Reassessing Western Liberality

Divorce in Douglas County, Kansas, 1867–1876

by Lyn Ellen Bennett

Alice Umbarger lived in Clinton, Douglas County, Kansas, eighteen years before she took as her husband John W. Conant on April 19, 1870. Wedded bliss ended three months later when John abandoned his new wife for unknown reasons. John not only left Alice without financial support but with his unborn child, forcing Alice to rely upon her own labor as a house servant. In early February 1871 John reappeared in Clinton, and reunited briefly with Alice for approximately two weeks. What ensued next is confusing in the public record. Alice gave birth on February 15 to her first child, a girl named Maggie May, at her father's house and without her husband in attendance. Apparently, however, he was not only in the neighborhood but knew of her impending labor. Maggie May's birth did not prick John's conscience as he still refused to support Alice and their new baby. Alice finally was stirred into action as she filed a petition for divorce about seventeen months later in July 1872 citing as grounds desertion and neglect of duty. In this divorce action, Alice requested the custody of Maggie May, the restoration of her maiden name, and any equitable relief to which she was enti-

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The author would like to express her gratitude to the Kansas Collection staff of Spencer Research Library at the University of Kansas for their assistance during her research, and to Professor Angel Kwolek–Folland who graciously commented on the article throughout its development.

tled by law. The court granted Alice her divorce as well as the custody of her daughter. As to the other requests, the public record remains silent. For Alice, divorce seemed the only recourse for a dysfunctional marriage, a recourse to which many women began increasingly to turn in the nineteenth century as the institution of divorce became more firmly established in civil law.[1]

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Divorce in the United States has been analyzed quite thoroughly throughout time.[2] Certain concepts and theories developed in the historical literature specifically have attempted to comprehend the existence of and rise in divorce. Some of the earliest studies speculated that the increasing number of divorces in the late nineteenth century was a direct result of divorce legislation; others concluded that changes in the law, such as the number and character of the grounds, did not affect the rate of divorce.[3] Several other works demonstrated that the real causes of divorce were not found in divorce legislation at all, but in the nature of social conditions.[4]

One development in the historical literature on divorce is the role the West played in liberalizing divorce law. This perception of liberal divorce laws in western regions can be traced to author and journalist Albert Richardson who wrote in 1867 that western divorce laws were "very liberal; seldom compelling men or women to remain in marriage bonds which they wish severed."[5]

This study of the decade 1867–1876 seeks, among other issues, to dispel the perceived liberality of western divorce.[6] Thus, it argues against the theories that divorce in the West was easily obtained and more readily available than in eastern regions of the United States. The "liberal theory" posits that divorce in the West resulted from multiple factors such as mobility, opportunity, class, and religion combining with exposure to the frontier, which provided a new, open, and democratic society. Traditionally, alleged western liberality is measured not only by the large number of divorces sought and obtained in the West but also by analyzing the grounds and procedures created and enforced by law. Another major theory cited in conjunction with western liberality is the existence of a migratory divorce pattern. Migratory divorce theorists posit that dissatisfied spouses left their state of residence to seek a di-

1. *Umbarger v. Umbarger*, Douglas County Civil Court, case no. 2184, Kansas Collection, University of Kansas Libraries, Lawrence.

2. Paul Jacobson, *American Marriage and Divorce* (New York: Rinehart and Co., 1959); Nelson Blake, *The Road to Reno: A History of Divorce in the United States* (New York: The Macmillan Co., 1962); William O'Neill, *Divorce in the Progressive Era* (New Haven: Yale University Press, 1967); Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago: University of Chicago Press, 1972); Lynne Halem, *Divorce Reform: Changing Legal and Social Perspectives* (New York: Free Press, 1980); Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (New York: Cambridge University Press, 1988).

3. Joel Bishop, *Commentaries on the Law of Marriage and Divorce* (Boston: Little, Brown, and Co., 1881); Walter Willcox, *The Divorce Problem: A Study in Statistics, Studies in History, Economics, and Public Law*, vol. 11 (New York: Columbia College, 1891); Theodore Woolsey, *Divorce and Divorce Legislation in the U.S.* (New York: Charles Scribner's Sons, 1882); George Howard, *A History of Matrimonial Institutions*, 3 vols. (Chicago: University of Chicago Press, 1904).

4. Willcox, *The Divorce Problem*; James Lichtenberger, *Divorce: A Study in Social Causation, Studies in History, Economics, and Public Law*, vol. 35 (New York: Columbia University, 1909); James Lichtenberger, *Divorce: A Social Interpretation* (New York: McGraw-Hill Book Co., 1931); Alfred Cahen, *Statistical Analysis of American Divorce* (New York: Columbia University Press, 1932); O'Neill, *Divorce in the Progressive Era*; Halem, *Divorce Reform*.

5. Richardson quoted in Glenda Riley, *Divorce: An American Tradition* (New York: Oxford University Press, 1991), 85. For a brief discussion of the rise of divorce colonies and migratory divorce, *see* Blake, *The Road to Reno*, 116–29. Albert Richardson, a well-known correspondent for the *New York Tribune* and author of *Beyond the Mississippi, 1857–1867* (Hartford, Conn.: American Publishers, 1867), was a proponent of divorce. Richardson was in fact part of a triangle that led to one of the most sensational nineteenth-century divorce cases and to his violent death in 1869 (Blake, *The Road to Reno*, 101–3).

6. These dates were chosen because they represent a fairly large amount of time over which changes in divorce patterns and legislation can be analyzed. Also, these dates coincide with national and state data on marriage and divorce published by the Department of Commerce and Labor in 1909.

vorce in a state with more liberal divorce laws, such as those that supposedly existed in the West.

