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"**All the Other Daisys:**
Roger Traynor, Recrimination, and the Demise of At-Fault Divorce"

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All the Other Daisys:

Roger Traynor, Recrimination, and the Demise of At-Fault Divorce

> Novel legal problems need not take [a judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.[1] —Roger Traynor

I. Introduction

In 1949, Mrs. Daisy DeBurgh filed suit for a divorce from her husband, Albert, claiming the grounds of cruelty.[2] She alleged that her husband was a philandering drunk; that he was jealous and cheap; and that he had beaten her on several occasions, once so severely she had attempted suicide by way of sleeping pills.[3] Albert, for his part, countersued, claiming that Daisy had ruined his reputation by sending vicious letters to his business associates alleging that Albert was a homosexual.[4] Clearly their marriage was a failure, and yet the trial court refused to grant them a divorce. At that time, California was one of a vast majority of states refusing to grant a divorce where both parties were at fault for the destruction of the marriage relationship. Known as the doctrine of recrimination, it was a complete bar to recovery in divorce actions. However, the DeBurghs appealed to the California Supreme Court and they won their case. That decision, which took the air out of recrimination doctrine and led the way to California's becoming the first state to have a no-fault divorce system, sent shockwaves through

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[1] Roger Traynor, *Better Days in Court For a New Day's Problems,* 17 VAND. L. REV. 109 (1963–1964).

[2] *See generally* DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952).

[3] *Id.* at 871.

[4] *Id.* at 871–72.

American society. This paper will examine the case and its context, and will attempt to answer the questions: why then, why California?

In 1970, California became the first state in the nation to change from a fault system of divorce to a no-fault system.[5] The California no-fault divorce statute "removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property."[6] Before the switch to a no-fault system, the law simply did not recognize consensual divorce involving an agreement between spouses to end their legal marriage relationship.[7] Rather, historically, divorce was only granted as a privilege to an "innocent spouse."[8] In order to obtain a divorce, the plaintiff would have to file a lawsuit against his or her spouse, the defendant, and proceed to allege and then prove "grounds" for the divorce[9] such as adultery, cruelty, or desertion.[10] That is, the plaintiff would need to show the defendant was at fault. Further, under the doctrine of recrimination, if the defendant could show that the plaintiff had also been at fault, the divorce would be automatically denied.[11]

These state divorce systems were generally statutory, and purposefully inefficient, in order to serve as "compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and

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[5] Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291 (1987).

[6] *Id.*

[7] Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective,* 63 OR. L. REV. 649, 653 (1984).

[8] *Id.*

[9] *Id.*

[10] Barbara Armstrong, *The California Law of Marriage and Divorce: A Survey,* 19 J. ST. B. OF CAL. 160, 174 (1944).

[11] George D. Basye, *Retreat From Recrimination—DeBurgh v. DeBurgh,* 41 CAL. L. REV. 320, 320 (1953).

physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."[12] Divorce law has historically been awkward and complex because it has so many different meanings and consequences for both the families involved and for society as a whole. Divorce "has economic meaning and economic consequences"[13] in that it "consists of the rearrangement of claims to property and other valued goods. But it also has moral and symbolic meaning. It touches on the basics: sex, romance, family, children, love, and hate."[14]

Divorce, and specifically divorce law, is controversial because it is a deeply personal, frequently devastating and almost always unfortunate event that involves the government in citizens' most private lives. Californians (and Americans in general) had, long before 1970, begun to find ways to circumvent the fault system, encumbered as it was by moral judgments and fraught with procedural hoop-jumping.[15] They had been using every conceivable method to separate themselves from unwanted spouses, even where neither was legally at fault. For example, in California, where one of the more popular grounds was cruelty, the plaintiff would often merely claim the defendant was "'cold and indifferent,'" the defendant would not even bother to show up in court to contest the suit, and the judge would simply rubber stamp the divorce.[16] In the end, no-fault divorce "statutes were a delayed ratification of a system largely in place; a system

[12] Friedman, *supra* note 7, at 653.
[13] *Id.* at 651.
[14] *Id.*
[15] *See* Hill, *supra* note 2, at 297–98.
[16] Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions,* 7 LOY. L.A. L. REV. 453, 454 (1974).

that was expensive, dirty, and distasteful, perhaps, but a system that more or less worked."[17]

California Supreme Court Justice Roger Traynor paved the way for California's change to no-fault divorce with his 1952 majority opinion in *DeBurgh v. DeBurgh*.[18] In that case, the Court did away with one of the major bulwarks of the at-fault system: the defense of recrimination.[19] In pruning away what he saw as an outdated and often unjust doctrine, Traynor's decision confronted the reality of a growing divorce rate brought on in large part by changing gender roles following the Second World War. He acted on his own judicial instincts that led him in this case and many others to make what he believed was a thoughtful, well-timed, and necessary modification to the common law in order to meet the challenges of a rapidly changing society. Traynor's hallmark as a judge was his endeavor to make a reasoned and careful decision to initiate a change, and then to craft his opinion in a way that made his thought process clear to lower courts as well as to the legal community at large.[20] While some have accused Traynor of being an activist, he likened himself more to the tortoise than the hare.[21] Far from autocratically transforming the law from the highest bench in the state, Traynor's decision in *DeBurgh* only articulated in the common law that which already existed in practice.

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[17] Friedman, *supra* note 7, at 666.

[18] 39 Cal. 2d 858.

[19] *See generally id.*

[20] *See, e.g.,* Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 230 (1962).

[21] Roger Traynor, *The Well-Tempered Judicial Decision,* 21 ARK. L. REV. 287, 291 (1967).

