GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation

Julie Rocheton, "Divorce, Civil Code, and Common Law: The Case of Nineteenth-Century United States", *GLOSSAE. European Journal of Legal History* 21 (2024), pp. 694-728 (available at http://www.glossae.eu)

Divorce, Civil Code, and Common Law: The Case of Nineteenth-Century United States

Julie Rocheton
Max Planck Institute for Legal History and Legal Theory

ORCID ID: 0000-0002-8276-7189

Received: 24.08.2023
Accepted: 30.11.2023

Abstract
Assumptions about the differences between common law and civil law have profoundly shaped understandings of US legal history and have rendered nineteenth-century American civil codes invisible to all but the most specialized legal scholars. During the nineteenth century, the states of Louisiana, Georgia, California, Dakota Territory, North Dakota, South Dakota, and Montana each enacted a civil code, creating a single document enforced by the state, which brought together all of the sources of private law. Simultaneously, divorce developed as a prominent legal issue, prompting an exploration of the interplay between civil codes and divorce legislation. How did civil codes and divorce impact each other's? While the breakdown of marriages often unfolded within the private sphere, the parameters and conditions governing their instances were outlined within the public sphere of civil codes of individual states. The legal framework governing divorce proceedings underscored the era's societal and cultural norms, thereby exerting a profound influence on the dynamics of marital relationships. Through an analysis of the pre-existing divorce laws, the incorporation of divorce regulations within the civil codes, and the ruling of State Supreme Courts in the civil code states, this article seeks to elucidate whether the civil codes served as catalyst for legal transformation, reshaping the legal landscape, or whether they merely mirrored the existing legal framework. The study examines the reciprocal influence between evolving divorce practices and the legal provisions encapsulated within the civil codes, aiming to ascertain the directional flow of change between these intersecting legal domains.

Keywords
Divorce, Civil Code, Codification, Nineteenth Century, United States, California, Dakota Territory, Georgia, Louisiana, Montana, North Dakota, South Dakota

1. Introduction

The question of divorce within the nineteenth-century United States has captivated the attention of numerous scholars. Legal experts, historians, legal historians, and various researchers have delved into this subject from multifaceted perspectives such as legal, historical, social, and cultural standpoints. Their collective efforts seek to fathom why the United States proved

to be a fertile ground for divorce during this era. Over decades, hypotheses have been formulated and addressed through extensive studies.[1] This article takes a unique approach by examining divorce through the prism of another legal instrument—namely, the nineteenth-century civil codes of the US states—and the corresponding jurisprudence of State Supreme Courts concerning divorce. Beyond being a mere exploration of divorce jurisprudence, this study delves into the intricate interplay between black letter law and divorce, exploring how divorce practices exerted influence on the law and, reciprocally, how the law shaped divorce practices. Recognizing the inseparable link between culture, practice, and law, this article endeavors to reunite these elements for a comprehensive understanding of the subject.

To understand where the work is situated, one has to start with the civil code states—Louisiana, Georgia, California, Dakota Territory, North Dakota, South Dakota and Montana. Assumptions about the differences between common law and civil law have profoundly shaped understandings of US legal history and have rendered nineteenth-century US civil codes invisible to all but the most specialized legal scholars.[2] In the US context, the lack of a single, unified code along the lines of France's Napoleonic Code has made it impossible to see the centrality of codification to state-building projects. The Napoleonic Code was undoubtedly the main model of codification at the time,[3] yet common law lawyers also adopted and adapted codification in consonance with their legal training and education.[4] If, in the French context, codification came to be synonymous with legal rationality and even with the revolutionary overhaul of existing legal institutions, in the United States, codification proceeded at a less dramatic pace and in a more piecemeal fashion.

What is a code in the context of nineteenth-century United States? Strikingly, even the documents defining or explaining the different codification projects do not agree on a definition of codification, a fact which demonstrates the irreducibility of codification to the rationalist model of the Napoleonic Code. Though definitions vary, some specific elements recur in most

[1] For legal historical studies on divorce in the United States, see Bash, N., *Framing American Divorce*, Berkeley (CA), 1999; Bash, N., "Marriage and Domestic Relations", *The Cambridge History of Law in America* (Tomlins, C., Grossberg, M., eds.), 2nd vol., Cambridge, 2008; Buckley, T. E., *The great Catastrophe of my Life: Divorce in the old Dominion*, Chapel Hill, 2002; Cott, N. F., *Public Vows: A History of Marriage and the Nation*, Cambridge (MA), 2000; Chused, R. H., *Private Acts in Public Places*, Philadelphia (PA), 1994; Griswold, R. L., *Family and Divorce in California, 1850–1890: Victorian Illusions and everyday Realities*, Albany, 1982; Grossberg, M., *Governing the Hearth*, Chapel Hill (NC), 1988; Hartog, H., *Man and Wife in America*, Cambridge (MA), 2000; Philipps, R., *Putting Asunder: A History of Divorce in Western Society*, New York, 1988; Rheinstein, M., *Marriage Stability, Divorce, and the Law*, Chicago, 1972; Riley, G., *Divorce: An American Tradition*, Lincoln (NE), 1991; Tanenhaus, D. S., "Families", *A Companion to American Legal History* (Hadden, S. E., ed.), Chichester, 2013; Woolsey, T. D., *Divorce and Divorce Legislation especially in the United States*, 2nd ed., Union (NJ), 2000.

[2] See, for example, the works by Masferrer, A., "The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation" *Arizona State Law Journal* 40, 1 (2008), pp. 173-256; "Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation", *American Journal for Legal History* 50.4 (2008-2010), pp. 355-430.

[3] Lequette, Y., 1804–2004, *Le Code Civil. Un passé, un Présent, un Avenir*, Paris, 2004; Soleil, S., *Le Modèle juridique français dans le Monde. Une Ambition, une Expansion*, Paris, 2014; Leca, A., *Le Code était presque parfait. Introduction historique au Droit*, Paris, 2013; *De l'Armorique a l'Amérique de l'indépendance. Deuxième partie du colloque du bicentenaire indépendance américaine 1796–1976 (Annales de Bretagne et des Pays de l'Ouest, 84th vol.)*, Rennes, 1977; Masferrer, A., "The French Codification and 'Codiphobia' in Common Law Traditions", *Tulane European and Civil Law Forum*, vol. 34 (2019), pp. 1-31.

[4] Rocheton, J., *The Genesis of Nineteenth-Century Civil Codes in the United States*, Leiden, 2024.

of them. This work relies on the academic consensus[5] defining elements constituting a codification. This consensus identifies four key components to the definitions of codification, as it had occurred in different times and places, and can be summarized as: codification is the gathering of all legal rules in a particular legal field into one document, which is created by the state with the aim of a better understanding of the law. This means that codification is characterized by a form, being one document, but also by the contents, being one legal field covered entirely through all existing different sources of law, and an intent, allowing a better understanding of the law. And finally, codification has to originate from an official state and be endorsed by it.[6]

By these definitional criteria, during the nineteenth century, the states of Louisiana,[7] Georgia,[8] California,[9] the Dakota Territory,[10] North Dakota,[11] South Dakota,[12] and Montana,[13] each enacted a civil code, creating a single document, enforced by the state, which brought together all of the sources of private law. Other states had documents called "civil codes" or "codes", however, the Codes of Alabama, Arizona, Indiana, and Tennessee, contain all the legislation and statutes concerning private law, but do not include common law and are, therefore, not exhaustive. Another code was excluded from this study as it was never adopted, this being the "Field Civil Code", also known as the 1860 Draft of a Civil Code for the State of New York. Although it was never adopted, it had a significant impact on subsequent civil codes. In the nineteenth century, American civil codes developed via a snowball effect, which worked as follows: after the 1808 Digest in Louisiana, a revised civil code went into effect in 1825, with both codes modeled after the Napoleonic Code.[14] Twenty years later, when New York decided to codify its private law, commissioners naturally turned to the Civil Code of Louisiana for inspiration, and as a source of law. After its creation, the Civil Code of New York became the main vector for the codification of private law in the US territories, and it subsequently replaced the Civil Code of Louisiana as the primary point of inspiration. This likely happened because, unlike the Civil Code of Louisiana, the content of the Civil Code of New York derived from common rather than civil law. The Civil Code of New York was then adopted without alteration in the Dakota Territory and was later adapted to local conditions in California. In the meantime, the Dakota Territory revised its civil code, this time basing its work on the slightly modified Californian version. The Revised Civil Code of the Dakota Territory was then adopted and adapted after the territory's division into North and South Dakota.

[5] For an overview of the evolution and consensus on codification, see Milo, J. M., Lokin, J. H. A., Smiths, J. M., *Tradition, Codification and Unification: Comparative-Historical Essays on the Development in Civil Law (Ius Commune Europeum)*, Cambridge, 2014, pp. 3-11.

[6] Vanderlinden, J., *Le Concept de Code en Europe Occidentale du XIIe au XIXe Siècle: Essai de Définition*, Bruxelles, 1967, pp. 15-16.

[7] *A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments adapted to its present System of Government* [LA Digest 1808], unknown, 1808; *Code Civil de l'État de la Louisiane. Traité de Cession de cet État par la France, Constitution de cet État, Constitution des États-Unis d'Amerique* [LA Civ. C. 1825], New Orleans, 1825; *The Revised Civil Code of the State of Louisiana* [LA Rev. Civ. C. 1870], New Orleans, 1870.

[8] Clark, R. H. et al., eds., *The Code of the State of Georgia* [GA C. 1861], Atlanta, 1861.

[9] Hart, A., ed., *The Civil Code of the State of California, as enacted in 1872*, San Francisco, 1880.

[10] Hand, G. H., ed., *The Revised Codes for the Territory of Dakota* [DT Rev. C. 1877], Yankton, 1877.

[11] *The Revised Codes of the State of North Dakota 1895 together with the Constitution of the United States and the State of North Dakota* [ND Rev. C. 1895], Bismarck, 1895.

[12] *The Revised Codes 1903, State of South Dakota, comprising the Political Code, Civil Code, Code of Civil Procedure, Probate Code, Justices Code, Penal Code and Code of Criminal Procedure* [SD Rev. C. 1903], Pierre, 1903.

[13] *The Codes and Statutes of Montana, in Force July 1, 1895, including the Political Code, Civil Code, Code of Civil Procedure and Penal Code, 1st Volume* [MT C. & Stat. 1895], Butte, 1895.

[14] LA Civ. C. 1825, Article 9.

North Dakota later revised the code once more, creating its own version. This version of the code was again adopted and revised a number of years later in South Dakota. Excluding the Code of Georgia, the civil codes are thus all interrelated. This pattern of interrelating codes must be kept in mind when examining the content of the specific civil codes. This correlation between the civil codes allows the creation of categories and groupings of the civil codes.[15]

Given that private law is the law of everyday life, including areas such as marriage, the family, contracts, and private property, the codification of this legal field was of paramount importance in the nineteenth century, especially as the nature of such relationships changed and grew more complex.[16] The selection of divorce[17] as the central focus of this study is predicated on its significance as a foundational aspect within both private and family law, coupled with its notable evolution throughout the nineteenth century. Positioned as a dynamic sphere of legal discourse, divorce serves as a pivotal starting point for the examination of American legal codification. The dissolution of a marital union, although predominantly considered a private affair, triggers the involvement of the legal system during the initiation of divorce proceedings. This pivotal juncture amplifies the influence of contemporary cultural norms and conceptions, exerting a profound impact on the dynamics of the couple's relationship. At the core of this investigation lies the fundamental question regarding the degree to which the civil codes of the era either influenced or remained untouched in shaping the trajectory of divorce. Given the diverse origins and cultural backgrounds underpinning the various American civil codes, an exploration of their impact on the evolution of divorce becomes imperative. As one author writes,

> "[e]ach divorce played itself out in a series of minidramas with multiple legal actors and institutions. Although each case must be taken on its own terms, the structure of the legal system ensured that all petitions shared certain features."[18]

[15] With this information in mind, the civil tradition civil codes are the Civil Codes of Louisiana, while the common law civil codes are all the nineteenth-century US civil codes (except the one in Louisiana), meaning those of Georgia, the Dakotas, and Montana. Finally, the heirs of the Civil Code of New York are the codes of the Dakotas and Montana.

[16] For a study of the Code of Civil Procedure during the same timeframe, see Funk, K., *The Lawyer's Code: The Transformation of American Legal Practice*, Princeton (NJ), 2018.

[17] For further readings on marriage and divorce in the United States, see Parker, S., *Informal Marriage: Cohabitation and the Law, 1750–1989*, New York, 1990; Dubler, A. R., "Governing through Contract: Common Law Marriage in the Nineteenth Century", *Yale L. J.* 107 (1998), pp. 1885-1920; Leydecker, K., "Breaking Vows: Divorce in European and North American Literature of the Long Nineteenth Century", *A Cultural History of Marriage in the Ages of Empires* (Puschmann, P., ed.), London, 2020. For additional materials on marriage and divorce in southern US states, see Bardaglio, P. W., *Reconstructing the Household. Families, Sex, and the Law in the Nineteenth-Century South*, Chapel Hill (NC), 1995; Fredette, A. D., *Marriage on the Border*, Lexington (KY), 2020; Fredette, A. D., "Breaking Vows: Divorce and Separation in the Postrevolutionary United States of America", *A Cultural History of Marriage in the Age of Enlightenment* (Behrend-Martínez, E., ed.), London, 2020; Censer, J. T., "'Smiling Through Her Tears': Ante-Bellum Southern Women and Divorce", *Am. J. Leg. Hist.* 25 (1981), pp. 24-47; Schweninger, L., *Families in Crisis in the Old South*, Chapel Hill (NC), 2012; Silkenat, D., *Moments of Despair—Suicide, Divorce, & Debt in Civil War Era North Carolina*, Chapel Hill (KY), 2011; Hudson, J., "From Constitution to Constitution, 1868–1895: South Carolina's unique Stance on Divorce", *SCHM* 98 (1997), pp. 75-96. For more information on specific US states, see Cott, N. F., "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts", *WMQ* 33 (1976), pp. 586-614; Smith, M. D., *Breaking the Bonds—Marital Discord in Pennsylvania, 1730–1830*, New York, 1991; Meehan, T. R., "'Not Made out of Levity' Evolution of Divorce in Early Pennsylvania", *PMHB* 92 (1968), pp. 441-464.