A close analysis of divorce records in Douglas County, Kansas, reveals that far from breaking with eastern patterns, those of this western county closely resembled national trends. Douglas County provides an ideal basis for this study for several reasons. It is located in the West in what was still a frontier area between 1867 and 1876, that is, an area where the transfer of eastern institutions was still in progress. But this county also combined rural–urban, agricultural–industrial, diversely populated elements that represented the kinds of people flowing westward to the frontier. Thus, a case study of Douglas County illustrates the reality of western divorce, which fell in line with that of the East. To discount the liberal and migratory theories of western divorce, it is perhaps best to review the early development of Kansas divorce law.[7]

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In 1855 under the leadership of Governor Andrew Reeder, the legislative assembly of Kansas enacted the first territorial statutes.[8] This assembly grappled with, among numerous other issues, the question of divorce, beginning with the concept of jurisdiction. Traditionally divorce fell within the jurisdiction of a lower court system, and initially the legislature assigned the jurisdiction of divorce within the newly created Kansas Territory to any court having chancery jurisdiction. But divorce in territorial Kansas ultimately required a legislative act granted by a special assembly and published as a private law. As divorce requests increased during the territorial period, both houses of the legislature commonly sent divorce petitions to a judiciary committee for recommendations before deliberating their fate. A petition accepted in both the house of representatives and the council became a law with the governor's signature. The first change in divorce jurisdiction occurred in 1859 when the Divorce and Alimony Act granted jurisdiction over all cases of divorce and alimony to the district courts in the county where the petitioner resided. This change in jurisdiction brought Kansas Territory into line with existing states. A similar transition in divorce jurisdiction from the legislatures to regular courts occurred in most states before 1860. Historian George Howard found that by 1867, thirty-three of the then thirty-seven states had ended the practice of legislative divorce. Such was true of Illinois and Pennsylvania, which delegated divorce to the courts in 1827 and 1838, respectively; Virginia and Kentucky followed in 1850, and Missouri and Utah in 1852.[9]

7. Paula Petrik suggests that divorce liberality reflects class bias in her study of Montana divorce, "If She Be Content: The Development of Montana Divorce Law, 1865–1907," *Western Historical Quarterly* 18 (July 1987): 261–91. For effects of religion on divorce, *see* Mary Somerville Jones, "An Historical Geography of Changing Divorce Law in the United States" (Ph.D. diss., University of North Carolina, 1978), and Phillips, *Putting Asunder*. For the impact of mobility and opportunity, *see* John Mack Faragher's study of westward migration, *Women and Men on the Overland Trail* (New Haven: Yale University Press, 1979). For the affect of changing and increasing expectations, *see* Robert Griswold, *Family and Divorce in California, 1850–1890: Victorian Illusions and Everyday Realities* (Albany: State University of New York Press, 1982). Although dealing with a later time period, Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post Victorian America* (Chicago: University of Chicago Press, 1980), also is a good source for reviewing the affects of changing expectations of matrimony, roles, and family. May's book focuses on how the development of urban life in California created new expectations in marriage that often were left unfulfilled resulting in an escalating divorce rate.

8. *Statutes of the Territory of Kansas, 1855* (Shawnee Manual Labor School: John T. Brady, 1855), preface. The legislative assembly voted to move the seat of government from Pawnee to the Shawnee Manual Labor School due to lack of accommodations.

9. *Kansas Statutes, 1855; General Laws of the Territory of Kansas, 1859* (Lawrence: Herald of Freedom Steam Press, 1859), 385; Howard, *A History of Matrimonial Institutions*, 3: 96–160. One can find private acts of divorce prior to the change in jurisdiction in the *Private Laws of the Territory of Kansas, 1859* (Lawrence: Herald of Freedom Steam Press, 1859), 9–11, and in the *Private Laws of the Territory of Kansas, Special Session, 1860* (Lecompton: S.A. Medary, 1860), 232–54. While the laws of 1859 granted jurisdiction to county courts, the territorial legislature still was granting divorces in 1860. It appears that a dual divorce-jurisdiction was operating from 1859 to statehood in 1861. To trace the legislature's actions in divorce, *see Council Journals of the Territory of Kansas* and *House Journals of the*

To sue for divorce, Kansas petitioners had to meet the requirements of residency as well as have legitimate grounds. The fourth section of the 1855 Divorce and Alimony Act established a residency requirement of one year in the territory prior to filing a divorce complaint. The only exception to this requirement was if the cited offense was committed in the territory or while either of the parties resided in the territory. This residency requirement was in line with most other areas in the United States. Differences occurred mainly in the length of required residence. In the East, for example, Rhode Island had a two-year residency requirement, Vermont and Connecticut three years (although in 1807 Vermont reduced its requirement to one year), and Massachusetts five years. Most midwestern and western states, such as Illinois, Missouri, Montana, and California, established the same residency requirement as Kansas: one year. One exception was Texas, where the six-month residency requirement was one of the shortest in the United States.[10]

Initially seven legitimate grounds existed for divorce in Kansas Territory: impotency, adultery, desertion without reasonable cause for a period of two years, conviction of a felony or infamous crime, habitual drunkenness for the space of two years, cruel and barbarous treatment that endangers the life of another, and bigamy. Leanna Wilson cited bigamy in her divorce suit against her husband, Henry, in 1872. Although this divorce case was ultimately dismissed, Henry did not get off scot-free—he was sentenced to two years in Leavenworth prison for the crime of bigamy.[11]

Causes for divorce in Kansas were similar to those in the eastern states of New Hampshire and Rhode Island. In 1791 grounds for divorce in New Hampshire included impotency, adultery, three years absence of either spouse, and extreme cruelty. As would later be true in Kansas, New Hampshire added to its list of legitimate causes for a divorce. In 1839 another ground was established: three years willful desertion or refusal to cohabit by either spouse. Three years later the state added a spouse's conviction and imprisonment for a felony, three years of habitual drunkenness, injury to the health of a spouse, or endangering reason. By 1843 the list of grounds expanded to include when a spouse joined a religious sect that believed the husband–wife relationship to be unlawful and when a spouse who lived separately in another state left the United States with the intent of becoming a citizen of a foreign country.[12]