II. *DeBurgh v. DeBurgh*

Plaintiff, Daisy DeBurgh, and Defendant, Albert DeBurgh, moved to California together in 1944.[22] They were living together in Manhattan Beach and were married on October 27, 1946.[23] They separated on February 13, 1949,[24] and Daisy filed suit for divorce on February 15, 1949, citing cruelty as the grounds.[25] On March 16, 1950, after Daisy had considerable difficulty serving him with process, Albert filed an answer and cross-complaint, also claiming cruelty as the grounds.[26] The two-day trial began on September 18, 1950, and on September 19, the court found neither party was entitled to a divorce because each was guilty of cruelty toward the other.[27] This was a classic case of recrimination, in that Daisy had accused Albert of cruelty and he had simply responded "you, too." Because both parties were thus legally at fault, neither could be granted a divorce. Unsatisfied with this result, Daisy appealed to the Second District Court of Appeal,[28] and that court affirmed the decision of the trial judge on February 18, 1952.[29]

To support her claim for cruelty, Daisy alleged five different ways in which her husband had been cruel to her, with specific instances of each.[30] Those five general categories included: "1. Physical force and assault. 2. Continuous reference to

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[22] Brief for Appellant at 4, DeBurgh v. DeBurgh, 240 P.2d 625 (1952) (Civ. 18581) [hereinafter *Brief for Appellant*].

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1.

[26] *Id.*

[27] *Id.* at 2–3.

[28] *Id.* at 3.

[29] Appellant's Petition for Hearing After Decision by District Court of Appeal at 1, DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952) (L.A. 21986) [hereinafter *Appellant's Petition*].

[30] *Brief for Appellant, supra* note 22, at 4.

plaintiff's former suitor. 3. Continuous reference by defendant to defendant's former girl friends and 'conquests.' 4. Derogatory statements concerning plaintiff's daughter. 5. Acts indicating a tendency toward homosexuality."[31] As to the physical abuse, she testified at trial to seven separate instances in which her husband struck her.[32] For example, she testified that the defendant had knocked her down in November, 1946, resulting in bruises, cuts, and a permanent scar.[33] She provided corroboration for this incident from several other witnesses.[34] She was likewise able to point to specific instances of the other four categories of defendant's cruelty, and was able to provide corroborating witnesses for each.[35]

"Defendant's answer to these cruelties was to minimize, depreciate and deny them."[36] His cross-complaint was based on one alleged act of cruelty that occurred immediately before the separation: that Daisy had sent letters to Albert's business associates accusing her husband of being a homosexual.[37] The trial court denied both parties a divorce on the basis of the recrimination doctrine.[38] That is, Daisy could not get a divorce from Albert because she was at fault, and Albert could not get a divorce from Daisy because he, too, was at fault.

In her petition for a hearing by the Supreme Court of California, Daisy argued that provoked acts of cruelty should not be allowed to defeat a cause of action for

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 5–6.
[36] *Id.* at 6.
[37] *See* DeBurgh v. DeBurgh, 240 P.2d 625, 626 (Cal Ct. App. 1952) vacated, 39 Cal. 2d 858 (1952); *Appellant's Petition, supra* note 29 at 6.
[38] *Brief for Appellant, supra* note 22, at 7.

divorce.[39] The trial court had found that Daisy's letters, while cruel, were provoked by her husband's many acts of cruelty.[40] The Supreme Court of California granted her petition, and, in doing away with recrimination, the court went considerably above and beyond what Daisy was asking for. Hers was the perfect case in which to take the larger step of eliminating the defense entirely, in that here was a woman who had been beaten throughout her short-lived marriage to a brutish man. Or at least her story could be packaged that way.

The opinion, indeed, paints Albert DeBurgh as a mean, cheating, lying drunk.[41] In formulating his opinion, Traynor first laid out the facts as found by the trial court and then deftly framed the issue as one solely of recrimination rather than, as Daisy suggested in her brief, provocation.[42] He pointed out that while Albert may have provoked Daisy's act of cruelty, she certainly did not provoke his, so the trial court could not have found in Abert's favor on these grounds, which it did by denying Daisy a divorce.[43] Turning then to recrimination, Traynor began by explaining that the trial judge erred by failing to consider that recrimination only applies where the guilt incurred is for something that would "bar" that party's suit for divorce.[44] Traynor went on to explain that, while "it has sometimes been assumed that any cause of divorce constitutes a recriminatory defense," the relevant statutory language — California Civil Code sections 111 and 122 — suggests that not just any cause will do to show recrimination.[45]

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[39] *Appellant's Petition, supra* note 29, at 4.
[40] *Brief for Appellant, supra* note 22 at 7.
[41] *DeBurgh,* 39 Cal. 2d at 861.
[42] *Id.* at 861–62.
[43] *Id.* at 862.
[44] *Id.* at 862–63.
[45] *Id.* at 863.

Rather, courts "are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce." Traynor's statutory interpretation argument was that, because the statute provides that "'[d]ivorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce,'" the Legislature could not have meant to make every cause of divorce an absolute defense.[46] If the Legislature had wanted to do so, "it could easily have provided that: 'Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.'"[47] Traynor did not list which acts would meet this heightened requirement of being "in bar" to a divorce, but the message is clear: recrimination was no longer to be the wooden, automatic defense that it had been construed to be in prior cases. Rather, the trial judge was to use his own discretion to determine whether certain acts would trigger the defense.[48]

With that in mind, Traynor went on to distinguish one such case: *Conant v. Conant,*[49] decided in 1858, which, according to Traynor, had erroneously stated that the recrimination defense was "based on the doctrine that one who violates a contract containing mutual and dependent covenants cannot complain of its breach by the other party."[50] Traynor used this case as a springboard for his overall policy argument that Conant's "deceptive analogy to contract law ignores the basic fact that marriage is a

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[46] *Id.*
[47] *Id.*
[48] *Id.* at 871.
[49] 10 Cal. 249, 1858 WL 905 (1858).
[50] 39 Cal. 2d at 863.

great deal more than a contract. It can be terminated only with the consent of the state."[51] Traynor went on to explain:

> In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life.[52]

Traynor argued that marriage provides important benefits: "It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; [and] it establishes continuity from one generation to another. . . ." He went so far as to declare that marriage, as an institution, "nurtures and develops the individual initiative that distinguishes a free people," and thus deserved every legal effort for preservation.[53] But in the end, he admitted, "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."[54]

Traynor continued on, pointing out the basic illogic of the recrimination doctrine: that "[t]he chief vice of the rule enunciated in the Conant case is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty."[55] In other words, two wrongs do not make a right, and it "is a degradation of marriage and a frustration of its purposes" when the state is allowed to use its power to deny divorce as a punishment for couples whose marriages have failed.

