cases that the House of Lords did not feel constrained to pay homage to the recrimination doctrine. In two of the cases the Lords simply ignored the doctrine (except when adjudicating the spouses' property rights), and in the other two they applied

77. 1 Hag. Ecc. at 790, 162 Eng. Rep. at 756.
78. 2 Hag. Con. at 297-98, 161 Eng. Rep. at 749.
79. *Id.* at 302, 161 Eng. Rep. at 751.
80. J. MADDEN, *supra* note 62, at 881.
81. L.R. 15 H.L. 20a (1700).
82. L.R. 42 H.L. 141 (1799).
83. L.R. 46 H.L. 435 (1808).
84. L.R. 77 H.L. 410 (1845).

the principle in a clearly unorthodox manner. In the *Duke of Norfolk's Case* the Lords granted the petitioner (husband) a divorce (on the ground that the Duchess had committed adultery with Sir John Germaine) even though there was no serious doubt that the Duke was himself guilty of adultery. The House appeared to regard petitioner's misconduct as irrelevant to the issue of whether he should be granted a divorce[85] (although relevant to the question of how the property should be divided).[86] In *Major Campbell's Case* the House passed a bill granting the applicant (Major Campbell) a divorce after refusing even to listen to evidence tending to show that the Major was guilty of marital misbehavior.[87]

The House denied relief to the petitioners in the *Bland* and *Simmons'* cases, but though the applicant in each case was undeniably guilty of recriminatory misconduct, in neither instance does it appear that the recrimination principle determined the outcome of the case. Major Bland's offense (adultery) was committed twelve years before he sought to divorce his adulterous wife and was definitely condoned by the latter.[88] It therefore seems likely that the Lords merely used petitioner's marital infraction as a pretext for denying a divorce petition that they believed, for other reasons, should not be granted. In *Simmons' Case* complainant was accused of illicit relations with one Ann Keeling. However, the House, speaking through Lord Campbell, indicated that it was denying complainant's divorce petition primarily because defendant's clearly-proven prostitution appeared largely attributable to her husband's wilful failure to support her.[89]

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85. *See* 2 L. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 106 (1904).

86. A special clause was inserted into the divorce bill ordering the Duke to pay the Duchess all monies brought by her into the marriage (£ 10,000).

87. "Mr. Adam [respondent's attorney] offered recriminatory matter, and tendered in evidence a letter of the petitioner to Mrs. Campbell, written before the commencement of her misconduct; but this letter was rejected by the House and the bill passed." T. MACQUEEN, A PRACTICAL TREATISE ON APPELLATE JURISDICTION OF THE HOUSE OF LORDS 590 (1842).

88. Normally a defense of recrimination cannot be based on an offense which the defendant has condoned. *See, e.g.*, Klekamp v. Klekamp, 275 Ill. 98, 113 N.E. 852 (1916); Neblett v. Neblett, 274 Wis. 574, 81 N.W.2d 61 (1957). *See also* 24 AM. JUR. 2d *Divorce and Separation* § 232 (1966).

89. Willful failure to support was not a recognized ground for a divorce *a mensa et thoro* in the English ecclesiastical courts. J. MADDEN, *supra* note 62, § 81. It therefore seems improbable that the Lords intended to treat complainant's failure to support defendant as a distinct recriminatory defense.

With the passage of the Matrimonial Causes Act of 1857[90] the divorce jurisdiction of the ecclesiastical courts was transferred to the newly-created Court for Divorce and Matrimonial Causes (commonly referred to simply as the Divorce Court), which was empowered to grant an absolute divorce in specified situations.

This enactment introduced recrimination into the statutory law of England, but it did not compel the Divorce Court to apply the doctrine in any given case. Quoting from the Act:

> The Court shall not be bound to pronounce such Decree [of divorce] if it shall find that the Petitioner has during the Marriage been guilty of Adultery, or if the Petitioner shall, in the opinion of the Court, have been guilty of . . . cruelty toward the other Party to the Marriage, or of having separated himself or herself from the other Party before the Adultery complained of, and without reasonable excuse or of such wilful Neglect or Misconduct as has conduced to the Adultery.[91]

Under the present English law the Probate, Divorce, and Admiralty Division of the High Court of Justice, which now has jurisdiction over matrimonial causes,[92] retains discretion over when to apply recrimination.[93]

Ecclesiastical courts were never established in America.[94] In Colonial times the few divorce cases that arose were adjudicated by the local legislature or governor.[95] Other matrimonial actions were handled by courts of equity under their general equity powers.[96] Later the various legislatures conferred specific marriage and divorce jurisdiction on the common law or equity courts, and the question then arose whether such enactments should be regarded as original pro-

90. 20 & 21 Vict., c. 85.
91. 20 & 21 Vict., c. 85, § XXXI.
92. 12 HALSBURY, THE LAWS OF ENGLAND 213 (3d ed. 1955).
93. [T]he court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has, during the marriage, been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty . . . (ii) of cruelty . . . or (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted . . . .
Matrimonial Causes Act, 14 & 15 Geo. 6, c. 25, § 4 (1950).
94. 1 J. BISHOP, *supra* note 65, §§ 117, 120. *See also* Cotter v. Cotter, 225 F. 471 (C.C.A. Alaska 1915).
95. Maynard v. Hill, 125 U.S. 190 (1888); A. JACOBS & J. GOEBEL, *supra* note 1, at 338-39.
96. Beamer, *supra* note 53, at 241; *see, e.g.*, Bray v. Landergren, 161 Va. 699, 172 S.E. 252 (1934).

visions or as vessels carrying the whole slumbering body of the ecclesiastical law which had been placed in suspension for want of a court to administer it. The New York courts adopted the "original provision" theory,[97] and those of Connecticut and Massachusetts adopted a modification of this interpretation,[98] but the majority of courts accepted the abeyance rule.[99] Surprisingly enough, however, the particular theory adopted by a given state seems to have had no bearing on the state's treatment of the recrimination doctrine, for all of the early American cases which considered the question accepted some form of recrimination.[100] It is obvious that the courts in those jurisdictions embracing the "original provision" theory were in no way constrained to accept recrimination. And even in those states adopting the "suspension" (or "abeyance") theory the courts could reasonably have rejected use of recrimination in divorce (as distinguished from separation) cases with the following argument: If canonical doctrines are to be applied in American courts, their application should be limited to fact situations paralleling those faced by the ecclesiastical courts. And an American couple seeking an *absolute* divorce presents a fact situation distinctly different from that presented by an English couple seeking a divorce *a mensa et thoro*. Whatever the merit of this argument, it had no perceptible influence on the American courts, and recrimination, in its mandatory form, became firmly entrenched in American divorce law by

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97. *See, e.g.*, Ackerman v. Ackerman, 200 N.Y. 72 (1908).

98. Shaw v. Shaw, 17 Conn. 189 (1845); Robbins v. Robbins, 140 Mass. 528 (1886).

99. *See* Note, *Recrimination and Alimony—Are They Compatible?*, 13 SYRACUSE L. REV. 562, 563 (1962) which states:

> [T]he implementation of these statutes created serious problems of construction. Were they to be treated as original provisions, without regard to prior English law, or had the English law merely been in abeyance and now impliedly incorporated in the newly granted jurisdiction? The majority of the states seem to have adopted the so called "abeyance theory," construing their statutes in light of the applicable English law. New York, however, seems to have adopted the "original provision" theory.

100. Ribet v. Ribet, 39 Ala. 348 (1864); Conant v. Conant, 10 Cal. 249 (1858); Johns v. Johns, 29 Ga. 718 (1860); Gordon v. Gordon, 41 Ill. App. 137 (1891); Trowbridge v. Carlin, 12 La. Ann. 882 (1857); Handy v. Handy, 124 Mass. 394 (1878); Hall v. Hall, 4 Allen 39 (Mass. 1862); Buerfening v. Buerfening, 23 Minn. 563 (1877); Nagel v. Nagel, 12 Mo. 53 (1848); Fuller v. Fuller, 41 N.J. Eq. 198, 3 A. 409 (1886); Wood v. Wood, 2 Paige 108 (N.Y. Ch. 1830); Foy v. Foy, 35 N.C. 90 (1851); Mattox v. Mattox, 20 Ohio 233 (1826); Shackett v. Shackett, 49 Vt. 195 (1876).

the mid-nineteenth century.[101] The doctrine acquired an even firmer base as many of the states, over a period of years, enacted statutes providing for its application under specified circumstances.[102]

In summary, the recrimination principle existed in the Mosaic law in a highly restricted form, operating only to bar a divorce to a husband who had falsely accused his wife of unchastity. Recrimination later manifested itself in the Roman law, but there the doctrine's sole function was to aid the court in determining how to divide up the parties' property. In the canon law the doctrine operated merely to bar an adulterous spouse from obtaining a legal separation (divorce *a mensa et thoro*). The doctrine played the same limited role in English matrimonial law (which followed the canon law and depended upon ecclesiastical courts for pronouncement), except during the brief period from the beginning of the Reformation until the start of the seventeenth century. The principle's application occasionally prevented a petitioner from obtaining an absolute divorce through a Parliamentary proceeding, but Parliament treated recrimination as merely a discretionary bar; and in any event, Parliamentary divorces were so expensive and difficult to procure that they were never common.[103] The Matrimonial Causes Act of 1857 (and its successor enactments) provided for application of recrimination, but only in the court's discretion. In the United States, ecclesiastical courts were never established, and divorce jurisdiction was therefore lodged in the common law and equity courts. For reasons that are not apparent, most of these courts broadened the scope and intensified the effect of the recrimination doctrine by recognizing additional recriminatory offenses (along with adultery) and by applying the principle in bar of an absolute divorce.[104] In addition,

101. Cases cited note 100 *supra*.

102. *See* Freed, *Defenses Against Divorce in French and American Law*, 38 TEX. L. REV. 303, 309 (1960).

103. "The expense and delay which were involved in the necessary preliminary steps [to a Parliamentary divorce], and in securing the passage of the act, were so great that no such divorce could be obtained except by the wealthy." 12 HALSBURY, THE LAWS OF ENGLAND 214 (3d ed. 1955).

During the period between 1700 and 1857, when Parliamentary divorces were most common, only 230 marriages were terminated in this manner. *Id.*

104. It is, of course, apparent why the courts did this in those states which enacted statutes requiring them to do so—that is, statutes which require the court to invoke recrimination in divorce suits (where appropriate) and which declare that the defendant can recriminate by showing

most American courts considered use of the doctrine to be mandatory and did not elect to alter this position in 1857 or thereafter. It is clear from the foregoing that one cannot tenably defend on a historical basis the doctrine of recrimination as it now operates in most American jurisdictions.

B. The Clean Hands Rule

The equity maxim that he who comes into equity must come with clean hands is the oldest reason advanced in justification of recrimination,[105] being traceable back at least as far as the 1799 English case of *Beeby v. Beeby*.[106] Modern courts appear to use this maxim more often than any other rationale to support the doctrine;[107] illustrative cases are *Hoff v. Hoff*,[108] and *Carlson v. Carlson*.[109] In both cases the husband sued for a divorce on the ground of cruelty, and the wife counterclaimed for a divorce on the same ground. In both instances the parties were denied relief on appeal. In the former case the Michigan Supreme Court declared:

> A proper administration of justice does not require that courts shall occupy their time and the time of the people who are . . . witnesses to the misdoings of others in giving equitable relief to parties who have no equities. And it is as true of divorce cases as of any others that a party must come into a court of equity with clean hands.[110]

In the *Carlson* case the Florida District Court of Appeal said:

> Recrimination is an outgrowth of the equity maxim that he who comes into equity must come with clean hands. . . . "One spouse cannot be the aggressor in a domestic fracas, that is to say, harass, torment and humiliate the other until she . . . retaliates in kind and then claim a divorce. . . . When this is found

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that plaintiff is guilty of any transgression recognized as a ground for divorce.

105. 2 C. VERNIER, AMERICAN FAMILY LAWS § 78 (1932).

106. 1 Hag. Ecc. 789, 162 Eng. Rep. 755 (1799).

107. Note, *Recrimination and Alimony—Are They Compatible?*, 13 SYRACUSE L. REV. 562, 565 (1962); Note, *Recrimination as a Defense in Divorce Actions*, 28 IOWA L. REV. 341, 343 (1943).

108. 48 Mich. 281, 12 N.W. 160 (1882).

109. 144 So. 2d 340 (Fla. 1962).