Rhode Island's 1798 public laws included New Hampshire's 1791 grounds for marital dissolution but with the addition of two more: the husband's neglect or refusal to provide, and "gross misbehavior and wickedness in either party that violated the marriage covenant." After the 1844 addition of habitual drunkenness to the list of grounds for divorce, two other changes occurred before the end of the century. The length of desertion time was reduced, and a new ground, "habitual, excessive, and intemperate use of opium, morphine, or chloral," was added. It is evident that parallels in divorce grounds existed between eighteenth- and early nineteenth-century New Hampshire and Rhode Island, and nineteenth-century Kansas.[13]

A comparison of Kansas with other western states also finds similar grounds for divorce. Colorado experienced little change from its original 1861 statute of divorce which included impotency, bigamy, adultery, desertion for one year, extreme mental or physical cruelty, neglect of duty for one year, habitual drunkenness over one year, and conviction of a felony. Nevada's 1861 divorce act echoed California's including as grounds for divorce adultery, extreme cruelty, desertion, neglect, habitual drunkenness, and conviction of a felony, but added impotency to its list

Territory of Kansas from 1855 to 1860 and *Kansas Private Laws, 1860*, in which legislative divorces granted for the year 1860 are published as law.

10. *Kansas Statutes, 1855*, 311; Howard, *A History of Matrimonial Institutions*, 3: 22–25, 155–56.

11. Howard, *A History of Matrimonial Institutions*, 3: 310. *Wilson v. Wilson*, Douglas County Civil Court, case no. 2284; *Kansas Statutes, 1855*, 310.

12. Howard, *A History of Matrimonial Institutions*, 3: 10–18, 50–79. Rhode Island and New Hampshire were selected for their representativeness among eastern states. As Howard demonstrates, these states' grounds for divorce are fairly standard among eastern states and thus allow for a valid east–west comparison.

13. Ibid., 14–15.

of legitimate causes. Clearly Kansas divorce legislation was in line with other states in its establishment of divorce grounds.[14]

From 1855 to 1858 the grounds for divorce in Kansas Territory were not altered. However, in 1859 the seven original grounds were reduced to six, as conviction for a felony or crime disappeared from the statutes.[15] This seems to have been a legislative oversight as it reappeared in the Divorce and Alimony Act of 1860. Besides reintroducing the felony or crime clause, the 1860 statutes also recognized three additional grounds for divorce in Kansas Territory: if the wife, at the time of marriage, was pregnant by a man other than her husband, gross neglect of duty, and fraudulent contract. An example of this last grounds is found in the 1867 case *Oliver v. Oliver*. Samuel Oliver claimed he was incapable of making a lawful contract due to his youth. He was seventeen years old and his estranged partner, Jennette, thirty-five at the time of their marriage. According to Samuel, a relationship developed between Jennette and himself when she was hired as a servant to care for him. Samuel further claimed that Jennette conspired with her uncle and sister to force him under the threat of prosecution to marry her because she was pregnant. Jennette's answering statement is fortunately included in the public record. Contrary to Samuel's claim, she stated that their marriage was not forced, that she had not been his servant, and that Samuel had been twenty-eight years old at the time of their marriage. Obviously the court found Jennette's version of the marriage more plausible than Samuel's as his petition for divorce was dismissed.[16]

No major changes in Kansas' grounds for divorce occurred between 1860 and 1876, but a reduction in time altered two of the causes. In 1855 the petitioner had to be deserted for at least a two-year period before being able to seek a divorce for this cause. The time limit was reduced to one year in 1859 and remained constant until 1876. This reduction of time, as well as the total number of divorces granted on the grounds of desertion, alluded to the prevalence of desertion in Kansas. Divorce due to drunkenness in the 1855 act required that the offender be consistently drunk over a two-year period. This time period was reduced to simply "addicted drunkenness" in 1859, and finally to "habitual drunkenness" in 1860. By reducing these time requirements, the law clearly laid an easier path for plaintiffs seeking divorce on these grounds, as well as allowing the courts to define socially acceptable behavior.[17]

Kansas territorial divorce law also enacted provisions for alimony, the maintenance of the wife, and the care, custody, and maintenance of children. Again this precedent was set in eastern states such as North Carolina, Massachusetts, and Virginia. Further, in a clear move to assert women's property rights, a Kansas woman who obtained a divorce from her husband retained all property she brought to the marriage that remained at the time of the petition. Vermont entitled a wife after a divorce not only the immediate possession of her real estate but also any part of her husband's real and personal estate the court deemed just. The enforcement of alimony or maintenance for a female plaintiff was guaranteed in both Vermont and Kansas through the court's sequestration of property to ensure the defendant's support of the plaintiff during divorce proceedings and if stipulated in the divorce decree. Such was the 1878 case of Lavinia Lamborn when the court granted her $10.50 a week for the duration of the divorce trial as well as $75 for court and attorney fees, both to be paid by the defendant Joseph Lamborn.[18]

14. Ibid., 129–30, 136, 143.

15. *Kansas General Laws, 1859*, 385.

16. *General Laws of Kansas Territory, 1860* (Lecompton: S.A. Medary and S.W. Driggs, 1860), 105; *Oliver v. Oliver*, Douglas County Civil Court, case no. 775.

17. *Kansas Statutes, 1855*, 310; *Kansas General Laws, 1859*, 385; *Kansas General Laws, 1860*, 105.

18. *Kansas Statutes, 1855*, 311–12; Howard, *A Historical of Matrimonial Institutions*, 3: 28–30, 90–94; *Lamborn v. Lamborn*, Douglas County Civil Court, case no. 3873. In conjunction with property rights guaranteed under the Divorce Act, the 1859 General Laws of Kansas Territory provided that the real and personal property a woman owned or inherited at the time of her marriage remained her "sole and separate property" free from the disposal or debts of her husband, *General Kansas Laws, 1859*, 565.

