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Foreign Migratory Divorces: A Reappraisal

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FOREIGN MIGRATORY DIVORCES: A REAPPRAISAL

by Peter Nash Swisher*

I. INTRODUCTION

Within the past twenty-five years there have been numerous articles written about the effects of foreign country migratory divorces on American domiciliaries. Most deal with Mexican divorces.[1] Since March 7, 1971, these Mexican divorces have become less available to American citizens, due to amendments to Mexican law which require aliens to become legal residents of Mexico before obtaining

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[1] *See, e.g.*, Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L. J. 45 (1960); Currie, *Suitcase Divorce in the Conflict of Laws: Simon, Rosenthiel and Borax*, 34 U. CHI. L. REV. 26 (1966); Foster, *Recognition of Migratory Divorces: Rosenthiel v. Section 250*, 43 N.Y.U. L. REV. 429 (1968); Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501 (1980); Leach, *Divorce by Plane-Ticket in the Affluent Society—With a Side Order of Jurisprudence*, 14 KAN. L. REV. 549 (1966); Lipstein, *Recognition of Foreign Divorces: Retrospects and Prospects*, 2 OTTAWA L. REV. 49 (1967); Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220 (1972); Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291 (1963); Phillips, *Equitable Preclusion of Jurisdictional Attacks on Void Divorces*, 37 FORDHAM L. REV. 355 (1969); Rosenberg, *How Void is a Void Decree, or The Estoppel Effect of Invalid Divorce Decrees*, 8 FAM. L.Q. 207 (1974); Note, *Domestic Relations—Jurisdiction—Extension of Comity to Foreign Nation Divorce*, 46 TENN. L. REV. 238 (1978); Note, *United States Recognition of Foreign, Nonjudicial Divorces*, 53 MINN. L. REV. 612 (1969); Comment, *Mexican Divorces: Are They Recognized in California?*, 4 CAL. W.L. REV. 341 (1968); Comment, *Mexican Divorce—A Survey*, 33 FORDHAM L. REV. 449 (1965).

See also Annot., *Domestic Recognition of Divorce Decree Obtained in Foreign Country and Attacked for Lack of Domicile or Jurisdiction of the Parties*, 13 A.L.R.3d 1419 (1967).

a divorce.[2] Nevertheless, Mexican divorces continue to create problems in many American jurisdictions.[3]

In addition to Mexico, the Dominican Republic and Haiti have joined this "quickie" foreign divorce market,[4] advertising in prominent periodicals,[5] and offering various

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[2] Article 35 of the Mexican Code (D.O. 35) now requires six months residence before a non-citizen can petition for a Mexican divorce. Amended Article 35 provides that: "No judicial or administrative agency shall entertain a divorce . . . of a foreigner if not accompanied by the certificate that is issued by the Secretary of Gobernacion as to his legal residence in [Mexico] and that his immigration status permits it to be acquired." Prior to this amendment of the Mexican Code, Mexican migratory divorces for Americans was reportedly a fifty million dollar-a-year business that catered to approximately 18,000 Americans each year. N.Y. Times, Feb. 13, 1972, § 10, at 1, col. 1.

[3] *See* Miller, *Mexican Divorces Revisited*, 84 CASE AND COMMENT No. 4, at 43. A major problem is that "legal residence" for "foreigners" under Mexican law may not be recognized under American law, since this residency might not qualify as the parties' marital domicile. *See infra* notes 62-79 and accompanying text.

[4] In both the Dominican Republic and Haiti no domiciliary intent nor residency requirement is necessary to procure a divorce. Dominican Law 142, Article I, Paragraph V of May 18, 1971, provides: "Foreigners who are in this country, although not residents, can be divorced by mutual consent, providing, however, that at least one of the parties must be physically present, and the other represented by a special attorney in fact." Haitian Law of June 28, 1971, Article X provides that: "Tourists, visiting persons, and residing aliens may apply to Haitian courts for a domicile in Haiti during the pendency of the divorce action" and Article II of the same law provides that Haitian courts will be competent to grant divorces "when a foreign plaintiff personally submits voluntarily to the Haitian jurisdiction and when a defendant shall have appointed a duly mandated representative . . . ." *See generally* Note, *Isle of Hispaniola: American Divorce Haven?*, 5 CASE W. RES. J. INT'L L. 198, 198-203 (1973); and Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 117-20 (1976). Although mutual consent is the exclusive ground for foreign divorces in the Dominican Republic, other Haitian divorce grounds are incompatibility, adultery, cruelty, excesses, grave and public insults and imprisonment. "Incompatability of temperament" appears to be the most widely used Haitian divorce ground for Americans. *See also* Note, *The Haitian Vacation: The Applicability of Sham Doctrine to Year-End Divorces*, 77 MICH. L. REV. 1332 (1979) (tax implications of Haitian divorces) and Comment, *Recognition of Haitian-Dominican Divorce in New York*, 11 COLUM. J. TRANSNAT'L L. 158 (1972).

[5] *See, e.g.*, "Divorce in 24 hours. Dominican Republic or Haiti. Mutual Consent or Contested Actions. Full Travel Services. Overland Dominican Advisory. P. O. Box 5, Hyattsville, Md. 20781" (advertisement in the Washington Post, Oct. 11, 1976, § B, at 4, col. 3); "Divorce in 24 Hours. Mutual or Contested Actions, low cost, Haiti or Dominican Republic. Dr. F. Gonzales, 1835 K. St. N.W., Washington, D.C. 20006 . . ." (advertisement in the International Herald Tribune, August

"divorce-tour packages" for Americans.[6] Solicitations by Haitian and Dominican divorce lawyers have also been mailed directly to many American attorneys.[7]

8, 1979, at 14, col. 3); and the following misrepresentation: "One Day Divorce—Dominican, Mexican, Haitian . . . *Legal All States* . . . Divorce Consent or Non-Consent. Air and Ground Travel 1 Nights Hotel. Can Go Fri. Night and Return Sat. (also marriage same day) . . . "One Day" provides total service. Just hop on and go. Write "One Day" Box 404 Danbury, Ct. 06810. Call 203-744-0686 8 AM to 10 PM E.S.T. 7 days a week." (advertisement in the Star, Sept. 1, 1981, at 30, col. 2)(Emphasis added).

[6] A good description of these "divorce tours" is found in Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972) (Haitian divorces are not recognized in New Jersey, and defendants were found guilty of violating the New Jersey Consumer Fraud Act).

[7] *E.g.*, undated letter from Maurice S. Bell, Counselor of Haitian Law, mailed to numerous American attorneys:

> Dear Counselor:
>
> My firm would like to take this opportunity to familiarize you with the divorce law of the Republic of Haiti. This law permits persons who are non-Haitian Nationals to discreetly obtain a divorce within a twenty-four hour period, with a minimum of expense.
>
> No domiciliary intent nor residence requirement is necessary. The Plaintiff must personally appear in the Haitian Court and the Defendant submits to said jurisdiction by executing a special Power of Attorney. These bilateral divorces are final and not interlocutory and both parties are free to marry immediately thereafter.
>
> I am taking the liberty of enclosing a two-page general information sheet regarding Haitian divorces, a set of forms for your possible future use, and a New York Supreme Court decision in the Kraham matter, whereby the Court upheld the validity of a bilateral Haitian divorce . . . .
>
> By way of background, I am currently a licensed attorney in the State of Alabama, having been admitted to the Bar in 1950. In 1965, I moved my law practice to Juarez, Mexico, where I specialized in matrimonial matters. In late 1970 the Government of Haiti requested my assistance in the drafting of the present divorce law for non-Haitian Nationals. At that time, I was granted permission to engage in the practice of Matrimonial Law before the Courts of Haiti.
>
> Should the occasion arise that you require additional forms or further information, please feel free to contact my office at any time . . . .

Enclosed with Mr. Bell's letter there is "general information on Haitian divorces" including a Power of Attorney form where the Defendant may "nominate, constitute and appoint Mr. MARC L. RAYMOND, an Attorney-at-Law as my attorney . . . to accept service for me, to appear for me and in my behalf at all hearings, and to answer such claims as he sees fit."

This advertising to solicit and procure such a divorce may itself be in violation of various state statutes. *See, e.g.*, VA. CODE § 20-122 (1975); and N.J. REV.

Since these divorces are *not* recognized by most American courts, because of jurisdictional and public policy reasons,[8] the continued practice of obtaining these divorces—and the convoluted rationale supporting it—has become "distorted beyond recognition,"[9] and it remains ethically questionable for American attorneys to engage in it.[10]

Overall, the concept of foreign country migratory divorces for American domiciliaries—with its jurisdictional and public policy defects; its alleged "defense" of estoppel; and with one exception piled upon another—has become so confusing to the lay public and the practicing bar that very few people adequately understand the underlying ramifications and liabilities involved in such divorces.[11]

The purpose of this Article is to review and reappraise

STAT. § 56:8-2, *cited in* Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972). Federal law also declares it a crime to mail foreign divorce information with intent to solicit business, 18 U.S.C. § 1714 (1948) (up to $5000 fine and one year in prison).

[8] *See infra* notes 17-27, 62-79 and accompanying text.

[9] [T]he law of migratory divorce inhabits a looking-glass world in which the usual conflicts principles are distorted beyond recognition. Jurisdiction over the defendant seems to be neither necessary nor sufficient to empower a court to hear a divorce case . . . . Jurisdiction is sustained every day on the basis of testimony that nobody begins to believe . . . . The Constitution is lost in the shuffle, and the law is held up to disrespect.

Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenthiel, and Borax*, 34 U. CHI. L. REV. 26 (1966).

[10] "A lawyer advising his client concerning the availability and effect of . . . migratory divorces faces extremely difficult ethical problems . . . . The law in this area is in such a state of hypocrisy and dishonesty that a lawyer who gives realistic advice about migratory divorce places his professional reputation at some hazard." H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 295 (1968).

[11] This continuing confusion with foreign migratory divorces is shown by contradictory results within the same court. *Compare* Berry v. Berry, No. C76-593 (Cir. Ct. of Va. Beach, Va., Dec. 14, 1976) (bilateral Haitian divorce not recognized, with an extensive supporting report from the Commissioner in Chancery) with Bloom v. Bloom, No. C77-750 (Cir. Ct. of Va. Beach, Va., Aug. 26, 1977) (bilateral Haitian divorce recognized without discussion from the Commissioner in Chancery). In both cases the Defendant's Power of Attorney was through Mr. Marc Raymond, and among Plaintiff's attorneys was, presumably, Maurice S. Bell, Counselor of Haitian Law. *See supra* note 7.

the important legal principles involved in foreign country migratory divorces; to discuss the various public policy rationales behind them; and to suggest possible remedies to alleviate much of this ambiguity and confusion.

In undertaking this evaluation, the author is mindful of dual responsibilities—that divorce law in this area should be predictable and uniform in order to maintain the authority of legal precedent; but at the same time it must attempt to approximate, as closely as possible, the clearly demonstrated needs of society.[12]

II. JURISDICTIONAL REQUIREMENTS FOR RECOGNITION OF A FOREIGN DIVORCE

A. *The Principle of Comity*

(1) *Comity and its Public Policy Defense*

It is a well-established principle of American law that a divorce or marital dissolution granted within the United States by a court having proper jurisdiction must be recognized in all sister states under the full faith and credit clause of the Constitution.[13]

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[12] One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent . . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry . . . must then be balanced against the social interest served by equity and fairness or other elements of social welfare.

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 112-13 (1949).

[13] U.S. CONST. art. IV, § 1 provides in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *See, e.g.*, Williams v. North Carolina [II], 325 U.S. 226 (1945) and Williams v. North Carolina [I], 317 U.S. 287 (1942) (ex parte divorces); Cook v. Cook, 342 U.S. 126 (1951) and Sherrer v. Sherrer, 334 U.S. 343 (1948) (bilateral divorce).