110. Hoff v. Hoff, 48 Mich. 281, 12 N.W. 160 (1882).

> to be the case equity will keep hands off and leave them to their own devices."[111]

Perhaps the most colorful statement of the clean hands precept to be found in a divorce case is that of the Mississippi Supreme Court in *Oberlin v. Oberlin*,[112] where the evidence revealed that the defendant (wife) was guilty of desertion, and the plaintiff, of adultery. Reversing the decree of the lower court, which had granted the plaintiff a divorce, the Mississippi Supreme Court said:

> The State, whose judicial servants administer its laws, is an interested party to the marriage contract, and one who comes into its courts complaining of a mote in the eye of his spouse must beware lest there appear a disfiguring beam in his own. His own hands must be clean.[113]

Courts in the seven jurisdictions having statutes providing that a divorce may be awarded only to "the party not at fault" or "the innocent party" or "the innocent and injured party" can, of course, justify use of the clean hands maxim by citing their local statutes.[114] But there are four reasons for objecting to use of this canon in support of recrimination in the remaining states: (1) The requirement that a plaintiff enter court with clean hands is a rule developed and applied in the equity courts and is not normally invoked in proceedings at law.[115] A divorce action is not a proceeding traditionally entrusted to courts of equity;[116] a few states now (by statute) commit divorce jurisidiction to equity courts,

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111. 144 So. 2d at 340-41, *quoting from* Russ v. Russ, 150 Fla. 653, 8 So. 2d 279 (1942).

112. 201 Miss. 228, 29 So. 2d 82 (1947).

113. *Id.* at 233, 29 So. 2d at 83. *See also* Narisi v. Narisi, 229 Ark. 1059, 320 S.W.2d 757 (1957); Kuhfal v. Kuhfal, 318 Mich. 105, 27 N.W.2d 512 (1947); Phillips v. Phillips, 48 Ohio App. 322, 193 N.E. 657 (1933).

114. Note 19 *supra* and accompanying text.

115. 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 398 (5th ed. 1941); Note, *Recrimination as a Bar to Divorce: Mitigating the Mandate*, 51 IOWA L. REV. 184, 187 (1965).

116. 24 AM. JUR. 2d *Divorce and Separation* § 241 (1966); 27A C.J.S. *Divorce* § 69 (1959). *See also* Partlow v. Partlow, 246 Ala. 259, 20 So. 2d 517 (1945). Quoting from the *Partlow* case:

> It is generally recognized in this country that the power to grant a divorce is not within the inherent general jurisdiction of courts of equity. Such courts have no cognizance of divorce proceedings except by statutes which necessarily prescribe and limit the powers of the courts . . . .

Id. at 261, 20 So. 2d at 518.

but most jurisdictions do not.[117] There seems to be no logical reason for a law court (contrasted with an equity tribunal) to deny a divorce on the basis of a maxim appropriate only to an equity proceeding. (2) Even if invocation of the clean hands precept were appropriate in divorce proceedings, the maxim could be properly used against a complainant only when his misconduct directly related to that of the defendant. Declares McClintock:

> The maxim [clean hands] is subject to the qualification that the inequitable conduct which will defeat plaintiff's recovery must be conduct with reference to the transaction on which he bases his suit; relief will not be refused merely because of plaintiff's general bad character, nor because of particular acts of misconduct not directly involved in the suit. *Even misconduct connected with the subject-matter of the suit will not defeat relief, where it does not form part of the transaction in controversy.*[118]

If a man seeks a divorce on the ground of cruelty or habitual intoxication and his wife attempts to recriminate by showing that plaintiff is guilty of adultery or sodomy, it does not appear that plaintiff's misbehavior can be said to form "part of the transaction in controversy." Yet over half the states permit a divorce defendant to recriminate by establishing that the plaintiff is guilty of any statutory divorce ground, regardless of whether the particular ground has any connection with defendant's misbehavior.[119] Thus to the extent that recrimination rests upon the clean hands maxim, the majority of American courts are acting improperly on this matter. (3) It is well recognized that a court of equity has discretion to disregard the clean hands canon whenever its use would produce an unjust or unwise result.[120] "It must

117. 24 AM. JUR. 2d *Divorce and Separation* § 241 (1966); 27A C.J.S. *Divorce* § 69 (1959).

118. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26 (2d ed. 1948) (emphasis added). Beamer agrees, as the following statement discloses: "Strictly interpreted, it [clean hands maxim] would not apply to divorce suits at all unless the misconduct of the petitioner was conducive to that of the defedant." Beamer, *supra* note 53, at 248.

119. Note 27 *supra* and accompanying text.

120. In Howay v. Howay, 74 Idaho 492, 497, 264 P.2d 691, 694 (1953) the court states: "Equity has always regarded itself free to apply or refuse to apply the maxim in a particular case, depending upon the consequences and a due regard for other considerations involved." *See also* Note, *Recrimination as a Bar to Divorce: Mitigating the Mandate*, 51 IOWA L. REV. 184, 187 (1965); Note, *Causes for Denying Divorce—Recrimination*, 27 SO. CAL. L. REV. 219 (1954).

be remembered that the application of the 'clean hands' doctrine is discretionary in nature and need not be applied where the interests of third parties or the public as a whole will be prejudiced by its application."[121] It follows that the clean hands precept cannot properly be used to justify the automatic application of recrimination whenever both spouses have committed misdeeds constituting grounds for divorce. (4) Finally, to base recrimination on the clean hands rule is to overlook the fact that in most jurisdictions misconduct which does not amount to grounds for divorce cannot be used in recrimination.[122] If the clean hands maxim were the basis for recrimination, then logic would demand that any divorce petitioner who entered court with soiled hands (tarnished in the matter in controversy) be denied relief, whether or not his misbehavior represented grounds for divorce.

For the reasons indicated above, it is submitted that the clean hands precept constitutes a rationalization for, rather than justification of, the recrimination doctrine.

C. The Pari Delicto Maxim

Use of the *pari delicto* maxim to justify application of recrimination is illustrated in *Mattox v. Mattox*,[123] and in *Rothwell v. Rothwell*.[124] In the former case the plaintiff (wife) sought a divorce on the ground of adultery. During the trial it was revealed that she was guilty of the same transgression, and the court dismissed her complaint, declaring: "These parties are *in pari delicto*, and to grant relief to either of them would be offering a bounty to guilt."[125] In the *Rothwell* controversy the complainant (wife) sued for a divorce on the ground of cruelty, and defendant cross-complained for the same relief, relying on the same ground. The trial court granted the wife a divorce, but the Supreme Court of Oregon reversed and dismissed, saying:

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121. Comment, *Divorce—Defense of Recrimination in Oregon*, 2 WILLIAMETTE L.J. 227, 229 (1962).
122. "The misconduct need not fall within the same statutory classification, but it must be ground for divorce, not merely for separate maintenance or divorce a mensa. If the conduct charged against the complainant is not such as to amount to ground for divorce, there is no 'recrimination' . . . ." 1 W. NELSON, NELSON ON DIVORCE AND ANNULMENT, *supra* note 1, at § 10.01.
123. 2 Ohio 233 (1826).
124. 219 Ore. 221, 347 P.2d 63 (1959).
125. 2 Ohio at 234.

> Both parties have been at fault, and the fault of one substantially equals the fault of the other. They are in pari delicto, and divorce should be denied both parties.[126]

> "... When the conduct of the parties is reprehensible to a kindred degree, the court ought not to interfere at the instance of either."[127]

Attempts to base recrimination on the *pari delicto* canon are open to two of the objections raised above (in connection with the clean hands precept). The former maxim, like the latter, is a creature of equity jurisprudence,[128] and its use is therefore not appropriate in a divorce action, except in those states—a minority—which commit divorce jurisdiction to courts of equity.[129] However, if the courts nevertheless choose to apply the maxim in divorce suits, they should treat the canon as a discretionary device—as a precept to be invoked or disregarded, depending upon which course of action will produce the more just and desirable results. In *Morrissey v. Bologna,*[130] a suit to cancel certain trust deeds, the Mississippi Supreme Court stated:

> "Even where the parties are *in pari delicto,* the courts may interfere from motives of public policy. . . . In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent . . . ."[131]

The Kansas Supreme Court, in *Saylor v. Crooker,*[132] an action to enjoin defendants from selling certain land, declared: "Equity does sometimes interfere to relieve one of two parties who are in pari delicto. It will do so if its forbearance would result in a still greater offense against public morals and good conscience."[133]

126. 219 Ore. at 231, 347 P.2d at 68.
127. *Id.* at 233-34, 347 P.2d at 68-69, *quoting from* Hollingsworth v. Hollingsworth, 173 Ore. 286, 292, 145 P.2d 466, 468 (1944). The court actually grounded its decision on a finding that neither party was shown to be guilty of statutory cruelty, but it indicated that it would have applied recrimination, had both spouses been guilty of this offense.
128. 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 403 (5th ed. 1941); 27 AM. JUR. 2d *Equity* § 141 (1966).
129. Note 102 *supra* and accompanying text.
130. 240 Miss. 284, 123 So. 2d 537 (1960).
131. *Id.* at 297, 123 So. 2d. at 543, *quoting from* 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 941 (4th ed 1919).
132. 97 Kan. 624, 156 P. 737 (1916).
133. *Id.,* 156 P. at 738. *See also* 27 AM. JUR. 2d *Equity* § 141 (1966).

D. The Contract Theory

Several cases have attempted to support application of recrimination with the argument that marriage is a contract, and that one who seeks relief for breach of a contract resting upon mutual and dependent covenants must first have performed his own obligations.[134] This rationale was used in *Jones v. Jones*[135] and *Richardson v. Richardson.*[136] The *Jones* case was a divorce action based on adultery. At the trial plaintiff (husband) admitted that since the parties' separation he had been living with another woman. The trial court nevertheless granted plaintiff a divorce, but the Texas Court of Civil Appeals reversed, saying:

> [T]he rule . . . that adultery is generally held to be a complete defense in an action for divorce upon any ground, including that of cruel treatment, was not predicated upon the ground that the guilty plaintiff had committed an act constituting a statutory ground for divorce in favor of the defendant, but . . . the basis thereof was the "general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to attain success must himself have performed the obligations on his part. . . . The doctrine of recrimination by the defendant as a defense in bar of the plaintiff's relief has been fully established in this country . . . ."[137]

In the *Richardson* case the wife sought a divorce on the ground of adultery. However, her own testimony revealed that she had abandoned her husband without justification. The Kings County Supreme Court dismissed the complaint, stating:

> Marriage, in this state, is a civil contract, and each party is bound to live up to it. . . . [P]laintiff broke her contract with the defendant, and . . . without justifiable cause . . . .

134. "[I]t would be hard if a man could complain of the breach of a contract which he has violated." Beeby v. Beeby, 1 Hag. Ecc. 789, 790, 162 Eng. Rep. 755, 756 (1790). *See also* Conant v. Conant, 10 Cal. 247 (1858); Smith v. Smith, 181 Ky. 55, 203 S.W. 884 (1918).
135. 176 S.W. 784 (Tex. Ct. Civ. App. 1943).
136. 114 N.Y.S. 912 (1906).
137. 176 S.W. at 786.

> By every rule of construction it seems to me that the right to relief, in these cases, as in all cases of contract, must be predicated as well upon good faith of and honest performance by the complaining party as upon bad faith and nonperformance on the part of the other party. . . .
>
> By first breaking the contract of marriage . . . plaintiff forfeited her right to demand relief for the defendant's subsequent breach of it.[138]

One advantage of basing recrimination on the "marriage-is-a-contract" theory is that this theory is not a canon of equity. Thus a court which uses this rationale has an answer to the argument that canons of equity are inappropriate in a divorce proceeding, which is an action at law (in most jurisdictions). The Ohio Supreme Court discussed this point in *Opperman v. Opperman*,[139] a divorce suit grounded on gross neglect of duty:

> As, in this state, the Common Pleas Court in divorce and alimony cases is a court of special and limited jurisdiction having no general jurisdiction in equity, and the statutes relating to divorce and alimony do not expressly confer any jurisdiction to enforce the equitable rule as to 'clean hands' or the similar canonical doctrine of recrimination, it would seem that so far as this state is concerned the enforcement of such doctrine by the courts of this state rationally rests on the concept that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed the obligation on his part . . . .[140]

There are three weaknesses in the marriage-is-a-contract justification of recrimination. First, marriage is not so much a contract as a status—and a status in which the state is vitally interested.[141]

> The execution of this [marriage] 'contract' is so circumscribed by regulations, and the state has such

138. 114 N.Y.S. at 914-15.
139. 77 Ohio App. 69, 65 N.E.2d 655 (1945).
140. *Id.* at 74-75, 65 N.E.2d at 658.
141. "It [marriage], certainly, does differ from ordinary common-law contracts, by reason of its subject-matter and of the supervision which the state exercises over the marriage relation, which the contract institutes. In such respects, it is sui generis." Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815, 816 (1936).