Divorce was not a necessary pre-condition for seeking support. The Kansas territorial statutes of 1855 allowed the court to decree support and maintenance for a wife and any children if her husband had abandoned or refused to support her. Similar statutes regarding alimony allotment without a divorce decree existed in Virginia, Florida, and Georgia. Clearly the courts and legislative bodies were not interested only in permanently severing the bonds of marriage. Whenever possible, they preferred a compromise in the form of mandated support for estranged couples, perhaps with reconciliation between the parties in mind. Kansas courts' interest in preserving marriages is reflected in the case of *Cummings v. Cummings*. In 1869 William Cummings accused his wife, Adaline, of committing adultery with a John Allen. However, a preliminary investigation did not produce enough evidence to support William's charges. As a result, the court refused to hear William's divorce complaint and sent him and Adaline along their way to deal with their marital problems in the best manner they could. Less than a year later the Cummingses reappeared in court under the same circumstances, except now William's accusations of adultery against Adaline stuck. The court found enough evidence to support William's charges, and it finally severed the bonds of matrimony.[19]

Although grounds for divorce varied slightly among states, most included impotency, adultery, desertion, conviction of a felony, drunkenness, neglect, and extreme cruelty.

The 1859 Kansas statutes also outlined specific times when divorce was not granted, such as in the cases of collusion between the parties or when both parties were found guilty of adultery. In all cases of divorce, the guilty party forfeited any rights or claims guaranteed under the marriage contract and could not remarry for a period of five years. Between 1859 and 1881 no time restriction for remarriage existed, but this changed in 1881 when a six-month waiting period appeared on the books. Similar restrictions appeared in Oregon in 1862 and in Nebraska in 1885. In comparison, however, the opposite and more "liberal" case of no restrictions on remarriage was found in Rhode Island rather than in Kansas.[20]

Clearly Kansas divorce law remained basically static from 1860 until 1870, when section 646 of the 1868 laws was amended. The added text stated that if the husband was found to be at fault in a divorce case, the wife would regain all her "lands, tenements, and hereditaments"; be restored to her maiden name if she so desired; and retain her right of dower if she outlived her spouse. If the wife was found at fault, she would still regain her lands, tenements, or hereditaments, but she would be barred from all rights of dower.[21]

Kansas divorce law was similar to statutes established in other states. The transition from legislative divorce to regular courts that Kansas experienced was a national trend in most regions of the United States. Nor were residency requirements prior to filing for divorce unique to Kansas, as the majority of states set up formal time requirements. Although legitimate grounds for divorce varied slightly among states, most, like Kansas, included impotency, adultery, desertion, conviction of a felony, drunkenness, neglect, and extreme cruelty. Even the issues of maintenance, alimony, and remarriage after divorce were

19. *Kansas Statutes, 1855*, 312; Howard, *A History of Matrimonial Institutions*, 3: 92; *Cummings v. Cummings*, Douglas County Civil Court, case nos. 1410, 1585. The precedent for the provision of alimony allotment without a divorce was found in the Common Law principal of "separation from bed and board."

20. *Kansas Statues, 1855*, 312; *Kansas Laws, 1881* (Topeka: Kansas Publishing House, 1881), 229–31; Howard, *A History of Matrimonial Institutions*, 3: 22, 147–48.

21. *Kansas Laws, 1869, 1870, 1871* (Topeka: State Printing Works, 1874) 179–80. Dower gave a widow the right to one-third of the real property owned by her husband at any time during the marriage; *see* Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 141.

dealt with by the various state and territorial courts. These changes in statutory law and jurisdiction clearly suggest that Kansas legislators and judges accepted national legal standards for divorce. The case of Douglas County not only suggests that local and state trends in this area were typical of national patterns, but it also reveals how one western county's divorce laws operated in reality.

Females made up the majority of plaintiffs in divorce cases and filed a majority of all successful divorce requests in Douglas County.

During the period under study, Douglas County, in northeast Kansas, was a predominantly agricultural region with a population ranging from 15,814 in 1865 to 18,505 in 1875. To put divorce in Douglas County into perspective and test the theories of western liberality and migratory divorce, it is necessary to not only analyze county divorce records, but to compare them with state and national findings. Nationally, for the ten-year period between 1867 and 1876, 122,121 divorces were recorded of which 2,018 or approximately 2 percent of the national total were from Kansas.[22]

22. The U.S. Bureau of the Census divided its statistics on divorce into five-year periods. National and state data demonstrate an increase of divorces between 1867–1871 and 1872–1876. However, this pattern of increase is not evident in the data from Douglas County, which actually experienced a decrease in divorces granted. The increase in state divorces is probably due to a large rise in population, whereas Douglas County's population decreased in the five years between 1870 and 1875.

Divorces Granted	1867–1871	1872–1876
Douglas County *		
Women	49	35
Men	20	17
Kansas		
Women	490	910
Men	235	383
United States		
Women	34,449	45,417
Men	19,125	23,130

* Five granted divorces were not able to be categorized due to missing data.
Source: Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906, Part II* (Washington, D.C.: Government Printing Office, 1990), 207, 554.

Of the 188 petitions recorded in Douglas County during these years, 126 were granted, about 6 percent of the state's total number of granted divorces. The remaining sixty-two divorce petitions in Douglas County were dismissed, refused, stricken from the trial docket, or simply lost in an age bereft of modern organizational methods. Traditionally in the United States, men made up the largest percentage of petitioners in divorce cases, but nationally, by the mid-nineteenth century, the reverse had become true. And, as will be seen in the divorce records, women formed the majority of petitioners in Douglas County from its founding in 1854.[23]

The causes cited for divorce in petitions submitted by Douglas County, state, and national plaintiffs also established other patterns. Initially the high rates of spousal desertion indicate that this easiest and most permanent way to dissolve a marriage was readily available to both sexes. Another frequently cited cause was adultery, which offended not only the transgressor's spouse but society in general. However, the rates of desertion and adultery lessened as the nineteenth century came to a close. Throughout this period a multitude of other causes arose that dealt less with society's rules for men and women and more with individual satisfaction.