[18] Buckley, T. E., *The great Catastrophe of my Life: Divorce in the old Dominion*, Chapel Hill, 2002, p. 3.

During the nineteenth century, the divorce rate in the United States experienced a rapid escalation, eventually reaching the highest prevalence in the Western world. The statistical surge is noteworthy, transitioning from 7,380 divorces in 1860 to 83,045 in 1910, reflecting a divorce rate of 0.9 per thousand individuals,[19] a jump which increased the total number of divorces eleven times in 50 years. By comparison, the rate of divorce ranged from 0.5 per thousand in France to 0.2 in the rest of Europe, with most countries around 0.2 per thousand.[20] How do we explain these differences?

Law shapes social norms, within as well as outside the courtroom,[21] meaning that acceptance of and recourse to divorce is strongly linked to the degree of liberalism within the law itself.[22] In the case of the states investigated here, the law was not excessively liberal, with no state allowing no-fault divorce. In the seven states studied, and in all the US states before 1970,[23] divorce was only admitted in case of fault by one of the spouses. Therefore, the divorce rate should not have been higher than in France, for example, where divorce was allowed for reasons as simple as character incompatibility. What, then, facilitated the United States' remarkable susceptibility to divorce? One of the social factors shaping high divorce rates was endemic to the nineteenth-century context: in a period of rapid social change and economic transformation driven by industrialization, new technologies, the apparition of new classes population increase, spouses expected more and more from one another.

In fact, nineteenth-century ideology stressed new obligations between husband and wife, "to provide and to serve respectively",[24] in the process also adding new potential spousal offenses. The new emphasis on the mutuality of obligations in marriage[25] heightened awareness of when one spouse neglected their contractual duties, thus contributing to the surge of divorce rates, conceptualized as a response to a serious breach of the marital contract.[26] As divorce became more prevalent, societal perceptions evolved, and the stigma associated with being a divorcée diminished. Easier access to divorce played a pivotal role in this paradigm shift. Initially requiring a special decree from the legislature, governor, or councils, divorce transitioned to becoming a strictly judicial matter. This shift rendered the process less expensive, less procedurally demanding, and less daunting, although primarily accessible to the affluent.[27] By the close of the century, divorce became more widely available, albeit with variations in access based on social class, and was accessible across all states.

Yet, obtaining a divorce was far from facile. The legal fault stipulated by the law necessitated rigorous proof, often conflicting with litigants' intentions. Complying with evidentiary standards, individuals had to demonstrate a serious breach in the marital contract—not any breach—deemed by statutes or later codes as sufficiently grave to dissolve the marital bond. The complexity and cost of obtaining a divorce are underscored by the jurisprudence of State Supreme Courts. Over the century, Louisiana recorded the highest number of cases at 26, followed by Georgia and California with 19 cases each, North Dakota with 12 cases, Montana

[19] Ferraro, J. M., *A Cultural History of Marriage*, London, 2020, p. 142.

[20] *Ibid.*, p. 142.

[21] Tanenhaus, D. S., "Families", *A Companion to American Legal History* (Hadden, S. E., ed.), Chichester, 2013, p. 219.

[22] *Ibid.*, p. 219-220.

[23] Ferraro, *A Cultural History of Marriage*, pp. 143-153.

[24] Phillips, R., *Putting Asunder: A History of Divorce in Western Society*, New York, 1988, p. 404.

[25] Bash, N., "Marriage and Domestic Relations", *The Cambridge History of Law in America* (Tomlins, C., Grossberg, M., eds.), 2nd vol., Cambridge, 2008, p. 252.

[26] *Ibid.*, p. 256.

[27] Phillips, *Putting Asunder*, p. 404; Kitchin, S. B., *A History of Divorce*, 2002, p. 212.

with 6 cases, and South Dakota with 2 cases. The Dakota Territory, owing to its early settlement and subsequent division, yielded only one case over the specified period, aligning with expectations. In aggregate, these findings encompass 84 divorce Supreme Court cases across seven states over the course of a century.

The influence of legal codes on divorce and reciprocally, the impact of divorce on legal codes, constitutes a multifaceted inquiry encompassing the evolution of code law content over time. The first is the content of code law and how it changes over time. Secondly, codes can also be studied as legal instruments used in the practice of the law, which is visible in how codes are ultimately used in the court room. This exploration commences with an examination of divorce law antecedent to the civil codes, followed by an investigation into nineteenth-century civil codes and the jurisprudential dynamics through State Supreme Courts. Ultimately, a focused inquiry into the jurisprudential landscape of the State Supreme Court is conducted, affording insights into the nexus between divorce and the civil code during the nineteenth century in the United States.

2. Divorce Law before the Civil Codes

The Report on Marriage and Divorce in the United States for the years from 1867 to 1886 defines divorce in the following terms: "Divorce is the dissolution (by means other than death), or the partial suspension of the marriage relation."[28] In other words, divorce is a legal action that allows two persons married under the law to be legally unbound.

Although, on the surface, all divorces exhibit similarities, divorce law is inherently molded by specific cultural norms that determine what qualifies as a sufficiently substantial rationale for marital separation.[29] In the past, marriage was thought of as a perpetually binding relation between a man and a woman, but as societies' norms changed, marriage evolved as well. It was during the nineteenth century that divorce legislation emerged in the United States, but divergent cultural attitudes about divorce ensured that the development of divorce law was not the same from one state to the other and,

> "[t]he law of divorce was always more complex and controversial than the law of marriage. Law and society was all in favor of marriage; not the least bit in favor of divorce. Catholics rejected it totally; for Protestants, it was at best a last resort."[30]

In the United States, especially in the first New England colonies, marriage was mostly understood as a civil contract rather than as a sacrament.[31] Notably, early legislation in New England explicitly stipulated that only a civil magistrate possessed the authority to officiate a marriage, and divorce was both acknowledged and sanctioned.[32] After being granted a colonial charter, the solemnization of marriage in the colonies was conducted by magistrates as frequently as by ministers, yet it never ceased being defined as a civil contract. However, "treatment of marriage as a civil contract and the denial of its sacramental nature by the Puritans did

[28] Wright, C. D., *A Report on Marriage and Divorce in the United States (1867–1887)*, Washington, 1889, p. 77.

[29] Brown, H. B., "The Law and Procedure in Divorce", *Am. L. Rev.* 44 (1910), pp. 321, 321-340.

[30] Friedman, L. M., *A History of American Law*, 3rd ed., New York, 2005, p. 478.

[31] Phillips, *Putting Asunder*, p. 134; Bash, "Marriage and Domestic Relations", p. 247.

[32] Phillips, *Putting Asunder*, p. 135; Rheinstein, M., *Marriage Stability, Divorce, and the Law*, Chicago, 1972, p. 32; Buckley, *The great Catastrophe of my Life*, pp. 46-79.

not necessarily entail a belief that dissolution of marriage by divorce was permissible."[33] The perspectives on divorce were intricately interwoven with religious convictions, wherein Catholics and Anglicans viewed marriage as a covenant involving both God and spouse, thereby precluding complete release.[34] However, the contractual understanding of marriage coupled with the development of romantic and happiness expectations linked to it[35] were instrumental in the development of total divorce in the United States.

At first, divorces were granted through an act of legislation or by the governor, usually on grounds of adultery, desertion, or extreme cruelty. Cases were rare; for instance, only four divorces were approved in the New York colony in the period before the revolution.[36] This procedure, called legislative divorce, was derived from the English model, from which American divorce law took its inspiration.[37] For a divorce to occur, the spouses needed the support of a member of Parliament who would introduce a bill on their behalf. The bill would then need to pass through both houses to become law. This process was used by prominent individuals who could afford the proceeding and navigate the complex political process of obtaining a private act of Parliament, effectively reserving legal divorce for the elite. [38] In England, the legalization of civil judicial divorce did not become legal until the enactment of the Marriage Causes Act of 1857. Prior to this legislative milestone, couples were constrained to seek recourse in the ecclesiastical court of the Church of England, an avenue that, if ever pursued, resulted in divorces being rarely granted. The 1857 statute marked a transformative juncture by permitting divorce proceedings through a private act of Parliament. Consequently, whether in the United States or England, divorces were quite rare, despite the fact that in the United States, divorce was formally more permissible. Homer Clark attributes this legal difference to the strong Protestant tradition in the United States and to the absence of ecclesiastical courts.[39]

In the different American states legislative divorce evolved quite quickly, albeit with differences from one state to another. In some states such as Pennsylvania (1785) and Massachusetts (1786), general divorce law arrived early. Every state in New England had enacted a divorce law by 1800, and by 1834, New York, New Jersey and Tennessee had joined them.[40] In those states, divorce took the form of an ordinary lawsuit. In other states, the shift from legislative divorce to judicial divorce was gradual and proceeded through the enactment of laws prohibiting legislative divorce as well as through the drafting of new divorce statutes. Divorce then became part of statute and common law, putting it in the hands of courts rather than the legislature,[41] with Delaware being the last state to do so in 1874.[42] Finally, by an act

[33] Phillips, *Putting Asunder*, p. 135.
[34] Chused, R. H., *Private Acts in Public Places*, Philadelphia (PA), 1994, p. 63.
[35] Bash, "Marriage and Domestic Relations", pp. 209-227.
[36] Kitchin, *A History of Divorce*, p. 212.
[37] For more research on divorce procedures in England during the eighteenth and nineteenth centuries, see Horstman, A., *Victorian Divorce*, New York, 1985; Kha, H., *A History of Divorce Law. Reform in England from the Victorian to Interwar Years*, London, 2021; Probert, R., *Marriage Law and Practice in the long Eighteenth Century*, Cambridge, 2009; Shanley, M. L., *Feminism, Marriage, and the Law in Victorian England*, Princeton (NJ), 1989; Stone, L., *Broken Lives, Separation and Divorce in England 1660–1857*, Oxford, 1993; Stone, L., *Road to Divorce*, Oxford, 1990; Stone, L., *The Family, Sex and Marriage in England 1500–1800*, New York, 1977; Kesselring, K. J., Stretton, T., *Marriage, Separation, and Divorce in England, 1500–1700*, Oxford, 2022.
[38] Woolsey, T. D., *Divorce and Divorce Legislation especially in the United States*, 2nd ed., Union (NJ), 2000, p. 196.
[39] Clark, H. H., *The Law of Domestic Relations in the United States*, St. Paul (MN), 1987, p. 408.
[40] Friedman, *A History of American Law*, p. 143.
[41] Phillips, *Putting Asunder*, p. 154.
[42] Wright, *A Report on Marriage and Divorce*, p. 78.

of Congress approved on July 30, 1886, legislative divorce was forbidden across the US territory, with exceptions for only a few states.[43] The shift allowed for far greater access to divorce. This change was additionally conceived to broaden the accessibility of divorce beyond the privileged elite. Nonetheless, akin to any legal process, securing access to divorce persisted as a formidable challenge, characterized by its inherent difficulty, substantial cost, and protracted duration. Attaining a divorce necessitated financial resources to cover expenses, including attorney's fees, court costs, witness fees, and other outlays associated with substantiating grounds for divorce, often requiring the engagement of a private investigator. The cumulative expense could escalate to several thousand dollars, thereby perpetuating divorce as a procedure predominantly accessible to the upper echelons of society.

One of the main challenges with early divorce statutes lay in their occasional drafting in a manner that confused grounds for marriage annulment with divorce grounds, resulting in standards that did not align with the expectations of the courts. The primary doctrinal reference on the subject, Bishop's *On Marriage and Divorce*, stated in its 1864 edition,

> "[t] hat [the] statutory laws of this country relating to this subject, seem in general to have been drawn up by men who either did not possess much knowledge of the unwritten law which governs it, or did not regard such unwritten law as worthy to be considered by them in framing the statute; and who, moreover, gave but little thought to the practical working of the statutes."[44]

Early American divorce law was also quite different from one state to another.[45] This seems to have been due to the different importance attributed to family and common law marriage, as well as to the diverse religious ideologies that existed in different parts of the United States.[46] Bishop explained this fact as follows:

> "As it is impossible to harmoni[se] the conflicting religious views by legislation, the legislatures of this country must act upon the subject in respect solely of its [their] political and social bearings, and if they establish laws permitting divorce, they do not therefore injure, even in the inmost conscience, those who deem marriage a religious sacrament and indissoluble. Such persons are under no compulsion to use the divorce laws, by appearing as plaintiff in divorce suits, and, if they are made defendants, having violated their matrimonial duties civilly, they cannot complain of being cut off from their matrimonial rights civilly."[47]

The dichotomy between south and north was particularly sharp in divorce law, with southern states limiting the possible grounds for divorce and granting divorce far less liberally than their northern counterparts. Despite the disparities in legal frameworks, by the end of the nineteenth century, all states had implemented divorce laws. In terms of jurisdiction, most of the statutes defined ordinary law courts or the court of chancellery as the institutions responsible for divorce proceedings.[48]

In the states that adopted civil codes, pre-civil code statutes varied widely. Before the civil codes, divorce had not been allowed in Louisiana, even in the 1808 Digest, while the first divorce in Georgia took place in 1798. The Georgian Constitution of 1798 enabled the superior court to grant divorces, albeit with a crucial caveat—its judgment lacked legal force until each

[43] *Ibid.*, p. 78.
[44] Bishop, J. P., *Marriage and Divorce*, 4th ed., Boston, 1864.
[45] Riley, G., *Divorce: An American Tradition*, Lincoln (NE), 1991, pp. 34-61.
[46] Phillips, *Putting Asunder*, pp. 144-149.
[47] Bishop, *Marriage and Divorce*, § 32.
[48] Kitchin, *A History of Divorce*, p. 213.

