

## CHAPTER THREE

### THE DIVORCE TWOFER

#### *Why Court Behavior Is Decoupled from the Right to Decouple*

China's courts routinely deny divorce petitions filed for the first time and routinely grant divorce petitions filed for the second time (Chen 2005a; He 2009; He and Ng 2013a; Jiang and Zhu 2014; Luo 2016; Tan and Wang 2016).<sup>1</sup> Despite its ubiquity, this judicial phenomenon, which I call the “divorce twofer,” has no basis in law. My task in this chapter is to explain its institutional roots.

Divorce is a microcosm of a general pattern in China's legal system of drifting simultaneously toward and away from global legal norms (Liu 2006; Minzner 2011), particularly with respect to gender equality (Chen 2007; He and Ng 2013a, 2013b; Li 2015b; Xu 2007). In the case of criminal justice, for example, laws on the books protecting the *globally* institutionalized due process rights of criminal suspects and their defense lawyers are overwhelmed by competing normative practices and cognitive scripts rooted in countervailing *local* institutional legacies (Liu and Halliday 2016; Michelson 2007). Laws conforming to *global* legal norms also coincide with spectacular *local* enforcement failures in the realms of labor (Bartley 2018; Gallagher 2017), food safety (Yasuda 2017), and environmental protection (van Rooij and Lo 2009; Stern 2013; A. L. Wang 2018), to name just a few examples.

In the context of Chinese divorce litigation, endogenous institutional logics similarly illuminate why courts obstruct the implementation of

<sup>1</sup> In Chinese, first-attempt denials are dubbed 第一次判不离 and 首次判不离, and the divorce twofer more generally is known variously as 二次离婚, 二次诉讼, 二次起诉, and 二次诉请.

domestic laws consistent with global legal norms. Given the general ubiquity of “logic pluralism” (Glynn and Raffaelli 2013; Thornton, Ocasio, and Lounsbury 2012:142), the institutional logic of laws protecting the freedom of divorce, gender equality, and victims of domestic violence is only one of many institutional pressures on Chinese judicial decision-makers. An acute imbalance between judges and cases is another source of institutional pressure giving rise to the divorce twofer. The decoupling of China’s divorce courts from world society models is thus, to some measure, a function of bureaucratic capacity constraints and technical enforcement impediments (Cole 2015). To a greater extent it is also a function of closer alignment with alternative and competing local institutional logics.

### THE DIVORCE TWOFER

In Chapter 1, we saw a feedback loop in the divorce litigation process (Figure 1.1). A feedback process by which litigation outputs return as new litigation inputs is unique to divorce cases. Divorce litigation represents an exception to the general rule – and a defining characteristic of China’s court system – known as the “maximum of two decisions” or the “second-instance trial is always final” (两审终审制; Fu 2018:85; Xin 1999:522–24). According to this general rule stipulated by the Civil Procedure Law (Article 10) and the Criminal Procedure Law (Article 10), civil litigants and criminal defendants are given two chances in court. Civil first-instance cases are almost always filed in basic-level courts. Civil litigants who are unhappy with the first-instance outcome may appeal to an intermediate court. Although the SPC is China’s court of last resort in a *technical* sense, the intermediate court is the court of last resort in a *practical* sense for most civil litigants. Divorces, however, are exempt from the general limit of one chance to request another trial. In the event a court denies a first-instance divorce petition, the process is reset following a statutory waiting period of six months. Article 124, Item 7, of the Civil Procedure Law has proven to be a gift to judges: “In divorce cases, where a judgment has been made to deny a divorce or where the parties reconciled through mediation ... a new petition filed for the same case by the plaintiff within six months shall not be accepted without new developments or new grounds.” Circumventing the six-month waiting period on the basis of “new developments” or “new grounds” is permitted but happens rarely in practice. Following an adjudicated denial, a subsequent divorce

attempt counts as a new first-instance trial, and is almost always filed at and tried by the same court of first instance.

From a practical standpoint, therefore, in divorce litigation the court of last resort is usually the original court of first resort. Divorce provides the rare possibility of a litigation do-over, which, as we will see, has proven to be enormously valuable to judges (Chapter 6). Certain cases involving child adoptions are also eligible for do-overs, but they are unusual. For every other type of case, an undesirable outcome can, generally speaking, only be appealed and accepted as a second-instance trial. Of course, first-instance divorce judgments may also be appealed. However, the court of second instance can only assess the specific rulings made by the court of first instance. When a court of first instance denies a divorce petition without ruling on child custody, property division, or other pertinent matters, the best a court of second instance can do is to remand the case back to the original court for retrial, further delaying the process (He 2009). The worst a court of second instance can do is to uphold the original judgment, imperiling the plaintiff's effort to divorce (although not necessarily irretrievably).

A court of second instance cannot easily overturn a first-instance adjudicated denial of a divorce petition. In China, there is no official procedure by which judges can grant a divorce without also settling all terms of the divorce (He 2009:84; Li 2015a:148n12). Although all divorce-related matters are supposed to be bundled together when judges decide to grant a divorce request, they can be unbundled in post-divorce motions.<sup>2</sup> According to the 1992 Opinions of the SPC on Several Issues Concerning the Application of the Civil Procedure Law, "When a first-instance decision to deny a divorce petition is appealed and the second-instance people's court holds that the divorce should have been granted, litigants, in accordance with the principle of voluntarism, may mediate the terms of property division and child custody. If mediation fails, the case is remanded to the original court for retrial" (Article 189).<sup>3</sup> A mutual agreement on divorce terms during

<sup>2</sup> In the course of conducting research for this book, I discovered that judges nonetheless do routinely unbundle property division from the decision to grant a divorce when they are (or claim to be) unable to clarify ownership or the value of certain assets. In such cases, judges encourage litigants to file separate motions on property division. Shaoxia Wang (2013:174) makes the same observation.