Like the commerce clause, the full faith and credit clause represents an instrument of uniformity in the nation. At the same time it respects the diversity among the states which is inherent in the federal system. The result in matrimonial affairs should be a free flow of people from state to state without fear of actions for bigamy, support, etc. by either the for-

Divorces granted in foreign countries, however, are not recognized in American jurisdictions under the mandatory concept of full faith and credit, but rather through the discretionary principle of comity.[14] As enunciated by the Supreme Court in the case of *Hilton v. Guyot*,[15] comity is defined as:

> [N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is recognition which one nation allows within its territory to legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[16]

Yet a state may *not* give comity to a foreign divorce "when contrary to its policy, or prejudicial to its interests,"[17] and thus decisions extending comity to a foreign divorce usually involve public policy considerations of possible prejudice to the state, its citizens, and the parties themselves.[18] While

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mer spouse, the government, or another party. This flow of people is needed to maintain the strength of the economy and assure the full enjoyment of personal rights. The full faith and credit clause was intended to prevent feuds between sovereignties by forcing each of the states into a position of accomodation in behalf of the nation.

Note, *Mexican Bilateral Divorce—A Catalyst in Divorce Jurisdiction Theory?*, 61 NW. U.L. REV. 584, 587 n.20 (1966) [hereinafter referred to as *Mexican Bilateral Divorce*]. See also H. EHRENZWEIG, CONFLICT OF LAWS §§ 45-47 (1959).

[14] "Writers and most courts agree that all that is meant by comity is that the state of the forum is not obliged by any superior power or force to apply foreign law." STIMSON, CONFLICT OF LAWS 71 (1963).

[15] 159 U.S. 113 (1895).

[16] *Id.* at 163-64.

[17] *Id.* at 165. *See also* Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943).

[18] Public policy generally refers to the morality, conscience, and public good of a state as exemplified in its state constitution, legislative statutes, and judicial opinions. *See, e.g.*, Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944); Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (App. Div. 1963), *aff'd* 42 N.J. 287, 200 A.2d 123 (1964); Glaser v. Glaser, 276 N.Y. 296, 12 N.E.2d 305 (1938); and *In re* Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

This defense has been categorized into the following areas that have been used to defeat the effects of foreign judgments: (1) insufficient authentication or proof of a foreign judgment; (2) lack of finality of a foreign judgment; (3) lack of subject-matter jurisdiction in the foreign forum; (4) lack of personal jurisdiction of

American courts generally use this defense to deny comity when jurisdictional requirements for a foreign divorce have not been met,[19] some courts have also denied comity on the ground that comity does not require recognition of a foreign judgment, even in the absence of any enumerated defense.[20]

Thus, the application of comity to foreign divorces remains distinct from the principle of full faith and credit found in domestic sister-state divorces.[21]

(2) *Comity and the Restatements of Conflict of Laws*

Although the original *Restatement of the Law of Conflict of Laws* (1934) contains no black-letter rule dealing with the recognition of foreign judgments,[22] Section 98 of the second *Restatement* states a general policy favoring foreign judgment recognition,[23] but the scope of this recognition differs from the recognition given to sister-state judgments.[24]

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the foreign forum; (5) insufficiency of notice or opportunity to be heard; (6) procurement of the foreign judgment by extrinsic fraud; (7) clear mistake of fact or law made by the foreign court in its judgment; and (8) the foreign judgment contravenes the public policy of the recognition forum. *See* Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 308-10 (1963) and authority cited therein.

[19] *See infra* notes 62-79 and accompanying text.

[20] *See, e.g.*, Perdikouris v. S.S. Olympos, 185 F. Supp. 140 (E.D. Va. 1960), Bittson v. Bittson, 7 A.D.2d 868, 182 N.Y.S.2d 104 (1959) and Fantony v. Fantony, 21 N.J. 525, 122 A.2d 593 (1956). This approach, however, has been severely criticized and largely discredited for allowing a "selective" recognition and enforcement of foreign judgments at the expense of general reciprocity. *See* Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 294 (1963); Smith, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 49-50 (1962), and authority cited therein.

[21] This distinction is important, since some courts have made the mistake of applying full faith and credit recognition, instead of comity, to foreign divorces. *See, e.g.*, Clagett v. King, 308 A.2d 245 (D.C. 1973).

[22] Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 222 (1972).

[23] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) states: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment b (1971) em-

Likewise, although Section 117 of the second *Restatement* provides that public policy defenses may be foreclosed as a matter of full faith and credit law in interstate cases,[25] Comment c to Section 117 emphasizes that American courts may still use public policy defenses in foreign cases involving comity.[26] Utilization of this public policy defense is also in accord with the first *Restatement* view.[27]

The *Restatements* thus provide continued recognition of comity principles established by earlier judicial precedent,[28] and although the *Restatements* do not constitute mandatory authority in the United States, their continuing recognition of comity and its policy defenses evidence current scholarly support for these theories—especially since

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phasizes that "[J]udgments rendered in a foreign nation are *not* entitled to the protection of full faith and credit," and comment c to the same section states:

> A foreign nation judgment will *not* be recognized in the United States unless the American court is conviced *that the foreign court had jurisdiction* and that *'there has been opportunity for a full and fair trial* abroad *before a court of competent jurisdiction,* conducting the trial upon regular proceedings, *after due citation or voluntary appearance of the defendant . . . and there is nothing to show either prejudice in the court,* or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . .' Hilton v. Guyot, 159 U.S. 113, 202 (1895). If these conditions are met, the judgment will not be refused recognition on the ground that the rendering court made an error of law or fact (emphasis added).

[25] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971) provides: "A valid judgment rendered in one State of the United States will be recognized and enforced in a sister state even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."

[26] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 comment c (1971) states:

> Judgments rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is contrary to its public policy. A judgment rendered in a foreign nation, however, will, *if valid,* usually be given the same effect as a sister state judgment (see § 98). (emphasis added).

See also Peterson, *supra* note 22, at 252-53.

[27] RESTATEMENT OF CONFLICT OF LAWS § 612 (1934) provides: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."

[28] *See supra* notes 14-20 and accompanying text.

judges and legal scholars in many foreign nations place heavy reliance on this work of the American Law Institute.[29]

(3) *Comity for Non-Judicial Foreign Divorces*

Foreign judicial divorces will generally be recognized by American courts under the theory of comity, if not against the public policy of the recognition state.[30] But will these comity principles be equally valid for non-judicial foreign divorces, such as Danish administrative divorces or Jewish *Ghet* divorces? The answer appears to be an affirmative one,[31] although subject to the same public policy defenses as would apply to foreign judicial divorces.[32]

Comity therefore has been found applicable in recognizing "quasi-executive" Danish administrative divorces;[33] and Jewish *Ghet* divorces have been recognized by American courts when performed by rabbis in a foreign nation which recognizes Jewish religious communities as self-governing, and where the *Ghet* divorce is legally binding on its Jewish citizens.[34]

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[29] *See* Peterson *supra* note 22, at 266, and *see, e.g.*, Duncan, *Foreign Divorces Obtained on the Basis of Residence, and the Doctrine of Estoppel*, 9 IRISH JURIST 59, 62 (1974). There are, however, current critics of the *Restatement* who feel the First and Second *Restatement of Conflict of Laws* are both too rigid in their disregard for interstate and multistate societal needs and practicalities. *See, e.g.*, Ehrenzweig, *American Conflict Law in Its Historical Perspective: Should the Restatement be "Continued"?*, 103 U. PA. L. REV. 133 (1954) and Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

[30] *See supra* notes 14-28 and accompanying text.

[31] In Hilton v. Guyot, 159 U.S. 113, 163-64 (1894), for example, the Supreme Court stressed that comity recognition may be given to "the *legislative, executive* or judicial acts of another nation" (emphasis added).

[32] *See supra* notes 17-20 and accompanying text.

[33] *See, e.g.*, Weil v. Poulsen, 121 Conn. 281, 184 A. 580 (1936) (applying New York law); Hansen v. Hansen, 255 A.D. 1016, 8 N.Y.S.2d 655 (1938); and Sorenson v. Sorenson, 219 A.D. 344, 220 N.Y.S. 242 (1924). These cases involved a royal decree of divorce from the Danish King, upon application to the Danish counsel in New York.

[34] *See, e.g., In re* Rubenstein's Estate, 143 Misc. 917, 257 N.Y.S. 637 (Sup. Ct. 1932) and Miller v. Miller, 70 Misc. 368, 128 N.Y.S. 787 (Sup. Ct. 1911).

However, these *Ghet* divorces will *not* be recognized if performed in the United States when the parties are American domiciliaries. The rationale behind this rule is that when a person seeking a divorce is domiciled within an American state's jurisdiction, only state law controls a person's domestic relations, and religious laws have no effect on state sovereignty.[35] This rationale has been applied to other religious divorces as well.[36]

Comity should therefore be given to non-judicial as well as judicial foreign divorces if such divorces are not against the recognizing state's strong public policy; but non-judicial divorces of American domiciliaries will *not* be recognized unless the parties have complied with their own state's duly enacted divorce laws.[37]

(4) *Comity and Res Judicata*

Res judicata is the legal principle that parties to an action should not be allowed to relitigate the merits of a case already settled—or which could have been settled—in the original proceeding. Very broadly stated, the guiding principle of res judicata is that there should be an end to litigation after the parties have had a fair chance to present their claims; [38] and the legal object behind this principle is to avoid harrassment of the successful party, to end litigation, and to bring some form of predictability and uniformity to the law through the finality and conclusiveness of judgments.[39]

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[35] *See In re* Goldman's Estate, 156 Misc. 817, 282 N.Y.S. 787 (Sup. Ct. 1935); Chertok v. Chertok, 208 A.D. 161, 203 N.Y.S. 163 (1924) and *cf.* Maynard v. Hill, 125 U.S. 190 (1888).

[36] *See, e.g.*, Hilton v. Roylance, 25 Utah 129, 69 P. 660 (1902) (refusal to recognize a Mormon religious divorce when Utah territorial statutes were not utilized). *Cf.* Romney v. United States, 136 U.S. 1 (1890) and Reynolds v. United States, 98 U.S. 145 (1878) (bigamy cases).

[37] *See generally*, Note, *United States Recognition of Foreign, Nonjudicial Divorces*, 53 MINN. L. REV. 612 (1969).

[38] *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 406-07 (1968).

[39] It is not the policy of the law to encourage litigation, and where a

When this intrastate theory of res judicata is extended to sister states, it merges with the full faith and credit requirement and produces a powerful ordering of legal relations within the United States—including divorce.[40] For example, under this combination of res judicata and full faith and credit a state must give recognition to the final judgments of sister states, even though the first judgment is clearly against the strong public policy of the second forum.[41] In addition, the policy of res judicata combined with full faith and credit is so strong that a state's judgment must be recognized by sister states, even though the judgment is based on a clear mistake of fact or law.[42] Therefore, if the parties appearing in a bilateral divorce action in State *A* do not question State *A's* jurisdiction in the original proceeding, under the mandates of res judicata and full faith and credit they will not be allowed to relitigate this jurisdictional question in State *B*.[43] A defendant who does not

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> court of competent jurisdiction, having the parties legally before it, has adjudicated the merits of their case, every reason favors holding them bound by the adjudication where the judgment may be called in question, if there has been no fraud practiced in obtaining it.

Glass v. Blackwell, 48 Ark. 50, 55, 2 S.W. 247, 259 (1886) *quoted in* R. LEFLAR, AMERICAN CONFLICTS LAW § 73 n.17 (1968).

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 73 (1971) states, for example: "A spouse who was personally subject to the judicial jurisdiction of the divorce state, and those in privity with him, may be precluded by application of the rules of res judicata of the divorce state from thereafter attacking the decree collaterally."

[41] *E.g.*, Fauntleroy v. Lum, 210 U.S. 230 (1908), *applied in* Wallihan v. Hughes, 196 Va. 117, 82 S.E.2d 553 (1954) (recognition of Nevada divorce and separation agreement although it violated Virginia's strong public policy). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971) *supra*, note 25. Comment b to § 117 states in pertinent part:

> As between States of the United States, the rule of this Section is one of Constitutional law. Provided that the judgment is valid (see § 92), full faith and credit requires that it be recognized and enforced in a sister State even though the original claim is contrary to the strong public policy of the sister State.

[42] *See, e.g.*, Aldrich v. Aldrich, 378 U.S. 540 (1964) and Fauntleroy v. Lum, 210 U.S. 230 (1908).