house of the legislature had given their approval through a two-thirds vote.[49] Between 1798 and 1835, 291 divorces were ratified in this way. Divorce reverted fully to the courts with the 1802 Act,[50] but the legislature continued to play a role in some divorces, particularly in cases involving wealthy and well-connected litigants. The enactment of the 1845[51] Statute marked a pivotal shift in divorce law proceedings, introducing a trial by jury. In case of an appeal to the superior court, a special jury was appointed, "who shall inquire into the situation of the parties before the intermarriage".[52] The act also enumerated the admissible grounds for divorce, including intermarriage within a Levitical degree of consanguinity or affinity, mental incapacity, impotence, menace of force or duress in contracting marriage, pregnancy of the wife at the time of the marriage without the husband's knowledge, adultery, willful and continuing desertion for a period of three years, conviction of one of the spouses and sentenced for at least two years for an offense involving moral turpitude, cruel treatment, or habitual intoxication. Illustrative of the stringent standards for divorce, the case of Head v. Head underscored that "abandonment by the wife was not a good cause for divorce, either a vinculo matrimonii or *a mensa et thoro*".[53] Ignoring the 1845 statute, the Supreme Court reminded that: "The only causes for total divorce in Georgia are those recognized by the common law, to wit, pre-contract, consanguinity, affinity, and corporeal infirmity."[54] It was in the subsequent year with the adoption of the code that divorce law in Georgia underwent an expansion of permissible divorce grounds. Indeed, all the case law in the Supreme Court on divorce was either for cruelty or adultery, and most of the time, partial divorce was granted instead of total divorce[55] with only one exception being a divorce turning into a marriage annulment for physical incapacity of the husband.[56]

In California, the first divorce law, enacted in 1851, meticulously outlined several specific grounds for divorce, with the first grounds being impotence and adultery.[57] The remaining offenses were extreme cruelty, desertion, neglect, habitual intemperance for a minimum period of three years, and being convicted of a felony with a punishment of at least three years of imprisonment. The part of the statute dealing specifically with cruelty explains that "women's finer sensibilities deserved respect and that imprecation as to her sexual conduct constituted cruelty".[58] This formulation laid the early groundwork for considering mental cruelty as a valid ground for divorce. The Californian Supreme Court emerged as one of the first courts to assert that: "Acts of violence to the person of the wife sufficient to authorize a divorce on the ground of extreme cruelty held not excused by the fact that the wife had an irascible temper and conducted herself improperly towards the husband."[59] The court maintained that finer sensitivity or an "irascible temper, and frequently scolded her husband and so conducted herself as to make his home unpleasant"[60] did not alter the assessment of cruelty. The court insisted that if

[49] Friedman, *A History of American Law*, p. 182.

[50] Phillips, *Putting Asunder*, p. 445.

[51] Hotchkiss, W. A., *Codification of the Statute Law of Georgia, including the English Statute in Force*, Savannah, 1845.

[52] *Ibid.*, § 26.

[53] *Head v. Head* (1847), 2 Ga. 191.

[54] *Ibid.*

[55] *John McGee v. Abby McGee* (1851), 10 Ga. 477; *William Methvin v. Mary A. Methvin* (1854); *John Cason v. Sarah Cason* (1854); *Pleasant H. Whitaker v. Elizabeth Strong* (1854), 16 Ga. 81; *James D. Roseberry v. Catherine Roseberry* (1855), 17 Ga.; *John Pinckard v. Sarah Pinckard* (1857), 13 Ga.; *Priscilla D Buckholts v. Peter Buckholts* (1858), 24 Ga. 238.

[56] *James W. Brown v. Catherine Westbrook* (1859), 27 Ga. 102.

[57] Hittell, T. H., *The general Laws of the State of California, from 1850 to 1864*, San Francisco, 1870.

[58] Griswold, R. L., *Family and Divorce in California, 1850–1890: Victorian Illusions and everyday Realities*, Albany, 1982, p. 19.

[59] *Sarah Eidenmuller v. George Eidenmuller* (1869), 37 Cal. 364.

[60] *Ibid.*

physical violence left visible marks on the spouse's body for an extended period, then it constituted cruelty. The court also demonstrated a pragmatic perspective, acknowledging that: "The testimony on both sides showed that the parties lived very unpleasantly together."[61] The last two possible grounds for divorce were adapted directly to divorce law from the grounds for annulment. The first was the forced or fraudulent consent of one of the parties,[62] the second concerned women only:

> "when the female at the time of the alleged marriage was under the age of fourteen years, and the alleged marriage was without the consent of her parents or guardian, or other person having the legal custody or charge of her person; and when such marriage was not voluntar[ily] ratified on her part, after she had attained the age of fourteen."[63]

The statute also required a minimum of six months of state residence before the petition for divorce.[64] This law was then used as a model in Montana.[65] The Montana Act of 1871 adopted the Californian law of 1851, but with a few changes to the amount of time an offense had to continue for it to be considered grounds for divorce. The duration of desertion and habitual drunkenness was downgraded to one year and no delay was necessary for cruelty or felony convictions.[66] The minimum residency requirement went from six months to one year. As for the Dakota Territory, no statutory divorce law existed before the code as it was adopted in the early years of settlement and thus constituted the earliest territorial law.

The divergence in divorce laws across the United States prompted the consideration of potential uniformization by the national government. In 1905, a Divorce Congress was held at the initiative of the state of Pennsylvania. Composed of delegates appointed by the governors of forty-two states (all states except Nevada, Mississippi, and South Carolina), the congress aimed to deliberate, reconcile, and codify divorce laws into a national statute.[67] However, attendees swiftly recognized the impracticality of this endeavor. The conceptions of divorce and, consequently, divorce law itself were deeply ingrained in the cultural fabric of each state. Hence, the initial resolution of the Congress affirmed the autonomy of each state to regulate the matter according to its discretion:

> "under the constitution of the United States the federal government had no jurisdiction of the question of Marriage and Divorce, and was of [the] opinion that in matters of such purely domestic concern it should have known, and that it would be practically impossible to secure an amendment to the Constitution in this regard for many reasons."[68]

The argument in favor of states retaining the authority to regulate divorce law primarily rested on the entrenched right of states to govern themselves. Additionally, proponents highlighted the considerable challenge posed by the constitutional amendment process, which necessitated a two-thirds majority at both the federal level and in the majority of state legislatures. This would have proven an almost impossible task given the substantial divergence of states

[61] *Ibid.*
[62] Hittell, T. H., *The general Laws of the State of California*.
[63] *Ibid.*
[64] *Ibid.*, p. 2415, Section 3, Act of March 25, 1851.
[65] Phillips, *Putting Asunder*, p. 454.
[66] *Revised Statutes of the Territory of Montana, passed at the seventh Session of the Legislative Assembly*, Helena, 1871, Section 1.
[67] Munson, C., "Divorce Congress and Suggested Improvements in the Statutory Law relating to Divorce", *Yale L. J.* 15 (1906), pp. 405, 406; Ginsburg, B., "Divorce", *L. Society J.* 7 (1937), p. 723.
[68] *Ibid.*, p. 409.

on the issue. The third argument against implementing a uniform national divorce law contended that, even if Congress were to reach a compromise, most state legislatures would likely reject such a statute due to their distinctive policies on divorce. Nevertheless, the Congress did adopt several resolutions intended to instill a degree of uniformity in divorce proceedings nationwide. These included stipulations that all divorce suits must be initiated in the bona fide state of residence of the plaintiff, with fraudulent claims subject to sanctions. Grounds for divorce and divorce procedures were to align with the laws of the plaintiff's state of residence. Additionally, individuals could not be compelled to petition for a divorce, and the grounds for divorce were to be distinct from marriage impediments. Importantly, no divorce could be granted unless the defendant had an opportunity to defend themselves, and divorce could only be granted by a court of justice.

3. Divorce Law post Nineteenth-Century US Civil Codes

Nineteenth century divorce law was based upon two key principles. Firstly, it was grounded in federal principles, allowing each state the autonomy to establish its own regulations concerning marriage and divorce. [69] This resulted in a diverse array of rules, as previously discussed. However, it is noteworthy that lawmakers did consider the decisions made by other states on this matter, a fact substantiated by the judicial rulings that often considered and cited opinions from other states.

The second guiding principle was the recognition that individuals could not unilaterally terminate a marriage at their own discretion. The examination of the evolution of divorce policies in the legal codes underscores a continuity in legal principles while revealing an augmented state control over the practice. Indeed, divorce policies in nineteenth-century America were rooted in causative reasoning, meaning that the granting of a divorce was contingent upon the ability to prove the commission of a fault by one of the spouses. This conceptualization of divorce permeated both civil codes and the broader legal landscape, encompassing procedural aspects as well as the admissible grounds for divorce. Even in instances such as the Civil Codes of Louisiana, heavily influenced by the Napoleonic Code, divorce by mutual consent was explicitly excluded.

3.1. Divorce Procedure

Divorce law in the civil codes followed the course set by previous statute law. Among the civil codes only one—the earliest—did not allow divorce. The 1808 Digest only allowed partial divorce known as separation from bed and board or divorce *a mensa et thoro*: "when a marriage is only partially suspended by divorce, and the parties are separated, but still retain the legal status of married persons, the divorce is termed 'limited' or *a mensa et thoro*—divorce from bed and board",[70] meaning, that spouses opted to lead separate lives and relinquish their marital obligations, particularly cohabitation. Despite the physical separation, the marital bond persisted. It is important to note that total divorce was only introduced into the civil code with the initial revision in 1825.[71]

[69] Cott, N. F., *Public Vows: A History of Marriage and the Nation*, Cambridge (MA), 2000, p. 28; Bash, "Marriage and Domestic Relations", p. 257.

[70] Wright, *A Report on Marriage and Divorce*, p. 77.

[71] Bullard, H. A. et al., *A new Digest of the Statute Law of the State of Louisiana, from the Change of Government to the Year of 1841*, New Orleans, 1827, p. 284.

Partial divorce was also found in applications of the Code of Georgia, where a total divorce could be granted based on the verdict of two special juries, while a partial divorce required only the verdict of one special jury.[72] Georgian divorce from bed and board encompassed a broader spectrum of potential grounds, as it "may be granted on any ground which was held to be sufficient in the English courts prior to May 4th, 1784".[73] This formulation directly emanated from precedent case law predating the code, underscoring the profound integration of jurisprudence in the drafting of the Code of Georgia.[74] In contrast, the Civil Code of California and the Codes of the Dakotas excluded separation from bed and board, making only total divorce possible. However, in case of a judgment denying divorce, especially when the grounds could not be sufficiently proven, the magistrate had the authority to mandate that the husband provide for wife and children while living in a separate residence. This allowed for separation without breaking the marital bond.[75] Remarkably, the sole instance where absolute divorce existed without exception was in Montana. [76] The absence of limited divorce, with exclusive recourse to total divorce, might appear unconventional given the societal significance attributed to marital obligations. However, during the nineteenth century, this practice was quite prevalent countrywide, with twenty-three states exclusively permitting total divorce and only five providing for maintenance or alimony in cases where divorce was not granted.[77]

The jurisdictional authority over divorces varied according to the provisions outlined in each code. In Louisiana, the competent courts were the district courts, with the exception of New Orleans, where divorce went before the parish courts. All cases were appealed to the Supreme Court.[78] In Georgia, it was the superior court that rendered judgment through a jury tasked with deciding on the petition and determining the type of divorce.[79] In the other states—California, the Dakotas and Montana—the codes granted jurisdiction over divorce to the district court.[80] The question of jurisdiction reached the state's Supreme Courts, with only two cases identified in the records post-codification. The first case originated in Dakota Territory[81], and the second in North Dakota. [82] In both instances, the court ruled that "Jurisdiction in matters relating to divorce and alimony is conferred by statute, and the power of the courts to deal with such matters must find support in the statute, or it does not exist".[83] The civil codes did not introduce conscious changes to court jurisdictions, maintaining a continuity with earlier statute law. It is likely that the authors of the codes aimed to facilitate implementation and avoid drastic shifts in court competence that could lead to confusion. However, court jurisprudence exhibited a stringent interpretation of the statute law in the codes on this matter, ensuring order and reinforcing strict state authority over issues related to the breakdown of marriages.

[72] GA C. 1861, § 1669.
[73] GA C. 1861, § 1672.
[74] *Bedford Head v. Amanda Head* (1847), 2 Kelly 191.
[75] Wright, *A Report on Marriage and Divorce*, pp. 91-92.
[76] *Ibid.*, p. 102.
[77] *Ibid.*, pp. 89-117. Absolute divorce only in: Arizona, Colorado, Connecticut, Idaho, Illinois, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oregon, Texas, Utah, Vermont, Washington, and Wyoming. No divorce, but separate maintenance in: California and Dakota. Alimony only in: Florida, Iowa, and Kansas.
[78] Bullard, *A new Digest of the Statute Law of the State of Louisiana*, p. 284.
[79] GA C. 1861, § 1768.
[80] Hittell, T. H., *The general Laws of the State of California*; Wright, *A Report on Marriage and Divorce*, p. 79.
[81] *Murphy v. Murphy* (1885), DT.
[82] *State ex. Rel. Hagert v. Templeton District Judge* (1909), 18 N.D. 525.
[83] *Ibid.*

One other procedural fundamental element of divorce law is the question of residence. This aspect was central in divorce law debate across the country in light of the migratory divorce situations that arose. Aware of the disparity in divorce law across the country, most US states added a residence requirement to their divorce laws to avoid residency for divorce only. Without this, a spouse who had restrictive divorce law or no possibility of divorce in his or her state could go to another state to find relief from the strictures of his or her place of residence. In divorce cases, residence is understood as domicile. This doctrine is explained in the doctrinal reference of the time, the *Commentaries on the Law of Marriage and Divorce and evidence in matrimonial suits*, § 230, by Joel Prentiss Bishop:

> "Upon the whole, the doctrine now firmly established in America upon the subject of divorce is that the law of the actual bona fide domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or the place where the offense for which the divorce is allowed was committed."[84]