<sup>3</sup> This provision reappears in Article 329 of the 2015 Explanations of the SPC on the Application of the Civil Procedure Law with an added provision allowing the court of second instance, with the approval of both plaintiff and defendant, to adjudicate property division and child custody (S. Guo 2018:113).

the second-instance trial is highly improbable for the same reason that the first-instance divorce petition was denied in the first place (e.g., the defendant's unwillingness to divorce or contentious claims concerning property division and/or child custody). From the plaintiff's standpoint, therefore, waiting six months for a second first-instance trial is far preferable to appealing the first-attempt judgment and extending the divorce process into a "three- to four-year marathon" (S. Guo 2018:113). Meanwhile, from the court's standpoint, giving litigants an extra six months to sort out their affairs greatly simplifies the litigation process. If, in the course of denying a first-attempt divorce petition, a judge assures the plaintiff he will grant the second-attempt petition on the condition that, during the statutory waiting period, both parties get their ducks in a row and return with an agreement on all terms of the divorce, the second first-instance trial should be relatively fast and straightforward, especially given that the basic facts of the case will not change, allowing the presiding judge to recycle a lot of text from the first court decision in the second one.

The second first-instance trial will thus benefit the judge's case volume and efficiency scores while simultaneously posing relatively little risk of an appeal, petition, or other sort of incident detrimental to a judge's performance evaluation (He 2009; J. Zhang 2018:109). The upshot is that "in judicial practice, when a husband or wife sues for divorce, the court will typically deny the petition on the first attempt, and only on the second or third attempt is there a possibility the court will grant it" (W. Zhang 2012:60).

To many judges, even if evidence is lacking, the very act of filing a second divorce petition is proof enough of the breakdown of mutual affection. A couple's failure to reconcile during the six-month statutory waiting period provides stronger legal grounds for the breakdown of mutual affection (Liu 2012; W. Zhou 2018:14). From a judge's perspective, a plaintiff sufficiently determined to file a second divorce petition is probably not acting frivolously, impulsively, or impetuously (Ye 2007:43). When ruling on second-attempt petitions, courts will often hold that "After the plaintiff's first divorce petition was denied, marital relations not only failed to improve but actually worsened. Neither side is fulfilling marital duties, both sides remain separated, and mutual affection has completely broken down" (Chen 2005a:155).

Long before the introduction of formal cooling-off periods in 2016, judges created informal cooling-off periods by denying divorce petitions. Typically, they declared that the marriage had merely

experienced a bump in the road, was fundamentally healthy, and therefore did not satisfy any legal standard for divorce. They then advised the litigants to use the six-month statutory waiting period to work on their relationship skills. When they denied plaintiffs' divorce petitions, judges sometimes explicitly characterized the statutory six-month waiting period as a "cooling-off period" (冷静期; Liu 2012:84). In some cases, even those involving allegations of domestic violence supported by evidence, judges justified denying divorces by holding that a defendant's unwillingness to divorce called for a cooling-off period (e.g., Decision #2315222, Yueqing Municipal People's Court, Zhejiang Province, March 3, 2010).<sup>4</sup> In another typical example that foreshadows the influence of political ideology, the judge, in consideration of the plaintiff's claim that her husband beat her and committed domestic violence, held that the divorce should be denied "in order to give the litigants a chance to calm down and reconcile for the sake of maintaining marital and family stability" (Decision #1080860, Shangcheng County People's Court, Henan Province, December 15, 2013).<sup>5</sup>

Many plaintiffs therefore couch their second-attempt petitions accordingly, doing their utmost to convey their dashed hopes for marital improvement following the adjudicated denial of their first-attempt petitions. As we will see in Chapter 7, their claims along the lines of "following the court's denial of my divorce petition, the defendant not only failed to stop beating me, but his domestic violence intensified" are commonplace.

Observers have speculated about whether experimental cooling-off periods preceding trials will ultimately replace the six-month statutory waiting period. Rather than viewing cooling-off periods as raising the bar for divorce, thus making the divorce process even harder and more prolonged, some scholars have argued precisely the opposite. If the cooling-off period is a functional substitute for the statutory six-month waiting period following an adjudicated denial, they may come to replace the divorce twofer. By granting divorces on the first attempt after the conclusion of a cooling-off period, cooling-off periods may obviate the need for at least two trials and in so doing help conserve judicial resources (J. Guo 2018:28; He 2019; Hu 2019; Liu and Zheng

<sup>4</sup> Case ID (2010)温乐柳民初字第17号, archived at <https://perma.cc/KZ6G-EMYH>.

<sup>5</sup> Case ID (2013)商民初字第1129号, archived at <https://perma.cc/QT9G-WYKF>.