During the period under study more plaintiffs in Douglas County, the state of Kansas, and the nation

23. Female dominance of plaintiff status has been traced to the mid-eighteenth century. In her study of Massachusetts, Nancy Cott found that women consistently began to outnumber men as petitioners as early as 1765. In 1765–1786 women were plaintiffs in more than 60 percent of all cases filed. Cott also demonstrated that these women were more successful in obtaining divorces, which clearly indicates a sympathetic court system. Of the eighty-five divorces granted in 1765–1786, 59 percent of the judgments favored female plaintiffs. *See* Nancy Cott, "Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records," *Journal of Social History* 10 (Fall 1976): 20–43; Nancy Cott, "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts," *William and Mary Quarterly*, 3d ser., 33 (October 1976): 586–614.

filed for divorce on the grounds of cruelty and neglect. It appears that plaintiffs of both sexes began to demand mentally and emotionally stimulating relationships with their spouses. Historian Robert Griswold notes that by the late nineteenth century a bond developed between female petitioners and the legal system that set up liberal provisions for mental cruelty as grounds for divorce.[24]

In 1872, when Alice Umbarger Conant petitioned for a divorce from her husband of two years, she typified the average county divorce petitioner for the ten years between 1867 and 1876. She not only married and divorced her husband in the same state, as did the majority of plaintiffs, but Alice cited as grounds the two leading causes among Douglas County petitioners: desertion for more than a year and neglect of duty. Thus, the divorce of Alice and John Conant is an excellent case in which to trace general patterns of divorce in Douglas County during the mid-nineteenth century.

One general pattern was established by the plaintiff's gender. Divorce was most often sought by females; in Douglas County women represented about 70 percent of all petitioners or plaintiffs in the period under study. Numerically males outnumbered female plaintiffs in only one year—1867—and then only by one. In that year men represented approximately 53 percent of all Douglas County petitioners. The following year almost 87 percent of all plaintiffs were female.[25]

The success rate for achieving divorce varied among the sexes. Analyzed by year for all divorces granted, it appears that Douglas County women like Alice Conant were more successful at obtaining divorces than male petitioners. However, these statistics can be misleading, for an analysis of the success rate of divorce by gender and by year indicates a more even breakdown. That is, the majority of petitioners regardless of gender sought and successfully obtained divorces.

Throughout this ten-year period, females made up the majority of plaintiffs in divorce cases and filed a majority of all successful divorce requests in Douglas County. Robert Griswold found this also to be the case in California for the period 1867–1886; there female plaintiffs were granted two-thirds of all divorces.[26] However, the data from both Kansas and California offer no clear indication that one gender was more likely to be granted a divorce than another.[27] What can be discerned is that the success rate of divorce by gender reversed over the ten-year period. Perhaps one of the most useful explanations of this change lies within the law itself. Although Kansas divorce law seemed to be the liberator of helpless females, a review of the statutes demonstrates that the

24. Griswold traces the evolution of mental cruelty and its acceptance in law in two studies: "Law, Sex, Cruelty, and Divorce in Victorian America, 1840–1900," *American Quarterly* 38 (Winter 1986): 721–45, and "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790–1900," *Journal of Social History* 20 (Fall 1986): 127–48. One of the central cases in the development of the legal concept of mental cruelty took place in Kansas, *Carpenter v. Carpenter*, Kansas Reports 30 (1883), 744.

25. Recently Paula Petrik presented a study of several Nebraska counties that found a different outcome among divorce plaintiffs. *See* Paula Petrik, "Something to Fight For: Nebraskans and Divorce, 1867–1890" (paper presented at the Law on the Great Plains Conference, March 9, 1991). Petrik found that males were the majority of initiators throughout the nineteenth century, which she connects to a change in the dower laws.

26. Griswold, *Family and Divorce in California*, 30. A slight decline in filed petitions occurred within the ten-year period under study. This decline can be explained by a review of the population size under scrutiny. Between 1867 and 1871, Douglas County had a population of approximately 20,000. This figure dropped in the next county census, in 1875, to 18,505. Whereas Douglas County experienced a loss of population between 1867 and 1871 and between 1872 and 1876, Kansas and the nation showed definite increases. Although Douglas County witnessed a decline in the number of divorces, Kansas and the United States both experienced increases in the total number of divorces granted. Population figures for approximate periods under study:

	1865	1870	1875
Douglas County	15,814	20,592	18,505
Kansas	140,079	364,339	528,349
United States	37,376,000	39,905,000	45,073,000

Sources: A.T. Andreas, *History of the State of Kansas* (Chicago: A.T. Andreas, 1883), 306, and U.S. Department of Commerce, the Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Part I* (Washington, D.C.: Government Printing Office, 1975), 8.

27. Griswold found that the success rate for male plaintiffs varied from 82 percent in the 1850s and 1860s to 75 percent in the 1870s; for female plaintiffs, the rates increased from 73 percent in the 1850s and 1860s to almost 90 percent in the 1870s. Comparison of Douglas County and California data reveal that Douglas County success rates varied more than California rates, but neither set of data lends itself to a consistent pattern. *See* Griswold, *Family and Divorce in California*, 30–31.

law began to show signs of inequity. Specifically in 1870 section 646 stated that women found at fault in a divorce would be barred from all rights of dower. However, the obverse case—men found at fault—did not deny the culprits any of their marriage rights.[28]

Alice Conant also serves as a typical Douglas County divorce plaintiff in other categories, such as the state in which she was married, the duration of her marriage, and the number of years that elapsed between the violation of the marital bond and her actual divorce petition filing. Alice was both married and divorced in Kansas. Of the 126 divorces granted between 1867 and 1876, where place of marriage is known (N = 117), 64 (55 percent) reveal that the parties involved were married and divorced in Kansas (Table 1). Forty-four percent (N = 51) of the estranged couples were married out of state, with the largest numbers coming from New York state, about 9 percent (N = 11). Only two percent (N = 2) of divorcing couples were married outside the continental United States, with both couples coming from Canada. The data also reveal that divorced males were more likely to have married outside Kansas, 52.8 percent, than their female counterparts, who married outside Kansas approximately 40 percent of the time. From this pattern, one can discern that divorced Douglas County males migrated to Kansas with their families while the majority of divorced Douglas County females established Kansas as their place of residence prior to marriage and maintained it through their divorces.