[43] *See, e.g.*, Cook v. Cook, 342 U.S. 126 (1951), Coe v. Coe, 334 U.S. 378 (1948), and Sherrer v. Sherrer, 334 U.S. 343 (1948). "As between States of the United States, this [res judicata] result is required by full faith and credit." RE-

appear in an ex parte divorce action to litigate the merits of the case, however, may later question the divorce court's jurisdiction.[44]

Foreign country divorces do *not* have this res judicata finality mandated by the full faith and credit clause. Rather, they are recognized under the principles of comity[45] and are subject to public policy defenses.[46] What this means is that American courts may *always* question the jurisdiction, or the merits, of an American domiciliary's foreign country divorce.

This apparent freedom of American courts, under the principles of comity, to summarily reject the res judicata finality of foreign divorces with or without cause[47] has come under criticism.[48] While admitting that the amalgam of comity and its enumerated defenses still reflect the status of American case law today,[49] critics sharply attack the judicial discretion involved in deciding whether or not to apply comity[50] and they strongly disapprove of the "doctrine of retaliation."[51] They further argue that foreign judgments

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STATEMENT (SECOND) CONFLICT OF LAWS § 73 comment b (1971). For res judicata to be effective, however, the divorce state must also comply with the requirements of due process. *Id.*

[44] *See, e.g.*, Rice v. Rice, 336 U.S. 674 (1949) and Williams v. North Carolina, 325 U.S. 226 (1945).

[45] *See supra* notes 14-17, 24 and accompanying text.

[46] *See supra* notes 18-20, 26-27 and accompanying text.

[47] *See supra* notes 18 and 20.

[48] *See, e.g.*, Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962); and Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291 (1963).

[49] *See* Peterson *supra* note 48, at 294.

[50] *See supra* note 20 and accompanying text.

[51] The "doctrine of retaliation," first set out in Hilton v. Guyot, 159 U.S. 113 (1859), permits the denial of comity recognition to foreign court judgments if the law of that foreign country would not recognize a corresponding American judgment. This doctrine has received scant approval from commentators, and is not binding on state courts. Many state courts and a majority of federal courts have refused to follow this "doctrine of retaliation." *See* R. LEFLAR, AMERICAN CONFLICTS LAW 171-72 (1968). *See also* RESTATEMENT OF CONFLICT OF LAWS § 6 (1934) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment e (1971), both

should be presumed res judicata—absent certain exceptions—and that res judicata, rather than comity, should be the real basis for recognition of foreign judgments.[52]

Professor Smit, for example, argues that foreign judgments involving questions of status or a determination of property interests,[53] should be given conclusive res judicata effect, but he believes that foreign in personam judgments should be given no binding effect at all if rendered against non-domiciliaries of the judgment forum.[54] Professor Peterson takes the concept of res judicata for foreign country judgments one step further, arguing that under a policy-oriented approach all foreign country judgments should be presumed res judicata unless there is an independent defense to reject these judgments—a defense that is distinct from the recognition rationale of comity. Such independent defenses, argues Peterson, would include: lack of jurisdiction;[55] insufficiency of notice or opportunity to be heard (which would also include gross unfairness of foreign law, and the failure to authenticate a foreign judgment);[56] and possibly the "mixed defenses" of extrinsic fraud[57] and mistake of law or fact.[58] The rationale behind these first two defenses is that there must be a minimum of fairness to the litigants,[59] and thus the question of whether the foreign court had jurisdiction must ultimately be tested by the notions of fairness held by the court of the recognition forum.[60] With the exception of the "mixed defense" of mistake of law or fact, Professor Peterson's theory appears to be fairly consistent with the second *Restatement's*

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disapproving the "doctrine of reciprocity."

[52] *See* Reese, *supra* note 48, at 784-85.

[53] *See* Smit, *supra* note 48, at 64-67.

[54] *See* Smit, *supra* note 48, at 68.

[55] *See* Peterson, *supra* note 48, at 310-11.

[56] *See* Peterson, *supra* note 48, at 310.

[57] *See* Peterson, *supra* note 48, at 317-18.

[58] *See* Peterson, *supra* note 48, at 317-18.

[59] *See* Peterson, *supra* note 48, at 310.

[60] *See* Peterson, *supra* note 48, at 311.

approach.[61]

Regarding these principles of comity and res judicata, this writer would agree with Professor Peterson that a selective, and seemingly haphazard, judicial approach to comity and its enumerated defenses definitely warrants further evaluation and revision (beyond the scope of this Article) in order to create a more uniform and predictable body of law that, at the same time, reflects the current needs of our society and other interacting societies.

Whether the recognition of foreign judgments is primarily based on the theory of comity and its enumerated defenses as present case law indicates, or whether it should be based on the presumption of res judicata as various commentators suggest, the important legal principle inherent in both theories continues to be that a lack of jurisdiction and a fundamental lack of fairness to the litigants are valid defenses to the recognition of *any* foreign country judgment, including foreign divorces. This principle is demonstrated below.

B. The Domiciliary Requirement for Divorce Jurisdiction

(1) *The General Rule*

It is a well established principle of American law that, whether it be in a sister state or a foreign nation, domicile[62]

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[61] *See supra* note 24.

[62] "Domicile" is usually defined as being the place where the plaintiff is physically present with the intent of making that place his or her home. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 286 (1968); A. EHRENZWEIG, CONFLICT OF LAWS § 72 (1962); Fiske v. Fiske, 48 Wash. 2d 69, 290 P.2d 725 (1955). "Domicile" differs from "residence" since with "domicile" there is a subjective intent to remain more or less permanently in a certain place, and this intent need not be present for "residence." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 70-72 (1971). As a jurisdictional requirement for divorce, however, "legal residence" usually means "domicile." H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 286 (1968); Cooper v. Cooper, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439, 441 (1969); Tower v. Tower, 120 Vt. 213, 138 A.2d 602 (1958). *But see* Garrison v. Garrison, 107 Ill. App. 2d 311, 246 N.E.2d 9, 11 (1969). Numerous courts remain confused with this distinction between "domicile" and "residence." *See, e.g.*, 13 WEST'S WORDS AND PHRASES *Domicile* pp. 423-98 (1965).

is the only basis for divorce jurisdiction. Over one hundred years ago, in the case of *Pennoyer v. Neff*,[63] the Supreme Court stated: "The [domiciliary] State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."[64] The rationale behind this important rule was restated by Mr. Justice Frankfurter in the case of *Williams v. North Carolina [II]*:[65]

> Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil . . . . The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.[66]

Compare the definitions of "domicile" and "residence" in the First *Restatement:*

> The word "residence" is often but not always used in the sense of domicil, and its meaning in a legal phrase must be determined in each case. It is sometimes used as the equivalent to "domicil." . . . On the other hand, it may mean something less than domicil. . . . The phrase "legal residence" is sometimes used as the equivalent of domicil.

RESTATEMENT OF CONFLICT OF LAWS § 9 comment e (1934).

[63] 95 U.S. 714 (1877).

[64] *Id.* at 734-35 (dictum). This principle was also restated with approval in Sosna v. Iowa, 419 U.S. 393, 404 (1975). The *Sosna* court further stated that a domiciliary requirement for divorce "additionally furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." *Id.* at 407.

[65] 325 U.S. 226 (1945).

[66] *Id.* at 229, (dictum), *cited with approval in* Sosna v. Iowa, 419 U.S. 393, 407 (1975).

The historical accuracy of this statement has been questioned by at least one judge in Alton v. Alton, 207 F.2d 667 (3d Cir. 1953) (Hastie, J., dissenting), *vacated as moot*, 347 U.S. 610 (1954). Justice Hastie wrote:

> The common law courts in England had no divorce jurisdiction at the time of the American Revolution and I know of none which was exercised by the courts in the North American British colonies . . . the rule that divorce jurisdiction will be exercised only by the courts of a state which has a domiciliary connection with the spouses is a creation of nineteenth century American judges.

207 F.2d at 681.

According to another authority, however, the common law rule that

The principle that domicile is the basis for divorce jurisdiction is also recognized in the first[67] and second[68] *Restatements.*

> jurisdiction in divorce is attributed exclusively to the courts of the domicile of the spouses . . . found its justification in the idea—first developed in Northwestern Europe during the fourteenth century and has maintained its relevance to this day—that jurisdiction is to be entrusted to the courts of the country with which the parties are most closely connected.

Lipstein, *Recognition of Foreign Divorces: Retrospects and Prospects,* 2 OTTAWA L. REV. 49, 53 (1967). The basis for this concept is:

> [A] judicial decree of divorce is not merely a judgment which attracts the common-law rules of the conflict of laws concerning the recognition and enforcement of foreign judgments, but affects status. Since status is governed by the law of the domicile, the courts of the domicile alone can decide whether the status is to be changed by applying their *lex fori* or whatever law their own choice of law rules declare to be applicable.

2 OTTAWA L. REV. 49, at 50.

Whatever the historical accuracy of this rule may be, it is clear that the recent Supreme Court decision in Sosna v. Iowa, 419 U.S. 393 (1975), reiterating Mr. Justice Frankfurter's statement that divorce jurisdiction is founded on domicile, indicates the Supreme Court is quite satisfied with the legal rationale supporting this principle. *See* Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era,* 58 TEX. L. REV. 501, 522 (1980). *See also infra* note 106.

[67] *See, e.g.,* RESTATEMENT OF CONFLICT OF LAWS §§ 8(2), 110, 111, and 113 (1934). Section 8(2) provides: "All questions concerning the validity of a decree of divorce are decided in accordance with the law of the domicil of the parties, including the Conflict of Laws rules of that state." Section 110 provides that a state can exercise divorce jurisdiction when both spouses are domiciled in the state, and Section 113 gives the state jurisdiction when one spouse is domiciled within the state, and the other spouse is not. As a corollary to this rule, Section 111 provides: "A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state."

The rationale for the domiciliary principle is that "[m]arriage is a status . . . an intangible thing . . . of particular interest to the state in which the spouses have their domicile and where in the great majority of cases the family life is permanently carried on." RESTATEMENT OF CONFLICT OF LAWS § 110 comment a (1934).

[68] *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 70-71 (1971). Section 70 provides: "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses both of whom are domiciled in the State," and Section 71 further provides: "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state." The rationale for this rule is "[t]he status of marriage is of peculiar interest to the state in which the family life of the spouses is carried on." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 70 comment b (1971). *But see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (1971), discussed *infra* in note 92 and accompanying text.

Thus, the overwhelming majority of American states *will refuse to recognize a foreign divorce,* regardless of its purported validity in the nation awarding it,[69] *unless at least one of the spouses was a good-faith domiciliary in the foreign nation at the time the divorce was rendered.*[70] This rule applies to foreign bilateral divorces,[71] ex parte divorces,[72] and mail-order divorces.[73] Under this general prin-

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[69] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971) which provides: "The local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce." Comment a of § 285 gives the rationale for this rule:

> The state of a person's domicile has the dominant interest in that person's marital status and therefore has judicial jurisdiction to grant him a divorce . . . . The same considerations which give a state judicial jurisdiction to divorce a domiciliary make it appropriate for the state to apply its local law to determine the grounds upon which the divorce shall be granted.

[70] *See, e.g.,* Harrison v. Harrison, 214 F.2d 571 (4th Cir.), *cert. denied,* 348 U.S. 896 (1954) (applying Va. law); Prudential Insurance Co. v. Lewis, 306 F. Supp. 1177 (N.D. Ala. 1969); Cross v. Cross, 94 Ariz. 28, 381 P.2d 573 (1963); Schotte v. Schotte, 203 Cal. App. 28, 21 Cal. Rptr. 220 (1962); Kittel v. Kittel, 210 So. 2d 1 (Fla. 1968); Everett v. Everett, 345 So. 2d 586 (La. App. 1977); Bohaker v. Koudelka, 333 Mass. 139, 128 N.E.2d 769 (1955); State v. DeMeo, 20 N.J. 1, 118 A.2d 1 (1955); Kugler v. Haitian Tours Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972); Lorenzo v. Lorenzo, 85 N.M. 305, 512 P.2d 65 (1973); Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978); Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943); Commonwealth v. Doughty, 187 Pa. Super. 499, 144 A.2d 521 (1958); and *In re* Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628 (1974). *See also* authority cited in Annot., 13 A.L.R.3d 1419, 1425-29 (1967).

Only four American jurisdictions do *not* recognize this rule: New York, Connecticut, Tennessee, and the U.S. Virgin Islands. This minority view is discussed *infra* in notes 107-125 and accompanying text.