2018; J. Zhou 2018). In contrast to this expectation, however, the only two decisions published on China Judgements Online containing the term “notice of cooling-off period” (冷静期通知书), both from Hebei Province, were divorce denials following cooling-off periods.<sup>6</sup> As I was writing this book, the passage of the 2020 Civil Code appeared to bring to an end to cooling-off periods in divorce litigation: Article 1077 stipulates that 30-day cooling-off periods apply only to mutual-consent “divorces by agreement” processed by marriage registration offices in the Civil Affairs Administration (Du 2020).<sup>7</sup>

Women have borne the brunt of the divorce twofer. According to Hongxiang Li (2014:87), in practice “the breakdown of mutual affection test is based simply on the number of times a divorce has been requested ... which undermines women’s right to the freedom of divorce.” Family sociologist Xu Anqi underscores the costs borne by women from this routine practice:

Judges wield excessive discretion with respect to whether litigants’ mutual affection has broken down. Article 32 of the Marriage Law stipulates, “in cases of complete breakdown of mutual affection, and when mediation has failed, divorce should be granted.” However, the *unwritten convention* in judicial practice – in first-attempt petitions when the defendant resolutely opposes the divorce – is to deny the divorce request on the grounds that mutual affection has not broken down. Under many circumstances this is perfectly appropriate, and may prevent frivolous divorce or the intensification of conflict. And yet, this *customary method* often results in the infringement of the physical rights of some women. For example, when in divorce litigation frequent offenders of domestic violence repeatedly admit wrongdoing and a desire to turn over a new leaf, judges typically try to persuade the female side to believe the defendant’s remorse and his promise to mend his ways, and then deny the divorce petition on the grounds that mutual affection did not break down. In this process, some male litigants, after returning home, beat

<sup>6</sup> Case ID (2017)冀0924民初601号, archived at <https://perma.cc/83CC-SFF4>, is an adjudicated denial following a two-month cooling-off period on the grounds that the litigants were experiencing a “marital crisis” that had not reached the point of breakdown. Case ID (2017)冀1127民初1650号, archived at <https://perma.cc/9V96-PE9G>, is an adjudicated denial following a three-month cooling-off period on the grounds that the defendant was unwilling to divorce and that neither side wanted custody of their son. I conducted this search on June 2, 2020.

<sup>7</sup> The Ministry of Civil Affairs formalized this change in its 2020 Notice Concerning the Implementation of Marriage Registration Provisions in the Civil Code of the People’s Republic of China, which took effect on January 1, 2021. In practice, however, courts continued to issue notices of cooling-off periods after the Civil Code took effect (Wang 2021; Yao 2021).

and abuse their wives with renewed intensity, resulting in the reoccurrence of serious physical and emotional violations. In fact, according to the amended [2001] Marriage Law, in the event of domestic violence or another form of wrongdoing, and if mediation fails, a divorce should be granted. The *prevailing practice* of denying a first-attempt divorce petition when one side withholds consent should be abolished. (Xu 2007:204, emphasis added)

The operative terms in the foregoing quotation are “unwritten convention,” “customary method,” and “prevailing practice.” Elsewhere the divorce twofer has been called an “unspoken rule” (潜规则; J. Guo 2018:28; He 2019:91; Hu 2019; Liu 2012), “hidden rule” (隐规则; Deng 2017), an “open secret” (公开的秘密; Zhou and Qiu 2018), and a “rigid practice” (刚性做法; Liu 2012:84n1). It has been likened to a hammer wielded by judges who see every divorce petition as a nail (一刀切, meaning it is applied “across the board” or in a “one size fits all” manner; He 2019:92). Indeed, a judge in Jiangxi Province’s Yongxiu County People’s Court declared the divorce twofer to be a form of customary law lacking any basis in state law. According to this judge, the fault-based standards listed in Article 32 of the Marriage Law fail to encompass the most common reasons for divorce claimed by plaintiffs in their divorce petitions, namely incompatible personalities, financial disagreements, and poor relations with mothers-in-law. This judge argues that the divorce twofer emerged as a pragmatic, quasi-legal means to grant divorces in the absence of sufficient evidence of the breakdown of mutual affection. Judges inform plaintiffs frankly that they cannot grant the divorce on the first attempt. The private agreement is for the plaintiff to accept an adjudicated denial on the first attempt if the judge grants the divorce on the second attempt, even if the legal circumstances that prevented the judge from granting the divorce the first time persist. Doing so gives litigants an opportunity to cool off and reconcile during the six-month statutory waiting period, mollifies plaintiffs who are disappointed that they failed to achieve their goal on the first attempt, and allows judges to grant divorces to persistent plaintiffs. Thus, in this judge’s account, the divorce twofer emerged as a form of “legal evasion” (法律规避) because it entails private agreements between judges and litigants (Huan 2014).

According to reports, in divorce disputes, if a court denies a divorce petition on the first attempt, the court will normally grant it the second time after the plaintiff files a new petition six months or so later. This is

known as the “two trial” rule of divorce litigation [离婚诉讼的“二次诉讼”规则]. This is a universal judicial phenomenon in basic-level courts across the country, and it is not based on any laws or judicial interpretations. (Zhang 2013)

Two judges from Henan’s Jiaozuo Municipal Jiefang District People’s Court explained their reluctance to grant first-attempt divorce petitions. In addition to citing plaintiffs’ common failure to prove the breakdown of mutual affection, they also cited their fear of recalcitrant litigants.

We discovered through our civil adjudication work that the majority of cases fall outside the scope of the conditions listed [in Article 32 of the Marriage Law]. For example, both sides constantly argue, they are physical separated for over one year but less than two years, one side withholds consent, they married shortly after meeting [闪婚, literally “flash marriage”], disagreements about property or relations with other family members led to the divorce petition, and so on. Moreover, in some cases in which the litigants and their family members ceaselessly argue, a fiercely disgruntled litigant, regardless of the outcome, will express an intent to appeal to a higher court or petition in the complaints system [上访]. The potential for upset litigants to end up in the petitioning system is a perennial threat lurking within cases such as these. Hard-pressed to know for certain whether mutual affection has indeed broken down, judges dare not adjudicate lightly. Thus, in order to avoid unnecessary trouble, judges tend to deny first-attempt divorce petitions. (Zhang and Fan 2011; also see Xu 2016)

As we will see later in this chapter, “upset” and “fiercely disgruntled litigants” may pose threats to judges’ personal safety and performance evaluations. Judges do less to ascertain the extent and nature of marital conflict than they do to minimize litigant discontent (W. Zhou 2018:23).

