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## COMMENTS

### FROM THE LEGISLATURE TO THE COURT OF APPEALS: NEW YORK'S CONVERSION DIVORCE UNDER DOMESTIC RELATIONS LAW SECTION 170

#### I. INTRODUCTION

To make divorce as difficult as possible and therefore preserve the family unit, the first general divorce law in New York<sup>1</sup> provided that adultery was to be the sole ground for divorce in the state.<sup>2</sup> From 1787 until 1879, remarriage by the defendant in a divorce action was prohibited.<sup>3</sup> The 1879 amendment permitted remarriage after five years of good behavior, upon receipt of the court's permission;<sup>4</sup> however, adultery remained the sole statutory ground for divorce.<sup>5</sup>

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1. Law of March 30, 1787, ch. 69, [1787] N.Y. Laws 494. See Comment, *Increased Grounds for Divorce in New York State: A Proposal*, 30 Albany L. Rev. 69, 70 (1966). When the United States achieved its independence from England, it adopted much of the English common law. However, in England the ecclesiastical courts exercised jurisdiction over divorce actions, and there were no such courts in the United States. Consequently, no established mechanism for obtaining a divorce was adopted, and the only method of dissolving a marriage was through a special act of the state legislature. 1 H. Foster & D. Freed, *Divorce, Separation and Annulment* § 6:4 (1966). When this method proved unsatisfactory, it was abandoned by the states and jurisdiction was relinquished to the courts. In New York, this step was taken in 1787. Mace, *Marriage Breakdown or Matrimonial Offense: A Clinical or Legal Approach to Divorce?*, 14 Am. U.L. Rev. 178, 180-81 (1965) [hereinafter cited as Mace]; Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32, 35-36 (1966) [hereinafter cited as Wadlington].

2. Nevertheless, the legislature retained the power to grant divorce on additional grounds until a 1903 constitutional amendment. See 1 H. Foster & D. Freed, *supra* note 1, § 6:2 n.16. In addition to allowing the chancellor to dissolve marriages on the ground of adultery and providing that any remarriage by the adulterous party would be void, the act permitted the other party to remarry "as if the party convicted was actually dead." Law of March 30, 1787, ch. 69, [1787] N.Y. Laws 494, 495.

3. Law of May 19, 1879, ch. 321, [1879] N.Y. Laws 405. See Legislative Note, *Retroactive Application of New Grounds for Divorce under § 170 Domestic Relations Law*, 17 Buffalo L. Rev. 902, 904 (1968).

4. Law of May 19, 1879, ch. 321, [1879] N.Y. Laws 405; Law of April 16, 1879, ch. 164, [1879] N.Y. Laws 231. No adjudicated adulterer was allowed to remarry during the life of the complainant unless the court which granted the divorce modified the judgment. Modification was allowed upon a showing that the plaintiff in the prior action had remarried and upon proof of the uniformly good conduct of the defendant, provided a minimum of five years had passed since entry of the judgment of divorce.

5. "Sociologists, psychiatrists and other behavioral science experts have long maintained that adultery is not a substantial root cause of marital failure." Perles, *Marital Offense Grounds And Defenses Under 1966 Divorce Reform Act* (pts. 1-2), 163 N.Y.L.J., Jan. 12-13, 1970, pt. 2, at 4, col. 3 [hereinafter cited as Perles]. With reference to the new law, the same author states: "It is rather refreshing . . . that perjured testimony of

With the passage of time, this limitation was recognized as unnecessarily restrictive,<sup>6</sup> basically unrealistic, and in need of reevaluation.<sup>7</sup> Perjury, migratory divorces,<sup>8</sup> consensual divorces and fraudulently obtained annulments were among the evils attributed to its outdated provisions.<sup>9</sup> As a counterweight, the New York courts demonstrated a reluctance to permit collateral attacks on migratory divorces<sup>10</sup> and liberally enforced rules governing annulment and separation.<sup>11</sup> Nevertheless, a viable divorce law could issue only from the legislature. In spite of public outcry for reform, this obviously outdated situation<sup>12</sup> remained basically unchanged until April 27, 1966 when the Divorce Reform Law<sup>13</sup> was signed, with the provision that it was to become effective on September 1, 1967.<sup>14</sup> In contrast to prior law, it provided six grounds for divorce:

adultery seems to be no longer necessary." *Id.* pt. 1, at 4, col. 1. See generally Bureau Project, *A Divorce Reform Act*, 5 *Harv. J. Legis.* 563, 563-73 (1968).

6. "New York's divorce law was the strictest in the United States, in the sense that all other states had more than one ground for divorce." Comment, *New York's New Divorce Law: Beyond the Sixth Commandment*, 5 *Colum. J.L. & Soc. Probs.* 1 n.3 (1969) [hereinafter cited as *Beyond the Sixth Commandment*].

7. See Grossman, *How Can We Make Divorce Realistic*, 23 *N.Y. State Bar Bull.* 350 (1951). Although divorce laws vary considerably, it has been noted that adultery is a ground for divorce in every American jurisdiction and "is an established and culturally accepted ground for terminating marriage." Foster, *Marriage: A "Basic Civil Right of Man"*, 37 *Fordham L. Rev.* 51, 76 (1968) [hereinafter cited as *Foster*].

8. As of 1965, the number of migratory divorces obtained by New York domiciliaries, in Mexico alone, was in excess of 200,000. *Beyond the Sixth Commandment* at 2 n.13. As one author noted: "A woman may appear in a divorce court in Nevada and assure the judge that she has come to the state with the intention of settling there . . . when in fact she has no such intention, and actually has a return ticket in her pocket. Again, in New York State, a man arranges to be found in bed in a hotel room with a woman he has never seen before, and in whom he has not the slightest sexual interest, in order that his wife may tell the divorce court judge that her husband has committed adultery." Mace at 179.

9. 1 H. Foster & D. Freed, *supra* note 1, § 6:2, at 248-49; Mace at 178-79; Ploscowe, *A Modern Divorce and Judicial Separation Act for New York*, 30 *Albany L. Rev.* 1 (1966).

10. See Phillips, *Equitable Preclusion of Jurisdictional Attacks on Void Divorces*, 37 *Fordham L. Rev.* 355 (1969); Comment, *supra* note 1, at 70-72.

11. See Legislative Note, *supra* note 3, at 904. One estimate placed the number of New York annulments at one-third to one-half of all those granted in the United States. Wadlington at 33 n.1.

12. "[T]he strength of sin is the law." I Corinthians 15:56, quoted in Wadlington at 32. A primary purpose of the new law was to eliminate the old evils and abuses. For example, although only five percent of all American divorces were migratory, the comparable figure for New York was estimated at sixty percent. Further, the interpretation of fraud under the annulment law was far more liberal in New York than in any other state. Note, *New York Domestic Relations Law Amendments*, 12 *N.Y.L.F.* 105 (1966). The 1960 marriage-divorce ratio reflected this tendency. Nationally it was 4:1, while in New York it was 17:1. *Beyond the Sixth Commandment* at 2 n.6.

13. Law of April 27, 1966, ch. 254, [1966] *N.Y. Laws* 833, as amended, *N.Y. Dom. Rel. Law* § 170 (Supp. 1969).

14. *Id.* § 15.