> an interest in it, that we probably would be much better off thinking of it as a status rather than a contract.[142]

That marriage differs fundamentally from an ordinary commercial contract was emphasized in *Maynard v. Hill*.[143] There the United States Supreme Court decided that article I, section 10 of the Federal Constitution, prohibiting state legislation from impairing the obligation of contracts, did not invalidate an Oregon Territory enactment dissolving Maynard's first marriage. Quoting from the opinion:

> [W]hile marriage is often termed by text writers and in decisions of courts as a civil contract . . . it is something more than a mere contract. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested . . . . When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest . . . upon the general law of the state . . . .[144]

If marriage is a special or hybrid kind of contract, then there is no compelling reason why its dissolution should be governed by the rules applicable to ordinary contracts.

Second, if for the sake of argument marriage were acknowledged to be an ordinary contract, then it would logically follow that the parties should be allowed to terminate it (rescind) by mutual consent. Declares Simpson:

> A contract . . . may be discharged by an express agreement that it shall no longer bind either party. Such an agreement, called mutual rescission, is itself a contract to discharge a prior contract. Its purpose is to restore the parties to the position they occupied before entering into the prior contract. It needs no other consideration.[145]

142. C. CLAD, FAMILY LAW 2 (3d ed. 1964).
143. 125 U.S. 190 (1888).
144. *Id.* at 210.
145. L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 205 (2d ed. 1965). If, however, the contract has been executed on one side then other consideration is necessary for a rescission.

Yet no American jurisdiction recognizes divorce by mutual consent,[146] and in a number of states the court is expected to deny a divorce whenever and however a recriminatory offense is brought to its attention—even though both parties desire a divorce.[147]

Third, if marriage were considered an ordinary contract, it would be reasonable to hold that when a spouse commits an act constituting a recognized ground for divorce, this represents a breach of the marital contract and excuses the other spouse from the duty of observing its terms.[148]

Yet no state recognizes any form of automatic divorce, and the courts do not limit application of recrimination to the situation where the plaintiff was the first to commit a marital offense.[149]

Thus, the attempted equation of marriage to an ordinary contract is, for the reasons indicated above, distinctly unsound.

In summary, analysis reveals that none of the legalistic defenses of the recrimination doctrine—the historical acceptance argument, the clean hands rule, the *pari delicto* maxim, or the contract analogy—has merit.

IV. POLICY-ORIENTED REASONS OFFERED IN DEFENSE OF RECRIMINATION

Supporters of recrimination have not based their case solely on arguments of a legalistic nature. At least four policy-oriented justifications of the doctrine may be found in judicial opinions: (a) By rendering divorces more difficult

146. C. CLAD, *supra* note 142, at 160. Admittedly, divorce by mutual consent may be very common in practice—because of collusion—but it is not sanctioned by the statutes or case law of any American state. *See also* A. JACOBS & J. GOEBEL, *supra* note 1, at 481-82.

Twenty five jurisdictions recognize voluntary separation for a specified period as a ground for divorce, but this ground requires more than mutual consent alone. AM. JUR. 2d *Desk Book* Doc. No. 125 (Supp. 1968).

147. *See* note 1 *supra*. In other states, however, the court will not apply the doctrine unless it has been formally pleaded as an affirmative defense. 1 W. NELSON, *supra* note 1, § 10.10; 27A C.J.S. *Divorce* § 114 (1959).

148. "A breach by one party may suspend, or if material, may altogether discharge the other party's performance. In either case, it affords a complete excuse for such other party's nonperformance." L. SIMPSON, *supra* note 145, § 184.

149. "[T]he defense of recrimination may be asserted without regard to whether the plaintiff or the defendant committed the first offense." 24 AM. JUR. 2d *Divorce and Separation* § 226 (1966); *accord*, De Burgh v. De Burgh, 39 Cal. 2d 858, 863, 250 P.2d 598, 600 (1952) (dictum); Whippen v. Whippen, 147 Mass. 294, 17 N. E. 644 (1888).

to procure, recrimination promotes marital stability. (b) The rule tends to deter immorality, since a spouse is less likely to commit adultery (or any other marital offense) if he knows that his misdeed may bar him from obtaining a divorce at some future time. (c) The doctrine serves to protect the wife's economic status. (d) Recrimination prevents persons who are obviously poor marriage risks from being freed to contract—and probably ruin—another marriage.

A. The Marital Stability Argument

The idea that recrimination promotes marital stability was embraced by the courts which decided *Decker v. Decker*[150] and *Eikenbury v. Burns*.[151] In the former case the Supreme Court of Illinois affirmed a ruling that adultery constituted a recriminatory offense barring the granting of a divorce on the ground of extreme cruelty,[152] saying:

> "The state is interested in the preservation of the marriage relation, since this relation is promotive of morality and innures to the perpetuation of its citizens."
>
> . . . It is not the policy of the law to favor divorces, or to encourage applications for the dissolution of the marriage relation.[153]

In *Eikenbury* the Appellate Court of Indiana affirmed a judgment denying a wife a divorce on the ground of abandonment, because of her own proven adultery. Said the court:

> The state itself regulates it [marriage], because the state has an interest in maintaining the family relation. . . . Public policy, good morals, the interests of society, all require that divorces shall be discouraged by the law . . . . The policy of the law in all Christian countries has been against divorce . . . . And while a divorce statute should not be construed

150. 193 Ill. 285, 61 N.E. 1108 (1901).
151. 33 Ind. App. 69, 70 N.E. 837 (1904).
152. This decision is contrary to the the statutory provisions of Illinois which provide: "If it shall appear, to the satisfaction of the court, that . . . both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed." ILL. ANN. STAT. ch. 40, § 11 (Smith-Hurd 1956).
153. 193 Ill. at 285, 61 N.E. at 1109-10, *quoting from* 9 AM. & ENG. ENCYC. OF LAW *Divorce* 928-29 (2d ed. 1892).

> . . . with a view to defeat its ends, yet it should be construed strictly.[154]

The argument that recrimination contributes to marital stability is infirm in at least three respects. First, it would be more logical to use the argument in support of a proposal to repeal the state statutes providing grounds for divorce than to use it in defense of recrimination. Once a jurisdiction has decided to permit persons to dissolve their marriage under given circumstances, it has necessarily concluded that there are situations in which a marriage is better terminated than perpetuated. If this conclusion is valid, then the goal of marital stability should not in every instance be given priority over all other considerations. To allow divorce on various (and sometimes trivial) grounds and at the same time to apply the recrimination doctrine mechanically is manifestly inconsistent.[155] Second, in practice recrimination prevents divorce petitioners from ending their marriage in only a small percentage of cases, since the great majority of divorce cases are uncontested.[156] Quoting from two often-cited decisions:

> I suppose that ninety-nine percent of divorces are granted on a routine ex parte hearing after the defendant has failed to appear, or has entered a general appearance and refused to plead further. . . . Frequently acquiescence reaches the verge of collusion.[157]

154. 33 Ind. App. at 69, 70 N.E. at 838. A flowery expression of this position (that recrimination conduces to marital stability) appears in Richardson v. Richardson, 114 N.Y.S. 912, 917 (1906):

> [A]ll good people know that marriage is the mother of purity and virtue and the guardian angel of the human race; that the family is the . . . promoter of all our best achievements. For these reasons when, as now, the moral sense of a large part of the community seems to be dulled and deadened as to the importance and sacredness of the marriage tie . . . it is time that . . . the servants of the law as well as its ministers should put up bars [such as recrimination].

155. "I can not see why the law should be so concerned to maintain the marriage status, and theoretically the home, when both spouses are at fault, while granting wholesale dissolution of marriages when but one is at fault." Evans v. Evans, 176 Ore. 403, 157 P.2d 495, 502 (1945) (dissenting opinion).

156. "Statistics show that the vast majority of divorces granted are uncontested and that in most cases only one of the parties appears in court." Note, *Recrimination as a Defense in Divorce Actions*, 28 IOWA L. REV. 341, 342 (1943). For a sample study that tends to corroborate this, see Feinsinger & Young, *Recrimination and Related Doctrines in the Wisconsin Law of Divorce as Administered in Dane County*, 6 WIS. L. REV. 195 (1931).

157. Evans v. Evans, 176 Ore. 403, 157 P.2d 495, 502 (1945) (dissenting opinion).

> It bears noting how frequently divorces are uncontested. In many cases neither spouse is 'innocent,' and yet one of them defaults to ensure a divorce. Thus a strict recrimination rule fails in its purpose of denying relief to the guilty.[158]

Thus recrimination actually operates to keep the marriage legally intact only in a small minority of divorce cases. Third, even when the doctrine does prevent the procurement of a divorce it holds the marriage together only in a legal sense. To deny a divorce is one thing, but to compel—or even enable—the parties to salvage what remains of their marriage is quite another. The liberalization of American divorce laws over the past few decades is evidently ascribable to a gradual realization that denial of a divorce seldom restores life to families that are sociologically dead when they enter court.[159] Declares one writer: "If anything is preserved [by the dismissal of a divorce petition] it is but the dead and empty shell of what has been and is no longer."[160] If a reconciliation is unlikely when *one* party is guilty of marital transgressions, then it would seem even more improbable when both are guilty.

> The interest of society . . . may be furthered by divorce even though both parties are at fault, if there is no possibility of their reconciliation. . . . The home is doubly broken. The bars to cohabitation are doubled . . . .[161]

> The chief vice of the [recrimination] rule . . . is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty. The disruption of family relationships . . . and the oppressive effect upon the children and the community are intensified.[162]

158. De Burgh v. De Burgh, 39 Cal. 2d 858, 869, 250 P.2d 598, 604 (1952).
159. *See* Beamer, *supra* note 53, at 249.
160. Sherman, *The Doctrine of Recrimination in Massachusetts*, 33 B.U.L. REV. 454, 471 (1953).
161. Chavez v. Chavez, 39 N.M. 480, 50 P.2d 264, 269 (1935) (concurring opinion).
162. De Burgh v. De Burgh, 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1952).

As Lord Stowell observed over one hundred and fifty years ago, to assume that the parties will even resume cohabitation is, in most cases, to err:

> I cannot blind myself to the fact that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the canon law had anticipated in connexion with its [recrimination] rule. There is no return to cohabitation, nor are any means to be resorted to for the purpose of compelling it.[163]

For the reasons set out above, the contention that recrimination promotes marital stability is far from convincing.

B. The Deterrent-to-Immorality Thesis

The argument that recrimination tends to discourage husbands and wives from engaging in immorality was noted in *Pavletich v. Pavletich*,[164] a case in which the court refused to apply recrimination, declared defendant's charge of adultery by plaintiff to be immaterial, and granted plaintiff a divorce on the ground of incompatibility. Said the court:

> [Two] possible sociological justifications for the doctrine of recrimination can be dimly discerned behind the empty incantations with which the courts rationalize its existence and application to the cases before them. The first is that it tends to hold the family together; the second, that it serves as a check upon immorality. . . .[165]

Is it realistic to suppose that a spouse who is inclined to commit adultery, cruelty, or some other marital offense is likely to desist out of fear that his actions will enable his mate at some future time to defeat his petition for divorce? The person who commits adultery is normally secretive about the act, and he does not expect his mate to learn of the deed. Cruelty, the most commonly employed divorce ground,[166] represents a pattern of conduct; and it hardly seems psychologically sound to expect that an individual with propensities

163. Proctor v. Proctor, 2 Hag. Con. 292, 302, 161 Eng. Rep. 747, 751 (1819).
164. 50 N.M. 224, 174 P.2d 826 (1946).
165. *Id.* at 231, 174 P.2d at 830-31.
166. Nearly sixty percent of all divorces are granted for cruelty. H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 561 (1965).

toward cruelty will (or even could) stifle these proclivities for any substantial period of time in order to maintain his ability to procure a divorce. The deterrent effect of recrimination would therefore seem to be negligible. What little deterrent potential the doctrine might have is doubtlessly diluted by the fact that most divorces are—to the knowledge of much of the public—uncontested.[167]

Certain aspects of recrimination's operation actually foster immorality. If a spouse has once given cause for divorce, then his mate can safely violate his marriage vows, secure in the knowledge that the other is barred from obtaining a divorce.[168] Furthermore, if a spouse sues for divorce, and is denied relief upon a showing of his own marital infractions, he remains subject to the emotional and physical needs which burden any normal human being. Being unable to satisfy his needs inside the law, he is likely to satisfy them outside of it.