When ruling on first-attempt divorce petitions, judges rarely support plaintiffs’ unilateral claims that mutual affection broke down for reasons other than those stipulated by Article 32 of the Marriage Law. On the first attempt, plaintiffs’ claims of marital discord will generally fall on deaf ears unless they are shared by defendants who consent to divorce or are supported by evidence either of statutory wrongdoing or a two-year physical separation (W. Zhou 2018). Even evidence of statutory wrongdoing, however, is rarely enough to stop judges from applying the divorce twofer. On the contrary, “judges’ rulings in divorce cases involving domestic violence conspicuously show this sort of judicial inertia [司法惯性].” Judges tend to grant first-attempt divorce



petitions involving domestic violence claims only when evidence of domestic violence is extraordinarily powerful or when mutual consent is achieved through mediation (Deng 2017:112; also see J. Jiang 2019:235).

In some parts of China, the divorce twofer has been formally codified. According to administrative regulations governing divorce cases in Guangdong Province (in a section on the “key conditions for denying divorces”), “Divorce petitions may be denied in first-attempt cases in which the defendant expresses an unwillingness to divorce, there is no fundamental conflict, marital affection has not completely broken down, and mediation fails to reconcile the couple.” The regulations even stipulate that first-attempt divorce petitions should be denied in cases in which either side committed adultery, provided the defendant vehemently opposes the divorce (Zhang 2013). I found the same administrative regulations in other provinces.<sup>8</sup> Nonetheless, local administrative regulations lack the status of law.

First-attempt divorce verdicts do indeed tend to hinge on mutual consent. A judge in Anhui put it this way:

When I first started working, I followed the practice of all courts by denying first-attempt petitions. During the initial trial, so long as none of the statutory conditions for divorce [in Article 32] was met, the instant I heard the words “I do not consent to divorce” I could start twiddling my thumbs. Seriously, from that point on I could stop listening and go straight to an adjudicated denial of the petition. This is the safest thing for judges to do. (Zhou and Qiu 2018)

Insofar as judges rarely grant divorces when defendants withhold their consent, defendants hold what amounts to a trump card overriding plaintiffs’ domestic violence allegations. Peking University law professor Ma Yi’nan echoed this point:

Judges are highly reluctant to grant a divorce when the petition is based on personality, temperament, and lifestyle incompatibilities or another reason that does not constitute a “fundamental conflict” [原则性分歧], or when the case involves housing, arrangements for a litigant with an illness or disability, or other complications that are difficult to resolve. So long as the other side resolutely opposes the divorce, judges for the most part will deny the petition, forcing the plaintiff to wait six months before filing a new petition. (Ma 2006:26)

<sup>8</sup> For two of many similar examples, see Henan High People’s Court (2018) and Xiji County People’s Court (2013). I thank Susan Finder for pointing out these rules to me.

Du Wanhua, a high-ranking official in the SPC, lamented the flipside, namely judges' tendency to grant divorces when defendants consent. His urging courts to do more to preserve marriages by denying divorce petitions foreshadows my discussion of political ideology later in this chapter.

Marriage and family stability has not been emphasized enough in the context of social construction. Marriage and family are often regarded as private domains, and their importance is insufficiently recognized. ... When judges try a divorce case, the first thing they ask is whether [the defendant] consents. As soon as the defendant expresses a willingness to divorce, the trial immediately shifts to property division and child custody. Judges do not adequately investigate the question of repairing and restoring the litigants' marriage. (Wang and Luo 2016:3)

The case of a woman from Sichuan Province's Pingchang County (outside the city of Bazhong) illustrates a defendant's power to end a plaintiff's bid for divorce simply by withholding consent and expressing a desire to reconcile. Over the course of four years, she filed four divorce lawsuits, all of which were unsuccessful. When a newspaper reporter asked her why she was desperate to end her marriage, she stated tearfully, "It's too painful [太苦了]. At this point all I want is a divorce. I've given him so many opportunities." She pleaded with her husband, "I beg you to let me go, to let go of our life together." And she questioned him: "In recent years I've been roaming around for the sake of work, a vagabond without a home. You think this is easy for me? None of my three children is by my side, not a single family member is with me. Do you truly not know the real reason?" During the trial she even gave up all property division claims in the hopes of gaining custody of one of their children. Meanwhile, the defendant did his utmost to demonstrate affection for his wife. In court, immediately before the trial, he handed her a gift of new clothes, which she initially refused but later accepted on the insistence of a judge. (After the trial she left the gift behind.) When it was time to make his defense statement, the defendant turned to the plaintiff and said, "In the years since you left I've kept your clothes clean. I always carry photos from when we were together. Please come home with me!" When the court took a brief recess, the husband offered to buy water for his wife. None of his gestures went unnoticed by the court. Despite the plaintiff's determination to divorce, her husband's persistent unwillingness – to which his displays of care and affection lent further credence – was the basis

of the court's string of rulings to deny her divorce petitions on the grounds that she had failed to prove the breakdown of mutual affection. The court's four adjudicated denials were supported by China's prevailing political ideology of marital preservation. As the head of the court division trying the case put it, "In every single divorce trial, we carry out mediation with the attitude of urging reconciliation and avoiding break-up [劝和不劝分]" (Yan 2016).