An analysis of Kansas data reveals that the in-state pattern found among Douglas County plaintiffs was repeated on the state level during this period. However, a comparison of Douglas County and Kansas data with the nation at large reveals some differences. The pattern traced on county and state levels demonstrating that women tended to marry and divorce in the same state is repeated on the national level throughout the time period. However, at the national level, men were more likely to be married and divorced in the same state instead of being married out of state as were the majority of Douglas County and Kansas male plaintiffs. This difference may lie with the small numbers of married men moving west as compared with the large population of married men who chose not to migrate. The incidence of divorces granted to couples married outside the United States is extremely low on county, state, and national levels. One could speculate that immigrants had time to establish mutual foundations and resolve problems within the early stages of marriage before choosing to cross the Atlantic. Or perhaps it was the experience of the crossing with its hazards, loss of life, and uncertain future in a new land that solidified immigrant marriages more thoroughly than their American counterparts (Table 1).

Clearly the theory of migratory divorce does not stand up in an analysis of Douglas County. The data in Douglas County demonstrate that the majority (55 percent) of divorce petitions were filed by individuals who not only lived in Kansas at the time of filing, but who were married in Kansas. The place of marriage and divorce for men and women is noticeably different. However, this can be explained by patterns of nineteenth-century migration. Males usually made the final decision to move westward with their wives agreeing because women had no viable option. This "forced" uprooting of families sometimes ended in disgruntled wives leaving the barren and hard life of the frontier and returning to the comforts left behind.[29]

Alice Conant's marriage lasted a little over two years, which was typical of Douglas County petitioners. Of all granted divorces where the duration of marriage is known (N = 118), 52 percent were in marriages that did not last more than five years (Table 2); approximately 53 percent of the female plaintiffs' and

28. *Kansas Laws, 1870*, 179–80.

29. It should be noted that some scholars disagree over women's response to migration. *See* Faragher, *Women and Men on the Overland Trail*; Glenda Riley, *The Female Frontier: A Comparative View of Women on the Prairie and the Plains* (Lawrence: University Press of Kansas, 1988); Julie Roy Jeffrey, *Frontier Women: The Trans-Mississippi West, 1840–1880* (New York: Hill and Wang, 1979).

47 percent of the male plaintiffs' marriages endured no longer than five years. The largest single proportion of female petitioners, about 30 percent (N = 25), were in marriages of no more than two years. Less common was the case of Martha Johnson Horton who in 1875 was granted a divorce from her spouse, Stephen, on grounds of desertion. What is unique about this couple's marriage is its duration, which was all of two days before Stephen took off for Colorado Territory never to be seen or heard from by Martha again.[30] For male plaintiffs, the largest single proportion of marriages, 42 percent (N = 15), lasted between three and five years. Thus, a decisive majority of all plaintiffs' marriages (women = 74 percent, men = 67 percent) were on the rocks within the first ten years.

Between 1867 and 1876 desertion was the most often cited grounds for divorce among all plaintiffs.

This pattern is repeated in collected data throughout Kansas and the United States. Whether it was due to incompatibility, disillusionment, or others factors, most couples obtaining divorces in Douglas County were doing so in relatively young marriages. This trend of short duration of marriage was not new to Kansas or the United States. Within the chronological period under study, both Kansas and the United States posted the largest percentage of their divorces within marriages of five years (Table 2).[31]

John Conant had abandoned his wife for more than one year before she filed a petition requesting a divorce, and here again Alice Conant represents a fairly typical example of Douglas County petitioners. Alice represents the average injured party in Douglas County divorces as she waited for more than a year before taking legal action against her spouse. According to the data, 56 percent of the divorced males waited more than one year before filing suit as compared with 34 percent of the females. Overall most petitioners filed for divorce just over a year from the date of the marital violation. From the known data it is also apparent that no offended plaintiff waited longer than six years before filing for divorce.

The year-long waiting period before filing makes sense within the context of the grounds allowed by Kansas law. Between 1867 and 1876 desertion required that one spouse be absent from the marriage at least one year before the court recognized it as legitimate grounds for divorce. During this period desertion was the most often cited grounds among all plaintiffs. Approximately 61 percent of divorces granted to females in Douglas County cite desertion as grounds or one of multiple grounds in their petitions. This pattern is repeated for women on both state and national levels (Table 3).

Historically, it was not unusual for a husband to abandon his wife and children in the West. The numbers of women filing on the grounds of desertion demonstrate that husbands commonly spurned their marriage vows, whether due to overpowering frontier conditions, failed marriage expectations, the lure of distant lands and quick

30. *Horton v. Horton*, Douglas County Civil Court, case no. 3380. The twists in this particular case merit further discussion. Stephen Horton was the brother of James Horton who ran for the Republican nomination in the 1874 Kansas gubernatorial race. In her 1874 diary, Fannie Horton, James' wife, wrote of a terrible secret that ultimately became a public scandal. An affair between Stephen and Martha Johnson, a servant in James and Fannie's home, resulted in Martha's unplanned pregnancy. As a result, Stephen and Martha were married on February 23, 1874. Stephen departed a few days later for Colorado Territory, leaving Martha with Fannie and James to best deal with the consequences of his actions. In April Fannie delivered Martha to Leavenworth's Home for the Friendless where she remained until the end of July. Apparently the child did not survive as no mention appears in Fannie's diary or in the 1875 divorce petition. Martha continued to live and work as a servant in the James Horton household until April 1875, when she departed Lawrence and was not heard from again. Stephen meanwhile settled in Georgetown, Colorado Territory, where he later remarried and ran for public office. *See* Katie H. Armitage, "Public and Private Lives: Fannie B. and James C. Horton, 1874," *Kansas History* 17 (Summer 1994), 124–39.

31. Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906, Part II, General Tables* (Washington,D.C.: Government Printing Office, 1909), 204–7.

wealth, or for convenience (quick and no cost). On state and national levels female plaintiffs cited desertion as the primary grounds for divorce (Table 3).[32]

In light of the male tendency to desert a spouse, it is surprising that a large percentage of male petitioners accused their wives of the same deed. Of the thirty-nine divorces granted to male plaintiffs, thirty-five cite desertion as the sole or one of multiple grounds. This trend is repeated on the Kansas and national levels. One explanation may be found in the cross petitions of female defendants. E. Davidson filed for a divorce in 1871 from his wife, Mary Elizabeth, on the grounds of desertion.[33] Mary Elizabeth in turn filed a cross petition that accused her husband of abandoning her and their child five years previously. Documents found in the *Davidson v. Davidson* file indicate that Mary Elizabeth subpoenaed several witnesses to support her case and persuaded the court to dismiss the case, thus denying her husband's attempt to discard her. Whether the two reconciled their differences is not known. However, this case is significant for the false claim of desertion by the plaintiff against his wife. This is not an isolated case. In 1873 Harvey Patty accused his wife, Anna, of desertion and filed for divorce.[34] Anna denied her husband's allegations of desertion and responded by requesting a divorce from her husband of three years. Ultimately the court decided the marriage should be ended and granted a divorce. To which party the divorce was granted is unknown. However, the court awarded custody of a child to Anna, which may be construed as the court's acceptance of her version of the marital discord.

Other grounds frequently cited in divorce petitions include neglect of duty, cruelty, and adultery.

It is possible that males voiced false accusations of adultery to end an unwanted marriage without loss of property.

Female plaintiffs in Douglas County accused their spouses of neglect of duty in almost 51 percent of the cases as compared with about 10 percent on the state level and 3 percent nationally. Neglect of duty was the second most often cited grounds for divorce by Douglas County females as compared with state and national data which list cruelty as the second most common grounds. Male plaintiffs in Douglas County resorted to neglect of duty as grounds for divorce in 13 percent of their complaints, in contrast to men on state and national levels who cited neglect of duty in fewer than one percent of divorces. It appears that neglect of duty rarely was cited as a sole cause for divorce (only four cases recorded in Douglas County); most often it was cited in conjunction with other grounds. Neglect of duty was predominantly a female-requested ground, as only five Douglas County male plaintiffs of the forty that filed cited neglect of duty in their petitions (Table 3).

Another female-oriented ground for divorce was cruelty, which encompassed physical, mental, and emotional aspects. Of the eighty-four divorces granted to female plaintiffs in Douglas County during this period, thirty-one (or 37 percent) listed some type of cruelty in their petitions making it the third leading cause of divorce. In 1871 Emma Smith had endured enough abuse from William, her husband of six years, to file a petition for divorce citing cruelty as a grounds. Emma's tragic testimony recounted the kinds of physical abuse she endured at the hands of her spouse: she was kicked and choked so intensely that it caused her to miscarry. The court-appointed referee supported her appeal for relief from years of abuse and ultimately granted her a divorce. Jane Terry also suffered through an abusive relationship that ended when her husband, Peter, imprisoned her and their three-year-old daughter in a hole in the ground for three days. Jane not only received a di-

32. Griswold, *Family and Divorce in California*, 80.
33. *Davidson v. Davidson*, Douglas County Civil Court, case no. 1803.
34. *Patty v. Patty*, Douglas County Civil Court, case no. 3868.

vorce but also was granted custody of her daughter. The overall statistics for male plaintiffs on the county level are, in contrast, extremely low in their citations of cruelty as a grounds for divorce (fourth leading cause). Specific grounds clearly were set aside in Kansas, whether by law or by legal advocates' interpretation of the law, for women to use when they wanted a divorce. With the inclusion of mental cruelty, it appears that the law recognized that not only could an overt or blatant physical act disrupt a marriage, but that emotional and mental abuse could be just as devastating (Table 3).[35]

Whereas desertion, neglect of duty, and cruelty are cited more often in female plaintiffs' complaints, accusations of adultery appear more frequently in male plaintiffs' petitions. Of all divorces granted to Douglas County men between 1867 and 1876, about 23 percent cite adultery as the sole or one of multiple grounds. Adultery was in fact the second leading cause for divorce throughout the period under study among males on county, state, and national levels. Their female counterparts accused their spouses of adultery in only 9 percent of their divorces on the county level and 4 percent on the state level. This contrasted sharply with the higher percentage (16 percent) on the national level (Table 3).