(1) cruel and inhuman treatment; (2) abandonment for two years; (3) imprisonment for three or more consecutive years after the marriage; (4) adultery; (5) living apart for a minimum of two years pursuant to a separation decree; and (6) living apart for a minimum of two years pursuant to a written separation agreement subscribed and acknowledged by the parties.<sup>15</sup> The latter two grounds are generally referred to as non-fault<sup>16</sup> or conversion grounds.<sup>17</sup>

## II. LEGISLATIVE BACKGROUND

While the basic purpose of the Divorce Reform Law was liberalization, the statute as enacted was the result of numerous compromises.<sup>18</sup> Due to various conflicting pressures—religious, political and social—it might have been anticipated that the measure, “spawned in political pragmatism and compromise, might be afflicted with certain ambiguities . . . .”<sup>19</sup> While it was obviously a poorly drafted statute, its deficiencies were disregarded in the effort to achieve some degree of reform.<sup>20</sup>

As originally proposed by the Joint Legislative Committee on Matrimonial and Family Affairs, the bill would have permitted divorce after consensual living apart for two years.<sup>21</sup> When this proposal, known as the Wilson-Sutton bill, proved incapable of gaining the necessary support, the legislative leaders of the Senate and Assembly introduced a compromise measure which came to be known as the leaders’ bill,<sup>22</sup> which would have allowed divorce conversion only after living apart pursuant to a separation decree for a minimum of five years.<sup>23</sup> Adverse legislative reaction led to further compromise and revision, with the final statute incorporating the two year minimum of the Wilson-Sutton bill, while adding a separation agreement ground to the leaders’ bill.<sup>24</sup>

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15. *Id.* § 2. The grounds are contained in N.Y. Dom. Rel. Law § 170 (Supp. 1969), to which the textual numbering conforms.

16. Wadlington at 63-74. But see notes 67-87 *infra* and accompanying text.

17. “Conversion” is used to indicate that the only requirement for divorce based on these grounds is that the parties have lived apart for the required period of time in accordance with the decree or agreement.

18. See Cohen, *The Need For Liberal Judicial Construction to Effectuate the Purposes of the New Divorce Law in New York*, 18 *Brooklyn Barrister* 13 (1966) [hereinafter cited as Cohen].

19. *Shapiro v. Shapiro*, 59 Misc. 2d 412, 413-14, 298 N.Y.S.2d 785, 787 (Sup. Ct. 1969). In fact, “it was an unexpected miracle that nonfault grounds for divorce survived in even limited form.” Foster & Freed, *The Conversion Ground for Divorce in New York* (pts. 1-3), 161 *N.Y.L.J.* Apr. 30-May 2, 1969, pt. 1, at 1, col. 5 [hereinafter cited as Foster & Freed].

20. See Cohen at 13; Foster & Freed pt. 1, at 1, col. 4.

21. Senate Intro. No. 627, 1966 N.Y. Legis. Record & Index 60; Foster & Freed pt. 1, at 1, col. 4. There was no requirement that the living apart be pursuant to either a separation decree or agreement.

22. Senate Intro. No. 4504, 1966 N.Y. Legis. Record & Index 423; Assembly Intro. No. 5836, 1966 N.Y. Legis. Record & Index 1020. See Cohen at 13.

23. See Foster & Freed pt. 1, at 1, col. 4.

24. “The proponents of the proposal chose to compromise and took the two conver-

Although New York's lack of a permanent record of legislative debate complicates legislative history analysis, some conclusions may be drawn. Senator John H. Hughes<sup>25</sup> believed that the new law would not be applied retroactively; on the other hand, Phillip Schaeffer, counsel to the committee which produced the Wilson-Sutton bill, asserted that the committee intended full retroactivity.<sup>26</sup> However, the lapse of time between the various proposals makes these conflicting opinions reconcilable and indicates that Senator Hughes' opinion should be afforded greater weight, even though to some extent it was based on the questionable belief that retroactive application would be unconstitutional.<sup>27</sup> This opinion was based largely on the assumption that retroactive application was expressly barred because the two year living apart minimum could not be computed to include any period prior to September 1, 1966.<sup>28</sup> However, this provision as interpreted relates only to the beginning of the two year computation, and does not bar conversion of prior decrees after expiration of the requisite period, *i.e.*, on September 1, 1968.<sup>29</sup> On the other hand, the law's five year statute of limitations is specifically inapplicable to conversion divorces—indicating an intent to allow conversion of the numerous separation decrees granted more than five years prior to the crucial date.<sup>30</sup>

In 1968, the legislature amended section 170(5) in minor respects,<sup>31</sup> concurrently amending section 170(6) to require that separation agreements be subscribed and acknowledged by the parties on or after August 1, 1966 to qualify for conversion.<sup>32</sup> The Legislative Memorandum accompanying the bill stated that the amendment expressed an intent to bar retroactive effect for section 170(6).<sup>33</sup> As to section 170(5), it said:

As originally introduced this bill would also have provided that the separation ground for divorce based upon a judgment or decree of separation must have been

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sion grounds . . . explaining, rather lamely, I suggest, that otherwise divorce reform might have to wait another 149 years." Perles pt. 2, at 4, col. 3 (citation omitted).

25. Senator Hughes was Chairman of the Judiciary Committee, a sponsor of the leaders' bill, and a chief architect of the compromise measure finally enacted.

26. Foster & Freed pt. 1, at 4, col. 1.

27. *Id.*

28. Law of April 27, 1966, ch. 254, § 15, [1966] N.Y. Laws 842.

29. See Foster & Freed pt. 1, at 4, col. 1 & n.8.

30. Law of April 27, 1966, ch. 254, art. 11-A, § 210(b)(c), [1966] N.Y. Laws 836.

31. Law of June 16, 1968, ch. 700, § 1, [1968] N.Y. Laws 2314. Since some states grant separation judgments rather than decrees, the statutory language was changed to include the former. In addition, the amendment lessened the requirement of compliance with judgment or decree from "due" to "substantial" compliance.

32. *Id.* § 2. This date was later changed to April 27, 1966 to allow conversion of separation agreements filed after that date in reliance on the original statute. Law of May 26, 1969, ch. 964, § 1, [1969] N.Y. Laws 2351. Thus, conversion of old separation agreements was effectively precluded unless both parties decided to re-execute. The failure to similarly modify section 170(5) was thought to raise a "negative inference" that the section could be applied retroactively. See Foster & Freed, Family Law, 20 Syracuse L. Rev. 411, 412-13 (1968).

33. Joint Legis. Comm. on Matrimonial & Family Laws, Memorandum on Proposed Amendments to N.Y. Dom. Rel. Law § 170, [1968] McKinney's N.Y. Laws 2308.

one granted on or after September 1, 1966. By amendment, this limitation was deleted. The bill as it now stands, demonstrates a legislative intent to construe that provision as retroactive.<sup>34</sup>

Significantly, the Governor was advised of this intent before signing the act, and was informed by his counsel that only section 170(6) would be denied retroactive application.<sup>35</sup>

Thus, although the statutory language clearly supports retroactive application, the 1966 Legislature, as a whole, apparently understood the section to be only prospective in application.<sup>36</sup> While the 1968 Legislature apparently intended retroactive application, its action merely added to the existing state of confusion; judicial conflict in interpretation was almost inevitable. This conflict culminated in diametrically opposed decisions in two departments of the appellate division,<sup>37</sup> and was resolved only by a decision of the New York Court of Appeals construing section 170(5) as retroactive<sup>38</sup>—a decision which raises important constitutional<sup>39</sup> and public policy questions.

### III. CONFLICT IN THE LOWER COURTS

#### A. Trial Court Decisions

Generally, those lower courts which found section 170(5) to be retroactive relied on the statutory language and the avowed intent set forth in the 1968 Legislative Memorandum;<sup>40</sup> those courts adopting the opposite view relied on the 1966 Legislature's silence as to retroactivity to infer that it was not intended.<sup>41</sup> Although most trial courts held section 170(5) to be retroactive,<sup>42</sup> opposition to this view was extensive.

In *Abelson v. Abelson*,<sup>43</sup> the court indicated that the legislature's failure to include express language of retroactivity barred such an interpretation.<sup>44</sup> How-

34. *Id.* For a discussion of retroactivity which distinguishes between "method retroactivity" and "vested rights retroactivity," see Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 *Calif. L. Rev.* 216, 216-20 (1960). See generally Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947).

35. *Foster & Freed* pt. 1, at 4, col. 2.

36. *Id.* pt. 2, at 4, col. 2.