Beyond illustrating the importance of mutual consent, this case brings to the fore additional themes to which I will return in subsequent chapters. We cannot be certain the plaintiff in the foregoing case was a victim of domestic violence. We can be certain, however, that many women do escape domestic violence by "roaming around for the sake of work." The divorce twofer, by denying relief to women fleeing their abusive husbands, contributes to labor migration and the formation of a population of "marital violence refugees" (Chapter 9). Women who flee domestic violence often leave their children behind with their abusive husbands. Doing so puts them at a significant disadvantage in child custody disputes (Chapters 10 and 11). A defendant's power to upend his wife's divorce petition – even in cases involving domestic violence – gives him enormous bargaining leverage over the terms of divorce (Chapters 8, 9, 10, and 11).

Recall from Chapter 2 that the 2008 Guidelines urges judges not to take apologetic husbands at their word. In essence, it warns judges to treat "loving contrition" as a common aftereffect of an "acute battering incident," both of which are key stages of the archetypal "cycle of violence" (Walker 2017:97–98). Judges, however, generally fail to heed this warning. In their efforts to persuade abuse victims that their abusive husbands love them and are committed to improving themselves, Chinese judges, like judges elsewhere, help abusers gaslight their wives (Sweet 2019). When a woman leaves her abusive husband, parents on both sides will often work to reconcile the estranged couple (Wang, Qiao, and Yang 2013:32). The cultural stigma of divorce motivates some parents to do their utmost to prevent their children from divorcing; some parents "preferred a detestable son-in-law to a divorced daughter" (Honig and Hershatter 1988:224). According to a female police officer in Guizhou Province, when women report domestic violence to the police, "a lot of relatives and friends will show up and take part, trying all-out efforts or even cajole the wives to withdraw their domestic violence reports by brainwashing her with the cliché that 'every couple will fight and quarrel'" (J. Jiang 2019:234). Judges are thus

part of a collective gaslighting effort (Chapter 9). Consider a divorce case filed by a woman beaten and injured by her husband. During her court trial, her father stood in for her abusive husband in court. The plaintiff and her father, as the defendant's representative, opposed each other in court. In his defense statement, the plaintiff's father described the defendant as a "good man and a good son-in-law," claimed their mutual affection had not completely broken down, characterized their current situation as the consequence of misunderstandings, and asked the court to deny his daughter's divorce petition. In typical fashion, the court denied the divorce petition on the grounds that "husband and wife still had reconciliation potential"; "their arguments over trivial matters had severely impacted marital affection" but "their foundation of affection was solid." The court further "recommended that both sides treasure their affection of many years, strengthen communication, and correctly resolve their conflicts" (Zhang 2013).

Despite the absence of any legal basis for the divorce twofer, it is a ubiquitous judicial practice that began to grow in the mid-2000s (Chapter 6). Unsupported by any sources of law, the divorce twofer only makes sense in terms of competing institutional pressures.

#### LIMITED JUDICIAL RESOURCES

Crushing workloads have incentivized Chinese judges to close cases as expeditiously as possible, and divorce petitions are easy targets owing in part to the highly discretionary and subjective breakdownism standard. For decades, a shortage of judges has been cited as a rationale for denying divorce petitions (Research Office of the Nanjing Municipal Intermediate Court 1987:16). According to a core tenet of the Stanford school of sociological institutionalism, the technical requirements of organizational work routines explain some measure of loose coupling between ceremonial conformity with globally legitimized norms and substantive organizational activities (Meyer and Rowan 1977). As the argument goes, legal systems around the world conform to the "universal ideal frame" embodied by global legal norms even when resource limitations and technical constraints limit their realization in practice (Boyle and Meyer 1998:217–18, 220). Evidence suggests that a state's bureaucratic capacity to fulfill its ceremonial commitments facilitates their implementation (Cole 2015). The case of Chinese courts appears to lend further support to this proposition.

A widening imbalance between the supply of and demand for judicial services is widely discussed as the problem of “many cases, few judges” (variously 案多人少, 官少案多, and 事多人少). Growth in the population of judges, which remained fairly stable at around 200,000 between 2000 and 2017 (Jiang 2015:26; Qu and Fan 2019:25; Zheng, Ai, and Liu 2017:169), has been far outstripped by growth in the volume of litigation. In 2009, when he delivered his annual work report to the National People’s Congress, SPC President Wang Shengjun (王胜俊) stated that between 1978 and 2008, the annual number of closed cases at every level of the court system increased by a factor of 19.5, while the number of court personnel increased by a factor of only 1.68 (<https://perma.cc/YL3Z-UH64>). Elsewhere legal scholars reported that, between the late 1970s and the early 2010s, court dockets expanded by a factor of 20, while judge positions grew by only a factor of between two and three (Jiang 2015:26; Zheng 2018:130). Chapters 5 and 6 more fully assess the consequences of this growing imbalance between judges and cases. For now, I will briefly preview the argument that judges have embraced the divorce twofer as a coping strategy for their heavy caseloads.

It may seem counterintuitive that the divorce twofer, by multiplying court petitions, could help relieve the crushing pressure of China’s court dockets. Indeed, granting first-time divorce petitions may seem like a more intuitive way for judges to clear their heavy dockets. After all, if a judge wants to put a divorce case behind him once and for all, swiftly granting the plaintiff’s petition might seem more sensible than denying it. In contrast to such an expectation, however, the divorce twofer may enhance bureaucratic efficiency. Judges economize their time and effort by denying petitions, particularly ones that involve property division, child custody, and allegations of domestic violence. French divorce judges, who are under similar pressure to clear cases efficiently, also do their utmost to avoid dealing with litigants’ time-consuming fault-based claims (Biland and Steinmetz 2017:314). If the plaintiff followed the judge’s instructions to work out the terms of the divorce during the six-month statutory waiting period, which we will see in subsequent chapters often entails giving up property and child custody claims in exchange for the defendant’s consent to divorce, judges can render relatively swift and uncontroversial decisions when the case returns for a second attempt.