During the nineteenth century, all US states and territories enacted provisions determining the length of time one or both parties must reside in a state or territory to be able to petition for a divorce except two, Louisiana and Georgia, both of them civil code states.[85] The absence of a minimal residency requirement in Georgia and Louisiana remains unclear, particularly considering that their divorce laws were not notably permissive yet not overly restrictive. The lack of liberalism of their grounds for divorce might have positioned them outside the prevalent migratory divorce pattern, which could explain why there was no perceived need to emphasize residency requirements. Case law from both states indicates that the question of residence was never raised before their Supreme Courts, neither before nor after the implementation of the codes. This suggests that the issue of residency was not a focal point of legal contention or consideration in these jurisdictions. The nineteenth-century US civil codes can be broadly categorized into three groups concerning the residence question. The first category encompasses the Civil Codes of Louisiana, which, rooted in the civil law tradition, notably did not address the residency question. The second category involves the Code of Georgia, drafted to function alongside the common law, allowing only residents to petition for divorce without specifying a minimum residency period. The third category includes the Civil Code of California and its descendants, which adopted the Civil Code of New York's draft. These codes, sharing a common lineage from the "Field Civil Code", exhibit similar rules regarding residency requirements but with different timeframe requirements. For instance, according to the Civil Code of California, the party seeking a divorce must be a state resident for at least one year and must have resided in the particular county for at least three months.[86] In the Dakota Territory, this residency requirement was reduced to ninety days[87], reflecting the unique circumstances of the newly settled territory. The law in this case was carefully crafted to the special conditions of the great plains. However, the Dakota Territory's generous 90-day residency requirement led to numerous abuses, with spouses establishing residence in the territory for the purposes of divorce, granting it renown as a divorce colony. Following the territorial division, both North and South Dakota initially retained the 90-day requirement. Still, by 1893, there was a push to increase the residency requirement to curb the influx of divorce migration. This campaign, led by conservative clergymen, supported by women's groups and the temperance movement[88],

[84] Bishop, *Marriage and Divorce*, § 230.
[85] Wright, *A Report on Marriage and Divorce*, p. 80.
[86] CA Civ. C. 1872, § 128.
[87] DT Rev. C. 1877, § 67.
[88] O'Neill, W., "Divorce in the Progressive Era", *Am. Q.* 17 (1965), p. 204.

resulted in North Dakota and Montana increasing the residency requirement to one year in their respective civil codes.[89] In South Dakota, the new code still permitted divorce petitions after six months but mandated one year for the receipt of a divorce judgment.[90] Residency requirements evolved in response to the circumstances of the states, ultimately converging to similar timings in order to prevent the states from being perceived as divorce havens. Despite the multiplication of divorce rates during the nineteenth century, divorce remained stigmatized, and states were reluctant to be associated with higher divorce rates due to concerns about morality.

Looking at the Supreme Court divorce case law, the question of residence reached the judges a few times but not as frequently as one would have expected it given how fundamental this rule of law was. It also only reached judges in the great plains, which aligns logically with their role as part of the migratory divorce phenomenon. The first occurrence was in North Dakota in the Smith case in 1901.[91] Mr. Smith petitioned for a divorce, but evidence indicated that he traveled back and forth to the state without fully establishing his residence, thus disqualifying him as a *bona fide* resident eligible to petition for divorce. The Supreme Court justice's decision in this case was based on two articles of the Revised Codes, bolstered by references to seven case law citations. Two other Supreme Court cases followed a similar pattern in South Dakota[92] and Montana.[93] In each instance, a husband petitioned for divorce but was deemed—based on evidence—not a state resident. The legal reasoning and foundations were consistent across these cases: reliance on the relevant code articles, reinforced by various case law citations. The courts rigorously assessed whether the plaintiff met the official state residency requirements for the mandated period before filing the petition. They scrutinized the individual's motives for moving to the state, discerning whether it was for genuine reasons or solely for divorce purposes. The courts were extremely cautious to avoid granting a divorce to someone who would not qualify for divorce in their own state. Unsurprisingly, all the cases that reached the Supreme Courts failed to meet these residency conditions and were dismissed, affirming the lower court decisions. This examination of the cases underscores the fundamental role played by the codes as the primary legal basis for such decisions.

A final procedural point needs to be mentioned here to fully grasp divorce policies in the studied states. Examining the procedural aspect of divorce in terms of petitioning reveals that the civil codes, akin to the previous statutes, were written to permit both spouses—husband and wife—to initiate a divorce petition. However, in California, the Dakotas, and Montana, the ground of willful neglect was specifically reserved for one gender: "Willful neglect is the neglect of the husband to provide for his wife."[94] This made neglect the sole ground for divorce that was not transferable to men. While a detailed examination of this ground, along with others, will follow in subsequent sections, it is important to note here that this gender-specific provision underscores the central intent of protecting the wife. As much as women gained slowly more independence in the nineteenth century and subsequent centuries, the mindset of the code draftsmen emphasized the need to protect women—wives and mothers. The prevailing notion was that women should be ensured the means to live, and consequently, to provide for their children, in adequate conditions befitting their status. Conditions that should allow her to raise children with the care needed. This perspective was rooted in the belief that, despite the development of a romantic vision of marriage centered on love and care, the institution was

[89] ND Rev. C. 1895, § 2755; MT C. & Stat. 1895, § 176.
[90] SD Rev. C. 1903, § 86.
[91] *Smith v. Smith* (1901), 10 N.D. 219.
[92] *Wells v. Wells* (1911), 27 S.D. 257.
[93] *Rumping v. Rumping* (1907), 36 Mont. 39.
[94] CA Civ. C. 1872, § 105.

not solely about the spouses. Instead, it was seen as a platform for the role of the "Republican mother",[95] tasked with guiding and raising children while attending to the needs of her husband.

In order to fulfill her duties, the woman needed adequate means, particularly financial support, as in many states she was not allowed to own property and was under coverture. If the husband failed to fulfill his primary duty of providing for her, it was considered a wrong, and she could not be compelled to stay in such conditions. This viewpoint reflects the prevailing sentiment of the time, encapsulated in the concept of the husband as the head of the family. The protection of the "wronged" party to the marriage contract was a paramount consideration. As stated initially, across the states studied, the fault of one of the parties remained central to divorce law, and divorce could only be granted based on serious misconduct by either party in the marriage. In total, ten recognized grounds for divorce can be identified within all of the nineteenth-century American civil codes, with five of them being present in every civil code.

3.2. Grounds for Divorce, Codes and Practice

Looking at the grounds for divorce individually showcases some differences and similarities in the ways states approached the breakdown of a marriage. Those regional differences testify to the diverse cultural heritage of the studied states. In most cases, the codes themselves note the origins of their divorce law. Only the Codes of Louisiana and Georgia do not cite the origins of their laws in the codes themselves. However, the Civil Code of Louisiana was drafted according to the existing law in the territory, meaning that the legal sources of the code are French law, custom and doctrine, as well as the earlier Spanish regulations enforced in Louisiana. As for the Code of Georgia, the act appointing the drafting commission lists the sources commissioners could rely on in drafting the code: "The laws of Georgia, whether derived from the common law, the constitution of the state, the statutes of the state, the decisions of the Supreme Court, or the statutes of England of force in this state."[96] As for the other states, they all cite their sources next to or directly under a given article. In California, it is the California Reports that are cited; in Dakota, it is the California Reports plus, in some cases, US judicial decisions. In North Dakota the source cited is the Civil Code of Dakota. In the case of South Dakota, the code also adds the Civil Code of North Dakota to the Civil Code of Dakota as source of law. In addition, where the pre-existing law changed or evolved in the Civil Code of South Dakota, the code cites judicial decisions from Dakota, North Dakota, and South Dakota, as sources of the law in the code. Finally, in Montana the sources of articles cited are two scholars, Bishop and Stewart, and US judicial decisions. The different sources cited in the different codes highlight several key points: Firstly, they showcase how the civil codes built on one another. Secondly, the prolific use of sources from the common law showcases the multiplicity of sources of divorce law. In the US context, codes were meant to bring uniformity to the law within the territories, while also adapting and adopting other sources of law to suit particular legal needs, something they did to the fullest possible extent for their divorce law.

In terms of grounds for divorce, the list of possible grounds has always been the subject of statutory law, predating the introduction of codes. The codes, by amalgamating existing laws and incorporating common law principles, facilitated the interpretation and evolution of certain divorce grounds. While exhibiting some divergences, the codes succeeded in establishing a measure of coherence across US states, while preserving individuality for each. This nuanced

[95] Grossberg, M., *Governing the Hearth*, Chapel Hill (NC), 1988, pp. 3-17.
[96] *Georgia Laws*, Atlanta, 1895, No. 95.

equilibrium between individuality and requisite uniformity is noteworthy. Certain grounds for divorce are universally recognized across all states, such as adultery, cruelty, desertion, habitual intemperance, and conviction. However, distinctions emerge among states regarding grounds like neglect, defamation, insanity, attempted murder, and causes warranting annulment, introducing a layer of variability reflective of individual legal frameworks.

	Adultery	Cruelty	Desertion	Habitual Intemperance	Conviction	Neglect	Others
Louisiana	X	X	X	X	X		Defamation Attempted Murder
Georgia	X	X	X	X	X		Causes of Nullity
California	X	X	X	X	X	X	
Dakota Territory	X	X	X	X	X	X	
North Dakota	X	X	X	X	X	X	Incurable Insanity
South Dakota	X	X	X	X	X	X	
Montana	X	X	X	X	X		

Table 1. Divorce Grounds in the Nineteenth-Century US Civil Codes

Concerning the application and prevalence of divorce grounds, variations exist among states, yet certain patterns emerge. One ground for divorce stands out as the most frequently invoked across all states: cruelty. Indeed, approximately 41% of divorce cases reaching the states' Supreme Courts draw on allegations of spousal cruelty. Following closely are cases based on adultery and habitual intemperance, constituting 19% and 17% of instances, respectively. Another recurring legal consideration in a majority of cases is the issue of alimony, which will be scrutinized separately. Beyond these, desertion accounts for 14% of cases, willful neglect for 7%, and conviction for only 2% of cases, with one instance each in Montana and Georgia.

Cruelty, also called extreme cruelty or cruel treatment, was defined more or less largely depending on the code. In Louisiana, that behavior had to be of such a nature, "as to render their living together insupportable".[97] In the other states, it was qualified as "the wrongful infliction of grievous bodily injury or grievous mental suffering upon the other one by one party to the marriage".[98] Although the phrasing differs, the core concept remains consistent, with variations primarily pertaining to the requisite intensity of cruelty necessary to qualify as grounds for divorce.

[97] LA Civ. C. 1825, Art. 138; LA Rev. Civ. C. 1870, Art. 138.

[98] GA C. 1861, § 1671; CA Civ. C. 1872, § 94; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2739, MT C. & Stat. 1895, § 134; SD Rev. C. 1903, § 69.

In the case law, cruelty was associated with another ground in 30% of the time, mostly habitual intemperance, then, depending on the case, adultery, abandonment, or willful neglect.[99] The distribution by gender indicates a relatively balanced presentation, with 39% of cases petitioned by women and 44% by men. It is important to note that, in the common law civil codes, mental suffering, hence psychological violence, was included and developed as a cause alongside physical violence, though the scope of this provision would be determined by case law. In Louisiana, violence was also defined as defamation or attempted murder by one spouse of another.[100] As a ground for divorce, cruelty had to be unbearable, and what was seen as moderate correction was accepted and not recognized a ground for divorce. Historically, the acceptance of a husband beating his wife persisted as long as it remained non-excessive. The common law established the doctrine of moderate correction, prohibiting the use of lethal weapons or a stick thicker than a man's thumb.[101] Acceptance of moderate correction disappeared slowly with nineteenth-century case law. The fault of cruelty did not serve as a ground for divorce universally across the United States,[102] but existed in all the state civil codes.[103] All the common law civil codes recognized cruelty as a ground for divorce, indicating an evolution compared to the civil code model they adopted. The Draft of a Civil Code for the State of New York only acknowledged adultery as a divorce ground. Therefore, all the states that followed the New York model made a deliberate decision to broaden the pool of divorce grounds. The jurisprudence on cruelty was the one that evolved the most during the nineteenth century.

> "Law sees and treats women the way men see and treat women. Judges are influences by social and cultural norms while when interpreting and applying the law; sometimes their own ideology plays a role in the legal decision-making process."[104]

Judges were initially reluctant to intervene in marital disputes at the beginning of the century. For instance, in the case of Durand v. her husband[105] in Louisiana in 1816, the State Supreme Court confirmed the denial of a separation from bed and board for the wife. The court reasoned that although she had received ill treatment, her own outrageous behavior towards her husband nullified her claim. However, as the century progressed, the legal landscape evolved. In 1887, a divorce case based on the grounds of habitual intemperance and cruel treatment was brought before the court and contested by the husband. He argued condemnation, asserting that his wife had chosen to stay with him throughout the years while his alleged misconduct occurred. Yet, the court argued that,

> "the plaintiff is a lady of taste, refinement, and culture, and accustomed to the amenities of good society. The very idea of coercing her to continue her marital relations with the defendant under such circumstances detailed, is shocking to our sense of justice and morality. (…) In a case like this the dictates of good morals, good breeding and Christian charity require that the tie that binds should be severed."[106]

---

[99] For a detailed study of Divorce in California during the nineteenth century, see Griswold, *Family and Divorce in California, 1850–1890*.

[100] LA Civ. C. 1825, Art. 139; LA Rev. Civ. C. 1870, Art. 139.

[101] Phillips, *Putting Asunder*, pp. 323-344.

[102] Specifically, Maryland, New Jersey, New York, North Carolina, and Virginia, did not acknowledge it as a basis for absolute divorce, but rather as grounds for limited divorce or separation from bed and board. Notably, only New York recognized adultery as an absolute ground for divorce.

[103] Wright, *A Report on Marriage and Divorce*, pp. 89-117.

[104] MacKinnon, C. A., *Toward a Feminist Theory of the State*, Cambridge (MA), 1991, p. 162.

[105] *Durand v. her husband* (1816), 4 Mart. (O.S.) 147.

[106] *Elisabeth Mack v. Alexander Stuart Handy* (1887), 39 La. Ann. 491.