> The interest of . . . public morality may be furthered by divorce even though both parties are at fault . . . . It may well be doubted whether the sum total of the public morality is increased by refusing a divorce under such circumstances. The result of refusing the divorce may be that each will become offenders against public morality . . . .[169]

Thus the predictable end-result of recrimination's invocation in a given case is the formation of an illicit relationship (by one or both spouses) followed (commonly) by the birth of illegitimate children. To argue that a doctrine productive of such fruits tends to curb immorality is to argue strangely indeed.

C. The Financial Security Argument

The contention that recrimination protects the economic status of the wife undeniably had some merit when the canon law adopted the principle and when Lord Stowell sat on the bench. In those years a wife had virtually no property of her own, because of such doctrines as *seisen jure uxoris* and

167. Note 156 *supra*.
168. This assumes that there is no condonation; for if a spouse condones his partner's misdeed, he cannot thereafter use the transgression in recrimination. 24 AM. JUR. 2d *Divorce and Separation* § 232 (1966).
169. Chavez v. Chavez, 39 N.M. 480, 50 P.2d 264, 269 (1935) (concurring opinion).

curtesy.[170] Furthermore, she could not make a valid contract or will and could not (without acting through her husband) collect her choses in action. Moreover, it was extremely difficult for a woman to earn a living outside the home. Few jobs were open to women, and those that were (such as governess work and domestic service) generally paid little. "Society had little legitimate use for women outside their husband's homes."[171] A divorcee could not hope to regain economic security through remarriage, since the only kind of divorce obtainable (aside from the expensive and arduous Parliamentary divorce) was a divorce *a mensa et thoro,* which amounted to merely a legal separation. Consequently, when a man divorced his wife and thereby terminated his liability for her debts[172] (while retaining his rights to her property),[173] she was likely to become a public charge or a prostitute.[174] Thus, by enabling wives sometimes to prevent their husbands from casting them off via a divorce *a mensa et thoro,* recrimination admittedly served a worthwhile social purpose. But the woman's position in society today is vastly different from her position in the England of Chaucer, Shakespeare, Pope, and Byron.[175] A wife can freely contract, can own real and personal property of her own, and can work at a wide variety of profitable occupations outside the home.[176] In addition, following an absolute divorce she can remarry.[177] It

170. Under the doctrine of *seisen jure uxoris* a man, upon marriage, became jointly seized (with his spouse) of his wife's freeholds and exclusively possessed of her leaseholds. He retained these rights during the duration of the marriage. Upon the birth of live, legitimate issue the husband became entitled, under the principle of curtesy, to exclusive seisen of his mate's freehold for life. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 283, 287 (1951).

171. Beamer, *supra* note 53, at 253.

172. Govier v. Hancock, 101 Eng. Rep. 726 (1796). *See also* Rex v. Flintan, 35 Rev. R. 273 (1830).

173. "The husband became entitled upon marriage to the absolute ownership of his wife's chattels, the right to collect her choses in action and earnings, and the sole use of her lands during the coverture. A divorce a mensa et thoro did not affect any of those rights . . . ." J. MADDEN, *supra* note 62 at § 97. *See also* Rex v. Flintan, 35 Rev. R. 273 (1830).

174. Manby v. Scott, 82 Eng. Rep. 1000 (1659).

175. G. Chaucer (1340-1400 A.D.); W. Shakespeare (1564-1616 A.D.); A. Pope (1688-1744 A.D.); G. Byron (1788-1824 A.D.).

176. "At the turn of the century the woman's place was said to be in the home, but today it is commonplace for a married woman to work regularly at gainful employment." Clugston v. Clugston, 197 Kan. 180, 185, 415 P.2d 226, 231 (1966) (dissenting opinion).

177. Twenty-two states have enactments restricting the right of a divorcee to remarry. Eighteen jurisdictions have statutes disallowing remarriage for a specific period, which ranges from sixty days to two years, and four states have acts which merely empower the state to regulate remarriage.

is therefore evident that the purpose which recrimination formerly served—that of protecting offending wives from being rendered destitute—is a function for which there is no longer any need.

D. The Prevention-of-Subsequent-Bad-Marriages Policy

The contention that recrimination prevents persons who are poor marriage risks from re-entering the marriage market is weak in two respects. First, it hardly seems fair or rational to permit a divorce-defendant to remarry when his first spouse is free from fault and at the same time deny this opportunity to a divorce-defendant whose first spouse is guilty of marital transgressions. One's opportunity to contract a subsequent marriage surely should not be determined by the standard of behavior of his first wife (or husband). Yet divorce-defendants who have been wedded to innocent petitioners are usually allowed to remarry.[178] Second, the available evidence does not in fact indicate that one-time married divorcees—even those who occupied the position of respondent (guilty party)—are poor marriage risks. A 1962 study discloses that just over thirty percent of first remarriages end in divorce, while twenty percent of first marriages terminate in this manner.[179] A 1956 work by a Detroit sociologist[180] and a 1953 analysis of marriage and divorce records in Iowa

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The eighteen jurisdictions comprise: ALA. CODE tit. 34, §§ 23, 38 (1964); ARIZ. REV. STAT. ANN. § 25-320 (1956); IND. ANN. STAT. § 3-1224 (1965); IOWA CODE ANN. § 598.17 (1962); KAN. GEN. STAT. ANN. § 60-1610 (1964); LA. REV. STAT. ANN. § 9:302 (1952); MINN. STAT. ANN. § 517.03 (Supp. 1966); N.Y. DOM. REL. LAW § 8 (1964); OKLA. STAT. ANN. tit. 12, §§ 1280-82 (1955); ORE. REV. STAT. § 107.110 (1965); PA. STAT. ANN. tit. 48, § 1 (1955); S.D. CODE § 14.0707 (1939); TENN. CODE ANN. § 36-831 (1955); TEX. REV. CIV. STAT. art. 4640 (1960); VT. STAT. ANN. tit. 15, §§ 550, 553, 560 (1947); VA. CODE ANN. §§ 20-118, 20-119 (1953); W. VA. CODE ANN. § 4722 (1961); WIS. STAT. ANN. § 245.03 (1955).

178. Statutes cited note 177 *supra*.

179. The failure rate figure of thirty percent for first remarriages includes widows and widowers, as well as divorcees, but there is no reason to believe that the rate would be significantly higher if the former group were excluded. They represent only twenty percent of remarried persons. Monahan, *How Stable Are Remarriages?*, 58 AM. J. SOC. 280 (1953). Moreover, it is reasonable to assume that upon remarriage they experience somewhat greater difficulties of adjustment, on the average, than do persons entering their first marriage. Being older as a class, they are likely to have established some rigid habit patterns, which are normally difficult to alter; and in addition, the image of the deceased mate, enhanced by nostalgia, is likely to make the present spouse appear inferior by comparison. One is reminded of the old Irish proverb: "Never marry a widow unless her first husband was hanged for horse thievery."

180. W. GOODE, AFTER DIVORCE (1956).

and Missouri[181] tend to support these figures. The former concludes that approximately seventy percent of those who remarry after a divorce "are and remain relatively happy" in their new wedlock;[182] the latter suggests that while divorcees as a class (including persons married three or more times) clearly exhibit a higher divorce rate than do persons entering their first marriage, the failure rate of divorcees who have been married only once before is not substantially higher than that of persons who wed for the first time.[183] It therefore appears that while one-time wedded divorcees as a class achieve less success in their second marriages than do persons contracting their first marriage, nevertheless, the distinct majority of their first remarriages succeed.[184] Admittedly, these studies embraced all divorcees and not just those who had occupied the position of defendant (guilty party); and it is possible that the latter group has a somewhat higher divorce rate upon remarriage than does the former. But it seems unlikely that the two groups would exhibit a difference of more than a few percentiles in their remarriage divorce rates. And unless the difference amounts to more than nineteen percent (which appears exceedingly improbable), over half the divorce-defendants who remarry for the first time succeed in their second matrimonial attempt.[185] It follows that those whom recrimination bars from entering a new marriage cannot, considered as a group, fairly be classified as poor marriage risks.

In conclusion, none of the policy-oriented theories submitted in justification of recrimination represents a sound reason for retaining the doctrine.

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181. Monahan, *supra* note 179.
182. W. GOODE, *supra* note 180, at 335. The author observes: "[I]t would be surprising, even if we grant a heavy concentration of personality deviation among divorcees, if they did not learn something about getting along in marriage from their previous marriage."
183. Monahan, *supra* note 179, at 284, 286, 287 (tables 1, 4, 5). The author emphasizes that "the divorce ratio increases with each successive marriage." *Id.* at 287.
184. Monahan conjectures that such marriages may to some extent involve persons who "select those who have learned from their first failure and, wishing a second marriage, are intent upon making a success of it." Monahan, *supra* note 178, at 280.
185. The writer has reached this conclusion by accepting seventy percent as the success rate of first remarriages of all divorcees (*see* note 179 *supra* and accompanying text), and by then subtracting up to nineteen percent om this rate.

V. STATUTORY AND JUDICIAL REFORMS

Perceiving the objectionable features of recrimination and noting the absence of any substantial counterbalancing merits, a number of the state legislatures and courts have devised means of minimizing or escaping the doctrine's evils. The means adopted are the following: (a) making recrimination's application discretionary with the court, (b) replacing recrimination with the doctrine of comparative rectitude, (c) declaring the rule to be inapplicable when the divorce ground relied upon is voluntary separation or incompatibility, and (d) abolishing recrimination altogether.

A. Discretionary Application of Recrimination

England and three American jurisdictions[186] have statutes authorizing the court to invoke or disregard recrimination in its discretion. Eight additional jurisdictions have adopted this position by judicial decision.[187]

In England. England's Matrimonial Causes Act reads in part as follows:

> [T]he court shall not be bound to pronounce a decree of divorce and *may* dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—
>
> . . .
>
> (ii) of cruelty . . . or
>
> (iii) where the ground of petition is adultery or cruelty, of having without reasonable excuse deserted . . . .[188]

Although this statute clearly allows the court to grant a divorce even when the petitioner is guilty of adultery, cruelty,

186. KAN. STAT. ANN. § 60-1606 (1964); MINN. STAT. ANN. § 518.08 (1947); MISS. CODE ANN. § 2735.5 (Supp. 1966).

187. Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. Cir. 1944); Matlow v. Matlow, 89 Ariz. 293, 361 P.2d 648 (1961); De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598 (1952); Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946); Howay v. Howay, 74 Idaho 492, 264 P.2d 691 (1953); Burns v. Burns, 145 Mont. 1, 400 P.2d 642 (1964); Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950); Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946).

188. Matrimonial Causes Act, 14 & 15 Geo. 6, c. 25, § 4(2)(c) (1950) (emphasis added).

or desertion, for a long time after 1857, when the present statute's antecedent was enacted,[189] the English courts were slow to exercise their discretion in favor of a petitioner guilty of those offenses.[190] Thus in *Evans v. Evans*,[191] the Probate Division supported its decision (denying a divorce for adultery to a petitioner who was himself guilty of the offense) with the following observations:

> The cases which have been decided under the [Matrimonial Causes] Act [of 1857] shew that the judges of this Court have not been lenient to petitioners in exercising a discretion in their favour . . . .[192]
> [I]t must obviously be very rarely that the Court would be disposed to exercise its discretion in favour of the petitioner, and I am not aware of any case in which this has been done except the two cases . . . of *Symons v. Symons* and . . . *Constantinidi v. Constantinidi*[193] . . . .[194]
>
> The guiding principle to be followed by the Court in the exercise of its discretion cannot, in my opinion, be better expressed than in the words . . . used by Vaughan Williams, L. J. [in *Constantinidi v. Constantinidi*]: "The Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer, respectively, but also to the interests of society and public morality."[195]

However, during the World War I era, the court began exercising its discretion in a more lenient manner, as evidenced by such decisions as *Habra v. Habra*,[196] *Hampson v.*

189. Matrimonial Causes Act, 20 & 21 Vict., c. 85 (1857).
190. "The Court formerly exercised its discretion within narrow limits, although the discretion was unfettered . . . ." 12 HALSBURY, THE LAWS OF ENGLAND 311 n.(q) (3d ed. 1955).
191. [1906] P. 125.
192. *Id.* at 129.
193. [1897] P. 167; [1903] P. 246. There are at least two other such cases, which the court evidently overlooked, namely Joseph v. Joseph, 34 L.J. (P.M. & A.) 96 (1865) and Coleman v. Coleman, L.R. 1 P. & D. 81 (1866). In the former case the respondent had led the petitioner to believe that she was dead and she remarried. In the latter one the respondent had compelled the petitioner to engage in prostitution.
194. [1906] P. at 131.
195. *Id.* at 132.
196. [1914] P. 100. In this case there was evidence that the respondent (wife) had condoned petitioner's adultery (although she left the petitioner the day after she allegedly forgave him), and the court appeared to be influenced to some extent by this consideration.