[71] Bilateral divorces are based on the physical presence of both spouses in the divorcing nation, or physical presence of the petitioner and the voluntary "appearance" by the defendant through an attorney. *See, e.g.,* Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd,* 42 N.J. 287, 200 A.2d 123 (1964) and Weber v. Weber, 200 Nev. 659, 265 N.W.2d 436 (1978).

[72] An ex parte divorce is based on the petitioner's physical presence in the foreign nation, with notice or constructive service given to the absent defendant. *See, e.g.,* Brown v. Brown, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969) and Kittel v. Kittel, 210 So. 2d 1 (Fla. 1968).

[73] A "mail order" divorce is rendered without either party ever appearing in the foreign jurisdiction. *See, e.g., In re* Chong Jah Alix, 252 F. Supp. 313 (D.C. Hawaii 1965); Rudnick v. Rudnick, 131 Cal. App. 2d 227, 280 P.2d 96 (1955); and Butler v. Butler, 239 A.2d 616 (D.C. 1968). "Mail order" and ex parte foreign divorces without domicile are *not* recognized in any American jurisdiction. *See gen-*

ciple, Mexican divorces requiring only residency for foreigners,[74] and Dominican and Haitian divorces requiring neither residency nor domicile,[75] will *not* be recognized by most American courts.[76]

The requirement of domicile for divorce jurisdiction has been codified in at least ten states[77] under the Uniform Divorce Recognition Act.[78]

The concept that domicile is the only basis for divorce jurisdiction has been criticized.[79] Professor Stimson argues,

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erally, Annot. 13 A.L.R.3d 1419, 1429-35 (1967).

[74] *See supra* notes 2, 3 and accompanying text.

[75] *See supra* note 4 and accompanying text.

[76] *See supra* notes 70-73 and accompanying text. It is also important to note that American courts might also deny recognition to foreign divorces based on substantive as well as jurisdictional grounds. For example, foreigners in the Dominican Republic can be divorced by "mutual consent," and by "mutual and steady consent" in Haiti. *See supra*, note 4. In most American jurisdictions, however, any procurement of divorce by mutual consent without any required marital fault, incompatibility, or irreconcilable marital breakdown—as required by state statute—is clearly contrary to a state's strong public policy, and may not be recognized under the principle of comity. *See, e.g.*, Ainscow v. Alexander, 39 A.2d 54 (Del. Super. Ct. 1944); Everett v. Everett, 345 So. 2d 586, 589 (La. App. 1977); and Smith v. Smith, 79 Mass. 209 (1859).

[77] California, Louisiana, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Washington, and Wisconsin.

[78] The UNIF. DIVORCE RECOGNITION ACT, 9 U.L.A. (1971), provides in part:

> § 1. A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for divorce was commenced.
>
> § 2. Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

[79] "Jurisdiction for divorce generally has been founded on domicile. The theory that a state or its court has power over a person whose home is in its territory is unsound." Stimson, *Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory*, 42 A.B.A.J. 222 (1956). *See also* Weintraub, *An Inquiry into the Utility of "Domicile" as a Concept in Conflicts Analysis*, 63 MICH. L. REV. 961 (1965) and Garfield, *The Transitory Divorce Action: Jurisdiction in the No-*

for example, that domicile is a variable concept, involving the conflicting ideas of "permanence and instantaneous change," based on conflicting inferences of the parties' domiciliary intent.[80] He also questions why full faith and credit must be given to a sister state divorce where there is no apparent domicile or jurisdiction[81] when a foreign divorce[82] can be refused recognition for this very reason.[83] Professor Stimson concludes that because of these problems with domicile, divorce jurisdiction should be based on the physical presence of parties, rather than on their domicile.[84] One may argue, however, that domicile creates an important "nexus" or relationship between the divorcing state

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Fault Era, 58 TEX. L. REV. 501 (1980).

[80] *See* Stimson, *supra* note 79, at 223 (quoting with approval Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955) and the dissenting opinion of Rutledge, J., in Williams v. North Carolina [II], 325 U.S. 226 (1945)).

[81] *See supra* note 43 and accompanying text.

[82] *See, e.g.*, Alton v. Alton, 207 F.2d 667 (3d Cir. 1953) (applying U.S. Virgin Islands law), *vacated as moot*, 347 U.S. 610 (1954). In *Alton* Judge Goodrich upheld a lower court decision denying a bilateral Virgin Island divorce to a Connecticut couple because of a lack of evidence the plaintiff was domiciled in the Virgin Islands. The Virgin Island divorce statute only required "residence," and neither spouse was complaining. Nevertheless, Judge Goodrich held this was a violation of the due process clause of the fifth amendment because there was no rational connection between physical presence in the Virgin Islands for six weeks and domicile. Domicile, Judge Goodrich reiterated, was essential to divorce jurisdiction because domestic relations are a matter of concern to the domiciliary state. Hastie, J., contested this assumption in his dissenting opinion. *See supra* note 66. Since the Altons did not object to this initial divorce, Judge Goodrich's opinion has been criticized because "the due process clause protects persons, not states" and for that reason the *Alton* opinion is "quite unsatisfactory." H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 290 (1968). On the other hand, Judge Goodrich may have been protecting "those who control affairs in Connecticut" as the "persons" deprived of due process. 207 F.2d 667, 677. *See* Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 515 n.89 (1980).

[83] "Does the due process clause prohibit what the full faith and credit clause requires?" Stimson, *supra* note 80, at 225. Professor Stimson may have overlooked the fact that cases such as Sherrer v. Sherrer, 334 U.S. 343 (1948), *supra* note 43, were decided on the principle of res judicata in combination with full faith and credit; but in *Alton* the question of domicile and due process was raised by the trial court judge, not in a subsequent collateral attack. *See supra* notes 38-43 and accompanying text.

[84] *See* Stimson, *supra* note 79, at 294-95.

and the spouses.[85] Mere physical presence in a jurisdiction and nothing more can never really constitute such a "nexus." And if recognition of a sister state divorce based on a sham domicile and thus a lack of jurisdiction[86] may at least be partially justified because of the paramount interests found in the full faith and credit clause,[87] this rule certainly should *not* be extended to include divorces where a foreign court clearly lacks any semblance of jurisdiction over American domiciliaries, or where other concepts of fundamental fairness are absent.[88] Nevertheless, at least four American courts purport to recognize this theory of divorce jurisdiction based on physical presence alone.[89]

Professor Weintraub is another critic who believes that "technical domicile" should not be a constitutional prerequisite to divorce jurisdiction. But where Professor Stimson suggests only physical presence for divorce jurisdiction,[90] Professor Weintraub argues for a more significant contact between the forum and the spouses in order to give the state a reasonable, and legitimate, interest in affecting the marital status—for example, a requirement of a "substantial period of residence" as is found in servicemen's divorce statutes.[91] The second *Restatement* also provides that a substantial period of residence, as well as domicile, may be

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[85] *See supra* notes 62-67, 76-78 and accompanying text.

[86] *See supra* notes 42-43 and accompanying text.

[87] *See supra* notes 13, 25, 41 and 43 and accompanying text.

[88] *See supra* notes 14-27, 62-78 and accompanying text.

[89] *See infra* notes 107-125 and accompanying text.

[90] *See supra* note 84 and accompanying text.

[91] *See* Weintraub, *supra* note 79, at 982-83. Servicemen's divorce statutes, applicable only to service personnel and their spouses, generally require domicile *or* residence for divorce jurisdiction. *E.g.*, HAWAII REV. STAT. § 580.1 (Supp. 1981); OR. REV. STAT. § 107.075(2) (1981); and VA. CODE § 20-97 (Supp. 1981). The reason for this exception to the general rule requiring domicile for divorce jurisdiction is that a military service family is often reassigned from place to place in the course of a military career, and lacking the freedom of choice to establish a new domicile, their domicile is likely to remain the place of military enlistment—where the spouses no longer reside. Physical presence is not enough for divorce jurisdiction under these statutes, since a residency nexus must be established in most states that have enacted these statutes. *See* Note, *Conflict of Laws: Limitations on the "Domicile of Choice" of Military Servicemen*, 31 OKLA. L. REV. 167 (1978).

an adequate prerequisite for divorce jurisdiction.[92]

A "substantial" residency requirement of six months to a year may well be a significant enough relationship or "nexus" to reasonably and legitimately allow for divorce jurisdiction in addition to the traditional requirement of domicile; and examples of this residency rule are clearly justified in servicemen's divorce cases.[93] Indeed, the exact distinctions between "residence" and "domicile" are not always clear.[94]

Yet any further expansion of these jurisdictional exceptions should be weighed and evaluated through a case-by-case approach and any jurisdictional modifications other than domicile should only be made if and when demonstrable legal and societal needs are seriously affected.

For example, a recent critic of the domiciliary requirement for divorce jurisdiction, Professor Garfield, argues that in our current transient society with no-fault divorce, the domiciliary requirement is obsolete because "the problem today is not so much migratory divorce as migratory people."[95] Accordingly, she recommends a proposed Uni-

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[92] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (1971) provides: "A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage." Comment a to § 72 reiterates a state "should not dissolve the marriage of spouses in whom it has little or no interest" and that a state may not exercise divorce jurisdiction "if neither spouse is domiciled in the state and if the state does not have sufficient interest in either spouse or some other basis to justify interference with the marriage status." Comment b to § 72 suggests, however, that the domicile of one or both of the spouses under §§ 70 and 71 is not the only possible basis of divorce jurisdiction, and that residence, as distinguished from domicile, "in the state for a substantial period, such as a year, is an adequate jurisdictional basis."

Under this *Restatement* view, Mexican divorces requiring six months residency for foreigners (*see supra* note 2) might qualify for comity recognition; but, except for servicemen's divorce statutes (*see supra* note 92), most American jurisdictions have not yet modified their domiciliary requirement for divorce jurisdiction *(see supra* notes 63-74 and 83).

[93] *See supra* note 91.

[94] *See supra* note 62.

[95] Garfield, *supra* note 79, at 504.

form Divorce Jurisdiction Act which would provide as the basis for divorce jurisdiction the mere presence of both parties in a state for bilateral divorces; and a brief period of presence, or simple residence in the forum state, for ex parte divorces.[96] Professor Garfield suggests few compelling reasons for changing domiciliary requirements for divorce jurisdiction. She admits that migratory divorces are no longer the problem they once were due to an increase in no-fault jurisdictions,[97] and there is much truth in this assertion.[98] What compelling social needs would be served, then,

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[96] *See* Garfield, *supra* note 79, at 544.

[97] "With the passing of fault as the sole ground for divorce, the need for the escape hatch of divorce mills necessarily has diminished. There is no reason to travel to Nevada [or Haiti or the Dominican Republic] for what is readily available at home for a fraction of the cost." Garfield, *supra* note 79 at 504. She does add "for those seeking instant release, the lure of a quickie divorce remains." *Id.* n.15.