[E]ven when both sides keenly want to divorce and clearly express their desire to end their marriage, the court of first instance will often deny the divorce petition. This way of thinking about and trying divorce cases has already acquired inertia among judges in some courts. If it is the plaintiff's first divorce attempt, the defendant withholds consent, and there is no compelling evidence of the breakdown of mutual affection, a judge's basic predisposition is to deny the petition, which obviously obviates the need to collect and assess evidence about child custody and property division, and thus lightens judges' workload. (S. Guo 2018:113)

From judges' perspective, better yet is if the case goes away altogether and never returns, which happens more often than not (Chapter 6).

Bureaucratic efficiency, however, is only one of several institutional imperatives bearing on China's courts. Even if policy efforts aimed at optimizing the use of limited judicial resources succeed (Chapter 5), bureaucratic efficiency and capacity improvements in China's courts are not a sufficient condition of – and will not automatically translate into – more faithful implementation of China's domestic and global legal commitments. As we will see later in this chapter, judicial performance evaluation systems reward judges for case volume and efficiency and punish them for “social unrest.” Judges are therefore incentivized to try the same case twice (to inflate case volume) by denying divorce petitions swiftly (to enhance efficiency), and thus to soothe the anger of defiant husbands unwilling to divorce and to defer or altogether avoid ruling on contentious matters such as property division and child custody that could potentially inflame violence between litigants or against judges themselves (to minimize “social unrest” and threats to their own personal safety). Hence my use of the word “twofer” to capture the “two for the price of one” quality of the benefits judges reap from denying first-attempt divorce petitions. In short, the technical ability to grant more divorce petitions, particularly to plaintiffs claiming domestic abuse, does not imply sufficient motivation on the part of judges to do so. Moreover, even if routinely granting first-time divorce petitions were sensible from a bureaucratic efficiency standpoint, doing so would be unthinkable from an ideological standpoint.

## POLITICAL IDEOLOGY

What Lazarus-Black (2007) calls a “culture of reconciliation” in her study of why courts in Trinidad so rarely approve applications for personal protection orders submitted by domestic violence victims applies

equally well to the Chinese context. Study after study of Chinese divorce refers to the enduring influence on judicial decision-making of the traditional cultural belief that “it is better to demolish ten temples than to destroy a single marriage” (宁拆十座庙, 不毁一桩婚; J. Guo 2018:28; Li 2003:7; Liu 2012:83; Ma 2006:23; Shi 2020:134; Xiong 2012:70; Xu 2016; Ye 2007:44; Zhou and Qiu 2018; W. Zhou 2018:28). China’s contemporary political ideology of marital preservation taps into its traditional culture of marital reconciliation.

A biological metaphor of the family as the basic cell constituting the organism of society (Chen 2005a:155; Fincher 2014:23; Jiang 2009a:63; Li 2015; Liang 1982; Woo 2003:133; Zhang 1957) has long been part of the ideology (discussed in Chapter 2) that calls for preserving the family by opposing frivolous divorce. Indeed, since the time of Confucius, “the family was seen as a basic unit of society,” and the stability of the family was therefore seen as beneficial to society as a whole (Baker 1979:10–11). Often characterized as a revival of Confucian ideology (Zhou 2017), China’s renewed ideological emphasis on strengthening the family by restricting divorce also has strong roots in Marxist ideology (Jiang 2009a; Jiang and Zhu 2014:87; Liang 1982).<sup>9</sup> Ironically, it also bears a striking resemblance to American “family moralists” who, alarmed by rising divorce rates, promoted an ideology of “conservative family values” that gave rise to widespread US government policies and programs “promoting marriage and discouraging divorce” (Coltrane and Adams 2003).

According to legal scholars in Henan, “Xi Jinping champions the family as the basic cell of society and the first school in life. No matter what, we must attach importance to building up the family” (Henan Provincial Academy of Social Sciences Research Team 2017:10). China’s Ministry of Civil Affairs has reportedly “warned of ‘irrational divorces’ and called for people to have a more responsible attitude towards marriage” (Zhou 2017). Parroting the party-state’s ideological talking points, a legal scholar at China’s Southwest University of Political Science and Law asserted, without supporting evidence, that “impulsive and irrational actions not only drove up the divorce rate, but also to some extent posed a new threat to social order” (Shi

<sup>9</sup> “Marx argued that in its essence marriage is indissoluble, though in reality it does sometimes die. Therefore divorce should be granted at times, but instead of being arbitrary, it must simply reflect the moribund state of the marriage. Thus in 1842 Marx was certainly no proponent of easy divorce and the abolition of the family” (Weikart 1994:658).

2020:140). A professor and Associate Dean of the Tsinghua University School of Law similarly proclaimed, “They may have quarreled about family affairs and they are divorcing in a fit of anger. After that, they may regret it. We need to prevent this kind of impulsive divorce” (Kuo 2020). According to the SPC’s Du Wanhua (Du 2018:4), “China’s continuously rising divorce rate over many years poses new challenges to harmonious and stable family construction.” China’s rapidly rising divorce rate is the backdrop against which Xi Jinping has made ideological calls for “civilized family construction,” “core socialist values,” “citizen moral construction,” and a “harmonious society.”