Hampson,[197] *Wilson v. Wilson*[198] and *Tickner v. Tickner*.[199] In all of these cases the court granted divorces to petitioners guilty of repeated acts of adultery. In the *Wilson* case the court set forth more liberal standards for the exercise of a favorable discretion than had theretofore been openly recognized. The court said that it could properly consider:

> (1.) the position of the children to whose interest it is that they should have a home with the sanctions of decency and, so far as may be, of the law; (2.) the position of Amelia Brown [petitioner's partner in adultery], for it is clearly in her interest that she should be lawfully married; (3.) the case of the respondent, who has long ceased to have any relations with the petitioner, and as to whom there is no prospect that my refusal of relief would have the effect of reconciling her to her husband; and, (4.) the case of the petitioner; it is in his interest that he should be able to marry [Amelia Brown] and live respectably.[200]

The progressive tendency manifested by the *Wilson* decision was further exhibited by the *Tickner* holding. The parties in the latter case wedded in 1906 and dwelled together until 1909, when respondent's adultery and ill treatment induced petitioner to leave him. Six months after moving out petitioner obtained employment as a housekeeper to W. C. Shortly thereafter she began living with W. C. as the latter's wife, and the two maintained this relationship until the institution of petitioner's divorce suit in 1921. At the time of the divorce action respondent was found cohabiting with another woman, who had already borne him a child. In granting petitioner a divorce, the court noted:

> [T]he discretion of the Court has been exercised of late upon broader considerations that were thought to govern it in the years immediately after the com-

197. [1914] P. 104.
198. [1920] P. 20.
199. [1924] P. 118.
200. [1920] P. at 21-22. During the ten years following this decision there were six hundred and ninety applications by divorce petitioners for favorable discretion. In the entire period preceding the *Wilson* decision there were only sixty-four such applications. Apted v. Apted, [1930] P. 246. The sharp increase appears to be at least partly ascribable to the liberalization of the law achieved by this case.

> ing into operation of the Matrimonial Causes Act, 1857.[201]
>
> [T]o refuse relief to a suitor who, in the language of old authorities, "does not come with clean hands," is not so obviously simple a course as may be thought when, as between the parties here, there are facts which explain or extenuate the plight of the claimant for relief, and as regards the public interest there are weighty considerations for and against the decree which is sought.[202]
>
> What I have really to determine is whether on grounds of public policy, and by way of example, she [petitioner] ought to be left under a disability to contract a new marriage until she is set free by the death of respondent. . . . I do not think virtue and morality will be promoted by a decision having that effect.[203]

Twenty years later the House of Lords in *Blunt v. Blunt*[204] gave its endorsement to the liberalization of divorce law effected by the *Wilson* and *Tickner* decisions. The *Blunt* case was a divorce action grounded on adultery. Respondent (wife) cross-petitioned for a divorce on the grounds of adultery and cruelty. Both parties admitted committing adultery. The trial judge granted the husband a divorce, but the Court of Appeal rescinded the decree and ruled that neither spouse was entitled to relief. Both parties appealed to the House of Lords, which allowed the husband's appeal and dismissed the respondent's cross-appeal. Viscount Simon, L. C., said that the court should give weight to the following criteria in deciding how to exercise its discretion on the recrimination question:

> The utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases, as helping to arrive at a just conclusion. . . . These four points are: (a) the position and interest of any children of the marriage; (b) the interest of the party with whom the petitioner has been guilty of misconduct, with special

201. [1924] P. at 121.
202. *Id.* at 123.
203. *Id.* at 125.
204. [1943] A.C. 517.

> regard to the prospect of their future marriage; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; (d) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably. To these four considerations I would add a fifth of a more general character . . . namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.[205]

Although there is some difference in the wording, the first four considerations specified in the *Blunt* decision are essentially the same as those set out in the *Wilson* case. One should not conclude that the *Wilson, Tickner,* and *Blunt* decisions have in effect extinguished recrimination in England. The doctrine was protected from possible extirpation by Lord Simon's fifth criterion: the aim of "maintaining a true balance between respect for the binding sanctity of marriage" and the wisdom of permitting a formal dissolution of a union which has "utterly broken down." This consideration played a significant role in the 1954 decision of Moor v. Moor,[206] a divorce action brought by a wife on the ground of adultery. The parties married in 1929 and cohabited until 1936 when petitioner left defendant for undisclosed reasons and began an adulterous relationship with another man by whom she subsequently had two children. Defendant thereafter began living with another woman, and this union eventually produced four children. Plaintiff coupled her divorce petition with an application that the court exercise its discretion in her favor. The trial court denied her application, and the Court of Appeal dismissed her appeal, saying:

> It is clear that the commissioner had *Blunt v. Blunt* in mind.[207]

The decision of the House of Lords in *Blunt v. Blunt* marked a turning-point in the way the court exer-

205. *Id.* at 525.
206. 1 W.L.R. 927 (1954).
207. *Id.* at 930.

> cised its discretion in divorce cases. Whereas previously discretion was exercised in comparatively few cases, since that decision it has been exercised in most of the cases in which it has been sought. But it is important to remember that . . . the House of Lords required the courts to maintain "a true balance" between the sanctity of marriage on the one hand and the other social considerations on the other hand.[208]

The conservative cast of the *Moor* decision becomes evident when one considers that of the five interests specified in *Blunt v. Blunt,* only one (the fifth) could be said to be furthered by denial of a divorce.[209] However, the *Moor* case has not had the effect of reversing the liberalizing trend charted by the *Wilson, Tickner,* and *Blunt* decisions,[210] and in England today a petitioner who can establish valid grounds for divorce usually has a good chance of obtaining relief, even though he is himself guilty of adultery, cruelty, or desertion.

In the United States. The three jurisdictions of Kansas, Minnesota, and Mississippi have statutes making recrimination a discretionary bar to divorce. Provides the Kansas enactment: "When the parties are found to be in equal fault, the court may grant or refuse a divorce."[211]

Declares the Minnesota act:

> In any action brought for divorce on the ground of adultery, although the fact of adultery be established, the court *may* deny a divorce in the following cases:
>
> Where it is proved that the plaintiff has also been guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce.[212]

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208. *Id.* at 931 (concurring opinion).

209. That is, the welfare of the parties' six children by their new alliances, the well-being of both petitioner and defendant, and the best interest of the petitioner's and defendant's paramours would all be promoted by the granting of a divorce, since this would make possible the legalization of the new relationships. The prospect of a reconciliation between the parties appeared to be exceedingly slim.

210. D. COCKAIN, DIVORCE AND MATRIMONIAL CAUSES IN A NUTSHELL 31 (1967).

211. KAN. STAT. ANN. § 60-1606 (1964).

212. MINN. STAT. ANN. § 518.08 (1947). States the Mississippi statute: "If a complaint or cross-complaint in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor to

Eight jurisdictions have accomplished the same end by court decision.[213] These decisions may be grouped into four categories: (a) decisions construing an ambiguous statutory phrase as conferring upon the court discretion to apply or disregard recrimination in a given case; (b) decisions holding that the addition of such divorce grounds as voluntary separation, insanity, and incompatibility—none of which involves an offense against the marriage—manifests a legislative intent to restrict the role that fault plays in divorce law, and that it would be inconsistent with this policy to continue applying recrimination in a mechanical manner; (c) decisions reasoning that the addition of a given non-culpatory divorce ground, such as incompatibility, reflects a legislative intent to eliminate considerations of fault in cases involving that particular ground, and that the mechanical application of recrimination in cases involving that ground would frustrate this legislative intent; (d) decisions holding that (whatever the divorce ground) recrimination should be merely a discretionary bar simply because it is contrary to sound public policy to treat the doctrine as an absolute bar.

The three states of California, Idaho, and Montana, representing category (a), have statutes providing in part as follows:

> Divorces must be denied upon showing:
>
> . . . .
>
> 4. Recrimination . . . .[214]
>
> Recrimination is a showing by the defendant of a cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.[215]

In *De Burgh v. De Burgh*[216] the Supreme Court of California reasoned that if the California legislature had intended to have recrimination operate automatically whenever both spouses were guilty of deeds constituting a divorce ground,

deny such a party a divorce, even though the evidence might establish recrimination on the part of such complainant or cross-complainant." MISS. CODE ANN. § 2735.5 (Supp. 1966).

213. Note 187 *supra*.

214. CAL. CIV. CODE § 111 (1954).

215. CAL. CIV. CODE § 122 (1954). The comparable enactments of Idaho and Montana are: IDAHO CODE ANN. § 32-613 (1958); MONT. REV. CODES ANN. §§ 21-118, 128 (1961).

216. 39 Cal. 2d 858, 250 P.2d 598 (1952).

then the statutory phrase "in bar of plaintiff's cause of divorce" would be superfluous. Hence the quoted phrase must mean that in some cases a plaintiff may be entitled to a divorce. Since the enactment does not specify the circumstances under which a guilty plaintiff should be granted a divorce, the California Supreme Court determined, on the basis of sociological considerations, that the California courts should be guided by the following criteria: the likelihood of reconciliation, the effect of the disharmony on the physical and mental health of the parties, the extent to which the discord is harming the children, and the disparity, if any, in the guilt of the parties.[217]

The Idaho Supreme Court in *Howay v. Howay*[218] and the Montana Supreme Court in *Burns v. Burns*[219] both relied heavily on *De Burgh* as support for their decisions.[220] However, the Idaho Supreme Court also stressed the following argument: Since recrimination is grounded largely on the "clean hands" maxim, and since it is well recognized that the court may disregard the "clean hands" canon when its use would produce an unjust or unwise result, it follows that the court should be free to apply or disregard the recrimination doctrine as it deems best. Quoting from the *Howay* opinion:

> The doctrine of recrimination is said to be based upon the equitable precept that he who comes into equity must come with clean hands. But, it cannot be compared to that precept if it must be applied manditorily by the divorce court in every case where improper conduct on the part of the plaintiff appears, without regard to consequences or other considerations having an equal claim upon the conscience of the chancellor. Equity has always regarded itself free to apply or refuse to apply the maxim in a particular case, depending on the con-

217. *Id.* at 872-73, 250 P.2d at 603-04.
218. 74 Idaho 492, 264 P.2d 691 (1953).
219. 145 Mont. 1, 400 P.2d 642 (1964).
220. The Idaho Supreme Court (explaining: "We quote at length from that [the *De Burgh*] decision because of the identity of the statutes considered to our own.") devoted over a page to quoting from the *De Burgh* opinion, and the Montana Supreme Court devoted three-quarters of a page to a discussion of the *De Burgh* case. The Montana Supreme Court also relied to a limited extent on the *Howay* decision.

sequences and a due regard for other considerations involved.[221]

The courts of the District of Columbia and the Virgin Islands, comprising category (b), justified their decisions in *Vanderhuff v. Vanderhuff*[222] and *Burch v. Burch*[223] with essentially the following argument: By adding non-culpatory divorce grounds the legislature disclosed an intent to curtail the role that fault plays in divorce law, and it would defeat this aim to continue invoking recrimination in a mechanical manner. In the *Vanderhuff* case the United States Court of Appeals for the District of Columbia affirmed a decree granting the plaintiff a divorce (on the ground that defendant had been convicted of a felony) even though there was evidence tending to show that plaintiff was guilty of adultery. Said the court:

> We believe our present statute[224] has changed the policy which made recrimination an absolute bar to divorce. The statute now provides four grounds for divorce . . . . Grounds (3) and (4) [voluntary separation for five years and conviction of a felony involving moral turpitude] may exist in the absence of any offense against the marital status itself. We have already held that recrimination is not a defense in the case of voluntary separation from bed and board for five years. In so deciding we said that the purpose of the liberalizing amendment was "to permit termination in law of certain marriages which have ceased to exist in fact" . . . .
>
> Our opinion in this case is limited to a ruling that recrimination is not an absolute bar to a divorce.[225]

The *Burch* controversy was a divorce action grounded on incompatibility. The defendant (wife) asked for a dismissal of the complaint, charging that plaintiff was guilty of cruel treatment. The District Court of the Virgin Islands granted plaintiff a divorce, and the United States Court of Appeals affirmed, speaking as follows:

> [I]t is perfectly clear that in the case of at least two of the grounds for divorce recognized by the

221. 74 Idaho at 496-97, 264 P.2d at 694.
222. 144 F.2d 509 (D.C. Cir. 1944).
223. 195 F.2d 799 (3d Cir. 1952).
224. D.C. CODE ANN. § 16-403 (1940).
225. 144 F.2d at 509-10.