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[51] *Id.*
[52] *Id.* at 863–64.
[53] *Id.*
[54] *Id.* at 863–64.
[55] *Id.* at 864.

Traynor shored up his argument with several more minor points. He argued that the Conant case included an inaccurate and irrelevant historical discussion of older English cases,[56] and that the California Legislature purposefully declined to follow the Conant holding in writing the recrimination provisions of the Civil Code.[57] He also pointed out that the relevant precedent on the issue of recrimination was unclear and thus ripe for review and clarification.[58] He then went on to note that the state legislature was already moving toward reforming the doctrine in response to the rising divorce rate. Traynor believed that the national surge in divorce "had compelled a growing recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault," and that the California Legislature had followed that trend by, for example, adding insanity and prolonged separation as grounds for divorce.[59] He argued that this showed a recognition on the part of the legislature that "[m]arriage failure, rather than the fault of the parties, is the basis upon which such divorces are granted."[60]

Traynor finished his analysis with a lengthy reiteration of his public policy argument that courts must recognize that "a marriage in name only is not a marriage in any real sense."[61] He noted that current legal scholarship supported ending the use of recrimination as a defense,[62] and he ended the discussion by neatly distinguishing

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[56] *See id.* at 864–66.
[57] *Id.* at 866.
[58] *Id.* at 867.
[59] *Id.*
[60] *Id.* at 868.
[61] *Id.*
[62] *Id.* at 870.

Albert's precedents.[63] The holding is rather complex, but boils down to the following: the relevant Civil Code section, 122, "imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as 'in bar' of the plaintiff's cause of divorce based upon the fault of the defendant."[64]

The Court also officially disapproved of any cases that "support a mechanical application of the doctrine of recrimination,"[65] thereby discarding the common law rule treating recrimination as an automatic bar to divorce wherever the defendant could show fault on the part of the plaintiff. For the *DeBurgh* situation, Traynor argued that "[t]echnical marital fault can play but little part in the face of the unhappy spectacle indicated by this evidence," and he supported this claim with a long list of some of the individual acts of cruelty alleged by both parties.[66] Traynor held the evidence was "ample to support a finding that the parties' misconduct should not bar a divorce"[67] and reversed the Court of Appeal, remanding back to the trial court for a decision as to the divorce.[68]

The decision was complicated by Traynor's announcement that there could "be no precise formula for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce." However, he listed four major considerations which the trial court should use to aid that finding: the likelihood of reconciliation; the effect of the marital conflict on the parties; the effect of that conflict on third parties, with special consideration for the welfare of any children; and comparative

[63] *Id.* at 870–71.
[64] *Id.* at 871.
[65] *Id.*
[66] *Id.* at 871–72.
[67] *Id.*
[68] *Id.* at 874.

guilt.[69] Thus, after *DeBurgh*, recrimination would be in the discretion of the trial court rather than an automatic bar to divorce whenever each party could show some fault in the other. Recrimination was not excised, per se, but its effectiveness was cut to the bone.

III. All the Other Daisys

Traynor was not only addressing one woman's problems when he handed down his opinion in *DeBurgh*. Daisy was just one of a generation of women who had married quickly in the years before, during, and after the war and realized too late that marriage was not the idyll being portrayed by society as the norm, and indeed the goal, for every woman.[70] Daisy's case was simply not at all unusual for the time. Due to rapidly changing gender politics and fluctuation of the feminine role after the war, divorce rates skyrocketed, becoming a huge strain on a legal structure that had been developed in a 'simpler' time. One of the major reasons that the postwar period saw such a surge in divorce was because men and women (and husbands and wives) frequently no longer related to each other the same way they had before 1940. Traynor addressed this reality with his opinion in *DeBurgh*: hoping to free men and women from strained marriages that were not all they were promised to be.

The gender role balance was upset[71] when, during World War II, there was a sudden, massive demand for workers.[72] With so many men gone off to fight, women

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[69] *Id.* at 872–73.

[70] MARILYN YALOM, A HISTORY OF THE WIFE 350 (2001); Stanley Mosk, *Ingredients of the Divorce Test Tube*, 29 L.A. B. BULL. 163, 179 (1954).

[71] There is a great deal of historical scholarship devoted to changes in gender politics during the postwar period. *See*, for example, WILLIAM H. CHAFE, THE PARADOX

workers took their place, resulting in a 50 percent increase in the female labor force.[73] Especially significant was the fact that the number of married women working doubled. Interestingly, rather than condemning women who worked as deserters of their homes, the government and the media began to encourage women enthusiastically to enter the badly diminished labor force.[74] The July 1942 issue of the *Woman's Home Companion*, for example, exhorted, "'Mrs. John Doe We Need You!'"[75] Propaganda posters assured women that their husbands wanted them to do their part.[76] Women were also being treated with more respect at their new jobs, and, as they began to show that they could do good work, their male coworkers frequently began treating them as equals.[77] Married women, especially, enjoyed a new and dominant place in the workforce.[78] By the time the war ended in 1945, the proportion of married women who worked had jumped to over 24 percent, up from 15.2 percent in 1940.[79]

This change was reflective of not just a pure necessity for bodies, but also of the changing values and attitudes that developed to justify the existence of a new female workforce. For example, Margaret Hickey, head of the Women's Advisory Committee to the War Manpower Commission, pointed out in 1943 that "'employers, like other individuals, are finding it necessary to weigh old values, old institutions, in terms of a

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OF CHANGE: AMERICAN WOMEN IN THE 20TH CENTURY (1991); ANNEGRET S. OGDEN, THE GREAT AMERICAN HOUSEWIFE: FROM HELPMATE TO WAGE EARNER, 1776–1986 (1986); YALOM, *supra* note 70; ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (1988).