Harmony and happiness in marriage and family are also the bedrock of national development, social progress, and the prosperity of the Chinese nationality. Since the 18th National Congress of the Chinese Communist Party [in 2012], Comrade Xi Jinping has put the construction of civilized families [家庭文明建设] at the core of the important tasks of the Party Central Committee. General Secretary Xi Jinping has strongly pointed out our need to attach importance to the construction of civilized families and to work hard to make millions upon millions of families the essential basis of the development of the Chinese nation, the progress of our nationality, and our harmonious society, and for families to become the point of departure for the people’s dream. At the 19th National Congress of the Chinese Communist Party [in October 2017], he pointed out the need to integrate core socialist values into all aspects of social development and for them to become part of people’s mentality, identity, and behavior. We will support action from all people, with officials taking the lead, starting with families and children. We will carry out a citizen moral construction campaign to advance public morality, professional ethics, family virtue, and personal integrity. We will encourage people to improve themselves, practice filial piety, and care for their family members. This fully reflects the high degree of importance the Party Central Committee attaches to civilized family construction and its care and concern for hundreds of millions of families.<sup>10</sup> (Du 2018:4)

If we were to strip out the China-specific and socialist language from this quotation, it would be nearly indistinguishable from the discourse of President George W. Bush and the Heritage Foundation justifying

<sup>10</sup> The last sentence is taken verbatim from Xi Jinping’s December 12, 2016, speech at the inaugural meeting of the National Delegation for Civilized Families (Xinhua 2016). The term “the people’s dream” (人民梦) refers to Xi Jinping’s “Chinese dream” (中国梦) ideology of restoring China to its rightful place on the world stage (Z. Wang 2014).



marital counseling and divorce reduction programs for the purpose of promoting “strong marriage and stable families” (Catlett and Artis 2004).

Ideological discourse of this nature grew in prominence as a nationwide “domestic relations trial reform” (家事审判改革), first introduced in 2016, ushered in new policy efforts aimed at preserving and reconciling marriages on the rocks through intensive mediation intervention on the part of social workers, psychologists, and female judges (Henan Provincial Academy of Social Sciences Research Team 2017; J. Jiang 2019:230; Li 2017; Shi 2020). One legal scholar describes China’s “ideology of family justice reform” as “advocating the ethical concept of marriage and family that promotes civilisation and progress, giving full play to the family justice’s role of diagnosis, repair, and treatment of marriage and family relations [sic]” (Shi 2020:136). Low fertility rates are an additional impetus not only for rescinding the one-child policy in 2016 but also for renewed official efforts to limit divorce (Myers and Ryan 2018) – as if prolonging unhappy marriages will promote childbearing. As mentioned earlier, courts in several provinces have even experimented with cooling-off periods for the explicit purpose of controlling rising divorce rates (Du 2018; J. Guo 2018; Shi 2020:140; J. Zhou 2018:35). In Henan Province, according to one report, under the banner of this reform, “Steadfastly ‘urging reconciliation and avoiding break-up’, and establishing 3–6 month ‘cooling-off periods’ for impulsive divorce cases with reconciliation potential, have helped 22,000 families on the verge of breakdown stay together” (Henan Provincial Academy of Social Sciences Research Team 2017:10).<sup>11</sup> In some ways cooling-off periods – particularly the one stipulated by Article 1077 of the 2020 Civil Code – are throwbacks to the old one-month approval period for Civil Affairs divorces prior to the 2003 Marriage Registration Regulations (J. Guo 2018:27; J. Zhou 2018:35).

Du Wanhua, the SPC’s domestic relations trial reform czar, reaffirmed – using slightly different terminology – the legislative spirit of breakdownism when he underscored the need to separate “marriages in

<sup>11</sup> The SPC’s 2018 Provisional Opinions on Further Deepening the Reform of the Methods and Work Mechanisms of Domestic Relations Trials subsequently clarified that cooling-off periods should not exceed three months (Article 40). In the 2020 Civil Code, however, provisions on cooling-off periods are limited to mutual-consent “divorces by agreement” processed by the Civil Affairs Administration.

crisis” from “marriages that have already died,” and to restore marriages in crisis (Wang and Luo 2016:4).<sup>12</sup> Further to this point, “Only when a marriage is determined to be in crisis can judges identify the root cause of the marriage’s disease and diagnose, treat, and heal the crisis” (J. Guo 2018:31). Du continued, “If the marriage is dead, the court will grant a divorce. Nowadays a huge number of divorce cases are spawned by marriage crises” (Wang and Luo 2016:4). Elsewhere Du again invoked a medical metaphor when calling for “bringing into full play the diagnostic and therapeutic function of domestic relations trials in order to provide emergency treatment to marriages that have not broken down and to families with problems” (Du 2018:5). He further underscored the imperative “to cultivate and practice core socialist values, to promote traditional Chinese family virtues ... and to advance the harmonious and healthy development of society” (Du 2018:5). The key motivating objective of the domestic relations trial reform has been to repair marriages in crisis (Shandong Province Ji’nan Municipal Intermediate People’s Court Research Team 2018:182; Wang and Luo 2016:4). According to an official who set up a “Happiness Class,” “At a time when freedom of marriage and divorce are being advocated, impulsive and hasty marriages and divorces are on the rise. We are offering free guidance and psychological counseling for the couples careening into divorce without careful forethought” (Xinhua 2019). Du put the magnitude of the problem in perspective by pointing out that the category of marriage, family, and inheritance cases (of which divorce is a part) accounts for about one-third of all civil cases (Wang and Luo 2016:3). According to its proponents and spokespersons, the ideology of marital preservation promises not only to check divorce rates but also, in so doing, to protect the interests of children, women, and the elderly (Du 2018). Chapters 9–11 on the negative consequences of the divorce twofer suffered by battered women and their children suggest otherwise.