37. *Schacht v. Schacht*, 32 App. Div. 2d 201, 301 N.Y.S.2d 151 (2d Dep't 1969); *Gleason v. Gleason*, 32 App. Div. 2d 402, 302 N.Y.S.2d 857 (1st Dep't 1969), *rev'd*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

38. *Gleason v. Gleason*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

39. Counsel for the respondent in *Gleason* has indicated that an application for a writ of certiorari may eventually be filed to determine these constitutional issues. See *N.Y.L.J.*, Jan. 22, 1970, at 1, col. 7.

40. See *Foster & Freed* pt. 1, at 4, col. 2 & n.8. See also *Leclaire v. Leclaire*, 58 *Misc.* 2d 41, 294 N.Y.S.2d 334 (Sup. Ct. 1968).

41. *Foster & Freed* pt. 1, at 4, col. 1 & n.8.

42. *Id.* pt. 1, at 4, col. 3 n.8.

43. 59 *Misc.* 2d 172, 298 N.Y.S.2d 381 (Sup. Ct. 1969).

44. *Id.* at 178-79, 298 N.Y.S.2d at 387-88 (*dictum*). See also 1 *McKinney's Cons. Laws of N.Y., Statutes* § 74 (1942) [hereinafter cited as *Statutes*] as to implications to be drawn from legislative silence.

ever, since statutory provisions generally are construed with any subsequent amendments,<sup>45</sup> the intent of the 1968 Legislature could support retroactive application. The 1968 amendment and its accompanying Legislative Memorandum provided the basis for the decision in *Adelman v. Adelman*.<sup>46</sup> There, the court found the legislative intent easily determinable and held section 170(5) to be retroactive.<sup>47</sup> The *Abelson* court had rejected this approach because the 1968 Legislature did not specifically treat the question of retroactivity, and it declined to infer any intent from the Legislative Memorandum which was not manifest in the amendment itself.<sup>48</sup>

In *Zientara v. Zientara*,<sup>49</sup> the trial court found that the 1968 amendment was not a reenactment of the entire section;<sup>50</sup> therefore, the law "remained the creature of [the 1966] body."<sup>51</sup> The court also concluded that sound legislative policy required that both conversion grounds be treated identically as to retroactivity. Since section 170(6) is expressly non-retroactive, the court felt that section 170(5) also should be prospective only.<sup>52</sup> However, this interpretation disregards the significant differences involved. For example, while a separation agreement is a voluntary undertaking largely governed by the law of contracts, a separation decree is a final judicial determination; the rights and remedies concerning enforcement or modification are substantially different.<sup>53</sup> Further, the *Zientara* court seemingly gave insufficient consideration to the possibility of fraud and collusion inherent in the conversion of separation agreements—a possibility practically non-existent with separation decrees, which are matters of court record.<sup>54</sup>

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45. See Statutes § 97.

46. 58 Misc. 2d 803, 296 N.Y.S.2d 999 (Sup. Ct. 1969).

47. *Id.* at 804, 296 N.Y.S.2d at 1002.

48. 59 Misc. 2d at 178, 298 N.Y.S.2d at 387-88.

49. 59 Misc. 2d 344, 299 N.Y.S.2d 253 (Sup. Ct.), *rev'd*, 32 App. Div. 2d 822, 302 N.Y.S.2d 294 (2d Dep't 1969).

50. *Id.* at 351, 299 N.Y.S.2d at 260. If the amendment were a reenactment of the entire section, the intent of the 1966 Legislature would have been superseded by that of the 1968 body. See *Kaplan v. Kaplan*, 31 App. Div. 2d 247, 249-50, 297 N.Y.S.2d 881, 884 (2d Dep't 1969).

51. 59 Misc. 2d at 351, 299 N.Y.S.2d at 260.

52. *Id.* at 352, 299 N.Y.S.2d at 261. This proposition was cited with approval in *Gleason v. Gleason*, 32 App. Div. 2d 402, 406, 302 N.Y.S.2d 857, 861 (1st Dep't 1969), *rev'd*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970). In *Shapiro v. Shapiro*, 59 Misc. 2d 412, 298 N.Y.S.2d 785 (Sup. Ct. 1969), the legislative failure expressly to deny retroactivity in the 1968 amendment to section 170(5) was interpreted as an intent to allow retroactive application only by the innocent spouse. *Id.* at 418-19, 298 N.Y.S.2d at 791. The assumption made by the court was that such a provision, if added, would have precluded all retroactive conversion. See notes 67-75 *infra* and accompanying text.

53. See 58 Misc. 2d at 809, 296 N.Y.S.2d at 1006 where the court noted the differences in enforcement procedures. For an excellent survey of the distinctions between separation agreements and decrees, see M. Grossman, *New York Law of Domestic Relations* §§ 398-496 (1942) and the 1962 Cumulative Supplements thereto. See also *Foster & Freed* pt. 3, at 1, col. 5. But see Statutes § 74.

54. *Foster & Freed* pt. 3, at 1, col. 5 and at 4, col. 1.

*Church v. Church*<sup>55</sup> also held section 170(5) to be solely prospective, claiming retroactive application against innocent spouses would violate the due process and equal protection clauses of the New York<sup>56</sup> and federal<sup>57</sup> constitutions by impairing vested property rights.<sup>58</sup> On the other hand, the *Adelman* court found this argument nugatory, since an expectation based upon the continuation of present law could not be "vested."<sup>59</sup> It further noted that unvested statutory privileges and exemptions such as are involved in the marriage relation may be abrogated by the state.<sup>60</sup> On the other hand, even in denying retroactive application, the *Abelson* court likewise noted the legislature's power to deprive a wife of her statutory right to inherit, although it found serious constitutional objections to retroactive application.<sup>61</sup>

The well-reasoned trial court opinion in *Gleason v. Gleason*<sup>62</sup> noted the many conflicting interpretations. The court commented:

The deep, moral, ethical and religious issues which confronted the Legislature in the enactment of the new divorce law are now again being aired with respect to the manner in which the new law is to be applied in the courts. It is therefore no surprise that the decisions, to date, on this issue have been far from uniform.<sup>63</sup>

In analyzing the objections to retroactive application, the court found the constitutional issues to be most serious.<sup>64</sup> After pointing out that there are no vested rights to remain married or to inherit,<sup>65</sup> the court noted that those states which have construed non-fault divorce grounds retroactively had faced and rejected the same constitutional arguments. Thus, the *Gleason* court was unable to find any showing of unconstitutionality.<sup>66</sup>

#### B. *Variations on the Theme: The Imposition of Fault Criteria*

The interpretive conflict in the trial courts was not limited solely to the question of retroactivity. In some cases, retroactive application was qualified by a distinction as to the status of the plaintiff. For example, *Shapiro v. Shapiro*<sup>67</sup> held that section 170(5) could be applied retroactively in favor of

55. 58 Misc. 2d 753, 296 N.Y.S.2d 716 (Sup. Ct. 1968).

56. N.Y. Const. art. I, §§ 6, 11.

57. U.S. Const. amend. XIV, § 1.

58. 58 Misc. 2d at 754-55, 296 N.Y.S.2d at 717. The vested rights which the court thought would be impaired were the marital status, property, social security and inheritance rights. *Id.* at 754, 296 N.Y.S.2d at 717.

59. 58 Misc. 2d at 806-08, 296 N.Y.S.2d at 1004-05.

60. *Id.* at 807, 296 N.Y.S.2d at 1004-05.

61. 59 Misc. 2d at 181, 298 N.Y.S.2d at 390.

62. 59 Misc. 2d 96, 298 N.Y.S.2d 375 (Sup. Ct.), *rev'd*, 32 App. Div. 2d 402, 302 N.Y.S.2d 857 (1st Dep't 1969), *rev'd*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

63. *Id.* at 98-99, 298 N.Y.S.2d at 378.

64. *Id.* at 99, 298 N.Y.S.2d at 378. See U.S. Const. art. I, § 10; *id.* amend. XIV, § 1; N.Y. Const. art. I, §§ 6, 11.