Consequently, the appreciation of what constituted ill treatment evolved during the century tolerating marital physical violence less and less. Courts further developed the notion of cruelty by incorporating mental cruelty into its definition.[107] The first instance of divorce based on mental cruelty by a lower court occurred in California in 1857, where the court asserted that a woman's finer sensibilities deserved respect, and imprecations regarding her sexual conduct amounted to cruelty.[108] The Supreme Court confirms this interpretation in 1867.[109] In this case, the husband asked for a divorce on the false accusation of adultery of his wife, and the court awarded a divorce for the wife on the ground of cruelty. Surprisingly, the court granted the divorce for the wife on the grounds of cruelty, considering false accusations as an unjust challenge to her moral character and behavior, tarnishing her reputation. In the following years, judges all over the country adopted that vision. Husbands' false charges of infidelity were turned by judges and used as ground of mental cruelty granting divorce to the wife.[110] For the civil code states, this had the consequence of establishing a judicial interpretation of the civil codes, creating a common law from the codes themselves. However, the extension of mental cruelty to false accusations of adultery was not consistently applied to husbands. In a case from North Dakota in 1898, a husband sought divorce, alleging cruelty, because his wife continuously accused him of adultery. Despite his reputation for spending time with women due to his profession as a singer, both the lower court and the Supreme Court denied him the divorce, asserting that false accusations of adultery were insufficient to constitute cruelty. This example illustrates a clear double standard and gender-oriented decision-making by the courts of justice during the studied period.

The diminishing tolerance for mental or physical abuse within marriages during this period can be attributed to the evolving landscape of women's rights and changing perceptions of the institution of marriage itself. Over time, marriage transitioned into a more deliberate union, grounded in love and respect, with abuse increasingly viewed as an unforgivable transgression. As Nora Bash noted, "jurists, essayists, poets and novelists idealized marriage as a loving and harmonious partnership that embodied core national values and required the participation of wives and mothers no less than that of husbands and fathers",[111] creating less and less tolerance for cruelty.

The second common divorce ground to all the civil code states is adultery. Adultery was one of the divorce grounds which was consistently defined in the same terms in the different codes: the illicit intercourse of two persons, one of whom is married.[112] In Louisiana, the definition of adultery underwent evolution during the nineteenth century. Initially regulated by the Act of March 19, 1827, following the civil code, this legislation outlined the charge of adultery based on the gender of the adulterer. The husband could demand a divorce for adultery on the part of the wife without any conditions or restrictions, while the wife could only claim adultery under specific circumstances. Indeed, the wife could only claim adultery "when he has kept his concubine in the common dwelling, or openly and publicly in any other".[113] This gender-based distinction mirrored Article 230 of the Napoleonic Code. Additionally, adultery was one of only two grounds for immediate divorce without a prior year-long separation from

[107] For an overview on the evolution of mental cruelty doctrine see Griswold, R. L., "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790–1900", *J. Soc. Hist.* 20 (1986), pp. 127-148.

[108] Griswold, *Family and Divorce in California, 1850–1890*, p. 19.

[109] *Louis E. Miller v. Theresa Miller* (1867), 33 Cal. 353.

[110] Grossberg, *Governing the Hearth*, p. 44.

[111] Bash, "Marriage and Domestic Relations", p. 252.

[112] LA Civ. C. 1825, Art. 139; LA Rev. Civ. C. 1870, Art. 139; GA C. 1861, § 1670; CA Civ. C. 1872, § 93; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2738, MT C. & Stat. 1895, § 133; SD Rev. C. 1903, § 68.

[113] Bullard, *A new Digest of the Statute Law of the State of Louisiana*.

bed and board under the 1825 Civil Code. This gender distinction disappeared with the 1870 Civil Code. The distinction marked an evolution in the understanding of a woman's role in society. In the early nineteenth century, women were perceived as belonging solely to the private sphere, with husbands responsible for public appearances. Sanctions were imposed only in cases where a husband's behavior compromised the veil of respectability. However, with the development of the ideal of "Republican motherhood", wives were also the keepers of good morals and virtue through their influence over men and children.[114] This shift resulted in extending the crime of adultery to men. Infidelity became an unforgivable offense, as it was a direct action against the foundations of social order—the mother. In the other states, these gender distinctions did not exist, further, adultery was the only ground for divorce recognized in all the US states and territories during the nineteenth century.

In the case law, adultery emerged as the second most used ground for divorce. Its highest rate of petitions was in Louisiana, with nine cases reaching the State Supreme Court during the century. Primarily, because it was the sole ground for obtaining a total divorce without a mandatory one-year waiting period after a judgment of separation from bed and board. Divorce courts, however, were stringent in terms of requiring proof of adultery. Generally, for a divorce to be granted on grounds of adultery, the wronged spouse had to demonstrate witnessing the act. For instance, in an 1840 Louisiana case, a wife seeking divorce on grounds of her husband's adultery presented a letter from her spouse's brother, stating that he was now living in Texas and married to another woman. The court deemed the letter insufficient proof and rejected the divorce. Indeed, to grant a divorce based on adultery, the general rule stipulated that the victim spouse had to prove witnessing the commission of the adultery.[115] In another case in Georgia, George Johns had his divorce request denied because his claim of adultery relied on the testimony of the couple's son.[116] The State Supreme Court also perceived that if a long time has passed between the commission of the adultery and the divorce petition, then the infidelity is considered as forgiven as it happened in Louisiana in 1887. In this case, the husband had supposedly witnessed his wife committing adultery in March, but afterwards had accepted her in his house and bed until August, while still being friends with the wife's paramour. The court interpreted this as evidence of forgiveness and subsequently refused the divorce.[117]

The issue of adultery gives rise to two distinct questions: firstly, whether adultery, aside from being a ground for divorce, is also considered a criminal offense; and secondly, the impact of adultery on the status of children. The criminalization of adultery was only observed in the southern states under study. In Louisiana, for instance, an adulteress forfeited all matrimonial gains, and the husband could face penalties such as a fine ranging from $100 to $2,000 or imprisonment for up to six months. Similarly, in Georgia, a conviction for adultery could result in imprisonment lasting between sixty days and a maximum of six months.[118] It's essential to note that the criminalization of adultery was not a uniform practice, and states like Massachusetts, New York, and Michigan also categorized adultery as a criminal offense, showcasing the variation in state policies.[119]

[114] Fought, L., "'Female Women or feminine Ladies' Gender and Women's Rights before the Antebellum Movement", *The Routledge History of nineteenth-century America* (Wells, J. D., ed.), New York, 2018, pp. 47-61; Grossberg, *Governing the Hearth*, pp. 17-30.

[115] *Adams v. Hurst* (1836), 9 La. 243.

[116] *Lucinda Johns v. George Johns* (1960), 29 Ga. 718.

[117] *Felix Bourgeois v. Euphrosine Chauvin* (188?), 39 La. Ann. 216.

[118] Woolsey, *Divorce and Divorce Legislation*.

[119] Phillips, *Putting Asunder*, p. 295.

The second question revolves around the impact of adultery on the status of children. The common law codes derived from the Civil Code of New York's draft, including those of California, the Dakota Territory, North Dakota, Montana, and South Dakota, all addressed this issue. In cases where divorce was granted due to the husband's fault, the legitimacy of the children was generally not questioned.[120] However, if the divorce resulted from the wife's adultery, the legitimacy of the children could be subject to scrutiny based on the timing of the offense.[121] These legal provisions reflect a clear concern for ensuring the certainty of the bloodline in cases of marital dissolution due to adultery.

The third commonly encountered cause for divorce was abandonment or desertion, referring to the act of one spouse leaving marital life without the consent of the other.[122] A divorce could be granted when one spouse ceased fulfilling cohabitation duties or, for example, when a spouse disappeared, leaving the other partner alone. Some codes provided gender-specific definitions for desertion. The wife was considered a deserter if she did not abide by the husband's choice of home, and "the husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion".[123] For the husband, on the other hand, "if the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him".[124] In the Dakotas—the Dakota Territory, North Dakota and South Dakota—desertion was also defined by the "persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary (…)".[125]

Interestingly, in the jurisprudence, this ground was petitioned as much by women as men. There was no statute of limitations for desertion.[126] The absence of one spouse was common during that time, particularly due to men having work situations that required them to be away from the conjugal home for extended periods. This, coupled with the high rate of migration across the US territory, explains the frequency of divorce cases related to desertion.[127] Most desertion cases involved one spouse disappearing, occasionally even leaving the state or country. State Supreme Court cases often dealt with spouses living in another country and the challenge of having the deserting spouses appear in court.[128] In the Louisiana case of Harman v. McLeland in 1840, the court refused the divorce for adultery but granted a separation from bed and board for desertion. This meant that one year after that judgment, she would be able to ask for a definitive divorce. Sometimes desertion was used as a counteraction from the husband when the wife had left home due to cruel treatment.[129] Allegations of desertion, in this context,

[120] CA Civ. C. 1872, § 144; DT Rev. C. 1877, § 62; ND Rev. C. 1895, § 2752; MT C. & Stat 1895, § 197; SD Rev. C. 1903, § 81.

[121] CA Civ. C. 1872, § 144; DT Rev. C. 1877, § 63; ND Rev. C. 1895, § 2753; MT C. & Stat 1895, § 197; SD Rev. C. 1903, § 82.

[122] LA Civ. C. 1825, Art. 138; LA Rev. Civ. C. 1870, Art. 138; GA C. 1861, § 1670; CA Civ. C. 1872, § 95; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2740, MT C. & Stat. 1895, § 135; SD Rev. C. 1903, § 70.

[123] CA Civ. C. 1872, § 104; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2740; MT C. & Stat 1895, § 142; SD Rev. C. 1903, § 70.

[124] CA Civ. C. 1872, § 103; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2740; MT C. & Stat 1895, § 141; SD Rev. C. 1903, § 70.

[125] DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2740; SD Rev. C. 1903, § 70.

[126] *Mosley v. Mosley* (1881), 67 Ga. 92.

[127] *Price v. Price* (?), 90 Ga. 244; *Mitchell v. Mitchell* (1896), 97 Ga. 795, *John A. Gardner v. Louie S. Gardner* (1900), 9 N.D. 192; *Bordeaux v. Bordeaux* (1904), 30 Mont. 36.

[128] *J. Lachaux v. his wife* (1855), 10 La. Ann. 156.

[129] *E.A. Christie v. John Christie* (1878), 53 Cal. 26; *Hagle v. Hagle* (1888), 74 Cal. 608.

became a strategic legal maneuver. By presenting the situation as a form of desertion, husbands sought to shift the narrative and portray themselves as victims rather than perpetrators of marital discord. By introducing the element of desertion, husbands aimed to create a scenario where the fault could be perceived as mutual or shifted away from themselves. This tactic, in a society where women often had limited financial independence, serves to sustain control over family resources and reputation while simultaneously providing a means to circumvent the obligation to pay alimony. Among all the studied cases across the seven states, instances of divorce for desertion, where spouses effectively abandoned their location, were consistently affirmed by the Supreme Courts.

Given the number of divorce cases found in the State Supreme Court jurisprudence, it was surprising to see that the question of desertion did not appear to reach the highest court with great frequency. This raises the question as to why desertion cases did not feature prominently in the highest court proceedings? Indeed, desertion was known to be something happening quite commonly in the context of the United States.[130] Several hypotheses may be considered. Some individuals who were abandoned by their spouses might have chosen to keep their private lives confidential. However, the most plausible explanation lies in financial considerations. When one spouse deserted the other, particularly in the case of the wife, the abandoned party was often left with limited financial means to support herself and her family. Under such circumstances, it might have been more expedient to remain legally married to the deserted spouse rather than navigating the complex and costly divorce proceedings, as much in terms of reputation as in terms of finance and time.

The fourth common ground was habitual intemperance, colloquially known as habitual drunkenness. This corresponded to "that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party".[131] Found in all the states, interestingly, habitual intemperance was only recognized in Louisiana with the 1870 Civil Code, where it was combined with the provisions on cruelty. This cause for divorce refers to what is now considered as non-functional alcoholism. It is a rather unique divorce ground that was not found in other codes, such as the various European civil codes. Yet it is a ground for divorce found in most US states.[132] This uniquely American provision lies in societal attitudes toward alcohol consumption, emphasizing the belief that excessive drinking was a moral failing. During the nineteenth century, the rise of temperance movements underscored the perception of excessive alcohol consumption as a societal issue requiring attention to shield spouses and children from the adverse effects of alcoholism. In colonial times, alcohol consumption, whether excessive or moderate, was not deemed problematic, with alcohol considered a form of sustenance, occasional medicine, and an integral part of social life. The one who was a drunkard was one "who loved to drink to excess, who loved to drink and get drunk".[133] However, with the development of the temperance movements, the reasoning changed, and the drunkard came to be understood as a victim of alcohol who could not keep himself from drinking. The recognition of habitual intemperance during

[130] Hartog, H., *Man and Wife in America*, Cambridge (MA), 2000, pp. 33-36; Riley, *Divorce*, pp. 9-33.

[131] LA Rev. Civ. C. 1870, Art. 138; GA C. 1861, § 1670; CA Civ. C. 1872, § 107; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2742, MT C. & Stat. 1895, § 144; SD Rev. C. 1903, § 72.

[132] Except for Maryland, New Jersey, New York, North Carolina, Pennsylvania, Texas, Vermont, and Virginia.

[133] Levine, H. G., "The Discovery of Addiction. Changing Conceptions of Habitual Drunkenness in America", *JSAD* 39 (1978), p. 46.

the nineteenth century emerged as a response to the widespread temperance movement, reflecting legislative efforts to safeguard spouses and children from the detrimental impact of an alcoholic spouse. This exemplifies how the codes closely mirrored societal developments, highlighting the evolving attitudes toward alcohol within society.

Habitual intemperance, as observed in case law, was predominantly invoked by wives, constituting 90% of the cases often in combination with cruelty allegations. The sole instance where a husband petitioned for divorce on this ground resulted in a denial by the court. A notable illustration is found in the Californian case of Peyre v. Peyre,[134] where the husband sought divorce on the ground of the habitual intemperance of his wife. In response, the wife presented a defense, contending that her illness was exploited by her husband. She explained that her husband concocted a mixture, causing severe illness that confined her to bed. Taking advantage of her intoxicated state, he had her committed to a hospital for inebriates without her consent, detaining her there for one week. The lower court ruled in favor of the wife, denying the divorce based on habitual intemperance. However, the husband was ordered to pay permanent alimony of $20 per month and attorney fees. Subsequently, the husband appealed this decision to the Supreme Court. The appellate court reversed the judgment concerning alimony but affirmed the refusal of the habitual intemperance claim. This case underscores the complexities and nuances involved in adjudicating divorce cases based on habitual intemperance, particularly when contested by the party accused of such behavior.