[72] See CHAFE, *supra* note 71, at 121.

[73] *Id.*

[74] *Id.*; MAY, *supra* note 71, at 59.

[75] YALOM, *supra* note 70, at 317.

[76] *Id.*

[77] CHAFE, *supra* note 71, at 124; *see also* MAY, *supra* note 71, at 59.

[78] CHAFE, *supra* note 71, at 130.

[79] *Id.*

world at war.'"[80] Hickey's astute observation reflected the massive changes occurring at the time relating to the acceptability of hiring married women to work outside the home.[81] That is, the public and private attitudes had changed from a condemnation of women leaving their homes, children and husbands to fend for themselves, to an outright encouragement of those same married women to do their part for the war effort by taking the place of soldiers gone away.[82]

The transformation did not go unnoticed. Many observers considered women's work experience in the war years to be a social and gender revolution. The Women's Bureau considered it to be "one of the most fundamental social and economic changes" of the time.[83] Women were suddenly being recognized as independently valuable to the nation and as first-class citizens capable of earning their own keep without their husbands to depend on financially.[84] The exigencies of the war had done away with the established ways of doing things.[85] Women seamlessly took the place of men in many fields, and barriers against married women's employment were broken down.[86] Millions of American women were discovering for the first time the economic and psychological independence that could be achieved from earning (and spending) the family bread, themselves.[87]

But the change was not without critics. Those who opposed married women working outside the home warned that in order for children's lives to remain stable, their

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[80] *Id.*
[81] *Id.*; *see also* MAY, *supra* note 71, at 59; and YALOM, *supra* note 70, at 320–22..
[82] CHAFE, *supra* note 71, at 130; MAY, *supra* note 71, at 59.
[83] CHAFE, *supra* note 71, at 133.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* and YALOM, *supra* note 70, at 350; *see also* MAY, *supra* note 71, at 73–74.

mothers needed to be at home all day.[88] These conservatives, fearing for the stability of American families, were only willing to tolerate married women's working outside the home "as a temporary necessity," and certainly not as a "permanent reality."[89] In other words, married women — and women, in general — entering the workforce during the war raised serious concerns about the evolution of male–female relations and a possibly permanent disruption of the existing social order.[90] Those concerns would become apparent in the postwar years leading up to *DeBurgh*, during which women and society tested the boundaries of the new female sphere.[91]

The dimensions of this transformation became clear once the war was over and there was no longer any need for women to be working in the now-defunct munitions factories. Car factories stopped making tanks and started making cars again.[92] Thus, between government pressure on businesses to hire returning veterans[93] and social pressures on women to return home,[94] the exodus began with alacrity.[95] And yet, even with women being fired to make room for the returning soldiers,[96] twice as many California women were employed in 1949 as were in 1940.[97] Married women were included in this statistic, and in 1952 about ten million wives across the nation held jobs.[98] This was two million more than at the height of the war and almost three times

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[88] *See* CHAFE, *supra* note 71, at 134; *see also* YALOM, *supra* note 70, at 323–24.
[89] CHAFE, *supra* note 71, at 134.
[90] *Id.* at 135; MAY, *supra* note 71, at 71.
[91] CHAFE, *supra* note 71, at 154; YALOM, *supra* note 70, at 348.
[92] *Id.* at 155.
[93] *See id.* at 158–59.
[94] *Id.* at 156–57; Ogden, *supra* note 71, at 166.
[95] CHAFE, *supra* note 71, at 158–59.
[96] *Id.*
[97] *Id.* at 161.
[98] *Id.*

more than in 1940.[99] Part of the reason for this was that there were simply more married women in general, with the greatest number of marriages in United States history occurring in 1946.[100]

These millions of working, married women were facing a dilemma, though: they were expected to fully shoulder two burdens at once. These women were expected to work outside the home from nine to five and still manage the many duties of a housewife who was home all day long.[101] Even though the ideal was still that of the suburban housewife, economic realities did not bode well for the traditional model of the individual male breadwinner.[102] The 1952 issue of the *Journal of Home Economics* made a shocking announcement: that the American economy would be unable either to sustain or expand productivity without the entry of an even larger number of women in the workforce.[103] Thus, with ideal and reality conflicting, American women received two equally strong but hopelessly opposing messages from society: one was to stay at home and gain fulfillment from caring for husband and children, and the other was, "Get a job."[104] The effect, some argued, was a rise in the national divorce rate from 2.8 percent in 1948 to 10.4 percent in 1951.[105]

For example, *Life* magazine editorialized on this issue in 1947 when it published a thirteen-page special on the "American Woman's Dilemma."[106] The editors revealed

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[99] *Id.*
[100] *See* OGDEN, *supra* note 71, at 166; Quintin Johnstone, *Divorce: the Place of the Legal System in Dealing With Marital-Discord Cases,* 31 OR. L. REV. 297, 298 (1952).
[101] CHAFE, *supra* note 71, at 175.
[102] OGDEN, *supra* note 71, at 172.
[103] *Id.* at 172–73.
[104] *Id.* at 173.
[105] *Id.* at 171.
[106] CHAFE, *supra* note 71, at 175.

that contemporary (middle-class) women were suffering from confusion and frustration due to a conflict that they perceived between the tradition and reality of gender norms.[107] That is, in the old days, a woman simply had no choice but whom to marry, while in 1947 she had a far more complicated set of decisions to make.[108] Should she stay at home? Should she work? If it were financially necessary to do both, where would she find the time? And if she somehow managed to balance the conflicting demands on her time and energy, what would her neighbors think of her? Her in-laws? The article characterized this identity crisis as a direct consequence of the war.[109]