65. 59 Misc. 2d at 99, 298 N.Y.S.2d at 379.

66. *Id.* at 100-01, 298 N.Y.S.2d at 379-80.

67. 59 Misc. 2d 412, 298 N.Y.S.2d 785 (Sup. Ct. 1969).



the innocent but not the guilty spouse.<sup>68</sup> In reaching this decision, the court found section 170(5) to be entirely fault oriented,<sup>69</sup> as only the innocent spouse initially could obtain a separation decree which later would be convertible into a divorce.<sup>70</sup> The court indicated that the legislature had been mindful of the economic benefits<sup>71</sup> which a spouse might lose through an undesired conversion, and had demonstrated a "sympathetic recognition of these practical considerations."<sup>72</sup> The court also noted that rules of statutory construction sanctioned this result, and presumed that the legislature was aware of these rules.<sup>73</sup> By giving the innocent spouse the election to proceed under section 170(5) or to pursue her remedy in Family Court,<sup>74</sup> the legislature allowed her the option of precluding a New York divorce.<sup>75</sup>

68. *Id.* at 415, 298 N.Y.S.2d at 738. The court used these terms to distinguish a successful plaintiff in a prior separation action (innocent) from the defendant therein (guilty). However, as noted in *Schacht v. Schacht*, 32 App. Div. 2d 201, 203-04, 301 N.Y.S.2d 151, 154 (2d Dep't 1969), the term "guilty" frequently is inaccurate. In separation actions ostensibly based on fault but actually grounded on incompatibility, the plaintiff may have been equally or even more responsible for the collapse of the marriage than the defendant.

69. 59 Misc. 2d at 415, 298 N.Y.S.2d at 788-89. See also *Church v. Church*, 58 Misc. 2d 753, 755, 296 N.Y.S.2d 716, 718 (Sup. Ct. 1968), dismissing the complaint in an uncontested divorce action on the ground that it could not be maintained by the guilty spouse.

70. New York presently allows separation on the following grounds: (1) cruel and inhuman treatment which renders cohabitation unsafe or improper; (2) abandonment; (3) a husband's neglect or refusal to provide for his wife; (4) adultery; and (5) confinement to prison after marriage for three or more consecutive years. N.Y. Dom. Rel. Law § 200 (Supp. 1969).

71. 59 Misc. 2d at 416, 298 N.Y.S.2d at 789. The most obvious and important economic benefit which might be lost through conversion is the surviving spouse's statutory right of election against the decedent's will. See N.Y. E.P.T.L. § 5-1.1 (1967), as amended, *id.* (Supp. 1969). See also *id.* § 5-1.4 (1967), as amended, *id.* (Supp. 1969) on the effect of such a divorce upon the decedent spouse's will. Concern has also been voiced over the possible loss of survivor's rights under social security and pension plans. See note 58 *supra*.

72. 59 Misc. 2d at 416, 298 N.Y.S.2d at 789.

73. *Id.* at 419-20, 298 N.Y.S.2d at 792. For example, the court pointed out the general rule that statutes are given prospective application. While remedial statutes are an exception to this rule, only procedural statutes are considered remedial. Since the innocent spouse was able to institute a separation action under prior law, the Divorce Reform Law provided a further remedy and in that sense was remedial and hence retroactive. On the other hand, since the guilty spouse was not entitled to a separation under prior law, as to him section 170(5) was a new remedy and not a mere change in procedure. Thus it should be applied only prospectively. *Id.*

74. Under the Family Court Act, a husband, if possessed of sufficient means, is chargeable with the support of his wife, N.Y. Family Ct. Act § 412 (1963), and a father with the support of his minor children, *id.* § 413 (Supp. 1969), and may be required to pay a reasonable sum as determined by the court.

75. 59 Misc. 2d at 416, 298 N.Y.S.2d at 789-90. Even in limiting retroactive application to the innocent spouse, the court noted, "it is clear that religious considerations, a spouse's inchoate inheritance rights, and other related economic benefits such as those un-

An analogous attempt to impose unlegislated restrictions on conversion divorces is found in *Abelson v. Abelson*.<sup>76</sup> There the defendant wife attempted to raise the equitable clean hands doctrine<sup>77</sup> by pleading as a defense the plaintiff husband's conduct since the entry of the separation decree.<sup>78</sup> In refusing to dismiss the defense, the court found the issue proper for factual determination. It noted that although the power over matrimonial actions is derived solely from statute,<sup>79</sup> historically they have been equitable in nature and the clean hands doctrine has been applied.<sup>80</sup>

In view of the legislature's failure to provide the traditional divorce defenses

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der social security, pension and group health plans, are neither 'vested rights' . . . nor otherwise constitutionally protected . . ." Id. at 416, 298 N.Y.S.2d at 789 (citations omitted). In *Adelman v. Adelman*, 58 Misc. 2d 803, 296 N.Y.S.2d 999 (Sup. Ct. 1969), the Shapiro rationale was specifically rejected. Although decided prior to Shapiro, Adelman considered the innocent spouse argument. Noting the absence of any express limitation, the court held that "[t]he question of fault is not involved." Id. at 805, 296 N.Y.S.2d at 1003.

76. 59 Misc. 2d 172, 298 N.Y.S.2d 381 (Sup. Ct. 1969).

77. Under the clean hands doctrine, a court of equity will refuse relief to suitors who are themselves guilty of unconscionable conduct in the transaction in question. See 2 J. Pomeroy, *Equity Jurisprudence* §§ 379-99, 90-100 (5th ed. 1941).

78. Defendant alleged that plaintiff had been living in open adultery, as he had procured a void Mexican divorce; that he had married his paramour in Connecticut; and that defendant had obtained a declaratory judgment that the Mexican divorce was void. 59 Misc. 2d at 173, 298 N.Y.S.2d at 383.

79. 59 Misc. 2d at 175, 298 N.Y.S.2d at 385. See note 1 supra.

80. 59 Misc. 2d at 175, 298 N.Y.S.2d at 385, citing *Lodati v. Lodati*, 268 App. Div. 1003, 52 N.Y.S.2d 119 (2d Dep't 1944) (unclean hands found in an annulment action where plaintiff husband had financed his wife's prior divorce and, for reasons relating to the Selective Service Act, had knowingly induced her to marry him before her decree became final); *Gevis v. Gevis*, 141 N.Y.S.2d 121 (Sup. Ct. 1955) (agreement to pay plaintiff alimony until she remarried not reinstatable where plaintiff had remarried but the marriage had been dissolved due to plaintiff's fraudulent representations of willingness to bear children); *Holiber v. Holiber*, 207 Misc. 716, 139 N.Y.S.2d 774 (Sup. Ct. 1955) (wife seeking modification of divorce decree to provide increased alimony and support payments had unclean hands, in that she concealed her remarriage from the court). Accord, *Church v. Church*, 58 Misc. 2d 753, 296 N.Y.S.2d 716 (Sup. Ct. 1968), where the court stated: "While the rights with respect to the marital status adjudicated in a matrimonial action are statutory in origin, the court which adjudicates them sits in equity, and a prior 'guilty' spouse does not come to that court with clean hands. To reward the 'guilty' spouse against the prior and present innocent spouse offends and violates fundamental concepts of fairness, due process and equal protection of the laws. It not only ignores, but it divests and impairs, the innocent spouse's vested rights of marital status, property, social security and inheritance." Id. at 755, 296 N.Y.S.2d at 718. But see *Foster & Freed*, who state: "Divorce cases are not proceedings in equity nor does the plaintiff seek an extraordinary equitable remedy. The proceedings are statutory, and the plaintiff seeks statutory relief. The Legislature in effect has said that certain dead marriages should be subject to legal termination regardless of fault; hence, a gratuitous imposition of the clean hands doctrine is in derogation of the Divorce Reform Law and an emasculation of section 170(5)." Id. pt. 2, at 4, cols. 1-2.

such as recrimination,<sup>81</sup> collusion,<sup>82</sup> connivance,<sup>83</sup> or condonation<sup>84</sup> in conversion divorce actions,<sup>85</sup> such a position is questionable. It would appear that the clean hands doctrine survives only to the limited extent of the statutory requirement that the plaintiff substantially perform the terms of the underlying separation decree to receive a conversion divorce.<sup>86</sup> Furthermore, since the requirement of "substantial performance" was substituted in 1968 for the prior requirement of "due performance,"<sup>87</sup> there is an indication of a legislative intent to deny conversion divorce only to those guilty of serious misconduct.