> statute, impotency existing at the time of the marriage and insanity occurring after marriage, there can be no question of either innocence or guilt . . . . [I]ncompatibility of temperament necessarily involves both parties.
>
> In accord with what we believe to be the legislative intent we hold that the defense of recrimination is not a bar to the granting of a divorce under the laws of the Virgin Islands except in the circumstances specified in Section 10 of the Divorce Law . . . .[226] We think, however, that evidence of misconduct on the part of the plaintiff may be considered by the court along with all the other evidence in determining whether, in the discretion of the court, the best interests of the parties and of the public will be served by the granting of a divorce.[227]

The position taken by New Mexico, the sole representative of category (c), is that the legislature, by adding the fault-free divorce ground of incompatibility, manifested an intent to give the court authority, in cases grounded on incompatibility, to apply or disregard recrimination in its discretion.[228] The Supreme Court of New Mexico adopted this approach in *Pavletich v. Pavletich*[229] and *Clark v. Clark*.[230] In the former case the court affirmed a decree awarding a divorce for incompatibility even though there was evidence that plaintiff was guilty of adultery. Quoting from the opinion:

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226. "In an action for the dissolution of the marriage contract on account of adultery the defendant may admit the adultery and show in bar of the action: (3) That the plaintiff has been guilty of adultery also without the procurement or connivance of the defendant . . . ." DIVORCE LAW OF VIRGIN IS. § 10 (1947).

227. 195 F.2d at 807, 808, 810; *accord*, Shearer v. Shearer, 356 F.2d 391 (3d Cir. 1965).

In *Burch* the court was concerned not only with the applicability of the recrimination doctrine, but also with the interpretation of a statutory phrase limiting the right to obtain a divorce to the "injured party." DIVORCE LAW OF THE VIRGIN IS. § 7 (1947). The court decided that a divorce petitioner could be an "injured party" without being an innocent party. 195 F.2d at 807.

228. Courts in a number of jurisdictions have held that the defense of recrimination has no application when the plaintiff bases his action on a non-culpatory ground, such as voluntary separation or incompatibility. *See* pt. V(c) *infra*. New Mexico appears unique in holding that in such a situation recrimination continues to have application but may be disregarded in the court's discretion.

229. 50 N.M. 224, 174 P.2d 826 (1946).

230. 54 N.M. 364, 225 P.2d 147 (1950).

> Some of the lexicographers give 'irreconcilableness' as a synonym [for incompatibility]. We venture the suggestion that this is an important factor to be considered in granting or refusing divorces upon the ground of incompatibility.
>
> If the chancellor believes the parties are reconcilable, he will, no doubt, endeavor to bring about a reconciliation. But where the parties are irreconcilable we believe that the public policy of this state, as expressed by the legislature, is against denying a divorce on the doctrine of recrimination.[231]

In the *Clark* case, decided four years later, the same court reversed a decision granting the plaintiff a divorce for incompatibility, because the trial court had refused to admit evidence that plaintiff had committed adultery. Explaining why it was reversing, the court said that the trial judge erred in concluding that he was *compelled* (by the *Pavletich* ruling) to grant a divorce if he once found that the parties were incompatible, even though plaintiff should be guilty of adultery. Rather, the *Pavletich* decision stands for the proposition that if the parties are found to be incompatible, the court should, after receiving all proffered evidence of recrimination, apply or disregard the doctrine, depending upon his judgment on the equities of the case. Quoting Justice Sadler:

> [A]s to other defenses traditionally employed by way of recrimination . . . there resides in the trial judge the discretion to say whether, notwithstanding such incompatibility, it shocks the conscience to hold such plaintiff entitled to a divorce by reason thereof.[232]

The courts of Arizona and Florida, comprising category (d), defended their decisions in *Matlow v. Matlow*[233] and *Stewart v. Stewart*[234] mainly with a simple policy argument:

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231. 50 N.M. at 233, 174 P.2d at 832.

232. 54 N.M. at 368, 225 P.2d at 149. Commenting on *Clark*, an American Law Report annotator says:

> The decision of the majority in the *Clark* case seems to establish the rule that while recrimination is not an absolute defense in cases of this kind . . . it is not immaterial, as indicated in the *Pavletich* case, and it may be considered by the chancellor and may warrant a denial of divorce, in the discretion of the chancellor, if it would shock the conscience to grant the divorce.

Annot., 21 A.L.R.2d 1267, 1268 (1952).

233. 89 Ariz. 293, 361 P.2d 648 (1961).

234. 158 Fla. 326, 29 So. 2d 247 (1946).

Treating recrimination as a discretionary bar is more consistent with good public policy than treating the doctrine as an absolute bar. As a supporting argument, both courts relied on the thesis that recrimination, being a child of the "clean hands" maxim, should, like its parent, be regarded as a discretionary bar to relief. In the *Matlow* case the Supreme Court of Arizona affirmed a decree awarding the petitioner a divorce for cruelty even though there was evidence tending to show that petitioner was also guilty of cruelty. Explaining its ruling, the court said:

> To hold that *any* recrimination would bar a divorce would be a degradation of marriage and a frustration of its purposes, for then the courts would be using recrimination as a device for punishment. If the marriage has failed and the family life has ceased, the purposes of marriage are no longer served. . . . The doctrine of recrimination, like the doctrine of unclean hands of which it is a part, is not a mechanical doctrine but an equitable principle to be applied to the facts of each case and with a consideration for the interests of the public.[235]

In the *Stewart* controversy the Florida Supreme Court affirmed a judgment granting the plaintiff a divorce for desertion although there was considerable evidence that plaintiff had committed adultery. In justification of this decision, the court said:

> The application of the doctrine of recrimination in divorce cases is an outgrowth of the equity maxim that 'he who comes into equity must come with clean hands.'
>
> It is not an absolute but a qualifying doctrine. . . .
>
> The application of the doctrine of recrimination . . . is a matter of sound judicial discretion dependant on public policy, public welfare, and the exigencies of the case at bar.[236]

235. 89 Ariz. at 297-98, 361 P.2d at 650.

236. 158 Fla. at 236, 29 So. 2d at 248-49. The *Stewart* case has been regarded as an adoption of the comparative rectitude doctrine. A. JACOBS & J. GOEBEL, *supra* note 1, at 450. These authors apparently base their interpretation on the court's statement that "the master and Chancellor found the equities with the plaintiff and it has not been made to affirmatively appear that inequity has been done by the Chancellor by his decree of divorce."

B. The Doctrine of Comparative Rectitude

The courts of Arkansas, Louisiana, Texas, and Utah have embraced the doctrine of comparative rectitude, which may be defined as "the principle that . . . relief by way of divorce may be given to the party least at fault, although both parties have shown ground for divorce."[237] If the parties appear to be equally at fault, a divorce will be denied.[238]

The case of *Ayers v. Ayers*[239] demonstrates Arkansas' acceptance of comparative rectitude. There the Supreme Court of Arkansas ruled that the appellant, who had crossed-complained for a divorce on the ground of adultery, was entitled to a decree even though he was guilty of conduct entitling his wife, had she been innocent, to a divorce for personal indignities. Said the court:

> [T]he question is whether both parties should be denied a divorce when the husband has been guilty of indignities and the wife of adultery . . . . "We concur in the finding of the court below that both parties were at fault, but we think appellee [the wife] was the greater and the first offender, and

29 So. 2d at 248. They (Jacobs and Goebel) may also be influenced by the fact that much of the dissenting opinion is devoted to a discussion of comparative rectitude. However, the majority opinion nowhere states or implies that the decision should be considered an adoption of comparative rectitude and in fact nowhere makes any reference to the doctrine. In view of this consideration, and in view of the court's statement that recrimination "is not an absolute but a qualifying doctrine," the writer construes the holding as an adoption of the view that recrimination is a discretionary bar to divorce.

237. Annot., 159 A.L.R. 734 (1945). "Under this doctrine [comparative rectitude] . . . the party whose hands are soiled the least is entitled to a divorce." Raskin & Katz, *The Dying Doctrine of Recrimination in the United States of America*, 35 CAN. BAR REV. 1046, 1048 (1957).

Wisconsin has adopted comparative rectitude by statute but has restricted the doctrine's operation so as to permit the spouse who is the less at fault merely to obtain a legal separation. The Wisconsin statute reads:

> The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for divorce under § 247.07(1) to (5) except that where it appears . . . that both parties have been guilty of misconduct sufficiently grave to constitute cause for divorce, the court may in its discretion grant a judgment of legal separation to the party whose equities on the whole are found to be superior.

WIS. STAT. ANN. § 247.101 (Supp. 1967).

238. "Where the court finds that the parties are equally at fault, it will refuse to grant relief to either party." 24 AM. JUR. 2d *Divorce and Separation* § 228 (1966). *See, e.g.*, Moore v. Moore, 230 Ark. 213, 322 S.W.2d 77 (1959); Gayle v. Gayle, 181 So. 2d 72 (La. 1965); Lee v. Lee, 145 So. 2d 618 (La. 1962).

239. 266 Ark. 394, 290 S.W.2d 24 (1956).

> we have concluded, under the case made, that a decree of divorce should be awarded appellant; and it will be so ordered."[240]

The leading case on comparative rectitude in Louisiana is *Eals v. Swan*.[241] This was a legal separation action grounded on cruel treatment. The defendant (husband) cross-petitioned for a separation, alleging abandonment. The Supreme Court of Louisiana affirmed a judgment granting plaintiff a separation, saying:

> [T]he learned trial judge . . . stated in his reasons for judgment that . . . he believed the fault of the defendant husband far outweighed that of plaintiff. . . .
>
> The Louisiana rule is that while mutual, *equal* fault operates as a bar to relief being given to either litigant, the courts consider in each case the *degree of guilt, and only where there is a finding of fact that the degree of guilt has been equal is the suit dismissed.* The rule of comparative rectitude has been impliedly recognized.[242]

Texas has not only adopted the doctrine of comparative rectitude but has further restricted recrimination, by limiting the doctrine's application to the situation where the parties' infractions are of the same general character[243] and

240. *Id.*, 290 S.W.2d at 25, *quoting from* Longinotti v. Longinotti, 169 Ark. 1001, 277 S.W. 41 (1925), where the same court granted the plaintiff a divorce for adultery even though there was substantial evidence supporting defendant's cross-complaint of cruelty.
In Moore v. Moore, 230 Ark. 213, 322 S.W.2d 77 (1959), it was held that recrimination barred the awarding of a divorce to either party, since both spouses were guilty of adultery and therefore were equally culpable.

241. 221 La. 329, 59 So. 2d 409 (1952).

242. *Id.* at 332-33, 59 So. 2d at 409-10. Other Louisiana cases applying the comparative rectitude doctrine are Gilbert v. Hutchinson, 135 So. 2d 283 (La. 1961), and Smith v. Smith, 139 So. 2d 813 (La. 1962). These cases, like *Eals v. Swan*, involve use of the principle in a legal separation suit. The dearth of divorce (*a viniculo*) cases involving application of comparative rectitude is explained by the fact that, in the absence of a separation, the only divorce grounds recognized in Louisiana are adultery and imprisonment for conviction of a felony. LA. CIV. CODE ANN. art. 139 (1959).