The fifth prevalent legal basis for divorce was criminal conviction.[135] In all civil codes, divorce was permitted in response to the conviction of one's spouse. In the case law, the utilization of conviction as grounds for divorce was consistently initiated by wives. Courts consistently granted divorce to the innocent wife, aiming to shield her from the repercussions of being associated with a convict spouse. Varying conditions were attached to convictions based on the specific codes. In common law civil codes, excluding Georgia, the conviction had to be for a felony.[136] In Georgia, the conviction had to be "for an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the Penitentiary for the term of two years or longer".[137] The concept of moral turpitude encompassed conduct contrary to societal morality. This concept allowed flexibility in divorce law concerning convictions, safeguarding the innocent spouse from punishment for their partner's criminal actions. This flexibility was echoed in the 1870 Civil Code of Louisiana, which allowed divorce, "when the other spouse has been condemned to an infamous punishment".[138] The drafters in this case opted for the term "infamous punishment" instead of specifying felony or crime. According to the American and English Encyclopedia of Law, an infamous crime "is an offense which works such infamy in the person who has committed it", also defined as a crime that "involves moral turpitude".[139] This last point once more establishes a distinction between the codes from the south and the rest. One other type of criminal offense is considered as a possible ground for divorce and can be found in all the Civil Codes of Louisiana: "An attempt of one of the married persons against the life of the other."[140] It's noteworthy that, although the crime of attempted murder didn't necessitate a conviction for constituting grounds for divorce, in practice, a conviction often

[134] *Peyre v. Peyre* (1889), 79 Cal. 336.

[135] LA Rev. Civ. C. 1870, Art. 139; GA C. 1861, § 1670; CA Civ. C. 1872, § 95; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2737, MT C. & Stat. 1895, § 132; SD Rev. C. 1903, § 67.

[136] CA Civ. C. 1872, § 107; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2742; MT C. & Stat 1895, § 144; SD Rev. C. 1903, § 72.

[137] GA C. 1861, § 1670.

[138] GA C. 1861, § 1670.

[139] *The American and English Encyclopedia of Law, Volume XVI*, Northport (NY), 1900, p. 245.

[140] LA Civ. C. 1825, Art. 138; LA Rev. Civ. C. 1870, Art. 138.

served as the primary means of proving such an attempt had occurred. All of the codes implemented the same idea in a different manner: the innocent spouse should not be punished for the other spouse's crime. Divorce here was necessary to free the "innocent spouse" and their reputation.

Looking at the five common grounds for divorce, all the civil codes implemented a common principle in varied ways: the imperative that the innocent spouse should be protected. Each civil code recognizes and affirms this imperative, emphasizing the need to safeguard individuals who find themselves in the unfortunate circumstance constituting a breach of contract. However, rather than ushering in revolutionary changes to divorce laws, these civil codes can be seen as formalizing and solidifying existing trends within the legal landscape. The implication is that states had already begun shaping divorce laws, and the codes now serve to codify and give structure to these evolving norms. This approach suggests a certain continuity in the evolution of divorce laws, with the civil codes acting as tools to streamline and standardize the legal processes surrounding divorce while preserving their individuality. Indeed, alongside those five common grounds, some states provided additional ones.

The most common additional ground for divorce was willful neglect. Like for conviction, this divorce ground was always coupled in the case law with other grounds such as desertion or cruel treatment. This female-only ground in the case law appears to be used as an extra ground to confirm the defective behavior of the husband toward the wife. It was based on the idea of standard of living. One spouse, the wife, could expect from the other spouse, her husband, according to his financial means, a certain standard of living. If he did not provide, she could ask for a divorce, as he had failed to fulfill his part of the contractual obligations of marriage. In terms of proof, the wife had to show that her husband indeed had the financial means to care for his family but was deliberately negligent.[141] It was the only ground for divorce directed towards the behavior of one gender alone.

One other ground which was not found at all in the studied states was the elements and conditions that were usually considered as causes of marriage impediments and could only be found in Georgia. They included consanguinity, default of consent, lack of capacity and the concealment of a pregnancy. Additionally, the Civil Code of North Dakota allowed divorce in case of madness of one's spouse.[142] In this case, divorce was permitted if the mental capacities of one's spouse had altered after marriage. However, it was strictly conditional, requiring that, "incurable insanity must continue for two years, the person affected to have been confined in an asylum for the insane during such time, before it is a cause of divorce, and the testimony of the superintendent of such asylum, showing such person to be incurably insane, must be produced before the court granting such divorce before the same shall be granted".[143] Finally, the last divorce ground only found in one state was defamation, which can only be found in the Civil Codes of Louisiana.[144] It is noteworthy that these state-specific grounds for divorce were conspicuously absent from, and seemingly not incorporated into, the jurisprudence of State Supreme Courts. While it can be reasonably assumed that these grounds were invoked at lower court levels, none of the cases utilizing these unique grounds progressed to the State Supreme Court. The reasons for this selective absence within higher court proceedings remain speculative, prompting potential inquiries into the specific legal processes, social dynamics, or other

[141] CA Civ. C. 1872, § 105; DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2741; MT C. & Stat 1895, § 143; SD Rev. C. 1903, § 71.

[142] ND Rev. C. 1895, § 2739.

[143] ND Rev. C. 1895, § 2743.

[144] LA Civ. C. 1825, Art. 139; LA Rev. Civ. C. 1870, Art. 139.

factors that influenced the limited reach and recognition of these distinct grounds for divorce within the higher echelons of the judicial system.

The civil codes did not only list the legal ground for marriage dissolution, as the common law did. They also sometimes required additional conditions to be attached to the grounds. The first common condition was a temporal requirement. In California, the Dakota Territory, and South Dakota, desertion, neglect, and habitual intemperance were recognized as grounds only if they had persisted for at least one year.[145] Conversely, in North Dakota and Montana, a minimum period of two years was stipulated.[146] These temporal conditions were designed to distinguish between an isolated lapse and a recurrent pattern, implying that while a singular mistake might be forgivable, repeated offenses warranted punitive action. These time constraints served dual purposes—ensuring the gravity of marital transgressions and providing spouses with the opportunity for thoughtful consideration before seeking the dissolution of their marriage. The codes further stipulated that a divorce petition should not be submitted after an unreasonable lapse of time from the commission of the damaging act. This provision aimed to prevent the perception of forgiveness if an excessive delay occurred between the offense and the divorce request.[147]Acknowledging divorce as an extraordinary legal act, the legislature, by incorporating such time constraints, sought to encourage spouses to carefully weigh the decision to dissolve their marital bond. While these conditions theoretically reflected the liberality or restrictiveness of divorce laws in the studied states, historical divorce statistics suggest that individuals found ways to navigate these conditions when seeking marital dissolution, regardless of the challenges posed by time constraints.

As the legal act of divorce was treated with utmost seriousness by the civil codes, provisions were also drafted to nullify the grounds for divorce. These provisions drew inspiration from tort law and English ecclesiastical law concerning marital separation.[148] The prevailing concept during the nineteenth century and thereafter was that divorce served as a remedy for the innocent spouse against the guilty, leaving few alternatives for spouses who mutually and amicably sought separation.[149] Consequently, divorce became legally void in cases of spousal reconciliation and the victim's forgiveness of the transgressions.[150] These limitations on divorce were uniformly present in all the codes. If the innocent spouse chose to forgive the other, the legal basis for divorce ceased to exist. Another reason for canceling a divorce arose when the ostensibly innocent spouse was found to be in connivance with the one at fault.[151] Connivance implied that the supposedly innocent spouse had somehow assisted the other in their fault, or that the guilty spouse had committed the error with the approval of the supposedly innocent spouse. Typically, such situations emerged when both spouses desired a divorce but neither had committed a fault. This limitation makes senses as divorce was a remedy and not supposed to be a willing choice to exit a marriage. The inclusion of limitations due to connivance, condoning, collusion, and recrimination in the codes exemplifies how common law practices were incorporated into the civil codes. Consequently, the US civil codes evolved into a hybrid of statutes and judicial decisions.

[145] CA Civ. C. 1872, § 107; ND Rev. C. 1895, § 2743; SD Rev. C. 1903, § 73.

[146] DT Rev. C. 1877, § 60; ND Rev. C. 1895, § 2741; MT C. & Stat 1895, § 172.

[147] CA Civ. C. 1872, § 111; DT Rev. C. 1877, § 61; ND Rev. C. 1895, § 2744; MT C. & Stat 1895, § 160; SD Rev. C. 1903, § 74.

[148] Clark, *The Law of Domestic Relations*, p. 409.

[149] *Brown v. Brown*, 198 Tenn. 600, 281 S.W.2d 492, 498 (1955).

[150] LA Civ. C. 1825, Art. 149; LA Rev. Civ. C. 1870, Art. 149; CA Civ. C. 1872, § 111; DT Rev. C. 1877, § 61; ND Rev. C. 1895, § 2744, MT C. & Stat. 1895, § 160; SD Rev. C. 1903, § 74.

[151] GA C. 1861, § 1673; NY Civ. C. 1865, § 61; DT Rev. C. 1877, § 61; ND Rev. C. 1895, § 2744, MT C. & Stat. 1895, § 160; SD Rev. C. 1903, § 74.

Finally, the question of remarriage arises. In theory, divorce should free the spouses from the bonds of matrimony, allowing them to remarry freely. However, the prevailing trend, as reflected in the legal provisions of the time, deviated from this theoretical freedom. In fact, only Montana and North Dakota had no remarriage restrictions, implying that individuals in these states were free to enter into new marriages without constraints. Louisiana, on the other hand, imposed a waiting period for the wife before she could remarry. This waiting period was set at ten months after the final divorce judgment.[152] This seemingly calculated period aimed to mitigate potential paternity issues that might arise if the wife remarried too soon after the divorce. Georgia took a more restrictive approach, prohibiting either spouse from remarrying after divorce.[153] This stringent stance likely arose from the social and moral perspectives of the time. In California, remarriage was permitted after the final judgment, which typically occurred one year after the initial court decision in divorce cases.[154] This waiting period, similar to those in other states, emphasized the seriousness and gravity with which divorce was viewed. Divorce was not a way to change spouses but a punishment due to a fault, an idea pushed further in the Dakota Territory and South Dakota, where only the innocent spouse was allowed to remarry.[155] This restriction further underscores the notion that divorce served not only as a legal affirmation of the end of a marriage but also as a form of sanction against the guilty party. In summary, the regulations surrounding remarriage after divorce were not uniform across states and territories, reflecting the diverse societal attitudes and legal approaches prevalent during the nineteenth century in the United States.

The prevalence and application of divorce grounds and conditions in the states under study reveals distinct patterns, akin in both the statutory law and the case law handed down by the Supreme Courts. The nineteenth-century comprehension of divorce, as mirrored in legal statutes and judicial decisions, encompasses a nuanced perspective that seeks to strike a balance between the necessity for legal remedies and the preservation of the institution of marriage amid the backdrop of evolving social norms. By delving into the civil codes and elucidating them with insights gleaned from the case law, one is prompted to contemplate: What insights can be derived from the case law? With the case law as the focal point, what revelations does it offer regarding the civil codes and the institution of divorce?

4. States Supreme Court Jurisprudence Exhibition on Divorce and Civil Codes

The jurisprudential landscape of divorce in the civil code, as exposed by the Supreme Court during the nineteenth century, serves as a rich source not only for understanding the intricacies of divorce law but also for insights into the broader process of codification. This historical examination offers dual perspectives: one can gain valuable insights into the dynamics of divorce within states characterized by diverse legal traditions, and concurrently, one can discern the utilization and impact of civil codes in shaping these narratives. Both perspectives will be examined here, shedding light on the nuanced interplay between divorce jurisprudence and the broader framework of codification during this significant historical period.

4.1. State Supreme Court Jurisprudence on Divorce

[152] LA Civ. C. 1825, Art. 134; LA Rev. Civ. C. 1870, Art. 138.
[153] GA C. 1861, § 1683.
[154] CA Civ. C. 1872, § 132.
[155] DT Rev. C. 1877, § 64; SD Rev. C. 1903, § 83.

An exploration of divorce case law prompts to wonder, firstly, who mainly petitioned for this legal relief. Analysis of Supreme Court cases reveals that, during the nineteenth century, wives did initiate divorce proceedings in 65% of instances.[156] A comparative examination of these statistics on a national scale underscores the alignment of civil code states with the prevailing national average. Indeed, countrywide divorce was asked by the wife in 65% of the cases in 1870. This number evolved to 68.9% by 1916.[157] However, it is crucial to note that men were not passive participants, as their role as plaintiffs in divorce cases still remains substantial. While women predominated as divorce petitioners, the numbers remained relatively balanced. The numerical equilibrium maintained between male and female petitioners challenges simplistic assumptions about gender roles in legal actions for marital dissolution. This balanced participation of both genders in divorce proceedings suggests a nuanced interplay of socio-cultural factors, legal frameworks, and individual motivations. While women may have predominated as initiators, the relatively equitable distribution of roles between husbands and wives signals a more complex narrative. Societal shifts, evolving gender norms, and legal developments likely contributed to the active involvement of both genders in navigating the complexities of divorce.

A notable divergence between husband-and-wife petitioners emerged when considering the grounds for divorce. It became evident that gender played a role in the choice of divorce grounds, with certain grounds being predominantly petitioned by wives. For instance, 90% of divorce petitions citing habitual intemperance and 100% of convictions were initiated by female petitioners. A broader examination of national trends, as reflected in the Report on Marriage and Divorce from 1867 to 1886,[158] indicates similar patterns, with wives primarily petitioning for divorce on grounds of cruelty (7.4 to 1), drunkenness (8.6 to 1), and desertion (1.5 to 1), while the majority of divorces on grounds of adultery were granted to men (56.4%).[159] This discrepancy in the frequency of desertion cases, however, appears more culturally rooted than tied to the specifics of civil code states, considering that some states only recognized desertion or adultery as grounds for total divorce. In addition, desertion was quite common over the country due to the facility of migration during the period. The studied states are not "old states" which might have had their population leaving to move to new territories. In fact, half of the states were new territories that attracted population, which might explain the lower number of desertion cases. Overall, the State Supreme Court jurisprudence shows that the studied states were not groundbreaking in their divorce practice.