### C. Conflict in the Appellate Division

The conflict apparent in the lower courts soon reached the appellate division, where a direct split of authority developed. In *Schacht v. Schacht*,<sup>88</sup> the second department unanimously held section 170(5) to be retroactive. However, in *Gleason v. Gleason*,<sup>89</sup> a divided first department, with two justices concurring in a separate opinion and two justices dissenting, held it to be solely prospective. The comprehensive opinion of the *Gleason* trial court, cited with approval by the second department in *Schacht*,<sup>90</sup> carried little weight with the first department.

The *Schacht* court heavily relied on a literal reading of the statute to support its finding of retroactivity,<sup>91</sup> and found this conclusion bolstered by the legislative intent.<sup>92</sup> On the other hand, the *Gleason* court found the available data both "confusing and indecisive."<sup>93</sup> On this basis, the court declined to speculate on the reason for the 1968 Legislature's failure to act on the proposed limita-

81. The recrimination defense is similar to the clean hands doctrine. It permits either party to preclude divorce by establishing the other party's commission of an offense which would constitute a statutory ground for divorce. See F. Keezer, *Marriage and Divorce* § 522, at 563-66 (3d ed. J. Morland 1946); Wadlington at 38.

82. The collusion defense is designed to prevent parties from actively cooperating to obtain a divorce. F. Keezer, *supra* note 81, § 515, at 546-50; Wadlington at 39.

83. When one spouse consents to conduct of the other which otherwise would be grounds for divorce under circumstances where consent is considered corrupt, the consenting spouse is barred from obtaining a divorce. F. Keezer, *supra* note 81, § 516, at 550-52; Wadlington at 39.

84. An innocent spouse who forgives an offending spouse relinquishes the right of action for divorce, subject to revival under certain circumstances. F. Keezer, *supra* note 81, § 519, at 553-58; Wadlington at 39.

85. See *Foster & Freed* pt. 2, at 4, cols. 1-2. Cf. *Perles* pt. 2, at 4, col. 2.

86. N.Y. Dom. Rel. Law § 170(5) (Supp. 1969). In view of plaintiff's failure to make timely support payments, it would seem that the resort to the clean hands doctrine in *Abelson* was not absolutely necessary. See 59 Misc. 2d at 173, 298 N.Y.S.2d at 383.

87. Law of June 16, 1968, ch. 700, [1968] N.Y. Laws 1473.

88. 32 App. Div. 2d 201, 301 N.Y.S.2d 151 (2d Dep't 1969).

89. 32 App. Div. 2d 402, 302 N.Y.S.2d 857 (1st Dep't 1969), *rev'd*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

90. 32 App. Div. 2d at 204, 301 N.Y.S.2d at 154.

91. *Id.* at 202, 301 N.Y.S.2d at 152.

92. *Id.* at 203, 301 N.Y.S.2d at 152-53.

93. 32 App. Div. 2d at 404, 302 N.Y.S.2d at 860.

tion to section 170(5).<sup>94</sup> It found the intent of the 1966 Legislature controlling, requiring prospective application.<sup>95</sup>

The *Gleason* opinion was confined to determinations of legislative intent, public policy,<sup>96</sup> and rules of statutory construction,<sup>97</sup> only once referring to possible constitutional violations. In this regard, the court expressed doubt whether the state constitutionally could sanction the dissolution of marriages without the consent of the innocent spouse.<sup>98</sup> In contrast, the concurring opinion was based almost exclusively on constitutional arguments—primarily the possibility of a violation of the equal protection clause if retroactive application were granted.<sup>99</sup>

#### IV. RESOLUTION OF THE QUESTION: *Gleason* IN THE COURT OF APPEALS

When this conflict reached the court of appeals, it said:

We agree with the dissenters in the First Department and the unanimous Appellate Division for the Second Department that the Legislature intended that subdivision (5) of section 170 of the Domestic Relations Law should be applied "retroactively," in the sense of encompassing pre-1966 decrees, and that, as so applied, it offends against neither due process, the equal protection of the law nor any other constitutional provision.<sup>100</sup>

Initially, the court of appeals dealt with the problems raised in *Shapiro* and *Abelson*. The court emphasized that the plaintiff husband's status as the prior guilty spouse was irrelevant,<sup>101</sup> as the legislative policy in conversion divorce merely requires separation without reconciliation for the two year period as an indication that the parties are irreconcilable.<sup>102</sup> Within this scheme, "[t]he function of the decree . . . is merely to authenticate the fact of separation."<sup>103</sup>

In accepting retroactive application, the court gave heavy emphasis to the legislative history of the Divorce Reform Law and the policy behind it,<sup>104</sup>

94. *Id.* at 404-05, 302 N.Y.S.2d at 860.

95. *Id.* at 405, 302 N.Y.S.2d at 860.

96. The court felt that sound policy requires both conversion grounds to be treated alike. *Id.* at 405-06, 302 N.Y.S.2d at 861.

97. The court found that a statute should not be applied retroactively if it can be satisfied entirely by prospective application, citing Statutes § 51, and that a statute should not be given retroactive effect when capable of any other construction, citing *Walker v. Walker*, 155 N.Y. 77, 81, 49 N.E. 663, 664 (1898). See 32 App. Div. 2d at 404, 302 N.Y.S.2d at 860.

98. 32 App. Div. 2d at 407-08, 302 N.Y.S.2d at 863.

99. *Id.* at 409, 302 N.Y.S.2d at 865 (concurring opinion). For an indication of the disfavor with which the Supreme Court regards constitutional claims against retroactive legislation, see *Slawson*, *supra* note 34, at 235-44.

100. *Gleason v. Gleason*, 26 N.Y.2d 28, 34, 256 N.E.2d 513, 516, 308 N.Y.S.2d 347, 350 (1970).

101. *Id.* at 35, 256 N.E.2d at 516, 308 N.Y.S.2d at 351.

102. *Id.*

103. *Id.* at 37, 256 N.E.2d at 517-18, 308, N.Y.S.2d at 353.

104. See *id.* at 36-40, 256 N.E.2d at 517-19, 308 N.Y.S.2d at 352-55.

and found an unequivocal legislative purpose in favor of retroactivity.<sup>105</sup> It noted that although the law was to become effective on September 1, 1967, it specifically declared that the two year periods required under sections 170(5) and 170(6) "shall not be computed to include any period prior to September first, nineteen hundred sixty-six, a year before the statute's effective date. . . . If the Legislature had intended that the decree must be one granted . . . subsequent to the effective date of the statute . . . it could not logically have prescribed that the period of living apart might begin one year prior to that effective date."<sup>106</sup> Moreover, the court found that the 1968 amendment was a reenactment of the law, making the intent of the 1968 Legislature controlling and resolving any possible doubt about the intent of the 1966 Legislature.<sup>107</sup>

Interpretation was expedited by an examination of the real purpose of the section, which the court found was "to sanction divorce on grounds unrelated to misconduct. . . . Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo' . . ."<sup>108</sup> In view of the moral and social undesirability of maintaining the legal fiction of a marriage which for all practical purposes has terminated, the court felt that denying retroactive application would in effect thwart the legislative purpose behind providing non-fault grounds for divorce.<sup>109</sup>

## V. Is *Gleason* CONSTITUTIONAL?

### A. *The Arguments Advanced*

Many of the earlier New York decisions denying retroactivity were at least partially predicated on constitutional considerations.<sup>110</sup> It was feared that

105. *Id.* at 39, 256 N.E.2d at 518, 308 N.Y.S.2d at 354. Prior to the court of appeals decision, many writers took the position that the legislative purpose was highly obscure. Following a comprehensive analysis of the problems involved, two noted authors stated: "Our conclusions regarding the statutory intent as to retroactivity may be summarized as follows: (1) On April 27, 1966, the legislature understood or 'thought' sections 170(5) and (6) were not retroactive; (2) the statutory language supports retroactivity; (3) by a strict construction and an emphasis upon legislative silence as to the precise point, an argument may be made against retroactivity; and (4) to hold that an 'innocent' but not a 'guilty' party may qualify for divorce under section 170(5) is judicial legislation in total disregard of legislative intent, as is the imposition of the clean hands doctrine in such cases." Foster & Freed pt. 2, at 4, col. 2.