[98] Among no-fault divorce grounds, six states recognize incompatibility as a legitimate ground for divorce: ALA. CODE § 30-2-1 (1975); ALASKA STAT. § 09.55.110 (1981); KAN. STAT. ANN. § 60-1601 (Supp. 1981); NEV. REV. STAT. § 125.010 (1981); N.M. STAT. ANN. § 40-4-2 (Supp. 1981); OKLA. STAT. ANN. tit. 12, § 1271 (West 1981). At least twenty-six jurisdictions now recognize divorce based on "irreconcilable differences" or "irretrievable breakdown": ARIZ. REV. STAT. ANN. § 25-312 (Supp. 1981); CAL. CIV. CODE § 4508 (West Supp. 1981); COLO. REV. STAT. § 14-10-106 (Supp. 1981); CONN. GEN. STAT. § 46-32 (1978); DEL. CODE ANN. tit. 13, § 1505 (Supp. 1981); FLA. STAT. ANN. § 61.052 (West Supp. 1981); GA. CODE ANN. § 30.102 (Supp. 1981) HAWAII REV. STAT. § 580-41 (Supp. 1981); IDAHO CODE § 32-603 (Supp. 1981); IND. CODE § 31-1-11.5-3 (Supp. 1981); IOWA CODE ANN. § 598.17 (West Supp. 1981); KY. REV. STAT. § 403.140 (Supp. 1980); ME. REV. STAT. ANN. tit. 19, § 691 (Supp. 1981); MASS. ANN. LAWS ch. 208, § 1 (Michie/Law. Co-op. 1981); MICH. COMP. LAWS ANN. § 552.6 (Supp. 1982); MINN. STAT. ANN. § 518.06 (West Supp. 1982); NEB. REV. STAT. § 42-361 (Supp. 1981); N.H. REV. STAT. ANN. § 458.7-2 (Supp. 1981); N.D. CENT. CODE § 14-05-03 (1981); OR. REV. STAT. § 107.025 (1981); R.I. GEN. LAWS § 15-5-3.1 (1981); TEX. FAM. CODE ANN. § 3.01 (Vernon 1975); V.I. CODE ANN., tit. 16, § 104 (Supp. 1981); WASH. REV. CODE ANN. § 26.09.030 (Supp. 1982). And fifteen jurisdictions, including New York, grant no-fault dissolutions after the parties have lived apart for some statutory period: ARK. STAT. ANN. § 34-1202 (Supp. 1981); MD. ANN. CODE art. 16, §§ 24, 26 (Supp. 1981); N.J. STAT. ANN. § 2A.34-2 (West Supp. 1981); N.Y. DOM. REL. LAW § 170 (McKinney 1977); N.C. GEN. STAT. §§ 50-5, 50-6 (Supp. 1981); OHIO REV. CODE ANN. § 3105.01 (Baldwin Supp. 1981); P.R. LAWS ANN., tit. 31 § 321 (Supp. 1981); S.C. CODE ANN. § 20-3-10 (Law. Co-op. Supp. 1981); TENN. CODE ANN. §§ 36-801 (Supp. 1981); UTAH CODE ANN. §§ 30-3-1, 30-3-2 (Supp. 1981); VT. STAT. ANN. tit. 15, §§ 551, 631 (Supp. 1981); VA. CODE § 20-91 (Supp. 1981); W. VA. CODE § 48-2-4 (Supp. 1981); WIS. STAT. ANN. § 767.07 (West 1981); WYO. STAT. § 20-2-104 (1977).

by changing this domiciliary test to require only physical presence of the parties? Professor Garfield argues that transient spouses, moving to a new home state, might be "barred" from obtaining a divorce since they are not yet domiciliaries of the new state.[99] But this is not altogether true.[100] Furthermore, if there is an important nexus between a new resident and the state, related to state and local police protection, property rights, rights of inheritance, taxes, voting rights, education, "new jobs, new environments, new opportunities, and the chance to start a new life," this nexus should relate to the parties' marital status

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Thus, in at least 47 American jurisdictions a type of no-fault divorce ground now exists, and most American domiciliaries no longer need to rely on "quickie" foreign divorces to give them grounds they could not obtain in their own state. Apparently Illinois is the only state retaining fault grounds as an exclusive remedy for divorce. ILL. ANN. STAT. ch. 40, ¶ 401 (Smith-Hurd 1980). *See generally* Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 119-20 (1976).

[99] [P]eople are increasingly mobile for reasons other than easy divorce . . . . It is much more likely that spouses contemplating divorce will leave their home states, not in search of lax divorce laws, but in search of new jobs, new environments, new opportunities, and a chance to start a new life. A move to another state may be perfectly honest, natural, and beneficial. Yet when a person in this situation attempts to secure a divorce in his (or her) new home, he may find himself barred from the courthouse by rules designed to meet the migratory divorce problems of a bygone era.

Garfield, *supra* note 79, at 504.

[100] The Supreme Court, as a constitutional mandate, has upheld certain domestic rights of individuals against arbitrary and unreasonable state statutes. There is, for example, a fundamental right to marry (Loving v. Virginia, 388 U.S. 1 (1967) and Zablocki v. Redhail, 434 U.S. 374 (1978)) and a fundamental right to divorce (Boddie v. Connecticut, 401 U.S. 371 (1971)). Following these precedents, the argument has been made that a domiciliary requirement for divorce jurisdiction would also violate a petitioner's due process rights under the fourteenth amendment by "barring" his or her access to a divorce if he or she were not yet a state domiciliary. But in Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court upheld Iowa's one year domiciliary requirement for divorce, stating Sosna's claim was not a total deprivation of the right to divorce, as in Boddie v. Connecticut, but only one of delay. The Iowa domiciliary requirement *could* be met in a matter of time, and was sufficiently related to establish a nexus between appellant Sosna and the right of the State of Iowa to control domestic relations and responsibilities "of the utmost significance." *See also, supra* notes 64, 66 and accompanying text.

as well.[101] Thus, it continues to serve an important function through married life and upon divorce.[102]

It might finally be argued that since various states can now obtain personal jurisdiction in divorce matters through state long-arm statutes,[103] the concept of marital domicile for divorce jurisdiction is no longer relevant. However,

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[101] "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." Maynard v. Hill, 125 U.S. 190, 205 (1888);

> As this Court on more than one occasion had recognized, marriage involves interests of basic importance in our society . . . . Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery.

Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (citations omitted).

[102] [A] residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience. A decree of divorce is not a matter in which the only interested parties are the State as a sort of "grantor," and a divorce petitioner such as appellant in the role of the "grantee." Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights. Where a married couple has minor children, a decree of divorce would usually include provisions for their custody and support. With consequences of such moment riding on a divorce decree issued by its courts, [a state] may insist that one seeking to initiate such a proceeding have the modicum of attachment to the State required here.

> Such a requirement additionally furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack.

Sosna v. Iowa, 419 U.S. 393, 406-07 (1975) (citation omitted).

[103] *See, e.g.*, ALASKA STAT. § 09.05.015(a)(12) (1973); ARK. STAT. ANN. 34-2446 (Supp. 1981); CAL. CIVIL PROC. CODE § 410.10 (West 1973); FLA. STAT. ANN. § 48.193(1)(e) (Smith-Hurd Supp. 1980); IDAHO CODE § 5-514(e) (1979); ILL. ANN. STAT. ch. 110, § 17(1)(e) (Smith-Hurd Supp. 1980); IND. R. TRIAL P. 4.4(A)(7) (West Supp. 1982); KAN. STAT. ANN. § 60-308(b)(8) (1976); MICH. COMP. LAWS ANN. § 600.705(7) (1981); N. MEX. STAT. ANN. § 38-1-16(A)(5) (1978); N.Y. CIV. PRAC. LAW § 314(1) (McKinney 1972); NEV. REV. STAT. § 14.065(2)(e) (1981); OKLA. STAT. ANN. tit. 12, § 1701.03(a)(7) (West 1980); OR. REV. STAT. § 14.035(2) (1977); S.C. CODE ANN. § 20-3-50 (Law. Co-op. 1976); TENN. CODE ANN. § 20-2-214(a)(7) (1980); TEX. FAM. CODE ANN. tit. 1, § 3.26(a)(1) (Vernon Supp. 1982); UTAH CODE ANN. § 78-27-24(6) (1977); VA. CODE § 8.01-328.1(A)(9) (Supp. 1981); and WIS. STAT. ANN. § 801.05(11) (West Supp. 1981).

these long-arm statutes generally require that the parties have maintained a marital domicile in the forum state at the time they separate; and that the initial grounds for divorce or legal separation are also based in the forum state.[104] Moreover, the forum state is barred from using its long-arm statute in any domestic relations matter unless the state has a significant relationship with the parties.[105]

The domiciliary requirement for divorce jurisdiction thus remains a reasonable and viable legal concept, and should not be modified unless there is a clearly demonstrated need.[106]

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[104] *See, e.g.*, VA. CODE § 8.01-328.1(A)(9) (Supp. 1981).

[105] *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978).

[106] By way of comparison, other countries continue to recognize this domiciliary requirement for divorce jurisdiction, although alternate residence requirements have also recently emerged.

Prior to 1974, for example, the divorce jurisdiction of English courts was based on domicile as a "rigid principle." Latey, *Recognition of Foreign Decrees of Divorce*, 16 INT'L & COMP. L.Q. 982 (1967). While still retaining domicile as a jurisdictional basis for divorce, Parliament passed the Domicile and Matrimonial Proceedings Act of 1973 which also permitted English divorce courts to exercise jurisdiction if either party has been a resident in England for at least one year preceding commencement of the divorce; and abolished the common-law rule that a wife's domicile is always dependent on her husband.

The Republic of Ireland has no such legislation. Under common-law principles, the Irish Supreme Court will recognize foreign domicile-based divorces, but recognition of foreign divorces based on residence is still doubtful. Duncan, *Foreign Divorces Obtained on the Basis of Residence and the Doctrine of Estoppel*, 9 IRISH JURIST 59, 62-64 (1974).

The Prague Convention of the International Law Association in 1947 proposed three alternate bases of jurisdiction for divorce: (1) domicile; (2) habitual residence; or (3) nationality. Latey, *supra*, at 995. This is the same test recommended at the 1968 Hague Conference on Private International Law, Convention on Recognition of Foreign Divorce Decrees. Nadelmann, *Habitual Residence and Nationality as Tests at the Hague: The 1968 Convention on Recognition of Divorces*, 47 TEX. L. REV. 766, 771 (1969).

See also North, *Recognition of Foreign Divorce Decrees*, 31 MOD. L. REV. 257 (1968) and Note, *Conflict of Laws: Foreign Divorce Decrees: Validity: Domicile of Husband: Whether Validity of Divorce To Be Determined By "Real and Substantial Connection" Test: Holub v. Holub [1976] 5 W.W.R. 527, 71 D.L.R.(3d) 698 (Man. C.A.)*, 9 OTTAWA L. REV. 676 (1977) [hereinafter referred to as *Foreign Divorce Decrees*].

Nowhere in these countries is divorce jurisdiction based on mere physical presence alone.

(2) *The Minority "New York Rule"*

To date, only four American jurisdictions[107] do *not* recognize the principle that domicile is the basis for divorce jurisdiction. Instead, their test for jurisdiction in bilateral divorces is based solely on physical presence, and these four jurisdictions will therefore recognize a foreign bilateral divorce without any finding of residence or domicile.[108] Since such divorces lack any significant connection with the divorcing forum—either through domicile or residency—which is a major defect in itself;[109] and since there is very little (if any) common law or foreign legal precedent to support such a theory;[110] this writer must conclude, with other commentators,[111] that this minority rule is of doubtful legal precedent, and should not be followed by other jurisdictions.

The case of *Rosenstiel v. Rosenstiel*[112] provides an example of this questionable theory's application. Although prior New York decisions were in conflict as to whether or not domicile was a prerequisite to divorce jurisdiction,[113] the New York Court of Appeals in *Rosenstiel* liberally interpreted some unique statutory law[114] and held that recog-

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[107] New York, Connecticut, U.S. Virgin Islands and Tennessee.

[108] *See, e.g.*, Perrin v. Perrin, 408 F.2d 107 (3d Cir. 1969) (applying Virgin Islands law to a Mexican divorce); Yoder v. Yoder, 31 Conn. Supp. 344, 330 A.2d 825 (1974) (Mexican divorce); Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966) (Mexican divorce); and Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978) (Dominican divorce).

[109] *See supra* notes 63-105 and accompanying text.

[110] *See supra* notes 63-66, 106 and accompanying text.

[111] *See, e.g.*, Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26 (1966); Leach, *Divorce by Plane-Ticket in the Affluent Society—With a Side Order of Jurisprudence*, 14 KAN. L. REV. 549 (1966); and *Mexican Bilateral Divorce, supra* note 13. *But see* Comment, *Divorce by Personal Jurisdiction of the Parties—A Support of the Mexican Bilateral Divorce*, 29 ALB. L. REV. 328 (1965).

[112] 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966).

[113] *Compare* Gray v. Gray, 143 N.Y. 354, 38 N.E. 301 (1894) with Scagg v. Scagg, 18 N.Y.S. 487 (Sup. Ct. 1892). *See also* Foster, *Recognition of Migratory Divorces: Rosenstiel v. Section 250*, 43 N.Y.U. L. REV. 429, 432 n.13 (1968).