The social commentary on this issue ranged from feminists, who claimed these women were unhappy because they were trapped inside the home and their traditional roles, to anti-feminists, who argued just the opposite: that women were unhappy when they strayed too far from both.[110] Betty Friedan, for example, wrote in her 1963 book, *The Feminine Mystique*, that American women in the 1950s were unhappy because they had been told that they should find all their happiness at home, through fulfillment of the roles of wife and mother.[111] But regardless of which side one was on, everyone agreed that there was a problem: that many women, especially married women, were deeply unhappy, because they were struggling to find their proper place in their homes and in the outside world.[112] With the relationship between men and women in such a state of flux, ideologically as well as personally, divorces were bound to occur. The

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 176.
[111] *Id.* at 195.
[112] *See id.* at 176; YALOM, *supra* note 70, at 351

reason divorce rates rose was, according to Betty Friedan, that "for the first time, some women had enough independence to want out of bad marriages."[113]

One of the biggest and most immediate issues that arose between husbands and wives during this era was that women often relished the economic freedom and sense of independence they had attained from working during the war years.[114] They were not necessarily willing to give up that feeling and stop working once their husbands came home.[115] The husbands, for their part, worried that they would lose power within the family if they were no longer acting as providers.[116] These men were used to the tradition of a breadwinning man's taking pride in his ability to support a stay-at-home wife and children.[117] As one contemporary commentator opined, "'Few men ever amount to much when their wives work.'"[118]

Even the legal procedures of divorce reflected the new tension surrounding gender roles. According to one legal historian, divorce suits at this time often reflected old gender stereotypes. In many of the California cases, "[t]he women described themselves as delicate plants, married to insensate brutes, men who cared nothing for the tender feelings and feminine sensibilities of their wives."[119] The problem with this is that "ideas about women's delicacy and refinement trap women in a web of stifling

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[113] BETTY FRIEDAN, *The Crises of Divorce*, in IT CHANGED MY LIFE: WRITINGS ON THE WOMEN'S MOVEMENT 318, 322 (1st ed. 1976).
[114] *See, e.g.,* YALOM, *supra* note 70, at 350.
[115] *Id.*
[116] *See id.* at 350.
[117] *Id.*
[118] *Id.* at 151.
[119] Lawrence Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault,* 86 VA. L. REV. 1497, 1527 (2000).

mock-protection."[120] That is, using the old, outmoded gender stereotypes to end a marriage put women in the position of having to subjugate themselves that one final time in order to get out of a marriage already characterized by subjugation.

IV. Background of California Divorce Law in 1952

Traynor addressed this problem by changing the focus of divorce law from the fault of either party to the simple fact of the breakdown of their marriage. He did so because, as the divorce rate grew, the cracks in the system began to show. The old story of the brutish man and the fainting woman was frequently nothing more than a charade, and with his decision in *DeBurgh*, Traynor played a large part in bringing the common law up to speed not just with the realities of divorce in practice, but also with postwar changes in gender politics.

Indeed, divorce as it actually existed in 1952 and that which the legal fault system prescribed were two very different things. The "divorce charade," as Lawrence Friedman refers to it, "paraded before the courts an endless procession of men, and mostly men, who confessed by their silence to adultery, cruelty, gross neglect of their obligations, and other deep-stained sins. But everybody knew the allegations were often or mostly lies."[121] In fact, while the "official line was that marriages ended because of adultery, desertion, cruelty, or intolerable indignities . . . this was out of step with a growing sense in society . . . that marriages ended because they 'didn't work out,'

[120] *Id.* at 1528.
[121] *Id.* at 1530.

because the spouses were 'incompatible.'"[122] Such was the case nationwide, and certainly in California.

Historically, California divorce law followed the national tradition of promoting a general policy against granting a divorce, favoring instead preservation of marriage at almost any cost.[123] That view held that "[f]ault is the basic tenet of . . . divorce law" and that a divorce was only to be granted if the defendant, and the defendant alone, was at fault.[124] Again, under the recrimination doctrine, if the plaintiff had also been at fault, there could be no divorce.[125] Divorce was seen as an action between not two, but three parties: the plaintiff, defendant, and the state as a third party with a vested interest "in the maintenance of the marriage tie."[126] A commentator in 1944, however, wrote that by that year there was "growing evidence . . . that the [courts] believe that the state's interest in conserving the marriage tie may well be limited to cases where the marriage is a real and functioning husband–wife relationship and not a mere legal concept accompanied by separated, estranged parties."[127]

The Legislature, too, was making changes in the historically moralistic and disapproving tone of divorce law. One commentator noted that in the years leading up to *DeBurgh*, "American legislatures have made statutory changes in the law of divorce that materially weaken the basic doctrine that divorce will be granted only upon proof of

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[122] *Id.* at 1531.
[123] Armstrong, *supra* note 10, at 178.
[124] Johnstone, *supra* note 100, at 301.
[125] *Id.*
[126] Armstrong, *supra* note 10, at 178.
[127] *Id.*

marital fault of defendant, and blamelessness of plaintiff."[128] Examples included "statutes permitting divorce for insanity or continuous separation, which have produced basic changes in other accepted elements of American divorce, and, perhaps more significantly, indicate a legislative interest in making American divorce law coincide with contemporary mores." What's more, that author argued that "the prevailing judicial interpretation . . . indicates that as to [certain grounds of divorce such as desertion] the doctrines of fault and recrimination are abolished, and . . . there has been acceptance of the fact that the divorce decree is only a ratification of the private agreement of the spouses to end the marriage."[129] Still, even with this clear judicial and legislative movement away from reconciliation at any cost, California in 1950 remained a fault state, and the doctrine of recrimination remained alive and well.