106. 26 N.Y.2d at 36-37, 256 N.E.2d at 517, 308 N.Y.S.2d at 352 (footnote omitted).

107. *Id.* at 39 n.9, 256 N.E.2d at 518 n.9, 308 N.Y.S.2d at 354 n.9.

108. *Id.* at 35, 256 N.E.2d at 516, 308 N.Y.S.2d at 351.

109. *Id.* at 39, 256 N.E.2d at 518-19, 308 N.Y.S.2d at 354-55.

110. See, e.g., *Gleason v. Gleason*, 32 App. Div. 2d 402, 409, 302 N.Y.S.2d 857 (1st Dep't 1969) (concurring opinion), rev'd, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970); *Zientara v. Zientara*, 59 Misc. 2d 344, 345, 299 N.Y.S.2d 253, 254 (Sup. Ct.), rev'd, 32 App. Div. 2d 822, 302 N.Y.S.2d 294 (2d Dep't 1969); *Abelson v. Abelson*, 59 Misc. 2d

retroactive application would violate the due process,<sup>111</sup> equal protection<sup>112</sup> and impairment of contracts<sup>113</sup> clauses of the constitution by depriving innocent spouses of vested property rights.<sup>114</sup> The court of appeals found these arguments invalid, a view seemingly amply supported by precedent.

Traditionally, federal concern with state regulation of marriages has been negligible,<sup>115</sup> as this power was thought to have been reserved to the states by the tenth amendment.<sup>116</sup> Similarly, the marital status was not thought to be a contract within the impairment of contracts clause of the constitution.<sup>117</sup> Although the traditional federal reluctance to impose constitutional standards on state regulation of marital affairs recently has been questioned, there has been little indication of any inclination to supervise state requirements for divorce. A noted authority has stated:

[R]ecent decisions of the Supreme Court may support [the] thesis that traditional state control of the marital status has to give way to current notions of *individual liberty* and the right of privacy. In *Griswold v. Connecticut*,<sup>118</sup> "an uncommonly silly law"<sup>119</sup> forbidding the dissemination of birth control information, for which justification was claimed due to the state's concern over extra-marital relations, was held to violate the penumbras emanating from the Bill of Rights as read into the Fourteenth Amendment. In *Loving v. Virginia*,<sup>120</sup> miscegenation statutes were declared unconstitutional per se and marriage was characterized as a "basic civil right of man."<sup>121</sup> Together, these two decisions raise a challenge to state regulation of marriage and the *freedom to remarry* after divorce. No longer may it be assumed that the states

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172, 177, 298 N.Y.S.2d 381, 384 (Sup. Ct. 1969); *Church v. Church*, 58 Misc. 2d 753, 755, 296 N.Y.S.2d 716, 717 (Sup. Ct. 1968).

111. U.S. Const. amend. XIV, § 1.

112. *Id.*

113. U.S. Const. art. I, § 10.

114. The prohibition against ex post facto laws has also been suggested as a reason for denying retroactive application. However, it is generally recognized that the constitutional prohibition against ex post facto laws pertains only to criminal statutes. See, e.g., Gershenson, *The Divorce Reform Law: A Brief for Retroactivity* (pts. 1-3), 158 N.Y.L.J., July 24-26, 1967, pt. 2, at 1, col. 4.

115. See Foster & Freed, *Family Law*, 20 *Syracuse L. Rev.* 411 (1968). See generally Foster, *Recognition of Migratory Divorces: Rosentiel v. Section 250*, 43 *N.Y.U.L. Rev.* 429, 446-49 (1968) for a recent discussion of federal full faith and credit problems.

116. See *Andrews v. Andrews*, 188 U.S. 14, 32-33 (1903) (constitution does not confer federal power to regulate marriage; it resides in the states). See also *Wadlington* at 35-36.

117. See *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888). In explaining why he did not treat the impairment of contracts argument separately from those of due process and equal protection, one author stated: "No Supreme Court decision in the last 25 years dealing with contracts has been found that did not contain language to the effect that what was said about the contract clause was equally applicable to the claimant's charge that he was being deprived of property without due process of law." Slawson, *supra* note 34, at 221 (footnote omitted).

118. 381 U.S. 479 (1965).

119. *Id.* at 527 (Stewart, J., dissenting).

120. 388 U.S. 1 (1967).

121. *Id.* at 12.

have autonomy over rules and laws governing marital status, for if marriage is a civil right, it is constitutionally protected.<sup>122</sup>

While this reasoning indicates a possible basis for federal constitutional challenge of state regulation, there is no indication that such a trend would be applied against the elimination of statutorily created rights. Further, it has been noted that retroactive application *eliminates* one potentially serious constitutional objection—perpetuating the obligation of support and precluding the husband's remarriage, while judicially absolving his spouse from the performance of wifely duties.<sup>123</sup>

The court of appeals' thorough treatment of the constitutional objections raised by retroactive application leaves little doubt of their lack of merit.<sup>124</sup> The court pointed out that a vested right is an "immediate, fixed right of present or future enjoyment,"<sup>125</sup> while marital rights are contingent and may be altered or abolished by the legislature prior to vesting.<sup>126</sup> The wife's right of inheritance is similar to the right of dower in that it is a mere expectancy and does not vest until the death of her husband.<sup>127</sup> In short, the State, having the power directly to limit or abolish rights of succession to the property of a living person, may undoubtedly do so indirectly by providing a new ground for divorce.<sup>128</sup>

Likewise, there appears to be no denial of equal protection in permitting retroactive application of section 170(5) while limiting section 170(6) to prospective application.<sup>129</sup> To violate the equal protection clause, a classifica-

122. Foster at 51 (author's footnotes renumbered) (emphasis added). It should be noted that both of the cases cited involved rather extreme statutory abuses of rights which were considered "basic." Similar reasoning could produce an argument that an individual has a basic right to divorce in order to remarry in furtherance of his pursuit of marital happiness. Cf. the dissenting opinion of Justice Black in *Williams v. North Carolina*, 325 U.S. 226, 261 (1945) (dissenting opinion). On the other hand, the strongest argument against retroactivity involves the loss of the wife's right to share in her husband's estate. See N.Y. E.P.T.L. § 5-1.1 (1967), as amended, *id.* (Supp. 1969). Far from being "basic," this right, while an extension of the common law right of dower, is entirely statutory. See Foster & Freed, *Family Law*, 20 *Syracuse L. Rev.* 411 (1968), suggesting "the possibility of successful constitutional challenge of statutory relics founded on dogma rather than some demonstrable public good." *Id.*

123. Foster & Freed pt. 3, at 4, cols. 1-2.

124. See 26 N.Y.2d at 40-42, 256 N.E.2d at 519-21, 308 N.Y.S.2d at 355-56.

125. *Id.* at 40, 256 N.E.2d at 519, 308 N.Y.S.2d at 355-56 (citation omitted).