[114] N.Y. DOM. REL. LAW § 230 (McKinney 1977) replaces former §§ 230 and

nition of a bilateral Mexican divorce based on mere physical presence of the parties "offends no public policy of this State."[115] (Ex parte[116] and "mail order"[117] foreign divorces, however, still remained void as against New York's strong public policy.[118]) The dissent in *Rosenstiel* made various persuasive arguments against this decision: (1) domicile is the sine qua non of jurisdiction over the marital status, and the State is a participant having a vital interest in this status;[119] (2) based on this domiciliary requirement, no other states recognize the New York rationale; (3) such divorces are blatantly and obviously the fruit of consensual arrangements forbidden by New York public policy;[120] (4) although the full faith and credit clause of the Constitution forces sister states to recognize Nevada divorces based on a six-weeks residence, the Constitution has no application to divorce decrees of foreign nations,[121] and therefore to analogize a one-day Juarez Mexican divorce to a six-week Nevada divorce is "too facile"; (5) the fact that some parties choose to treat their marriage contracts with the same indifference they treat commercial contracts does not mean the judiciary should endorse such conduct; and (6) no court is licensed to override a public policy declared by the

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170. Until 1966, the New York legislature conferred divorce jurisdiction without regard to domicile where the marriage ceremony had been performed in New York, and by "judicial gloss," the legislative failure to use the term "domicile" was interpreted by the courts to mean "residence" as "physical presence." *See generally* Foster, *supra* note 114 at 431-33.

[115] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, ___, 209 N.E.2d 709, 713, 262 N.Y.S.2d 86, 91 (1965).

[116] *See supra* note 72.

[117] *See supra* note 73.

[118] *See, e.g.*, Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, ___, 209 N.E.2d 709, 713, 262 N.Y.S.2d 86, 89 (1965). *See also* Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943).

[119] *See supra* notes 63-105 and accompanying text. The dissent also pointed out that the majority had not sufficiently distinguished the rationale behind Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948).

[120] N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1978) forbids divorce by mutual consent by prohibiting any such contract to dissolve a marriage.

[121] *See supra* notes 13-47 and accompanying text.

legislature.[122]

The greatest criticism of *Rosenstiel* by various commentators is that the New York Court of Appeals did indeed appear to override state public policy declared by the New York legislature, not only through a de facto recognition of divorce by consent,[123] but also by allowing New York migratory couples to evade state divorce law[124] by obtaining a foreign decree. Criticism of this judicial usurpation of the legislative function—regardless of any legislative "wisdom" inherent in the statutes—has been severe,[125] and is shared

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[122] *See generally* Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, ___, 209 N.E.2d 709, 715-22, 262 N.Y.S.2d 86, 92-103 (1965)(dissenting opinion). *See also* Leach, *supra* note 112 at 552.

[123] *See supra* note 120 and accompanying text.

[124] At the time of *Rosenstiel*, divorce grounds in New York were limited to adultery. N.Y. DOM. REL. LAW § 170 (McKinney 1977) now contains additional grounds for divorce, including cruelty, abandonment, and separation.

[125] *E.g.*,

> [T]he decision of the Court of Appeals in Rosenstiel v. Rosenstiel was . . . inexcusable, for the court chose to nullify New York Statutes without pretense of constitutional compulsion . . . . If New York's public policy is to be found in the statutes, the court's statement that recognition of the Mexican incompatibility decree "offends no public policy of this state" cannot bear scrutiny. . . . In brief, the *Rosenstiel* decision left New York with a divorce law that could satisfy nobody, and it did so at great cost to the proper relationship between the courts and the legislature.

Currie, *supra* note 111, at 57, 59 and 62. "[New York Mexican divorce] decisions are distinguishable . . . in terms of New York's extremely restrictive divorce law at the time (divorce for adultery only) and the court's open disapproval of legislative prudery." H. KRAUSE, FAMILY LAW 839 (1976).

> The New York [*Rosenstiel*] decision changes the substantive law of New York to make divorce by mutual consent a proper basis for the termination of the marriage.
>
> Even if the approach taken is a clever way for the courts to avoid the harshness of the statute, it is inappropriate for the courts to assume this function and adopt this method to bring about the result. No legislature in the United States has yet adopted mutual consent as a statutory basis for divorce, but what the New York courts have done is to assume the power to sanction it. If the divorce laws do not reflect modern thinking, and mutual consent ought to be a basis for divorce, then the laws ought to be revised. But changing [these] laws is a job for the legislature.

Note, *Mexican Bilateral Divorce, supra* note 13, at 608.

This same argument might also apply to other states that follow the minority

by this writer. For the reasons cited above, this author concurs with other commentators who believe that the minority "New York Rule" is of doubtful legal precedent, and should not be embraced by other jurisdictions.

III. Does Estoppel "Validate" A Void Foreign Divorce

A. The Application of Estoppel Doctrines to Void Divorces

Assuming that a foreign country divorce decree is void due to a lack of jurisdiction,[126] a crucial question remains: Will the doctrine of equitable estoppel serve to "validate" a void foreign divorce? This question has been analyzed by various commentators,[127] and the courts have reached different results in judicial opinions that appear to be contradictory and confusing.

The source of this confusion is largely based on two conflicting legal principles. First, as a general principle of law, a judicial judgment in divorce proceedings—or any other legal matter—which is given without jurisdiction is void; and thus is open to collateral attack by the parties themselves, by interested third parties, or by the state.[128] There is, however, another legal principle that one who obtains a judgment, or one who relies on a judgment, may not collaterally attack it later on jurisdictional grounds; and this second principle is commonly referred to as "estop-

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"New York rule." *See, e.g.*, Recent Developments, *Domestic Relations—Jurisdiction Extension of Comity to Foreign-Nation Divorce*, 46 Tenn. L. Rev. 238, 249-51 (1978), discussing Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978).

For another problem related to this "minority rule," *see* Note, *New York-Approved Mexican Divorces: Are They Valid in Other States?*, 114 U. Pa. L. Rev. 771 (1966).

[126] *See supra* notes 62-105 and accompanying text.

[127] Among various commentaries discussing estoppel and divorce see H. Clark, The Law of Domestic Relations in the United States 295-314 (1968); Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L.J. 45 (1960); Phillips, *Equitable Preclusion of Jurisdictional Attacks on Void Divorces*, 37 Fordham L. Rev. 355 (1969); and Rosenberg, *How Void is a Void Decree, or the Estoppel Effect of Invalid Divorce Decrees*, 8 Fam. L.Q. 207 (1974).

[128] *See* H. Clark, *supra* note 127, at 295 and Clark, *supra* note 127, at 45-46.

pel,"[129] although in divorce cases it sometimes differs from the technical theory of equitable estoppel.[130] In practice some courts refuse to recognize this estoppel principle for void divorces,[131] while other courts give it only limited application.[132]

Under what circumstances will American courts invoke or refuse to invoke estoppel in cases involving void foreign divorces? A disturbing conflict of authority is discussed below, but two general principles must be emphasized.

First, this particular form of equitable estoppel differs dramatically from the theory of res judicata, which is sometimes called "estoppel by judgment" or "jurisdictional estoppel." Res judicata is a function of the divorce decree itself and not the parties' subsequent conduct. Therefore, the underlying policy for res judicata is to demand finality in litigation after the parties have had an opportunity to present their case; and in sister state controversies, under the full faith and credit clause, this res judicata finality is mandated even in the absence of jurisdictional prerequisites.[133] Equitable estoppel, on the other hand, is *not* a rule of jurisdiction, and is *not* governed by the full faith and credit clause in sister state actions or foreign controversies. The theory of equitable estoppel is dependent upon events and conduct which occur *after* the divorce is granted, separate and apart from the divorce decree itself. It is a personal dis-

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[129] *Id.*

[130] This estoppel doctrine:

> is broader than the traditional estoppel theory, and for that reason it has sometimes been called "quasi-estoppel." There is no need, however, for new terminology as long as we keep in mind that the peculiarities of matrimonial cases require a more liberal application of this equitable doctrine. . . . [T]he principle difference in the matrimonial application is that . . . one party does not necessarily have to *rely* to his detriment upon factual representations made by the other party. It is sufficient [in some cases] that a court finds that it would be unfair to let a party take advantage of the legal invalidity of the decree.

Rosenberg, *supra* note 127, at 208 (emphasis in original).

[131] *See infra* note 141 and accompanying text.

[132] *See infra* notes 144, 147 and 152 and accompanying text.

[133] *See generally supra* notes 38-46 and accompanying text.

ability of the party attacking a void divorce decree, under the theory that one who has taken a prior position regarding a divorce and has obtained a benefit from it, or one who has brought about a change of position in the other party, cannot later take an inconsistent position which would prejudice the other party.[134]

Second, *the doctrine of equitable estoppel does not legally "validate" a void divorce.* Those courts applying the estoppel concept to void divorces are careful to avoid stating that such divorces are now "valid," but only that the attacking party is estopped to *assert* any invalidity. This distinction is crucial: although a party may be estopped from questioning a divorce in certain circumstances, the divorce is still void.[135]

How have the courts interpreted and utilized this estoppel principle relating to void foreign country divorces? American courts have generally followed one of four approaches in determining whether or not estoppel should apply to a void divorce: (1) the "traditional theory" that generally refuses to apply an estoppel defense to void divorces based on public policy grounds; (2) the "sociological theory" that estoppel should be liberally applied to validate the parties' expectations; (3) the "*Restatement* theories" that estoppel should apply to one who has obtained a void divorce, who remarries in reliance on a void divorce (1st *Restatement)*, or whenever there would be "inequitable circumstances" (2d *Restatement*); and (4) the "status versus property rights" theory that estoppel should not be applied in any divorce controversy involving the parties' marital status, but that estoppel is appropriate in later controver-

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[134] *See* Rosenberg, *supra* note 127, at 208-09; Clark, *supra* note 127, at 46-49.

[135] *See* H. CLARK, *supra* note 127, at 297; Clark, *supra* note 127, at 47 and Rosenberg, *supra* note 127, at 208 ("[T]he application of estoppel does not imply that the [divorce] decree is valid legally—on the contrary, many decisions explicitly declared a decree invalid and then proceeded to hold one party estopped from asserting this invalidity.") *See, e.g.,* Packer v. Packer, 6 A.D.2d 464, ___, 179 N.Y.S.2d 801, 805 (1958) and Dunn v. Tiernan, 284 S.W.2d 754 (Tex. Civ. App. 1955).

sies involving property rights. These four estoppel theories are analyzed below.

B. The "Traditional Theory" of Estoppel and Void Divorces

The "traditional theory" of estoppel and void foreign divorces is for the domiciliary state to reject estoppel, and to permit collateral attack on the void divorce in all cases that may arise.[136] The rationale behind this rule is that estoppel, even for a limited purpose, results in the recognition of a void migratory divorce granted by a court lacking any jurisdiction whatever. The domiciliary state should thus apply its own laws to the marital difficulties of its citizens,[137] and if the domiciliary state applied estoppel it would, in effect, condone an evasion of its divorce laws and countenance an unwarranted interference in the domestic affairs of its citizens by the unrelated courts of a divorce-mill jurisdiction.[138]

Although one commentator believes that this "traditional theory" of estoppel is "obsolete" and "no longer defensible,"[139] recent judicial opinions have held otherwise.

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[136] *See* CLARK, *supra* note 127, at 302-03; Clark, *supra* note 127, at 53-54; *see also* Ainscow v. Alexander, 39 A.2d 54 (Del. Super. Ct. 1944). Smith v. Smith, 79 Mass. 209 (1859), Hollingshead v. Hollingshead, 91 N.J. Eq. 261, 110 A. 19 (1920). Under this theory, a void divorce may be collaterally attacked by the parties themselves, any interested third parties, or the state.

[137] *See supra* notes 101-02 and accompanying text.

[138] *See* Phillips, *supra* note 127, at 363-65.

> Since the divorce is a legal nullity, to give it effect is to permit dissolutions at the unilateral will of one spouse in the case of an ex parte divorce . . . [and] likewise, recognition of a void, bilateral divorce amounts to divorce by consent. This violates the public policy prohibiting [agreements] to alter or dissolve a marriage.
>
> If the divorce is one procured by fraud and perjury as to the plaintiff's domicile and the divorce court's jurisdiction, and perhaps to the grounds alleged as well, to recognize the divorce is to tolerate illegal conduct and even make it effectual. Then too, recognition of a void divorce frequently confers a semblance of legitimacy upon a bigamous second marriage.

Id. at 364.

[139] H. CLARK, *supra* note 127, at 303; Clark, *supra* note 127, at 54.