Furthermore, the scrutiny of Supreme Court divorce cases transcends the mere examination of grounds for divorce, extending its purview to encompass a critical ancillary concern—alimony. Against the backdrop of a societal context wherein women were predominantly dependent on their husbands, often devoid of employment, alimony assumed a paramount role as a vital means of survival.[160] Consequently, 14% of the examined cases presented issues related to alimony, revealing the substantive impact of this facet on the legal practice surrounding divorce during the nineteenth century. Without any surprise, cases were drastically different,

[156] Divorce petitioners by state: Louisiana: 60% women, 40% men; Georgia: 83% women, 17% men; California: 61% women, 39% men; Dakota Territory: only one case, female petitioner; North Dakota: 50% women, 50% men; Montana 90% women, 10% men; South Dakota: only two cases, male petitioners.

[157] *100 Years of Marriage and Divorce Statistics, United States, 1867–1967* (United States Department of Health, Education, and Welfare, ed.), Rockville (MD), 1973, p. 50.

[158] Wright, *A Report on Marriage and Divorce*, p. 170.

[159] *Ibid.*, pp. 170-171.

[160] Bash, N., *Framing American Divorce*, Berkeley (CA), 1999, pp. 109-114.

whether they were petitioned by women or men. In instances where wives were the petitioners, alimony inquiries focused on non-payment. Courts, aware of the significance of alimony in sustaining the financial well-being of divorced women, displayed limited tolerance for excuses pertaining to payment defaults, particularly when the husband possessed the means to fulfill these obligations. Sanctions for non-compliance extended to imprisonment sentences for contempt of court.[161] Going even further, alimony was a right that could not be willingly ceased by private agreement. Indeed in 1906, the California Supreme Court refused and deemed inexistent an agreement in which the wife agreed not to seek any alimony in her divorce action and ordered her faulty husband to pay monthly alimony.[162] Conversely, when men initiated petitions regarding alimony, the predominant contention revolved around disputes concerning the amount and / or the permanency of the alimony sought. This dichotomy in the nature of alimony cases highlights the gendered dimensions of marital dissolution during this period. The intersection of civil code provisions and alimony adds an additional layer of complexity to this legal landscape.

Courts explicitly recognized that code articles pertaining to alimony were an embodiment of common law principles, thereby adhering meticulously to the letter of the code. This adherence, however, led to a significant challenge in California, where the absence of provisions regarding permanent alimony in the codes resulted in judges refusing such awards to wives until the 1878 Civil Code's amendments. These amendments facilitated courts in providing, "such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just".[163]

Another noteworthy aspect is the procedural requirement for wives in common law civil code states to file a separate suit explicitly for alimony. If alimony was sought within the same action as the divorce, it was summarily denied until a subsequent complaint on the subject was introduced.[164] This procedural formality underscores the specificity of the alimony question, illustrating that the law in codes or statutes unambiguously stipulated that alimony was an entitlement exclusively due to the wife.[165] These code articles were carefully crafted to safeguard the financial interests of the wife and ensure the survival of both her and the children. The gendered nature of alimony persisted until a landmark shift in 1979[166] when alimony legally became gender-neutral. This transformation marked a significant departure from historical norms, reflecting evolving societal attitudes towards gender equality within the realm of marital dissolution.

In summary, the investigation into divorce case law within nineteenth-century State Supreme Courts provides a nuanced comprehension of the intricate dynamics inherent in marital dissolution. Despite the distinct concerns that wives and husbands bring to divorce proceedings, neither party assumes a passive role. Indeed, both are active participants in the intricate legal, societal, and gendered interplay that shapes divorce laws, grounds, and alimony practices during this period.

---

[161] *Ex parte Hart* (1892); *Wells v. Wells* (1910), 26 S.D. 70.

[162] *Cohen v. Cohen* (1906), 150 Cal. 99.

[163] CA Civ. C. 1878, § 139.

[164] Nguyen, M., "History of Alimony in California: 1850 to 1994", *J. Contemp. Legal Issues* 20 (2011-2012), pp. 15-24; Hansen, P., "Death and Remarriage as Alimony-Termination Events: A California History", *J. Contemp. Legal Issues* 22 (2014-2015), pp. 534-536.

[165] *State ex rel. Hagert v. Templeton, District Judge* (1909), 18 N.D. 525.

[166] Morono, D., "A Short History of Alimony in England and the United States", *J. Contemp. Legal Issues* 20 (2011-2012), pp. 3-8.

4.2. State Supreme Court Divorce Jurisprudence on Private Law Codification

As the previous development demonstrates, the State Supreme Court divorce jurisprudence revealed a noteworthy correlation between the development of divorce law and the unfolding of the century, more so than with direct references to civil codes. Nevertheless, the examination of legal foundations following the adoption of codes unveils a prevalent reliance on these codes within Supreme Court decisions. Civil codes were consistently invoked in the scrutinized Supreme Court case law, with a striking statistic revealing that 80% of the Georgia cases cited the code in justification of their rulings. Similarly, jurisdictions such as Louisiana, the Dakota Territory, the Dakotas, Montana, were all citing provisions of their respective civil codes, with Californian divorce jurisprudence consistently joining this practice after 1887.

Legal citation within case law generally serves two primary purposes: to identify sources validating statements for accuracy, or to support or challenge specific assertions.[167] In the realm of Supreme Court jurisprudence on divorce, the codes are consistently cited not as discordant legal references or opinions but rather as authentic legal foundations substantiating decisions. This discovery is intriguing, especially when considering the interpretive rule of common law civil codes (all excluding Louisiana), wherein they are deemed subsidiary sources of law or secondary to the prevailing common law within the state. In principle, the accepted rule stipulates that, except where the code expressly intends to alter the law, common law should take precedence.[168] An exploration of divorce law within the context of prior common law norms suggests that, in instances where the codes did not explicitly modify the law, common law should logically prevail. This renders the consistent citation of codes in divorce jurisprudence all the more perplexing, as these instances seemingly necessitate adherence to common law principles. The unexpected reliance on codes as integral legal foundations rather than subsidiary sources challenges established norms of legal interpretation, prompting a reevaluation of the relationship between civil codes and common law in the evolution of divorce jurisprudence within State Supreme Courts.

However, the usage of the civil code as the legal basis on divorce claims must be balanced. While these codes were indeed cited, they were almost never invoked as the sole reference, with Louisiana being a notable exception. In Louisiana, only two cases cited state case law alongside their civil code,[169] aligning with the state's classification as a civil law tradition, where codes constitute the primary source of law. In contrast, in other states, the citation of codes was consistently accompanied by references to case law and, at times, doctrinal sources. Case law references could originate from within the state, other states, or federal legal sources, and the frequency of such citations varied across states. Remarkably, only Georgia cited English common law during the entire studied century.[170] Those citations were justified by the magistrates as "we have adopted the ecclesiastical law of England into our body of laws touching matrimonial causes".[171] This juxtaposition of civil code sections with common law served to balance the initial observation—despite the extensive use of civil codes, they appeared insufficient to stand alone. The necessity to supplement the codes with common law references

[167] Duxbury, N., *Jurists and Judges: An Essay on Influence*, Oxford, 2001, p. 9.

[168] Pomeroy, J., *The 'Civil Code' of California, originally published as 'The true Method of Interpreting the Civil Code'*, New York, 1885, p. 51.

[169] *Adams v. Hurst* (1836), 9 La. 243; *Mazerat v. Godefroy* (1896), 48 La. Ann. 824.

[170] *John McGee v. Abby McGee* (1851), 10 Ga. 477; *Lucinda Johns v. George Johns* (1860), 29 Ga. 718; *Mosley v. Mosley* (1881), 67 Ga. 92; *Myrick v. Myrick* (1881), 67 Ga. 92; *Campbell v. Campbell* (1893), 90 Ga. 687.

[171] *Mosley v. Mosley* (1881), 67 Ga. 92.

underscored the complementary nature of these legal sources, with the common law accentuating the content of the code article.

In the landscape of State Supreme Court' divorce jurisprudence, a consistent pattern emerges wherein a tandem of legal sources is invoked. However, there are two notable exceptions where the civil code stands alone: alimony and residency. In these instances, civil codes serve as the exclusive legal reference, particularly in addressing procedural questions. Whether elucidating the minimum residency requirement or delineating procedures for filing and assessing alimony, civil codes function more as procedural tools than as standalone legal definitions. This nuanced analysis underscores the intricate interplay between civil codes and other legal sources within the realm of divorce law, shedding light on the multifaceted nature of legal reasoning employed by State Supreme Courts. The civil codes alone are used as procedural tools more than stand-alone legal definition.

The Supreme Court jurisprudence also cited doctrinal reference when a particular point needed theoretical explaining. In Louisiana, the Supreme Court quoted Fenet and the Napoleonic Code,[172] in Georgia it was Kent's Commentaries[173] and principles of English ecclesiastical law.[174] Yet, the only authority used in all the states except Louisiana was Bishop, who seems to be the foremost nineteenth-century doctrinal reference in the United States regarding divorce and marriage law. Born on March 10, 1814, in New York State, and dying on November 4, 1901, Joel Prentiss Bishop was suffering from bad health, having to sometimes put aside his studies, but getting admitted to the bar at nearly thirty and beginning his legal practice and scholarly career.[175] His first book was "Commentaries on the law of Marriage and Divorce" in 1853, published ten years after he had entered a law office as a student.[176] He continued publishing numerous literature pieces on criminal law, torts, and contract law. His work was utilized and followed as "a large part of Bishop's Book consisted of legal doctrine not found in those of prior authors."[177] Indeed, he became the reference regarding marriage and divorce law. In Georgia, he was used extremely early for "perhaps the most accurate definition of marriage is found in Bishop on Marriage and Divorce".[178] His writings were considered as highly original, and significantly influenced their field.[179] Bishop's position on divorce law was that "we have almost everywhere rendered divorce easier, and improved, in many respects, the legal condition of married women".[180] His work was used as a reference on three main subjects in the jurisprudence. Firstly, judges cited and applied his definition for the notion residence. In North Dakota, his expertise was also employed to explain the evidence of conduct[181] in case of a divorce ground behavior. Secondly, his work was utilized in the different states[182] on the

[172] *Eliza Johnston v. Stewart Johnston* (1880), 32 La. Ann. 1129.
[173] *John McGee v. Abby McGee* (1851), 10 Ga. 477.
[174] *Mosley v. Mosley* (1881), 67 Ga. 92; *Myrick v. Myrick* (1881), 67 Ga. 92.
[175] "In Memoriam Joel Prentiss Bishop", *S. L. Rev.* 1 (1901), p. 550.
[176] Bishop, C. S., "Joel Prentiss Bishop", *Am. L. Rev.* 36 (1902), pp. 1-9.
[177] Lawrence, W., "The Works of Joel Prentiss Bishop", *S. L. Rev.* 2 (1876), pp. 68-107.
[178] *Askew v. Dupree* (1860), 30 Ga. 173.
[179] Siegel, S. A., "Joel Bishop's Orthodoxy", *L. Hist. Rev.* 13 (1995), pp. 215-260.
[180] Bishop, J. P., *Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits*, Boston, 1852.
[181] *Anna D. Graham v. Andrew Smith Graham* (1899), 9 N.D. 88.
[182] In Georgia, *Georgia Campbell v. Campbell* (1893), 90 Ga. 687; in California, *Sarah Eidenmuller v. George Eidenmuller* (1878), 37 Cal. 364; in North Dakota, *Anna D. Graham v. Andrew Smith Graham* (1899), 9 N.D. 88.

issue of maintenance due by the husband to the wife and the legal justification to it. Additionally, the question of the definition of divorce versus separation from bed and board[183] and the definition of cruelty as leading to a divorce[184] relied on his reasonings. In Georgia[185] and California,[186] his knowledge also allowed defining condonation. Usually, Bishop's treatise on marriage and divorce is cited with the relevant code articles and sometimes with court jurisprudence.

Despite the nuanced interplay with other legal references across states, it is imperative not to overlook the unmistakable role that civil codes played in shaping divorce jurisprudence. These codes emerged as pivotal and indispensable sources of law, prominently featured in the legal landscape as primary foundations upon which State Supreme Courts based their judgments. The discernible trend indicates a deliberate and conscious choice by the judiciary to accord civil codes a central position in framing legal decisions on divorce matters. This overarching observation crystallizes the primary lesson gleaned from the State Supreme Court divorce jurisprudence: the undeniable significance of civil codes. Rather than being relegated to the periphery, ignored, or merely referenced, these codes were actively embraced and utilized as core legal instruments. The decisions rendered by State Supreme Courts underscore the intentional selection of civil codes as primary sources of law, emphasizing their paramount role in shaping and defining divorce law within the respective jurisdictions. The judicial preference for anchoring judgments in these codes underscores not only their legal relevance but also the conscious decision by judges to maintain their centrality in the realm of divorce law. This recognition of the enduring importance of civil codes in the evolution of divorce jurisprudence stands as a noteworthy takeaway from the analyzed State Supreme Court decisions.

5. Conclusions

The incorporation of divorce regulations within the civil code serves to fortify the authority of the state, as the divorce law transitions from mere statutes to a formalized document, thus imbuing it with heightened potency. This alteration in the structural framework of divorce law, as opposed to its substantive content, constitutes a distinctive development, amplifying state control over family law through a novel form. This structural transformation underscores a shift in the locus of legal authority, emphasizing the codification as a more robust mechanism for asserting state power in matters pertaining to family law.

Analyzing the law, state by state, reveals that the civil codes brought minimal alterations in divorce law. In Georgia, the identical grounds for divorce are evident in both the statutes preceding the code and the code itself, aligning with expectations, as the code was formulated to reenact the prevailing law. Similarly, in Montana, the code introduced no legal modifications to divorce law and essentially replicated the pre-existing statute. In California, some slight changes occurred with removing the grounds for marriage annulment that the statutes had previously held as grounds for divorce. The most noteworthy change instituted by the code

[183] In Georgia, *Mosley v. Mosley* (1881), 67 Ga. 92; in California: *Conant v. Conant* (1858), 10 Cal. 249; also *Louis E. Miller v. Theresa Miller* (1867), 33 Cal. 353; in North Dakota, *Anna D. Graham v. Andrew Smith Graham* (1899), 9 N.D. 88.