243. Oxspring v. Oxspring, 393 S.W.2d 369 (Tex. Ct. Civ. App. 1965); Hutt v. Hutt, 76 S.W.2d 567 (Tex. Ct. Civ. App. 1934). In the former case the court affirmed a judgment granting plaintiff a divorce for cruelty even though there was evidence of improper conduct (not described in the reports) on plaintiff's part. Said the court:

> To establish the defense of recrimination the evidence must establish conduct on the part of the one seeking a divorce of the same general character as that of the defendant and such as would be reasonably calculated to have provoked the miscon-

to the case where defendant's misconduct was induced or provoked by that of plaintiff.[244] However, when these conditions are met, recrimination still operates in Texas—most commonly in instances where both spouses are guilty of adultery[245] or of cruelty.[246]

A case illustrating the application of comparative rectitude in Texas is *Marr v. Marr*.[247] The husband sued for divorce on the ground of cruelty, and his wife cross-petitioned for a divorce on the same ground. The Texas Court of Civil Appeals affirmed a judgment granting the wife a divorce, notwithstanding a special finding by the jury that she was also guilty of cruelty. Said the court:

> In Texas . . . comparative rectitude is recognized.
>
> We have reached the conclusion that the acts and conduct of appellee, the wife, toward the appellant, the husband, are insignificant when compared to his conduct toward her, and though guilty of recrimina-

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> duct charged against the defendant . . . . We cannot say that the evidence establishes such conduct on the appellee's part as a matter of law.

393 S.W.2d 369, 369-70. *But see* Jones v. Jones, 176 S.W.2d 784 (Tex. Ct. Civ. App. 1943). Here a husband seeking a divorce for cruelty was denied relief because he was guilty of adultery. The court did not comment on the fact that the two offenses were not of a similar character.

244. Trigg v. Trigg, 18 S.W. 313 (Tex. 1891) and Ward v. Ward, 352 S.W.2d 513 (Tex. 1962). In the former case the Supreme Court of Texas affirmed a decree awarding a wife a divorce for cruelty although there was evidence tending to show cruelty on the part of complainant. Quoting from the opinion:

> Whatever may have been the character of the acts of the appellee [wife] which are complained of as recriminatory, it is evident that they were committed only when provoked by defendant's conduct . . . . But it is the important and the recognized rule that recrimination, as a valid defense, must arise out of the fact that the acts or conduct [of defendant] for which the plaintiff seeks a divorce were induced by or in retaliation of plaintiff's conduct.

18 S.W. at 316.

245. Oster v. Oster, 130 S.W. 265 (Tex. 1910); Haines v. Haines, 62 Tex. 216 (1884). A Texas statute expressly provides for the application of recrimination where both parties are guilty of adultery. TEX. REV. CIV. STAT. ANN. art. 4630 (1960). *See* note 15 *supra* and accompanying text.

246. Hausladen v. Hausladen, 388 S.W.2d 952 (Tex. 1965); Beck v. Beck, 63 Tex. 34 (1885). In the *Hausladen* decision the ruling denying a divorce was based only partly on the ground that recrimination was applicable. In Robertson v. Robertson, 217 S.W.2d 132, 134 (Tex. 1949) (dictum) the court stated: "In such cases [based on cruelty], it cannot be doubted that recrimination of acts by plaintiff comparable to the cruel treatment alleged presents a defense to divorce on that ground." *See* Comment, *supra* note 53, at 62, 65-66.

247. 191 S.W.2d 512 (Tex. 1945).

> tion to some degree, her acts are not sufficient to bar a judgment in her favor.[248]

A case evidencing Utah's acceptance of comparative rectitude is *Hendricks v. Hendricks*,[249] a divorce suit grounded on cruelty. Defendant (husband) counterclaimed for a divorce on the same ground. After finding that both spouses were guilty of cruelty the trial court invoked recrimination and dismissed the action. However, the Supreme Court of Utah reversed and ordered the granting of a divorce to the party less at fault. Quoting from the opinion:

> To affirm that a guilty spouse is never entitled to a divorce is a position difficult to apply to the facts of life. It is seldom, perhaps never, that any wholly innocent party seeks a divorce against one who is wholly guilty. Awareness of this fact and the giving of attention to the social implications of divorce has given rise to various exceptions and limitations on the doctrine of recrimination. . . . [T]he doctrine of 'comparative rectitude' . . . is often used and has been given tacit recognition by this court. . . . [T]he trial court would best perform its function in the administration of justice by determining which party was least at fault, granting a divorce and adjusting their rights . . . .[250]

Although but four states have openly embraced the doctrine of comparative rectitude, the writer suspects that courts in other jurisdictions often accomplish the same end by deliberately "finding" that the misconduct of the spouse less at fault is not sufficiently culpable to constitute grounds for divorce—that is, that the cruelty relied upon is not "extreme" (or "intolerable"); that the asserted intoxication does not appear "habitual"; or that the alleged neglect does not qualify as "gross." Since most jurisdictions hold that recrimination is applicable only when the complainant's misdeeds amount to

248. *Id.* at 513-14; *accord*, Watts v. Watts, 390 S.W.2d 30 (Tex. 1964); McFadden v. McFadden, 213 S.W.2d 71 (Tex. 1948). Quoting from *Watts* at page 32: "It is well recognized that the doctrine of comparative rectitude is recognized in Texas. Under it . . . the court has the duty of weighing the conduct of the respective parties, and is authorized to grant a divorce to the one who is less guilty."

249. 123 Utah 178, 257 P.2d 366 (1953).

250. *Id.*, 257 P.2d at 366-67; *accord*, Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 (1956).

grounds for divorce,[251] the doctrine would not operate in any of the situations just described. Declares an annotator in the American Law Reports:

> Although . . . few cases refer to the doctrine of comparative rectitude in express language . . . there are a number of decisions with respect to which it would seem . . . from the actual decree rendered or directed, or from the factual situation appearing, the contentions of the parties . . . and the treatment of the judgment below by the appellate court, that approval of the theory underlying the doctrine was accorded or that an actual application of the principle was made without any express invocation or recognition of it.[252]

C. *Inapplicability of Recrimination When Divorce Ground is Voluntary Separation or Incompatibility*

Of the twenty five jurisdictions[253] which recognize voluntary separation for a specified period as a ground for divorce, five have declared by statute,[254] and seven have determined by court decision,[255] that a suit based on this ground cannot be

251. 27A C.J.S. *Divorce* § 67b (1959). H. PILPEL & G. ZAVIN, YOUR MARRIAGE AND THE LAW 296 (1952). *See, e.g.*, Redding v. Redding, 317 Mass. 760, 59 N.E.2d 775 (1945).

252. Annot., 159 A.L.R. 734, 735-36 (1945).

253. ALA. CODE tit. 34, § 22 (1) (1959); ARIZ. REV. STAT. ANN. § 25-312 (1956); ARK. STAT. ANN. § 34-1202 (1947); COLO. REV. STAT. ANN. § 46-1-1 (1960); CONN. GEN. STAT. ANN. § 46-13 (1958); DEL. CODE ANN. tit. 13, § 1522 (1953); D.C. CODE ANN. § 16-403 (1961); HAWAII REV. LAWS § 324-1 (1961); IDAHO CODE ANN. § 32-619 (1958); KY. REV. STAT. ANN. § 403.020 (1963); LA. REV. STAT. ANN. § 139 (1957); MD. ANN. CODE art. 16, § 24 (1957); MINN. STAT. ANN. § 518.06 (1947); NEV. REV. STAT. § 125.010 (1963); N.H. REV. STAT. ANN. § 458.7 (1955); N.C. GEN. STAT. § 50-5 (1950); OHIO REV. CODE ANN. § 3105.01 (Page 1960); R.I GEN. LAWS ANN. § 15-5-3 (1956); TENN. CODE ANN. § 36-802 (1955); TEX. REV. CIV. STAT. ANN. art. 4629 (1960); UTAH CODE ANN. § 20-91 (1953); VA. CODE ANN. § 20-91 (Supp. 1966); WASH. REV. CODE § 26-08-020 (1965); WIS. STAT. § 247.07 (1955); WYO. STAT. ANN. § 20-38 (1957).

254. ALA. CODE tit. 34, § 22 (1) (1964); ARK. STAT. ANN. § 34-1202 (7) (Supp. 1963); KY. REV. STAT. ANN. § 402.020 (1963); VA. CODE ANN. § 20-91 (Supp. 1966); WIS. STAT. ANN. § 247.101 (Supp. 1967).

255. Unger v. Unger, 174 A.2d 84 (D.C. Mun. Ct. App. 1961); Finnegan v. Finnegan, 76 Idaho 500, 285 P.2d 488 (1955); Jolliffe v. Jolliffe, 76 Idaho 95, 278 P.2d 200 (1954); Raymond v. Carrano, 112 La. 869, 36 So. 787 (1904); Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960); Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965); Jones v. Jones, 261 N.C. 612, 135 S.E.2d 554 (1965); Guillot v. Guillot, 42 R.I. 230, 106 A. 801 (1919); Helfer v. Helfer, 342 S.W.2d 8 (Tex. 1961); Robertson v. Robertson, 217 S.W.2d 132 (Tex. 1949).

defeated by recrimination. Two of the three jurisdictions[256] which allow a divorce for incompatibility have proclaimed by judicial decree that recrimination constitutes merely a discretionary bar to an action based on this ground.[257]

Of the five jurisdictions which provide by statute that recrimination has no application to a suit grounded on voluntary separation the enactments of Alabama, Arkansas, and Virginia are the most explicit. They read as follows:

> The circuit court in equity shall have the power to divorce persons from the bonds of matrimony in favor of either party where there has been a final decree of divorce from bed and board, or of separate maintenance, when such decree has been in force and effect for more than four years. The fact that the party against whom such action is brought may also have some ground for divorce shall not constitute any defense to any proceeding under this section.[258]

> Where either husband or wife has lived separate and apart from the other for three consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in cases wherein by the pleadings the wife seeks either alimony . . . or a division of property . . . or both.[259]

> A divorce from the bond of matrimony may be decreed:
>
> (9) On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for two years. A plea of . . . recrimination with

256. ALASKA STAT. § 56-5-1 (1962); N.M. STAT. ANN. § 22-7-1 (1953); DIVORCE LAW OF VIRGIN IS. § 4 (1947).

257. The courts of New Mexico and the Virgin Islands have so ruled. The relevant cases (which have been fully discussed in the text accompanying notes 227, 231, 232 *supra*) are: Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950); Pavletich v. Pavletich, 50 N.M. 224, 174 P.2d 826 (1946).

258. ALA. CODE tit. 34, § 22 (1) (1959).

259. ARK. STAT. ANN. 34-1202 (7) (1947).

> respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground.[260]

In *Fuqua v. Fuqua*[261] a divorce suit grounded on the Alabama statute, defendant (wife) argued that the attempted abolition of recrimination was unconstitutional, since it represented an endeavor to destroy matrimonial rights already acquired.[262] The Alabama Supreme Court affirmed a decree overruling defendant's demurrer and granting plaintiff a divorce. Said the court:

> [U]ntenable is the argument that the Act is unconstitutional because the defense of recrimination is abolished . . . . [A] sufficient answer is that the legislature has complete authority in matters of divorce and may add to or take away any grounds it so desires.[263]

Although it would seem fairly obvious from the wording of the Arkansas enactment that the state legislature intended to abolish recrimination as a defense in actions based on voluntary separation, this point was nevertheless disputed in *Young v. Young*.[264] The husband sued for divorce and relied on voluntary separation. His wife defended with the charge that plaintiff was guilty of adultery. The trial court ordered the striking of this defense and awarded plaintiff a divorce. The Arkansas Supreme Court affirmed, saying:

> It will be observed that in the . . . act the Legislature has eliminated all consideration of which spouse is the guilty party, except in settling property and alimony rights. Since these rights are not involved in this case the result, here, is that the Court is forbidden to consider which is the guilty party. In other words, recrimination is abolished as a defense under this three year separation statute.[265]

In contrast to the explicit statutes of Alabama, Arkansas, and Virginia, the enactments of Kentucky and Wisconsin

260. VA. CODE ANN. § 20-91 (Supp. 1968).
261. 268 Ala. 127, 104 So. 2d 925 (1958).
262. *Id.* at 128, 104 So. 2d at 926.
263. *Id.* at 130, 104 So. 2d at 927.
264. 207 Ark. 36, 178 S.W.2d 994 (1944).
265. *Id.*, 178 S.W.2d at 997.

merely imply that a divorce suit grounded on voluntary separation cannot be barred by recrimination. This implication is accomplished by statutory declarations that recrimination *will* defeat a suit based on *other* grounds. The Kentucky and Wisconsin acts read (in part) as follows:

> A divorce may be granted to either party for the following causes:
>
> . . .
>
> (b) Living apart without any cohabitation for five consecutive years next before application.
>
> (2) A divorce may be granted to the party *not in fault* for the following causes . . . .[266]
>
> The equitable doctrine that the court shall not aid a wrongdoer is applicable to any party suing for a divorce under § 274.07 (*1*) to (*5*) . . . [267]

Other sections of the Wisconsin act provide for the granting of a divorce when the parties have voluntarily lived apart for the past five years or have dwelled apart for that period pursuant to a judgment of legal separation.[268]

That recrimination is not invokable under the Kentucky statute in suits based on voluntary separation was definitely established in *Ward v. Ward*.[269] The husband petitioned for divorce and relied on the above-quoted provision (b). The wife counterclaimed for a divorce, charging cruelty. The trial court dismissed the husband's petition and granted his wife a divorce for cruelty. The Kentucky Court of Appeals affirmed in order to effectuate petitioner's basic aim of terminating his marriage, but stated that the trial court should have granted the divorce to the *husband*, regardless of whether he was guilty of cruelty.[270] Said the court:

> [I]t was uncontradictedly proven . . . that the parties separated and had not lived or cohabited together since July 11, 1911, a period of more than five years next before the filing of the petition, and which proven facts entitled the husband to a divorce,

266. KY. REV. STAT. ANN. § 403.020 (1963).
267. WIS. STAT. ANN. § 247.101 (Supp. 1967).
268. WIS. STAT. ANN. § 247.07 (6)-(7) (Supp. 1967).
269. 213 Ky. 606, 181 S.W. 801 (1926).
270. The court added that it was affirming on the ground of five years' voluntary separation, not on the ground of cruelty.