The predominance of male plaintiffs in adultery accusation could be due to several factors. Plaintiffs' wives may have committed adultery as accused. The population breakdown by gender in Kansas in 1870 records 202,000 men to 162,000 women.[36] Possibly this shortage, as minimal as it was, may have placed women in a position to "barter" themselves to achieve more favorable conditions. On the other hand, because women performed many important and necessary functions on the frontier, especially on farms, they may have been actively pursued by single males as valuable economic "commodities."[37] Finally and perhaps most importantly, a review of the legislation is mandated. In 1870 section 646 of the divorce law was amended in a manner that had direct bearing on cases of adultery. A wife found guilty of adultery was barred from all rights of dower, which was one-third of the real and personal property of her husband granted by law as in the case of *McDivitt v. McDivitt*. In 1869 Samuel McDivitt petitioned for a divorce from Demorest, his wife of three years, on grounds of adultery. It seems Demorest's infidelity first occurred two months after her wedding date, and it was repeated several times with a James McDivitt. Whether Samuel and James had a bond of kinship is not stated in the public record. The public record, however, does indicate that Samuel's petition for divorce was granted as well as his request to bar Demorest from all rights of dower. The same year Hattie Peck met with the same fate as Demorest McDivitt when her husband, Charles, received a divorce on grounds of adultery. The court ensured that Hattie's escapades with a Leroy Mosher did not go unpunished as its decision deprived Hattie of all rights of dower.[38] It is possible that males voiced false accusations of adultery to end an unwanted marriage without loss of property. This can be assessed by comparing male plaintiffs' adultery accusations with their petition requests. Three of the nine divorce cases initiated by men claiming adultery by their wives explicitly request to bar their spouses from property and dower rights.[39] It may be impossible to demonstrate that these men deliberately manipulated the law to retain their property while disposing of their wives. Yet because their cases are one-third of all male initiated divorce cases claiming adultery and because of the law's predisposition to deny women dower rights, it is hard to ignore the potential.

Although the pattern of desertion as the primary grounds cited by female plaintiffs for divorce is re-

35. *Smith v. Smith*, Douglas County Civil Court, case no. 1912; *Terry v. Terry*, Douglas County Civil Court, case no. 1857.

36. U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1970, Part I*, 28.

37. Glenda Riley, "Farm Women's Roles in the Agricultural Development of South Dakota," *South Dakota History* 13 (Summer 1983): 83–121.

38. Males guilty of adultery suffered no hardships for their misbehavior, a form of the double standard prevalent in nineteenth-century law. *See McDivitt v. McDivitt*, Douglas County Civil Court, case no. 1371; *Peck v. Peck*, Douglas County Civil Court, case no. 1377.

39. *Riley v. Riley*, Douglas County Civil Court, case nos. 1371, 1377, 1638.

peated in the Kansas and national data, the order of the other three grounds for both Kansas and the United States differ not only with each other but also with Douglas County. State and national data list cruelty as the second most common grounds of divorce cited by female plaintiffs as compared with those of Douglas County, which cite neglect of duty as the second leading cause. Kansas statistics place neglect of duty as the third leading grounds cited by female plaintiffs, while the United States lists adultery, and Douglas County cites cruelty. For women in Douglas County and Kansas, adultery was the fourth leading grounds for divorce. United States data indicate that neglect of duty was the nation's fourth most frequently cited cause of divorce for both sexes (Table 3). What can account for the different ordering of these last three grounds on county, state, and national levels? Did lawyers acting on their clients' behalf simply follow a precedent set by local courts or their colleagues? Did lawyers pursue appeals based on a judge's previous record of acceptable grounds in successful divorce cases? Perhaps regional differences in economics, societal structure, and politics created environments sympathetic to particular grounds in divorce cases. Further analysis is needed to assess the effect individual, regional, and national customs and behaviors had upon citing specific divorce grounds.

With some exceptions, Alice Umbarger Conant was representative of the typical plaintiff in divorce cases between 1867 and 1876 not only in Douglas County but in Kansas and the United States. The increased number of divorces in Douglas County indicates that more couples were ending their marriages, but this was not a unique development as revealed in state and national trends. Although Kansas divorce law reflects a change through its expansion of the grounds of divorce, this too is a pattern grounded in eastern divorce law about which we need to know more. Comparisons of divorce records in Douglas County, Kansas, and the nation indicate that western divorce was neither more liberal nor more readily available than its eastern counterpart. KH

TABLE 1. GRANTED DIVORCES, 1867–1876, PLAINTIFF'S PLACE OF MARRIAGE KNOWN

	Instate	%	Out of State	%	Non-U.S.	%
Douglas County						
Women	49	60	32	40	0	0
Men	15	41.7	19	52.8	2	5.5
Kansas						
Women	683	50	665	49	10	1
Men	236	39	351	59	11	2
United States						
Women	55,387	79	13,225	19	1,745	2
Men	27,648	74	8,415	23	1,072	3

Source: Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906, Part II* (Washington, D.C.: Government Printing Office, 1990), 693.

TABLE 2. KNOWN DURATION OF PETITIONER'S MARRIAGE BY YEARS, 1867–1876

	Douglas County*		Kansas		United States	
Years	N	%	N	%	N	%
0– 2	27	23	392	20	14,666	13
3– 5	34	29	609	31	31,312	28.5
6–10	24	20	512	26	31,208	28
11–15	10	8	235	12	15,479	14
16–20	8	7	121	6	8,735	8
21+	15	13	110	5	9,267	8.5

Source: Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906, Part II* (Washington, D.C.: Government Printing Office, 1990), 205, 576.

* Excludes eight cases in which duration is unknown.

TABLE 3. GRANTED DIVORCES BY CAUSE AND PLAINTIFF, BY COUNTY, STATE, AND NATION, 1867–1876*

	Douglas County*		Kansas		United States	
	N	%	N	%	N	%
Desertion						
Women	53	60.92	793	56.64	26,778	33.53
Men	35	89.74	469	75.89	18,085	42.80
Adultery						
Women	8	9.20	57	4.07	12,752	15.97
Men	9	23.07	98	15.86	15,156	35.87
Neglect of Duty						
Women	44	50.57	145	10.36	2,323	2.91
Men	5	12.82	0	0	0	0
Cruelty						
Women	31	35.63	292	20.86	15,264	19.11
Men	2	5.13	15	2.43	1,886	4.46

* Stated cause cited as either sole or one of multiple causes.

Source: Department of Commerce and Labor, *Special Reports of the Census Office, Marriage and Divorce, 1867–1906* (Washington, D.C.: Government Printing Office, 1990), 1:554; 2:84– 85.