Indeed, the "traditional theory" remains the law in various jurisdictions,[140] and where it has effect, domiciliary requirements and public policy rationale supersede any kind of estoppel argument.[141]

C. The "Sociological Theory" of Estoppel and Void Divorces

The "traditional theory" of estoppel and void divorces has been perceived in some sectors as inequitable to the divorcing parties. Professor Clark has suggested that a "sociological theory" is in its validation of the parties' "real" expectations of marriage and divorce rather than relying on a purely theoretical, and perhaps "unreal," legal basis. Therefore:

> if the person attacking the divorce is, in doing so, taking a position inconsistent with his past conduct, or if the parties to the action have relied upon the divorce, and if, in addition, holding the divorce invalid will unset relationships or expectations formed in reliance upon the divorce, then estoppel [under the 'sociological view'] will preclude calling the divorce in question.[142]

Nevertheless, according to another commentator, this "sociological theory" of estoppel and void divorces has some weaknesses:

> [I]t can result in uncertainty and ambiguity as to a person's marital status and his capacity to marry. This is undesirable because the ambiguity could conceivably lead a person to refrain

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[140] *See, e.g.*, Everett v. Everett, 345 So. 2d 586 (La. App. 1977); Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978); Kugler v. Haitian Tours Inc., 120 N.J. Super. 260, 293 A.2d 706 (1972); In re Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628 (1974). *See also* Prudential Ins. Co. v. Lewis, 306 F. Supp. 1177 (N.D. Ala. 1969); Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd*, 42 N.J. 287, 200 A.2d 123 (1964); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937); and Bobala v. Bobala, 68 Ohio App. 63, 33 N.E.2d 845 (1940); Commonwealth v. Doughty, 187 Pa. Super. 499, 144 A.2d 521 (1958). *But see* Ferret v. Ferret, 55 N.M. 565, 237 P.2d 594 (1951) and Davis v. Davis, 80 Ohio Abs. 433, 156 N.E.2d 494 (Ct. Com. Pleas 1959).

[141] *See generally* H. CLARK, *supra* note 127, at 295-314, and Clark, *supra* note 127, at 45.

[142] H. CLARK, *supra* note 127, at 305 and Clark, *supra* note 127, at 56-57.

> from a marriage he could validly contract. More importantly, judicial ambiguity relative to a person's status can encourage him to attempt a bigamous marriage he would not attempt in the face of a forthright determination that his prior marriage subsisted. Then too, estoppel can prevent a valid dissolution of a prior dead marriage and, consequently, the regularization of a bigamous remarriage that has been attempted.[143]

D. The Restatement Theories of Estoppel and Void Divorces

The Conflict of Laws *Restatements* demonstrate an evolution in the law of estoppel and void divorces from a conservative theoretical rule to a more liberal sociological approach. The first *Restatement* prohibits the questioning of a void divorce "either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying."[144]

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[143] Phillips, *supra* note 127, at 365-66.

[144] RESTATEMENT OF CONFLICT OF LAWS § 112 (1934). Section 112 also has the following caveat:

> [t]he Institute expresses no opinion as to whether a spouse may not be precluded from questioning the validity of a divorce decree under circumstances other than those described in this Section; nor is any opinion expressed as to whether the children of a prior marriage, or a third person, may be precluded from questioning the validity of a divorce decree under circumstances described in this Section.

Comment b to Section 112 further states: "The rule stated in this Section is not applicable to prevent a state from prosecuting for bigamy or for unlawful cohabitation, a person who has obtained a divorce in a state which had no jurisdiction to grant it." This rule has been followed in various states. *See, e.g.*, Long v. State, 44 Del. 262, 65 A.2d 489 (1949); and State v. DeMeo, 20 N.J. 1, 118 A.2d 1 (1955). There appears to be a conflict of authority as to whether or not the home state should be able to challenge a foreign divorce if the parties themselves cannot. Those holding that the state should not be able to challenge a void foreign divorce include A. EHRENZWEIG, CONFLICT OF LAWS 253 (1962) and H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 259 and n.30 (4th ed. 1964). But for an opposing view, supporting comment b, see Von Mehren, *The Validity of Foreign Divorces*, 45 MASS. L.Q. 23, 29 (1960); Cavers, Book Review, 47 CALIF. L. REV. 414, 417 (1959); and Currie, *Suitcase Divorce in the Conflict of Laws*, 34 U. CHI. L. REV. 26, 54-55 n.130 (1966).

For cases holding that third party "strangers" are not estopped from attacking a void divorce, see *In re* Ainscow's Estate, 34 A.2d 593 (Orphans' Ct. Del. 1943) (third-party children not estopped) and *In re* Lindgren's Estate, 293 N.Y.

The second *Restatement*, apparently influenced by Professor Clark's "sociological" approach to estoppel and void divorces,[145] states a more general rule: "A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him to do so."[146] There is some uncertainty,

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18, 55 N.E.2d 849 (1924) (dictum). But for a case holding that a child could not collaterally attack a parent's void divorce under Florida law to obtain property, see Johnson v. Muelberger, 340 U.S. 581 (1951).

Cases apparently following § 112 include: Rediker v. Rediker, 35 Cal. 2d 796, 221 P.2d 1, 6 (1950) ("the validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry.") Hensgren v. Silberman, 87 Cal. App. 2d 668, 197 P.2d 356 (1948), Justus v. Justus, 208 Kan. 929, 495 P.2d 98 (1972), and Dennis v. Dennis, 337 Mass. 1, 147 N.E.2d 828 (1958).

[145] Clark's article, *supra* note 127, is quoted in the Reporter's Note to § 74 of the *Second Restatement*.

[146] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74 (1971). Comment a to § 74 provides:

> Unlike the principle of res judicata (see § 73), application of this estoppel doctrine has not to date been held required by any constitutional mandate. Its applicability in a particular case has been held to be determined not by the local law of the state in which the divorce was granted but by the local law of the state in which the validity of the divorce is attacked. Each State of the United States has been deemed free, at least within broad limits, to determine the rule's scope and effect. . . .

The scope of § 74 under comment b further states:

> The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party.
>
> The rule's scope of application varies from state to state and, even within the confines of a single state, if often clouded with uncertainty. In general, it may be said that a person who obtains a divorce and then remarries will not be permitted to attack the validity of the divorce in order to free himself from his obligations to his second spouse or in order to claim an inheritance from the estate of the first spouse. On the other hand, if both parties to a divorce attack its validity in a subsequent action, neither should be estopped from making such an attack since neither is placing reliance upon the validity of the divorce. An example is where after a husband has obtained an *ex parte* divorce, the wife brings an action against him for separation and support, and the husband in turn seeks to counterclaim for divorce. He should be permit-

however, as to what constitutes "inequitable circumstances," and this may encourage some judicial subjectivity and not a little confusion.[147]

E. The "Status versus Property Right" Theory of Estoppel and Void Divorces

A fourth application of estoppel to void divorces is based on the nature of the lawsuit itself. If the action is "matrimonial"—that is to say, if the action deals with marital *status,* including actions to declare the nullity of a void marriage, or separation and divorce—then estoppel is deemed to be inappropriate. If the action is "non-matrimonial"—that is to say, dealing with a *property right* such as

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ted to do so. The wife is attacking the validity of the divorce in her action for separation, and there is no reason under the circumstances why the husband should not be allowed to do the same.

A spouse who has accepted benefits under the divorce will usually be held estopped to attack it. So an invalid *ex parte* divorce obtained by a husband will be held immune from attack by a wife who has remarried. Usually, such a divorce will also be held immune from attack by a wife who has accepted alimony under the original decree or who has waited an unreasonably long time before attacking the divorce, particularly if the husband has remarried in the meantime.

Section 74 of the second *Restatement* thus appears to incorporate Section 112 of the first *Restatement* while providing for additional equitable remedies as well.

According to one commentator, "California appears to follow the spirit of the [second] *Restatement* more closely than most jurisdictions: estoppel is applied when equitable considerations demand it and not according to some narrow, legalistic rules." Rosenberg, *supra* note 127 at 213. *See also* Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957); Dietrich v. Dietrich, 41 Cal. 2d 497, 261 P.2d 269 (1953); Baker v. Baker, 2 Ill. App. 2d 795, 276 N.E.2d 792 (1971); and Perrenoud v. Perrenoud, 206 Kan. 559, 480 P.2d 749 (1971).

[147] Comment b to Section 74 of RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) admits that the rule's scope "varies from state to state and, even within the confines of a single state, is often clouded with uncertainty." *See, e.g.,* Carroll v. Carroll, 232 Ark. 997, 342 S.W.2d 79 (1961); Samuel v. McDaniel, 107 N.J. Super. 582, 259 A.2d 714 (1969); *In re* Shufelt's Estate, 125 Vt. 131, 211 A.2d 173 (1965). *See also* Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462, 464 (Sup. Ct. 1968) (New York law regarding estoppel and void divorces has created "an edifice of inconsistency and confusion"), Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436, 441 (1978) ("In cases involving foreign divorce decrees . . . the application of the principles of equitable estoppel cannot be subjected to fixed and settled rules of universal application, but rests largely on the facts and circumstances of each particular case.")

taking against a deceased spouse's will, or enforcing an alleged right to support—then estoppel may apply.[148]

Although this theory was first suggested in New York,[149] the inconsistent and confusing application of this rule in that state provides a poor model for analysis, and its New York application has been severely criticized by numerous commentators.[150] But since other common-law precedent exists involving this theory,[151] and since other states have subscribed to it,[152] the "status versus property right" theory of estoppel and void divorces should not be dismissed due to its unfortunate mishandling in New York. The major drawback to the "status versus property right" theory is that "[t]his distinction is sometimes difficult to apply."[153]

F. A Proposed Synthesis of Estoppel Doctrines to Void Divorces

The above analysis of estoppel relating to void divorces

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[148] *See* Clark, *supra* note 127, at 49-50 and Phillips, *supra* note 127 at 366-68.

[149] *See* Clark, *supra* note 127, at 50.

[150] *E.g.*, "The New York courts, with an ingenuity which would be praiseworthy if employed in a socially useful cause, have succeeded in constructing upon this ostensibly simple [marital status v. property right] distinction an edifice of inconsistency and confusion unsurpassed elsewhere in the law." Clark, *supra* note 127, at 50. "[T]he case law in New York has little consistency or direction, and it is virtually impossible to synthesize any clear rules." Rosenberg, *supra* note 127, at 213. "The [New York] cases are conflicting and their rationales inconsistent. Nevertheless, the results in the cases show a fairly consistent pattern." Phillips, *supra* note 127, at 356. *Cf.* Alfaro v. Alfaro, 5 A.D.2d 770, 169 N.Y.S. 2d 943, *aff'd*, 7 N.Y.2d 949, 165 N.E.2d 880 (1958); Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943); and Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).

[151] *See, e.g.*, Downtown v. Royal Trust Co., 34 D.L.R.3d 403 (Can. 1972) and Hayward v. Hayward, 1 All E.R. 236 (Eng. 1961) *cited in* 9 OTTAWA L. REV. 676, 685-86 (1977).

[152] *See, e.g.*, Rabourn v. Rabourn, 385 P.2d 581 (Alaska, 1963); Cross v. Cross, 94 Ariz. 28, 381 P.2d 573 (1963); Unruh v. Industrial Comm'n, 81 Ariz. 118, 301 P.2d 1029 (1956); Brown v. Brown, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969); and *In re* Edgett's Estate, 188 Cal. App. 2d 700, 10 Cal. Rptr. 552 (1961); Romanski's Estate, 354 Pa. 261, 47 A.2d 233 (1946); *In re* Englund's Estate, 45 Wash. 2d 708, 277 P.2d 717 (1954).