126. *Id.* See also *Maynard v. Hill*, 125 U.S. 190 (1888); *Thome v. Macken*, 58 Cal. App. 2d 76, 136 P.2d 116 (Dist. Ct. App. 1943); *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619 (1937); *Bunten v. Bunten*, 15 N.J. 532, 192 A. 727 (Sup. Ct. 1937); *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47, appeal dismissed, 302 U.S. 641 (1937); *Adelman v. Adelman*, 58 Misc. 2d 803, 296 N.Y.S.2d 999 (Sup. Ct. 1969).

127. 26 N.Y.2d at 40, 256 N.E.2d at 519, 256 N.Y.S.2d at 355.

128. *Id.* at 41, 256 N.E.2d at 520, 308 N.Y.S.2d at 356.

129. Cf. note 52 *supra* and accompanying text.

tion must be palpably arbitrary.<sup>130</sup> However, the differences between separation decrees and agreements are sufficient to withstand constitutional challenge.<sup>131</sup>

### B. *Comparison With Other States*

The experience of other states which have enacted non-fault grounds for divorce indicates that retroactive application is constitutional. "[T]he fact remains that a near consensus of state and federal cases have applied new divorce grounds retroactively"<sup>132</sup> without finding constitutional violations.<sup>133</sup> Moreover, some states denying retroactive application have done so on the basis of provisions peculiar to their individual state constitutions.<sup>134</sup> With reference to these provisions, the New York Court of Appeals as early as 1878 was prompted to observe:

It is a subject on which much has been said by courts in different States, and not with entire accord; and in several cases in different States it has been held, as we gather from decisions, that a law authorizing a judgment of divorce on account of acts done before its passage, is not in conflict with a constitutional provision against retroactive or retrospective laws.<sup>135</sup>

Further, it should be noted that most statutes providing new divorce grounds are silent on the issue of retroactivity, as was the Divorce Reform Law, yet retroactive application is the prevailing rule.<sup>136</sup>

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130. See *Phillips Chem. Co. v. Dumas Independent School Dist.*, 361 U.S. 376 (1960); 9 N.Y. Jur. Constitutional Law § 295 (1960). See also *Foster & Freed* pt. 3, at 4, col. 1.

131. E.g., imposition as opposed to voluntary agreement; intervention by state authority; available enforcement procedures, etc. See 26 N.Y.2d at 41, 256 N.E.2d at 519, 303 N.Y.S.2d at 356; M. Grossman, *New York Law of Domestic Relations* §§ 398-496 (1947) and 1962 Cumulative Supplements thereto.

As one author points out, often arguments phrased in terms of constitutional issues in reality are based upon a reliance interest. See Slawson, *supra* note 34, at 225-26. Thus it is possible that individuals have relied upon a particular law in planning their actions and that a change in the law often will result in frustration of their purposes. However, the author notes that change required by the common good precludes any possibility of ever achieving absolute reliance, and concludes that "[r]eliance on existing rules, therefore, must be sacrificed to some extent to the need for change." *Id.* at 226.

132. *Foster & Freed* pt. 2, at 1, col. 1.

133. See Annot., 23 A.L.R.3d 626 (1969); *Foster & Freed* pt. 1, at 4 n.4; Gershenson, *supra* note 114, pt. 3, at 1, col. 5. For a list of cases holding that new divorce legislation may be applied retroactively (the majority view), and those holding the opposite, see Annot., 23 A.L.R.3d 626, 630-32 (1969).

134. E.g., N.H. Const. Pt. 1, art. XXIII (1792), denounces retrospective laws and prohibits their passage "either for the decision of civil causes, or the punishment of offenses." *Clark v. Clark*, 10 N.H. 380 (1839), held that this prohibition invalidated a statute purporting to make desertion which took place before the statute's enactment a ground for divorce.

135. *Hunt v. Hunt*, 72 N.Y. 217, 233 (1878), appeal dismissed, 131 U.S. appendix clxv (1879).

136. *Wadlington* at 80. However, retroactive application sometimes has been expressly specified. *Id.*



The *Gleason* court noted that this "overwhelming weight of authority" supporting retroactive application<sup>137</sup> had arisen in spite of constitutional challenges in each state,<sup>138</sup> citing cases from jurisdictions retroactively applying new living apart grounds for divorce.<sup>139</sup> In *Stallings v. Stallings*,<sup>140</sup> a statute<sup>141</sup> permitting divorce after living apart pursuant to a separation decree was silent on the question of retroactivity. The court concluded that the statute was directed at the continuing act of separation, and was satisfied upon the expiration of the specified time period.<sup>142</sup> It observed that the legislature's power to regulate divorce was conferred by statute, and held that "no right of either party is divested by limiting or extending the time for applying to have the decree of separation made absolute as a divorce."<sup>143</sup> Similarly, in *Hagen v. Hagen*,<sup>144</sup> the absence of an express requirement of retroactivity in a living apart divorce statute was found to be irrelevant.<sup>145</sup> Further, retroactive application was found not to be unconstitutional "as being retroactive legislation."<sup>146</sup> In the face of this and other precedent,<sup>147</sup> the *Gleason* court correctly concluded that retroactive application is not unconstitutional.<sup>148</sup>

The most recent state to enact non-fault grounds for divorce is California, which has just completed the first major revision of its divorce law since its enactment in 1872.<sup>149</sup> The California reform was designed to lessen the inevitable emotional pain and eliminate the "sideshow elements" which attend so many divorce cases.<sup>150</sup> Under the new law, incurable insanity and irreconcilable differences are now the sole grounds for marital dissolution,<sup>151</sup> and the trial judge determines whether the differences are sufficient to warrant relief.<sup>152</sup> Although alimony will still be granted, the amount will be determined after consideration of the duration of the marriage and the earning ability of the woman.<sup>153</sup> Although this reform undoubtedly was prompted by policy con-

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137. 26 N.Y.2d at 36 n.5, 256 N.E.2d at 317 n.5, 308 N.Y.S.2d at 352 n.5.

138. *Id.* at 42, 256 N.E.2d at 521, 308 N.Y.S.2d at 357.

139. *Id.*

140. 177 La. 488, 148 So. 687 (1933).

141. Law of July 7, 1932, Act No. 56, § 1, [1932] La. Acts 265 (now La. Rev. Stat. Ann. § 9:302 (1965)).

142. 177 La. at 495, 148 So. at 689.

143. *Id.*

144. 205 Va. 791, 139 S.E.2d 821 (1965).

145. *Id.* at 796, 139 S.E.2d at 824.

146. *Id.* at 796, 139 S.E.2d at 825.

147. Cf. *Campbell v. Campbell*, 174 Md. 229, 198 A. 414 (1938); *Gerdts v. Gerdts*, 196 Minn. 599, 265 N.W. 811 (1936); *Canavos v. Canavos*, 205 Va. 744, 139 S.E.2d 825 (1965). See Annot., 23 A.L.R.3d 626 (1969).

148. 26 N.Y.2d at 43, 256 N.E.2d at 521, 308 N.Y.S.2d at 358.

149. See N.Y.L.J., Sept. 29, 1969, at 1, col. 6.

150. *Id.*, quoting Governor Ronald Reagan.

151. Cal. Civ. Code § 4506 (West Supp. 1970).

152. *Id.* § 4508.

153. *Id.* § 4801(a).

siderations similar to those which led to New York's Divorce Reform Law, California seems to have achieved its goal with far less compromise.