[184] In Georgia, *Priscilla D. Buckholts v. Peter Buckholts* (1858), 24 Ga. 238; also *Myrick v. Myrick* (1881), 67 Ga. 92; in California, *Charles S. Lord v. Elisabeth H. Lord* (1868), 1485 Cal. 417; in North Dakota: *Daniel C. McAllister v. Adelaide McAllister* (1898), 7 N.D. 324.

[185] *Priscilla D. Buckholts v. Peter Buckholts* (1858), 24 Ga. 238.

[186] *Johnson v. Johnson* (1894), 36 Pac. 637.

involved an extension of the delay periods. Specifically, the residency requirement for filing a divorce increased from six months to one year, and the duration required for a felony conviction or to establish desertion, neglect, and habitual intemperance reduced from three years to two. In Louisiana and the Dakotas, no alterations were made due to the absence of a pre-existing divorce law in either state prior to the code. In Louisiana, this absence was intentional, while in the Dakotas, it was a result of their early settlement stage. The examination of the specific case of divorce underscores that the codes generally mirrored the ongoing cultural transformations of the nineteenth century, while simultaneously preserving state-to-state disparities in approaches to divorce. In the realm of divorce, the nineteenth-century US civil codes are consequently not agents of change but rather reflections of existing laws in states where divorce had already been legislated and expressions of the nineteenth-century American stance on divorce in regions lacking pre-existing divorce legislation.

The examination of the different grounds for divorce reveals that, despite variations, the codes demonstrated similarities in the permissible reasons for divorce across states, primarily centering on the protection of the victimized spouse. Consequently, only divorces stemming from faults involving damaging or deficient behavior by one of the spouses were legally sanctioned. Such divorces were designed, in theory, to liberate the innocent spouse while concurrently imposing sanctions on the guilty party. Divorce, during the nineteenth century, was not considered a fundamental right inherent to individuals but rather viewed as a recourse available in response to a perceived wrongdoing within the marriage. The legal landscape surrounding divorce reflected a societal perspective that marriage was a solemn contract, and dissolution could only be sought when specific breaches of that contract occurred. In cases where such breaches or wrongs were identified, divorce proceedings were not only a private matter but also carried a substantial public and quasi-criminal dimension.[187] The proceedings were often conducted in a public forum, and the grounds for divorce were scrutinized not only by legal authorities but also by society at large. The process of seeking a divorce involved exposing the alleged wrongs and grievances to public scrutiny, making it akin to a quasi-criminal sanction. This public dimension added a layer of social and moral judgment to the legal proceedings, contributing to the stigmatization of divorce. The emphasis on divorce as a remedy for wrongdoing rather than an inherent right reflected broader societal attitudes towards marriage, morality, and the sanctity of the marital contract during the nineteenth century. A plausible explanation for the observed divergence in grounds for divorce within the civil codes appears to be more closely linked to cultural distinctions, particularly between the southern states and their counterparts. In this context, the legal framework appears to be intricately tied to diverse state cultures rather than adhering strictly to a particular codification tradition.

Divorce has evolved significantly over the years, with all states currently authorizing it; however, the timing of its legalization varied among US states. For instance, South Carolina only permitted divorce in 1949.[188] The regulation of divorce is shaped by a myriad of substantive laws and proceedings, a reflection of the diverse social factors that influence and determine it. As marriage is both a religious and societal construct, its dissolution carries varied meanings across different times and places. By the twenty-first century, divorce had become a commonplace act, shedding much of the strong stigma associated with it. A pivotal legal shift in this trajectory occurred with the diminishing emphasis on guilt during the twentieth century.[189] The

[187] Hartog, *Man and Wife in America*, p. 84.

[188] Rheinstein, *Marriage Stability, Divorce, and the Law*, p. 9.

[189] Friedman, L. M., Percival, R. V., "Who sues for Divorce? From Fault through Fiction to Freedom", *J. Legal Stud.* 61 (1976); Weitzman, L. J., Dixon, R. B., "The Transformation of Legal Marriage through no-fault Divorce", *Family in Transition* (Skolnick, A. S., Skolnick, J. H., eds.), New York, 1999, pp. 143-153.

pursuit of faults and the investigation of guilt waned with the advent of divorce by mutual consent. By 1970, divorce after a specified period of separation became permissible in thirty states. [190] Despite these legal changes, as noted by David R. Mace in 1963, the American divorce law is deemed "an absolutely ghastly, dreadful, deplorably messy situation".[191]

Divorce rates have steadily increased since the nineteenth century, transitioning from one divorce for every twenty-one marriages in 1880 to one for every twelve marriages two decades later.[192] To grasp the prevalence of divorce today, it is illuminating to note that in 1929, a divorce was granted every two minutes,[193] whereas in 2023, this frequency escalated to one divorce every thirteen seconds. And, as much as divorce law shaded through the centuries, its foundations are still rooted in the nineteenth-century laws and practices…

Bibliographical References

Bardaglio, P. W., *Reconstructing the Household. Families, Sex, and the Law in the Nineteenth-Century South*, Chapel Hill (NC), 1995.

Bash, N.:

- *Framing American Divorce*, Berkeley (CA), 1999.
- "Marriage and Domestic Relations", *The Cambridge History of Law in America* (Tomlins, C., Grossberg, M., eds.), 2nd vol., Cambridge, 2008.

Bishop, C. S., "Joel Prentiss Bishop", *Am. L. Rev.* 36 (1902).

Bishop, J. P.:

- *Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits*, Boston, 1852.
- *Marriage and Divorce*, 4th ed., Boston, 1864.

Brown, H. B., "The Law and Procedure in Divorce", *Am. L. Rev.* 44 (1910).

Buckley, T. E., *The great Catastrophe of my Life: Divorce in the old Dominion*, Chapel Hill, 2002.

Bullard, H. A. et al., *A new Digest of the Statute Law of the State of Louisiana, from the Change of Government to the Year of 1841*, New Orleans, 1827.

Cahen, A., *Statistical Analysis of American Divorce*, New York, 1932.

Censer, J. T., "'Smiling Through Her Tears': Ante-Bellum Southern Women and Divorce", *Am. J. Leg. Hist.* 25 (1981), pp. 24-47.

Clark, H. H., *The Law of Domestic Relations in the United States*, St. Paul (MN), 1987.

Clark, R. H. et al., eds., *The Code of the State of Georgia*, Atlanta, 1861.

Cott, N. F., "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts", *WMQ* 33 (1976), pp. 586-614.

Cott, N. F., *Public Vows: A History of Marriage and the Nation*, Cambridge (MA), 2000.

Chused, R. H., *Private Acts in Public Places*, Philadelphia (PA), 1994.

Dubler, A. R., "Governing through Contract: Common Law Marriage in the Nineteenth Century", *Yale L. J.* 107 (1998), pp. 1885-1920.

Ferraro, J. M., *A Cultural History of Marriage*, London 2020.

Fought, L., "'Female Women or feminine Ladies' Gender and Women's Rights before the Antebellum Movement", *The Routledge History of nineteenth-century America* (Wells, J. D., ed.), New York, 2018.

Fredette, A. D.:

- *Marriage on the Border*, Lexington (KY), 2020.

[190] Rheinstein, *Marriage Stability, Divorce, and the Law*, p. xiii.

[191] *Time* 87 (1963).

[192] O'Neill, "Divorce in the Progressive Era", p. 203.

[193] Cahen, A., *Statistical Analysis of American Divorce*, New York, 1932, p. 15.

- "Breaking Vows: Divorce and Separation in the Postrevolutionary United States of America", *A Cultural History of Marriage in the Age of Enlightenment* (Behrend-Martínez, E., ed.), London, 2020.

Friedman, L. M., *A History of American Law*, 3rd ed., New York, 2005.

Friedman, L. M., Percival, R. V., "Who sues for Divorce? From Fault through Fiction to Freedom", J. Legal Stud. 61 (1976)

Funk, K., *The Lawyer's Code: The Transformation of American Legal Practice*, Princeton (NJ), 2018.

Ginsburg, B., "Divorce", *L. Society J.* 7 (1937).

Griswold, R. L.:

- *Family and Divorce in California, 1850–1890: Victorian Illusions and everyday Realities*, Albany, 1982.
- "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790–1900", *J. Soc. Hist.* 20 (1986).

Grossberg, M., *Governing the Hearth*, Chapel Hill (NC), 1988.

Hadden, S. E., *A Companion to American Legal History*, Chichester, 2013.

Hand, G. H., ed., *The Revised Codes for the Territory of Dakota*, Yankton, 1877.

Hansen, P., "Death and Remarriage as Alimony-Termination Events: A California History", *J. Contemp. Legal Issues* 22 (2014-2015).

Hart, A., ed., *The Civil Code of the State of California, as enacted in 1872*, San Francisco, 1880.

Hartog, H., *Man and Wife in America*, Cambridge (MA), 2000.

Horstman, A., *Victorian Divorce*, New York, 1985.

Hittell, T. H., *The general Laws of the State of California, from 1850 to 1864*, San Francisco, 1870.

Hotchkiss, W. A., *Codification of the Statute Law of Georgia, including the English Statute in Force*, Savannah, 1845.

Hudson, J., "From Constitution to Constitution, 1868–1895: South Carolina's unique Stance on Divorce", *SCHM* 98 (1997), pp. 75-96.

Kha, H., *A History of Divorce Law. Reform in England from the Victorian to Interwar Years*, London, 2021.

Kesselring, K. J., Stretton, T., *Marriage, Separation, and Divorce in England, 1500–1700*, Oxford, 2022.

Lawrence, W., "The Works of Joel Prentiss Bishop", *S. L. Rev.* 2 (1876).

Leca, A., *Le Code était presque parfait. Introduction historique au Droit*, Paris, 2013.

Lequette, Y., 1804–2004, *Le Code Civil. Un passé, un Présent, un Avenir*, Paris, 2004.

Leydecker, K., "Breaking Vows: Divorce in European and North American Literature of the Long Nineteenth Century", *A Cultural History of Marriage in the Ages of Empires* (Puschmann, P., ed.), London, 2020.

Levine, H. G., "The Discovery of Addiction. Changing Conceptions of Habitual Drunkenness in America", *JSAD* 39 (1978).

MacKinnon, C. A., *Toward a Feminist Theory of the State*, Cambridge (MA), 1991.

Masferrer, A.:

- "The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation" *Arizona State Law Journal* 40, 1 (2008), pp. 173-256.
- "Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation", *American Journal for Legal History* 50.4 (2008-2010), pp. 355-430.
- "The French Codification and 'Codiphobia' in Common Law Traditions", *Tulane European and Civil Law Forum*, vol. 34 (2019), pp. 1-31.

Meehan, T. R., "'Not Made out of Levity' Evolution of Divorce in Early Pennsylvania", *PMHB* 92 (1968), pp. 441-464.

Milo, J. M., Lokin, J. H. A., Smiths, J. M., *Tradition, Codification and Unification: Comparative-Historical Essays on the Development in Civil Law (Ius Commune Europeum)*, Cambridge, 2014.

Morono, D., "A Short History of Alimony in England and the United States", *J. Contemp. Legal Issues* 20 (2011-2012).

Munson, C., "Divorce Congress and Suggested Improvements in the Statutory Law relating to Divorce", *Yale L. J.* 15 (1906).

Nguyen, M., "History of Alimony in California: 1850 to 1994", *J. Contemp. Legal Issues* 20 (2011-2012).

O'Neill, W., "Divorce in the Progressive Era", *Am. Q.* 17 (1965).

Parker, S., *Informal Marriage: Cohabitation and the Law, 1750–1989*, New York, 1990.

Philipps, R., *Putting Asunder: A History of Divorce in Western Society*, New York, 1988.

Pomeroy, J., *The 'Civil Code' of California, originally published as 'The true Method of Interpreting the Civil Code'*, New York, 1885.

Probert, R., *Marriage Law and Practice in the long Eighteenth Century*, Cambridge, 2009.

Rheinstein, M., *Marriage Stability, Divorce, and the Law*, Chicago, 1972.

Riley, G., *Divorce: An American Tradition*, Lincoln (NE), 1991.

Rocheton, J., *The Genesis of Nineteenth-Century Civil Codes in the United States*, Leiden, 2024.

Schweninger, L., *Families in Crisis in the Old South*, Chapel Hill (NC), 2012.

Shanley, M. L., *Feminism, Marriage, and the Law in Victorian England*, Princeton (NJ), 1989.

Siegel, S. A., "Joel Bishop's Orthodoxy", *L. Hist. Rev. 13* (1995).

Silkenat, D., *Moments of Despair—Suicide, Divorce, & Debt in Civil War Era North Carolina*, Chapel Hill (KY), 2011.

Smith, M. D., *Breaking the Bonds—Marital Discord in Pennsylvania, 1730–1830*, New York, 1991.

Soleil, S., *Le Modèle juridique français dans le Monde. Une Ambition, une Expansion*, Paris, 2014.

Stone, L.:

- *Broken Lives, Separation and Divorce in England 1660–1857*, Oxford, 1993.
- *Road to Divorce*, Oxford, 1990.
- *The Family, Sex and Marriage in England 1500–1800*, New York, 1977.

Tanenhaus, D. S., "Families", *A Companion to American Legal History* (Hadden, S. E., ed.), Chichester, 2013.

Weitzman, L. J., Dixon, R. B., "The Transformation of Legal Marriage through no-fault Divorce", *Family in Transition* (Skolnick, A. S., Skolnick, J. H., eds.), New York, 1999.

Woolsey, T. D., *Divorce and Divorce Legislation especially in the United States*, 2nd ed., Union (NJ), 2000.

Wright, C. D., *A Report on Marriage and Divorce in the United States (1867–1887)*, Washington, 1889.

Vanderlinden, J., *Le Concept de Code en Europe Occidentale du XIIe au XIXe Siècle: Essai de Définition*, Bruxelles, 1967.