[153] *Foreign Divorce Decrees, supra* note 106, at 685.

demonstrates no less than four competing theories in American jurisdictions, and a disturbing conflict of intrastate and interstate legal authority on the subject.[154] What is needed, writes Professor Phillips, is "the adoption of some rule . . . to resolve the present contradictions in the cases, to make the law predictable and to insure equity."[155] Such a rule of estoppel should ideally combine the predictability and public policy rationale of the "traditional" theory and the "status versus property right" theory; and at the same time protect the equitable remedies inherent in the "sociological" and *Restatement* theories. Professor Phillips' suggested rule is: *a person should be estopped to attack the jurisdiction of a divorce court in nonmatrimonial [property right] actions if his conduct has made the attack inequitable; but any person may attack a divorce in any subsequent matrimonial [status] action.*[156]

Phillips' rationale for this rule, which follows the "status versus property right" concept, is as follows:

> Society has a special interest in the marital status of its members which justifies the distinction between matrimonial and other actions. Marriage creates the family upon which society depends for most of the educational, material, and affective needs of the great majority of its members.
>
> The social importance of marriage justifies a rule which requires that marital status always be truly adjudicated upon real facts rather than upon a fictitious divorce.[157] Hence, it is proper to hold that there can be no estoppel to collaterally attack a void divorce in matrimonial actions since the estoppel would prevent a true determination of the marital status in question. On the other hand, an estoppel could be raised, when appropriate, in non-matrimonial cases concerning a property right in which society does not have the special interest it has in marital status . . . . Therefore, a void divorce should not be permitted

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[154] *See supra* note 148. It is little comfort that similar problems exist in Canada, England, and Ireland. *See Foreign Divorce Decrees, supra* note 106, Duncan, *supra* note 106.

[155] Phillips, *supra* note 127, at 366.

[156] *Id.*

[157] This rationale appears supportable in fact. *See* notes 62-77 and 101-06 and accompanying text.

> to influence an adjudication of marital status. Any person should be permitted to show the nullity of a void decree for the purpose of adjudicating status as required in separation and divorce actions and in actions for the declaration of the nullity of a void marriage . . . .[158]
>
> Since the distinction between matrimonial actions and other types justifies estoppel in non-matrimonial cases, both the traditionalist and the sociological judge could agree to permit estoppel in such cases.
>
> The sociologist would also permit estoppel in matrimonial actions, but the traditionalist would not. The difference results because the two attach greater importance to and seek the achievement of different ends. The virtue of the rule rejecting estoppel is that it results in certainty as to a person's status and his capacity to marry and, therefore, should tend to encourage the validation of void marriages. The sociologist recognizes the undesirability of ambiguity as to marital status which results when estoppel to avoid inequitably upsetting relationships and expectations formed in reliance on the putative divorce.
>
> The relationship which the sociologist wishes to avoid upsetting is a second marriage by a supposed divorcee. But . . . no real inequity is involved in a finding that a divorcee's remarriage is void when the finding is made in a matrimonial action. The marriage is bigamous and, therefore, void even if a court refuses to so find.[159]

Admittedly, a "sociological" judge may be less than happy that estoppel may not apply to matrimonial "status" actions under the "synthesis" theory, and a "traditional" judge may object when estoppel applies to non-matrimonial property issues; but this rule does attempt, at least, to alleviate much of the present judicial uncertainty.

Some legal "sociologists" may argue that to utilize this proposed estoppel "synthesis" would be inequitable and do

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[158] Phillips, *supra* note 127, at 367-68 (footnotes omitted). Phillips' rule was primarily directed at developing some predictability and uniformity in New York law, but may be applied to many other states as well.

[159] Phillips, *supra* note 127, at 370-71 (footnotes omitted). Again, this rationale appears factually correct. *See* notes 133-35 and accompanying text. Indeed, a good synthesis by analogy is found in the cases of Rabourn v. Rabourn, 385 P.2d 581 (Alaska, 1963) and Unruh v. Industrial Comm'n, 81 Ariz. 118, 301 P.2d 1029 (1956) which have elements of the "status versus property rights" approach, and also appear in the *Restatement* Reporter's Notes.

a grave injustice to the "de facto spouse," who might learn after a collateral attack on a void divorce that he or she is no longer a "legal spouse," although that was the real and present expectation of the parties. An answer to this legitimate concern is that the "de facto spouse" would have alternate remedies. For example, many states now provide alimony provisions on annulment as well as on divorce.[160] The "de facto spouse" might also have an action for unjust enrichment,[161] for a partnership or quasi-partnership,[162] or for a contract action resulting from unmarrieds living together.[163] Laches might also be a valid defense.[164] Finally, the last-in-time marriage presumption generally places the burden of proving there was no valid divorce on the attacking party rather than the last-in-time spouse, and this is a strong presumption to overcome.[165]

In short, there are alternate equitable remedies to protect the "de facto spouse"; and the fact that most American jurisdictions have now reformed their divorce laws to provide for realistic "no fault" grounds[166] indicates the domiciliary state no longer places an inequitable burden on its citizens which might encourage them to obtain a void foreign divorce in the first place.

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[160] *E.g.*, CAL. CIV. CODE § 4455 (West Supp. 1981); CONN. GEN. STAT. § 46b-60 (Supp. 1981); N.Y. DOM. REL. LAW § 236 (McKinney 1977); VA. CODE § 20-107.1 to 107.3 (Supp. 1981); WIS. STAT. ANN. § 247.26 (Supp. 1980).

[161] *E.g.*, Walker v. Walker, 330 Mich. 332, 47 N.W.2d 633 (1951).

[162] *E.g.*, Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Cooper v. Spencer, 218 Va. 541, 238 S.E.2d 805 (1977). *See also* Annot., 31 A.L.R.2d 1255 (1953).

[163] *E.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979). *But see* Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

[164] *E.g.*, Norris v. Norris, 342 Mich. 83, 69 N.W.2d 208 (1955); Attebery v. Attebery, 172 Neb. 671, 111 N.W.2d 553 (1961); Newberry v. Newberry, 184 S.E.2d 704 (S.C. 1971), *cited in* Rosenberg, *supra* note 127, at 220.

[165] Regarding the last-in-time marriage presumption, *see generally* Annot., 14 A.L.R.2d 7 (1950).

[166] *See supra* notes 97-98.

IV. ETHICAL PROBLEMS IN ADVISING A FOREIGN MIGRATORY DIVORCE

Although a comprehensive examination is beyond the scope of this Article, ethical problems involved in advising a client about a foreign country migratory divorce must still be addressed. There are some earlier articles on the subject,[167] but in light of recent reforms in American divorce laws[168] much of the sociological rationale behind these articles is now outdated; and a new comprehensive analysis of the subject should be made to benefit current legal practitioners.[169] Some important concepts still require discussion.

The overwhelming majority of American jurisdictions refuse to recognize a foreign divorce decree unless at least one of the spouses was a good-faith domiciliary in the foreign nation at the time the divorce was rendered,[170] and the doctrine of estoppel does not legally "validate" this void divorce.[171] If the lawyer tells a client anything to the contrary, this would be misleading and unethical. However, if the lawyer had not originally helped to procure a void foreign divorce, it would appear ethical and proper to defend a client in a later collateral attack which might include the defenses of estoppel,[172] laches,[173] or the last-in-time marriage presumption.[174]

Regarding foreign bilateral divorces which lack the

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[167] *See, e.g.*, Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443 (1953); Note, *The Role of a Lawyer in Divorce: Some Ethical Problems*, 21 U. PITT. L. REV. 720 (1960); Adams and Adams, *Ethical Problems in Advising Migratory Divorce*, 16 HASTINGS L.J. 60 (1964). *See also* Groves, *Migratory Divorce*, 2 LAW & CONTEMP. PROB. 293 (1935); and H. EHRENZWEIG, *supra* note 144, §§ 71-74. A major sociological problem for some of these authors concerned the "restrictive divorce laws" in some American states, which have now largely been alleviated.

[168] *See supra* notes 97-98, 100-102.

[169] *See supra* note 10.

[170] *See supra* notes 69-76.

[171] *See supra* note 135 and accompanying text.

[172] *See supra* notes 127-159 and accompanying text.

[173] *See supra* note 164 and accompanying text.

[174] *See supra* note 165 and accompanying text.

domiciliary requirement, Professor Ehrenzweig has suggested what might be called "the likelihood test":

> If, as in the case in New York [Connecticut, U.S. Virgin Islands, and Tennessee], a foreign non-domiciliary divorce may be recognized as valid, there is no reason why an American attorney should not assist in its procurement. On the other hand, he should be held to act *unethically* if assisting in obtaining a divorce likely to be held void in his or the spouses' state.[175]

Regarding foreign "mail-order" divorces which are void in all states,[176] the practitioner should be aware of a number of cases in which attorneys were disciplined for participating in obtaining Mexican mail-order divorces for American clients.[177] Even in sister-state migratory divorces, the ethical considerations can be sobering.[178]

In conclusion, the following "practical considerations" are offered by attorneys Phillip and Steven Adams: the attorney "will be prudent to act as though the [foreign divorce] decree is a legal nullity, whether or not it is one" and a "California underpinning" [a separate in-state divorce decree] "is essential."[179] "We have seen how . . . precarious is the legal status of out-of-state ex parte decrees,[180] but more

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[175] H. EHRENZWEIG, *supra* note 144, at 243; (emphasis added) *cited in* Adams and Adams, *supra* note 167, at 78 (emphasis added).

[176] *See supra* note 73.

[177] *See, e.g., In re* Anonymous, 274 A.D. 89, ___, 80 N.Y.S.2d 75, 76 (1948) ("It should be unnecessary for the courts to have to expressly advise attorneys that their conduct is to be performed within the law and not in an attempt to flout it . . . .") *See also In re* Cohen, 10 N.J. 601, 93 A.2d 4 (1952); *In re* Esquitol, 285 A.D. 138, 136 N.Y.S.2d 133 (1954).

[178] *See, e.g.,* Griffith v. State Bar, 40 Cal. 2d 470, 254 P.2d 22 (1953) (void migratory Texas divorce). "It would appear that in *Griffith v. State Bar* the [California] supreme court has established extremely strict standards of volunteering the disclosure of all hearsay information that *might* help strike down a foreign divorce decree valid on its face, even if the disclosure would send the client to prison for bigamy." Adams and Adams, *supra* note 169, at 98.

[179] Adams and Adams, *supra* note 167, at 98. But if an in-state divorce decree is "essential," why procure a void foreign divorce decree in the first place? If the client has previously procured a foreign divorce decree without the lawyer's assistance, however, a separate in-state divorce decree would indeed be essential.

[180] Foreign country ex parte divorce decrees are indeed "precarious" since no American jurisdiction will recognize them. *See supra* note 74.

importantly, they breed family confusion and strife," and as for mail-order divorces "counsel must remonstrate as strongly as possible against them."[181] The Adams' conclusion is that "[i]t is best that citizens should solve their legal dilemmas in the state of which they are permanent inhabitants . . . ."[182]

V. CONCLUSION

Foreign country migratory divorces are recognized in the United States under the principle of comity. This principle is distinct in theory and practice from sister-state migratory divorces that are recognized under the full faith and credit clause as an instrument of uniformity within the states.

Recognition of foreign divorces in the overwhelming majority of American states is based upon a jurisdictional requirement of domicile in the divorcing forum and, in some exceptional circumstances, upon a residency requirement. This concept of domicile recognizes that an important nexus exists between the state and its citizens in domestic matters, and this nexus has been reaffirmed in recent Supreme Court decisions. The domiciliary requirement for divorce jurisdiction thus remains a reasonable and viable legal concept, especially in light of recent divorce reforms in most American jurisdictions, and it should not be modified unless there is a clearly demonstrated need to do so. Foreign "quickie" migratory divorces that lack this domiciliary requirement should therefore be recognized as a worthless legal sham and continue to be treated as void decrees by most American courts.

The estoppel defense does not legally validate a void

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[181] Adams and Adams, *supra* note 167, at 99.

[182] They continue to state however, "in the light of the restrictive divorce laws of some states, and frequently because of publicity that could wreck a career, out-of-state divorces are a necessary aspect of our lives." *Id.* This writer cannot agree with that rationale. *See especially supra* notes 13-21, 38-46, 62-78, 97-106, and 135 and accompanying text.

divorce. It may, however, estop the parties from collaterally attacking a void decree. The estoppel defense in American jurisdictions is currently beset by a disturbing conflict of authority and differing legal theories. One suggested approach of Professor Phillips is to disallow estoppel in actions involving marital status; but to allow estoppel in nonmatrimonial property actions depending upon the equities of each particular case. This would arguably permit a final adjudication of marital status, and at the same time be equitable to the parties. A de facto spouse would also be protected by alternate remedies.

Finally, it must be emphasized that in the vast majority of states an American attorney who attempts to procure a foreign country divorce for a client is on notice that he is procuring a void decree, and ethically he does so at his peril.