#### VI. CONCLUSION

In interpreting New York's new public policy as enacted in the Divorce Reform Law, the court of appeals observed:

An insistence upon a fault-oriented ground of divorce, where the marriage, under the Legislature's present policy, ought to be dissolved, would for years perpetuate two of the chief evils the new divorce law was designed to eliminate—collusive or fraud-ridden divorce actions in this State and the continued pursuit of out-of-state divorces based upon spurious residence and baseless claims. If, therefore, the legislative aims and purposes are to be achieved, the statute must be interpreted as making divorce available on living apart grounds pursuant to pre-1966 decrees just as it would be if the decree were obtained later and regardless of the "guilt" or "innocence" of the party seeking it.<sup>154</sup>

Noticeably absent from this policy is a relief provision for spouses living apart under pre-1966 separation agreements, who are precluded from divorce by the refusal of the other party to re-execute the agreement.<sup>155</sup> Although resort to fraud or collusion is perhaps impossible in such circumstances, the migratory divorce problem<sup>156</sup> is still present to frustrate New York's new public policy. The distinction between separation decrees and agreements made in *Gleason*, although adequate to withstand constitutional challenge,<sup>157</sup> fails to justify the discriminatory application of public policy against those living apart pursuant to pre-1966 separation agreements.

In *Gleason*, New York has repudiated the "basic inhumanity, if not inanity, of protecting and preserving the legal bond when all other ties have been broken."<sup>158</sup> The court of appeals not only implemented, but seemingly expanded the new policy promulgated by the legislature, rejecting the state's prior policy, which was "based on the medieval trial by fire approach to marital relations and the theory of marital offense with an unnecessarily respectful

154. 26 N.Y.2d at 39-40, 256 N.E.2d at 519, 308 N.Y.S.2d at 354-55.

155. Originally, it was thought that the requirement that separation agreements be subscribed and acknowledged after the crucial 1966 date would preclude conversion of prior agreements. However, by re-executing and acknowledging such agreements, the parties clearly can qualify them. See N.Y. Dom. Rel. Law § 170(6) (Supp. 1969); Foster & Freed pt. 1, at 4, col. 2.

156. See note 8 supra.

157. See 26 N.Y.2d at 41, 256 N.E.2d at 520, 308 N.Y.S.2d at 356.

158. Perles pt. 2, at 1, col. 5. Such an approach is, of course, entirely contrary to the progressive theory of non-fault divorce. Compare the following excerpt from Plutarch, *Lives of Illustrious Men*, Amelius Paulus, quoted in Tenney, *Divorce Without Fault: The Next Step*, 46 Neb. L. Rev. 24 (1967): "A Roman divorced from his wife, being highly blamed by his friends, who demanded 'Was she not chaste? Was she not fair? Was she not fruitful?' holding out his shoe asked them whether it was not new and well made. 'Yet,' added he, 'none of you can tell where it pinches me.'"

obedience to the 'clean hands' doctrine but without any compassion or understanding of the dynamics of marital breakdown as a phenomenon which may occur without fault of either party."<sup>159</sup> Denying relief to those who live apart under pre-1966 separation agreements is a retrogressive re-affirmation of that policy which should not be permitted. Full implementation of the judicially interpreted new public policy clearly calls for an amendment to the Divorce Reform Law permitting conversion of pre-1966 separation agreements.<sup>160</sup> A potential reason for precluding retroactive application, the possibility of pre-dating agreements to allow immediate conversion, is no longer as forceful as when the date requirement was set. The courts can be relied upon to assure that there actually has been a two year continuous separation.

The proposed amendment would eliminate the possibility of conduct such as occurred in *Revson v. Revson*.<sup>161</sup> There the wife had defaulted in her husband's section 170(5) divorce action. After the husband's remarriage and the appellate division's decision in *Gleason*, she moved to vacate the judgment because at the time of her default there had been no appellate determination on the issue of retroactive application.<sup>162</sup> The appellate division affirmed the lower court's ruling that the wife was entitled to reopen the judgment. Justice Nunez, dissenting, noted that the wife's default was not inadvertent, and that the parties had reached agreement on financial matters—including participation in each other's estates.<sup>163</sup> Surely such conduct, seemingly motivated solely by spite, should not receive the sanction of the state.

Allowing conversion of "old" separation agreements would, at worst, place the parties in substantially the same position as their counterparts who live apart pursuant to separation decrees. In many cases, separation agreements embody determinations reached by the parties concerning their rights upon death.<sup>164</sup> Incorporation of these provisions in the divorce decree would give the survivor a benefit not available to her counterpart with a separation decree, for it clearly is within the power of the state to deprive the latter of rights granted by statute.<sup>165</sup> On the other hand, a divorce incorporating an underlying separation agreement adds the power of judicial enforcement to the ordinary contractual remedies. Moreover, even if the separation agreement is not incorporated into the divorce decree, the agreement remains independently enforceable as a contract.<sup>166</sup> Thus, allowing retroactive application of section 170(6) would not

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159. Perles pt. 1, at 4, col. 3.

160. Such an amendment might simply repeal the requirement that qualifying separation agreements be subscribed and acknowledged "on or after April twenty-seventh, nineteen hundred sixty-six." N.Y. Dom. Rel. Law § 170(6) (Supp. 1969).

161. 33 App. Div. 2d 738, 305 N.Y.S.2d 891 (1st Dep't 1969) (per curiam).

162. Id. at 738, 305 N.Y.S.2d at 892.

163. Id. at 738, 305 N.Y.S.2d at 892-93 (dissenting opinion).

164. For two examples of typical agreements, see 1 A. Lindey, Separation Agreements and Ante-Nuptial Contracts §§ 1, 2 (1967).

165. Compare note 128 supra and accompanying text.

166. In *Galusha v. Galusha*, 116 N.Y. 635, 22 N.E. 1114 (1889), the court of appeals found error in imposing on the husband a greater obligation than was required by the

involve the potential financial inequities inherent in *Gleason*, except in the rare case where the agreement does not contain a provision dealing with the survivor's right to a share in the other's estate. Clearly, the new public policy enunciated in *Gleason* requires retroactive application of section 170(6).

In *Gleason*, the court of appeals suggested that the legislature could grant the courts discretion to award the wife an amount in lieu of her prospective inheritance rights.<sup>167</sup> Clearly, some provision should be made permitting the courts to deal with the equities of individual cases. Such a provision could provide an opportunity to assure equitable financial security for wives separated under pre-1966 separation agreements, in addition to those separated pursuant to decrees. In each instance, the courts are in the best position to evaluate the merits of the individual case and the compensation to which the spouse is entitled in order to achieve an equitable dissolution. Clearly, they should be given this power.

As the court of appeals has noted, the underlying policy of the Divorce Reform Law is flaunted by the existence of deadlocked marriages whose dissolution is precluded only by an arbitrary date requirement in the statute. *Gleason* has done much to advance this underlying policy. The burden of moving forward now rests with the legislature.

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separation agreement. The court stated: "If . . . the parties have legal capacity to contract, the subject of settlement is lawful and the contract without fraud or duress is properly and voluntarily executed, the court will not interfere. To hold otherwise would be not only to establish a rule in violation of well-settled principles, but in, [sic] effect, it would enable the court to disregard entirely settlements of this character. For, if the court can decree that the husband must pay more than the parties have agreed upon, it is difficult to see any reason why it may not adjudge that the sum stipulated is in excess of the wife's requirements and decree that the husband contribute a smaller amount." *Id.* at 646-47, 22 N.E. at 1117. In subsequent litigation between the same parties, the court stated that the separation agreement would measure the support payments so long as it remained unimpeached. *Galusha v. Galusha*, 138 N.Y. 272, 283, 33 N.E. 1062, 1064 (1893). *Goldman v. Goldman*, 282 N.Y. 296, 33 N.E.2d 265 (1940) reaffirmed this position, subject to the qualification that the sum agreed upon could not be "plainly insufficient." *Id.* at 301, 33 N.E.2d at 267.

"As was pointed out in the *Goldman* case, only a mutual act of the parties based upon mutual intention, or some other cause recognized by law, could terminate [a] valid separation agreement. 'Such agreements, lawful when made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to destroy or change the agreement.'" *Schmelzel v. Schmelzel*, 287 N.Y. 21, 26, 38 N.E.2d 114, 116 (1941) (citation omitted).

167. 26 N.Y.2d at 43, 256 N.E.2d at 521, 308 N.Y.S.2d at 357-58.