In the years leading up to *DeBurgh*, California was a relatively liberal state in terms of divorce, allowing for seven possible grounds: adultery, cruelty, desertion, willful neglect, habitual intemperance, conviction of a felony, or incurable insanity.[130] In order to claim desertion, neglect, or intemperance, a plaintiff would have to show that the condition persisted for at least one whole year, without interruption.[131] To claim insanity as grounds for divorce, a showing of three years' institutional confinement was required.[132] Adultery and cruelty were somewhat easier to prove, in that a single act of either would be enough, although continuous conduct would suffice as well, of

[128] Thomas Carver, *Divorce: Statutory Abolition of Marital Fault,* 35 CAL. L. REV. 99, 99 (1947).
[129] *Id.* at 100.
[130] Armstrong, *supra* note 10, at 174.
[131] *Id.* at 174–75.
[132] *Id.* at 175.

course.[133] What's more, a plaintiff could allege mental rather than physical cruelty by showing that s/he experienced "grievous mental suffering" as a result of "conduct that reasonably could be believed to have such a result."[134]

Plaintiff did not even need to show any physical manifestation of said suffering, and a multitude of types of mental cruelty were being accepted by the courts as sufficient for a grant of divorce. The California Supreme Court stated the test in the 1941 case *Keener v. Keener*, writing that in "each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party."[135] Cruelty was thus in many cases the easiest ground to plead and prove, which was reflected in its popularity.[136] There were certainly instances of "real" cruelty,[137] but as one contemporary observed, the "legal theory of the innocent suffering spouse has long been regarded as a myth. In actual practice, divorce today is usually but a judicial ratification of prior agreement between the parties."[138] While it does appear as though Daisy DeBurgh suffered real cruelty at the hands of her husband, in deciding her case Traynor was surely also addressing the fact that her situation was not necessarily the norm.

Some judges were less willing than others to go on with the charade. One example is San Francisco judge Walter Perry Johnson, who in 1934 "more or less

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[133] *Id.*
[134] *Id.*
[135] 18 Cal. 2d 445, 447 (1941) (referenced in Armstrong, *supra* note 10, at 175).
[136] Hill, *supra* note 5, at 297–98.
[137] Friedman, *supra* note 119, at 1530.
[138] 35 Cal. L. Rev. at 99.

dropped the mask of ignorance, and talked openly about realities."[139] In yet another cruelty case, the plaintiff, Jessie Trower, alleged that her husband's cruelty consisted of his "'absence from home without explanation, his statement that he did not love her, and his objection to her music studies.'"[140] Johnson remarked that this did not "'really constitute cruelty in the proper meaning of the term.' It amounted to nothing more than 'incompatibility.' But that was true of most of the 'cruelty' charges, he said, and, in his view, 'incompatibility' should be grounds for divorce. Of course, the legislature had never made such a move."[141] Johnson granted the divorce, regardless.[142]

Another San Francisco judge, the Honorable Thomas M. Foley, took the opposite approach in his court in 1946.[143] He announced that as far as he was concerned, "'cruelty, extreme or otherwise, mental or physical,'" would not constitute legally sufficient grounds for divorce unless "'backed up with solid evidence.'"[144] The judge believed that divorce law at the time was "far too lenient," and that generally, "'differences between married couples' . . . were 'trivial.'"[145] He feared that "easy divorce" was "'destroying the fabric of the home,'" and he was going to do his part to stop it.[146]

However, evidence from the California case files shows that Judge Foley was losing that battle.[147] One contemporary posited that, despite the rigid party line of the

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[139] Friedman, *supra* note 119, at 1519.
[140] *Id.* at 1519–20.
[141] *Id.* at 1520.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

statutes, “any divorce judge will admit that he rarely denies a divorce.”[148] It is of course true that there were legitimate stories of actual cruelty and abuse, both physical and psychological, like Daisy DeBurgh’s.[149] However, many California plaintiffs “also told stories that were essentially nothing more than stories of unhappy marriages — stories of nagging and cursing, and general marital misery.”[150] But regardless of how minor these offenses were, California “courts were willing to pin the label of ‘extreme cruelty’ on all sorts of behavior. . . . ‘[E]xtreme cruelty,’ as Roscoe Pound remarked in 1943, was a ‘convenient legal phrase to cover up . . . incompatibility.’” [151]

Indeed, Superior Court Judge Frank G. Swain wrote, in a 1945 article on default divorce: “It is impossible to formulate any hard and fast rules as to what constitutes extreme cruelty because of the varying degrees of sensibility of plaintiffs. The law recognizes the fact that what causes great mental anguish to a lady of refinements will not faze a Tugboat Annie.”[152] He remembered a time at the beginning of his practice when there were “stalwarts on the bench . . . who did not grant divorce decrees on the ground of cruelty unless serious misconduct of the defendant was proven.”[153] But by the time Judge Swain was writing, he saw a trend of judges shrugging, “what is the use of denying a default decree, the parties know best, if they can’t get along they are better off divorced.”[154] While he himself did not ascribe to that practice,[155] he admitted that, at

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[148] Johnstone, *supra* note 100, at 300.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] Frank G. Swain, *Default Divorce,* 21 L.A. B. BULL. 52, 53 (1945).
[153] *Id.*
[154] *Id.*
[155] *Id.*

the time, there was "little or no uniformity among judges as to what amounts to extreme cruelty."[156]

As a result of this uncertainty, Californians were unsatisfied with the state of divorce law, generally.[157] Experts, like academics and legislators, "looked through the peephole, and what they saw was fraud and rot."[158] Lawyers, for their part, "hated taking part in a disgraceful travesty."[159] Laypeople were split between those thinking divorce was too easy to obtain, and those who believed it "was too hard, too expensive, too dirty."[160] The legal academy "kept trying to reform the official law, to make it conform to what they considered social realities. They wanted, naturally enough, to get rid of the perjury, the chicanery, and the lying."[161] Traynor, seeing this problem, set about to do just that: to reform the common law by getting rid of the old recrimination doctrine which was an obstacle to the change to no-fault divorce.