> regardless of the question as to who was to blame for the separation . . . . The court, therefore, was in error in dismissing plaintiff's petition.[271]

Most of the seven jurisdictions in which the courts have, without statutory direction, abolished recrimination as a defense in divorce suits founded on voluntary separation appear to have been influenced mainly by one (or both) of the following two considerations: (1) Since the ground of voluntary separation is non-culpatory in character, it seems inappropriate to recognize recrimination—a doctrine which emphasizes the concept of fault—as a bar to a suit based on this ground. (2) When the spouses have voluntarily dwelled apart for the requisite number of years, the marriage normally has already ended in fact; hence it seems pointless to invoke recrimination and deny the parties a divorce.

The case of *Matysek v. Matysek*[272] contains probably the best statement of the first consideration. This was a divorce action grounded on three years' voluntary separation. Defendant (husband) attempted to frustrate the suit by showing that plaintiff had committed adultery. Although the adultery was established, the trial court granted plaintiff a divorce, and the Maryland Court of Appeals affirmed, observing:

> The recrimination rule is a derivative of the "clean hands" doctrine of Equity which holds that a plaintiff who seeks a divorce for the defendant's misconduct should have no cause to complain thereof if he himself has committed equal or greater misconduct. But this logic fails of application to this novel ground for divorce which does not involve any misconduct of the defendant. The "clean hands" of the plaintiff are immaterial when the case is not con-

271. 213 Ky. at 606, 181 S.W. at 802; *accord*, Best v. Best, 218 Ky. 648, 291 S.W. 1032 (1927), where the Kentucky Court of Appeals affirmed a judgment awarding the petitioner (husband) a divorce on the ground of five years' separation, saying:

> The answer nowhere denied the five years' separation relied on in the petition, but . . . sought to deprive plaintiff of the benefit of that ground, because . . . he was guilty of cruel and inhuman treatment toward defendant . . . . But if that were true, it would not defeat the particular statutory ground, since it is available regardless of the fault of the parties or either of them causing the separation.

Id., 291 S.W. at 1032.

272. 212 Md. 44, 128 A.2d 627 (1957).

> cerned with the "unclean hands" of the defendant. The whole recrimination defense is tied up with the misconduct theory of divorce which has been totally departed from in this added ground. Hence it has no application.[273]

The second consideration was stressed in *Jolliffe v. Jolliffe*,[274] a divorce suit founded on five years' voluntary separation. Defendant (wife) alleged that plaintiff was guilty of willful neglect and extreme cruelty. The Supreme Court of Idaho affirmed a judgment granting plaintiff a divorce, saying:

> [A] recriminatory defense is not available in an action for divorce on the ground of five years' separation . . . .
>
> "The public policy of these separation statutes is based upon the proposition that where a husband and wife have lived apart for a long period of time, without any intention ever to resume conjugal relations, the best interests of society and the parties themselves will be promoted by a dissolution of the marital bond."
>
> . . .
>
> "It is the policy of the state, where the husband and wife have, for so long a time, failed to become reconciled, not to compel them to continue in a marital status which is ostensible rather than real."[275]

The first of the two considerations just discussed—the argument that it is illogical to treat a fault-oriented doctrine as a bar to a suit based on a non-culpatory ground—would appear to have equal application to actions founded on other non-culpatory grounds, such as insanity, impotency, and drug addiction.[276]

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273. *Id.* 128 A.2d at 632-33, *quoting from* Comment, *Five Years Voluntary Separation as New Ground for Absolute Divorce*, 2 MD. L. REV. 357, 361 (1938). The court used similar reasoning in Finnegan v. Finnegan, 76 Idaho 500, 285 P.2d 488 (1955).

274. 76 Idaho 95, 278 P.2d 200 (1955).

275. *Id.* at 100, 278 P.2d at 202-03, *quoting from* Annot., 51 A.L.R. 763 (1927) (first quotation); McKenna v. McKenna, 53 R.I. 373, 166 A. 822 (1933) (second quotation). *See also* Robertson v. Robertson, 217 S.W.2d 132, 136 (Tex. 1949).

276. Hochwarth, *Recrimination as a Bar to Divorce on Ground of Three Year Voluntary Separation*, 17 MD. L. REV. 268, 272 (1957). According to the author:

> Insanity is non-culpatory in its nature. The ground of imprisonment for a felony is culpatory in itself, but non-culpatory so far as matrimonial offenses are concerned. It appears rea-

D. Complete Abolition of Recrimination

Five states—Colorado, Nevada, North Dakota, Oklahoma, and Washington—have enacted statutes abolishing recrimination altogether. Provides the Colorado statute:

> If, upon the trial of an action for divorce, either or both of the parties shall be found guilty of any one, or more, of the grounds for divorce, then a divorce may be granted to either, or both, of said parties in accordance with such findings.[277]

In *Schrader v. Schrader*[278] the Colorado Supreme Court, affirming a decree granting a divorce for cruelty to a plaintiff who was himself found to be guilty of cruelty, relied upon the above enactment. The court simply observed:

> It should be noted that the defense of recrimination is no longer a part of the law of Colorado, and that the lower court, in consequence of the statute, acted properly in granting a divorce to the husband, although it found him guilty of cruelty toward the wife.[279]

States the Nevada act:

> In any action for divorce when it shall appear to the court that both husband and wife have been guilty of a wrong or wrongs which may constitute grounds for a divorce, the court shall not for this reason deny a divorce, but in its discretion may grant a divorce to the party least in fault, if both parties seek a divorce, otherwise to the party seeking the divorce, even if such party be the party most at fault.[280]

Without the last seventeen words, this statute would constitute merely a legislative adoption of the comparative rectitude theory. It is the addition of the phrase beginning with "otherwise" that completely eradicates recrimination.

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sonable that the fault of the plaintiff should not be a bar to a divorce based on these grounds, for the same reasoning as applied by the courts in suits based on voluntary separation. The misconduct theory of divorce has been abandoned for these grounds, and therefore the misconduct of the plaintiff should be immaterial.

277. COLO. REV. STAT. ANN. § 46-1-4 (3) (1960).
278. 156 Colo. 521, 400 P.2d 675 (1965).
279. *Id.* at 527, 400 P.2d at 678.
280. NEV. REV. STAT. § 125.120 (1957).

Declares the North Dakota enactment:

> Divorces must be denied upon showing:
>
> 1. Connivance
>
> 2. Collusion
>
> 3. Condonation, or
>
> 4. Limitation and lapse of time.[281]

The absence of recrimination from the statutory list of defenses becomes more significant when it is noted that prior to 1963 recrimination appeared on the list. The change came about primarily as the result of the decision in *Kucera v. Kucera*.[282] In that case the North Dakota Supreme Court, acting with manifest reluctance, ruled that a divorce petitioner (wife) who established cruelty by her spouse was not entitled to relief, since she was also guilty of cruelty (and desertion as well). The court acknowledged that "the legitimate ends of the marriage have been destroyd and a divorce perhaps would be the better solution,"[283] but stated that it was compelled by the mandatory provisions of the statute to invoke recrimination in bar of a divorce. The following year the state legislature took the hint and amended the enactment to delete recrimination.

Provides the Oklahoma act:

> That the parties appear to be in equal wrong shall not be a basis for refusing to grant a divorce, but if a divorce is granted in such circumstances, it shall be granted to both parties.[284]

This enactment determined the decision in *Mitchell v. Mitchell*.[285] There the Supreme Court of Oklahoma affirmed (with modification) a decree granting both parties a divorce on the ground of incompatibility, saying:

> "In Oklahoma there is no proscription against divorcing parties who are both at fault; and where one of them seeks the divorce and the other does not, a decree awarding the divorce to both may be modified

281. N.D. CENT. CODE § 14-05-10 (1966).
282. 117 N.W.2d 810 (N.D. 1962).
283. *Id.* at 814.
284. OKLA. STAT. ANN. tit. 12, § 1275 (1961).
285. 385 P.2d 462 (Okla. 1963).

on appeal to reflect its award to the one seeking it."[286]

Finally, the Washington statute declares:

> The defendant may, in addition to his or her answer, file a cross-complaint for divorce or annulment, if any, in favor of either party, or as if it were on the application of both.[287]

The enactment of this statute did not produce a great change in Washington divorce law, for the courts of that state had already emasculated recrimination by adopting the doctrine of comparative rectitude[288] and confining the application of recrimination to the situation where the parties' infractions were of the same general character.[289]

The fact that all five of the above statutes were enacted during the past decade may be indicative of a modern legislative trend toward complete abolition of recrimination.

VI. CONCLUSION

The preceding pages have considered the present status of recrimination in the United States and England, the history of the doctrine, the legalistic and policy-oriented reasons advanced in justification of the rule, the evils of the doctrine, and the various statutory and judicial efforts to restrict the rule's operation or to eliminate it altogether.

Principal among the evils noted are the distinct tendency of recrimination to encourage illicit alliances and pre-divorce blackmail[290] and the fact that the doctrine perpetuates

286. *Id.* at 464, *quoting from* Rakestraw v. Rakestraw, 345 P.2d 888 (Okla. 1959). Admittedly, since incompatibility is a non-culpatory ground, the court could doubtlessly have granted the plaintiff a divorce without invoking the aid of the Oklahoma statute. Cases cited note 257 *supra*. However, it is clear from the opinion that the court was relying on the statute and not on the principle that the use of recrimination is inappropriate when the divorce petition is based upon a non-culpatory ground.

287. WASH. REV. CODE § 26.08.150 (1966).

288. 24 AM. JUR. 2d *Divorce and Separation* § 228 (1966); Flagg v. Flagg, 192 Wash. 679, 74 P.2d 189 (1937); Huff v. Huff, 178 Wash. 684, 35 P.2d 86 (1934). Although they *applied* comparative rectitude, the Washington courts did not use the term itself.

289. Hokamp v. Hokamp, 132 Wash. 2d 593, 203 P.2d 357 (1949); McMillan v. McMillan, 113 Wash. 250, 193 P. 673 (1920).

290. This term has reference to the extortionary pre-divorce bargaining that recrimination makes possible. The spouse who is less anxious to terminate the marriage (or who is simply more adept at bargaining) can often

the unhappiness of mismated couples. It seems apparent that these objectionable features vastly outweigh the questionable merits of the rule. A substantial number of courts and legislatures have come to recognize this, as evidenced by the reforms discussed in part V, and it appears probable that the doctrine of recrimination will eventually go the way of the dinosaur.

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obtain exorbitant financial concessions from his mate by threatening to disclose a recriminatory offense.

> [I]t [recrimination] exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial concessions as the price of remaining silent.

De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598, 604 (1952).