With so much demand for divorce and such rampant deception besmirching the legal system surrounding it, a doctrinal change had to be made in order to bring the common law up to speed with what trial courts were already doing not so secretly. Traynor had already made a name for himself as an 'activist' with cases like *Escola v. Coca Cola*[162] and *Perez v. Sharp*. In *Escola*, he made the rather startling argument that manufacturers should be held strictly liable whenever their products injured consumers, and in *Perez* he completely invalidated the California statutory ban on interracial

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[156] *Id.* at 56.
[157] Friedman, *supra* note 119, at 1531.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] 24 Cal. 2d 453 (1944) (Traynor, J., concurring).

marriages.[163] But Traynor was no activist, really, at least in the area of divorce law. He did not generate the changes himself. Rather, he put his name, and that of the Supreme Court of California, on what had already been decided by the people of that state. This fit perfectly with his judicial philosophy of pruning the hedges and ridding the common law of those ancient doctrines that had long since worn out their welcome. Traynor did not believe in making decisions hastily or without cause, and his opinion in *DeBurgh* was no different.

By 1940, jurists across the country were not only calling for divorce reform generally, but also specifically for an end to the doctrine of recrimination.[164] The basic argument was that the requirement under the recrimination scheme that one, and only one, party must be blameworthy should no longer apply.[165] The reality was "that the marital life of a married couple might be so stormy, so disagreeable, and so fraught with unhappiness that it would be in the public interest to grant a divorce," even though both were at fault.[166] According to one judge, about half of all contested divorce actions involved wrongdoing by both parties at some point in the marriage, often serious enough to constitute grounds for divorce, thus precluding divorce if the recrimination rules were applied strictly.[167] Yet, that jurist argued, "no fair-minded person would

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[163] 32 Cal. 2d 711 (1948); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA, 197–200 (1980); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES, 243–66 (2007).

[164] *See, e.g.,* Everett C. McKeage, *More Flexible Procedure Urged for Divorce Actions,* 15 St. B.J. 158, 159–60 (1940).

[165] *Id.* at 159.

[166] *Id.*

[167] *Id.*

contend that in such circumstances any public interest could be served by forcing the parties to remain as man and wife."[168]

Traynor thus had all the evidence he needed to face the reality that continuing to apply recrimination as an automatic defense to divorce was no longer in the public interest — that, as one female lawyer put it, "the old ecclesiastical theory that divorce could be granted only on the basis of penalty, and that one party must be innocent . . . and the other guilty" was contrary to contemporary mores;[169] that these "restrictive laws of the 19th Century . . . on the statute books . . . have no application to modern conditions;"[170] and that the law must be changed in order to "recognize and utilize modern attitudes, inventions and creations . . . [and] recognize that of all the ties which in previous ages held families together only the affectional tie remains unchanged, and that to be successful today, marriage must contribute directly to the satisfaction of the individuals."[171]

The author of an article on the *DeBurgh* decision in the *California Law Review* in 1953 noted that, while the case may appear "to be a dramatic reversal by the California court in its position on recrimination," it was really "not quite so startling when viewed against the background of recent developments in California and elsewhere."[172] He pointed out that while the "majority of jurisdictions still adhere to recrimination in its traditional form," courts had recently been weakening it, such that there was a

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[168] *Id.*
[169] N. Ruth Wood, *Marriage and Divorce Laws,* 33 WOMEN LAW. J. 23, 27 (1947).
[170] *Id.* at 29.
[171] *Id.*
[172] Basye, *supra* note 11, at 320.

discernible and "marked trend away from the automatic application of the doctrine."[173] He noted three specific ways in which courts had been pruning the doctrine.[174]

First, courts would frequently apply a "comparative rectitude" analysis, in which recrimination would only bar a divorce where the plaintiff's degree of fault was equal to or greater than the defendant's.[175] Second, courts developed new grounds for divorce that were not based on fault.[176] Finally, even before *DeBurgh*, jurisdictions outside of California were beginning to consider recrimination to be a discretionary, rather than an absolute bar to divorce.[177] This contemporary commentator thus characterized *DeBurgh* as "a well-reasoned opinion which . . . brought California into the small but growing group of jurisdictions" that gave trial courts the discretion to apply recrimination more or less rigidly according to the circumstances at hand.[178] It was Traynor's judicial philosophy that gave him the freedom to make this change in California common law.

V. Roger Traynor Enters the Fray

In 1940, when Traynor was appointed to the California Supreme Court, the role of courts as lawmakers was in transition.[179] From the mid-nineteenth century until the turn

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[173] *Id.* at 320–21.
[174] *Id.* at 322.
[175] *Id.*
[176] *Id.* at 322–23.
[177] *Id.* at 324.
[178] *Id.* at 326.
[179] Edmund Ursin, *How* Great *Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking,* 57 BUFFALO L. REV. 1267, 1290 (2010). For more information on the differing schools of thought on the judicial role, see LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY (2001); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920–1980 (2001); EDWARD A. PURCELL, JR., THE CRISIS OF

of the twentieth, the legal academy had promoted a variety of judicial formalism that required judges to simply "find" the law.[180] The assumption was that the law was predetermined but somewhat hidden, and that judges, having great legal minds, were singularly capable of discovering it. Then, at the beginning of the twentieth century, a new school of thought arose known as legal "realism," which promoted judicial creation of the law.[181] Realists promoted the idea that the people — via judges — could make the law as they saw fit for society as it existed at the time, creating a backlash in the mid-twentieth century as commentators began to decry what they saw as unrestrained judicial lawmaking power.[182]

Coming to the Court at this moment of instability, Traynor had made his own feelings on the subject of law and judicial lawmaking known early on.[183] "Unlike the [formalist] scholars, Traynor's goal was not to limit judicial lawmaking. It was to encourage it."[184] But he did not believe that judges should make the law as they saw fit. Indeed, from his first years on the Supreme Court, Traynor urged his fellow justices "to engage in policy-based lawmaking," and by "the 1950s he converted the California Supreme Court to his view," thus altering "the norms of judicial decision making and opinion writing for his court, which served as an example for courts across the nation."[185] Under Traynor's tutelage, in "the 1950s and 1960s the California Supreme

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DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956).

[180] *See* WHITE, *supra* note 163, at viii–ix.

[181] *Id.* at xi.

[182] *Id.* at xii.

[183] Ursin, *supra* note 179, at 1327.

[184] *Id.*

[185] *Id.* at 1335.

Court left . . . [formalist] . . . thinking in the dust as it emerged as the most innovative court in the nation."[186]

According to one commentator on Traynor's judicial philosophy, "Traynor's process of decision making combined reason with intuition."[187] Others have argued that Traynor was not guided by intuition, but by "a cohesive conception of the public interest."[188] Traynor himself, though, gave his own definition of what drove his innovative decisions, writing that judges "do a great disservice to the law when [they] neglect that careful pruning on which its vigorous growth depends and let it become sicklied over with nice rules that fail to meet the problems of real people."[189] In 1956, Traynor lamented:

> In no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault . . . is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys with the tacit sanction of the courts.[190]

This glimpse into the justice's mind provides ample evidence of his reasons for deciding *DeBurgh* as he did: that it was merely a recognition of what was already happening in courts across the state.

And yet, despite the absurdity that clearly would have resulted if recrimination remained as it had been, Traynor did not strike at it lightly. He was fully aware of the

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[186] *Id.*

[187] BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR (2003) at iii.

[188] *Id.*

[189] Roger Traynor, *Law and Social Change in a Democratic Society,* 1956 U. ILL. L.F. 230, 236 (1956).

[190] *Id.*

obligations of stare decisis, but he was just as acutely aware of the need to make changes to precedent that had outlived its use or, even worse, its fairness. He discussed this conflict in a 1962 article, writing that while "[a] judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain stability in the law . . . [t]here are of course precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation."[191]

Traynor saw it as his duty to heal the breach between stare decisis on the one hand and progress on the other. He believed that pruning retrograde precedent required "forthrightness," and that leaving it to fester still further showed a lack of "the wit or the will or the courage to spell out why the precedent no longer deserves to be followed. Such dogmatic adherence to the past perpetuates bad law."[192] Traynor, far from being an activist throwing caution (and precedent) lightly to the winds, believed that the greatest common law judges move "not by fits and starts, but at the pace of a tortoise that explores every inch of the way, steadily making advances though it carries the past on its back."[193]

While change was not to be undertaken thoughtlessly, it was surely necessary in order to "stabilize the explosive forces of the day."[194] According to one commentator, "Traynor . . . saw the world in rapid flux. This was not simply a world view, but an empirical truth: Traynor sat on the California Supreme Court during one of the most

[191] Traynor, *supra* note 20, at 229–30.
[192] *Id.*
[193] Traynor, *supra* note 21, at 291.
[194] Traynor, *supra* note 1, at 124.

dynamic periods in California's history."[195] That is, Traynor believed that he himself initiated nothing. Rather he only responded according to what he saw were new fact patterns that did not fit the old precedents. The world was changing around him, and Traynor believed that it was his duty, as a justice of the highest court in the state, to "keep the inevitable evolution of the law on a rational course."[196] He wrote:

> A reasoning judge's painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression. When he has encountered endless chaos in his long march on a given track, the most cautious thing he can do is to take a new turn. He does so though he knows that ours is a profession that prides itself on not throwing chaos lightly to the winds.[197]

Traynor believed that he did not initiate change because he personally felt it was the right change to make, but because it was his job to make law that applied to the world as it existed in his day. He rid California common law of recrimination because the realities of the time demanded it. He would have seen it as a dereliction of his duty to leave an unjust and outmoded law on the books.

VI. Conclusion

Daisy DeBurgh presumably got her divorce, in the end. Her story, at least the written record, ends with her case, but given the court's opinion, she likely managed to escape what was evidently an abusive and deeply unhappy marriage. She was not the only miserable spouse who benefited from Traynor's decision in *DeBurgh*. In fact, the justice was probably not as concerned with her particular story, pitiable as it was, as he was

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[195] John W. Poulos, *The Judicial Philosophy of Roger Traynor,* 46 HASTINGS L.J. 1643, 1700 (1994–1995).

[196] Roger Traynor, *The Limits of Judicial Creativity,* 63 IOWA L. REV. 1, 7 (1977–1978).

[197] *Id.* at 6.

concerned with the collective plights of all the other miserable spouses in California: people who were trapped by the ancient rule precluding relief for the slightest smudge of dirt on their hands. Unhappy marriages had become a common thing in the years surrounding the Second World War. Gender roles were in transition, women were overburdened, ideologically as well as literally, by conflicting duties to work and stay home. Men were just as confused about their roles as breadwinners at a time when it was no longer necessarily feasible for them to keep the family afloat all on their own.

Unhappy marriages meant even unhappier divorce battles, stymied by an antiquated set of laws that punished people for failing to keep their sacred unions intact. Rampant perjury and deception ensued, often needlessly, for the trial judges recognized the inevitable truth before the Legislature did. Enter Traynor, who observed the untenable situation and performed what he saw as his duty: to change the law to meet the demands of reality. Traynor's decision in *DeBurgh* is the perfect example of his judicial philosophy in action: "Things happen fast in our small world and we who tend the law must keep pace . . . . The law will never be built in a day, and with luck it will never be finished."[198]

[198] Traynor, *supra* note 20, at 236.