The contents of a “notice of cooling-off period” issued by the Chongqing Municipal Yubei District People’s Court on May 9, 2020,

<sup>12</sup> Here Du quoted directly from the SPC’s 2016 Opinions on Carrying Out Pilot Reform of the Methods and Work Mechanisms of Domestic Relations Trials: “On the basis of a diagnosis of the marital condition, marriages in crisis must be distinguished from marriages that have already died, the marital crisis must be defused, and the correct balance between protecting the freedom of marriage and maintaining family stability must be found.” It reappears almost verbatim in the SPC’s 2018 Provisional Opinions on Further Deepening the Reform of the Methods and Work Mechanisms of Domestic Relations Trials.

bring into high relief the ideological underpinnings of China's domestic relations trial reforms.

"Falling in love is easy, marriage is difficult, marriage is a fine porcelain bowl that needs care and love from both sides [相爱容易, 婚姻不易, 婚姻是只细瓷碗, 需要双方的呵护和爱护]." From your first acquaintance, to romance, and ultimately to marital bliss, you built a family. You share a happy, beautiful past. Marital affection is the foundation of marriage's durability. Even if your mutual affection were stronger, you would inevitably encounter some bumps in the road. If there were two people even better for each other than you, they would still experience disagreements. A good marriage requires that both sides calmly accept their differences and embrace the other side's shortcomings. "Hand in hand, growing old together [执子之手, 与子偕老]" was your original intention as you approached marriage. Marriage is a long journey during which you will inevitably encounter setbacks. We urge you to calm down, carefully consider each other's efforts and hardships, empathize with and support each other, communicate with a positive attitude, resolve problems rationally and kindly, warm your children with patience and sincerity, cherish the person by your side, respect and trust one another, remain committed to your original intentions, and work together to create a better future!

In order to restore your marital relations and maintain family and social stability to the greatest extent possible, and in accordance with the spirit of the [SPC's 2018] Provisional Opinions on Further Deepening the Reform of the Methods and Work Mechanisms of Domestic Relations Trials, you are hereby notified of the following provisions concerning your divorce dispute. (Cheng 2020)

The three provisions at the bottom of the notice concern: (1) the duration of the cooling-off period (i.e., one month), (2) the behavior required of the litigants during the cooling-off period (i.e., remaining cool-headed and rational, not raising the issue of divorce), and (3) additional items (i.e., the ability to extend the cooling-off period and/or withdraw the divorce petition) (Cheng 2020).

The first "notice of cooling-off period" issued by Sichuan Province's Anyue County People's Court in 2017 was similar in its abundance of legally irrelevant relationship advice. The judge presiding over the case deemed a cooling-off period appropriate in this case because "the plaintiff was less than entirely determined to divorce, the defendant was unwilling to divorce, and both sides had the potential to reconcile" (Sichuan Online 2017). The judge also emphasized that the purpose of cooling-off periods more generally is to prevent impulsive divorces, to protect the stability of marriage and family, and to rescue marriages on

the brink (Li 2017). We will see in Chapters 7 and 8 that the language judges used in their holdings to deny divorce petitions is virtually identical to that in their notices of cooling-off periods. Both types of court decisions are bursting with hackneyed clichés written by paternalistic judges professing to know better than the plaintiffs themselves and imploring plaintiffs to treasure the toxic marriages they are desperate to exit. As if they have superior insight into the objective marital circumstances and best interests of plaintiffs seeking divorce, judges routinely assert their authority to invalidate plaintiffs' no-fault claims of irreconcilable differences and fault-based claims of statutory wrongdoing.

China's domestic relations trial reform is a contemporary extension of a deeper ideological legacy of institutionalized limits on the freedom of divorce (W. Chen 2013; Tsui 2001; Yi and Tong 1998). Earlier discourse about out-of-control "frivolous divorce" (or "rash" or "impulsive" divorce, 轻率离婚, 草率离婚, 轻易离婚; Diamant 2000b), "experimental divorce" (试离婚), "heat-of-passion divorce" (赌气离婚), and "abuse of the freedom of divorce" (滥用离婚自由; Chen 2005b; Fei 2010) persists in the form of discourse about the need for policy measures to control "impetuous divorce" (冲动性离婚; Li 2017; Ma 2018; J. Zhou 2018), which feeds an ostensibly broader phenomenon of "bogus lawsuits" (虚假诉讼; An 2015; Y. Zhang 2017; <https://perma.cc/9DXY-B244>). As we will see later in this chapter, such ideological discourse is not gender-neutral.

China's domestic relations trial reform also stems from and further supports China's broader ideology of "stability maintenance" (维稳; Han 2017; Lee and Zhang 2013; Yang 2017). Judges have been tasked with maintaining social stability in general (Zhang 2016a:23) and to do so by denying divorce petitions in particular. To support claims of a link between divorce and social stability, Du Wanhua has asserted that juvenile crime is driven by divorce, that 70–80% of juvenile offenders have divorced parents (Du 2018; Li 2017; M. Wang 2018; Wang and Luo 2016). According to a judge in Shanghai:

The government believes that sustaining a marriage relationship means or equals maintaining social stability; and we have to carry out the Party's stability maintenance policy in work. Hence, China does not really have freedom of marriage – there is no freedom of divorce – even in metropolises like Shanghai. What if the divorce statistic reaches above 50%? How improper it would look, and how inharmonious it would appear. (J. Jiang 2019:239)

We will see in Chapters 7 and 8 the full extent to which political discourse about preserving and strengthening family harmony has penetrated China's courts. Judges have embraced and incorporated this political discourse into their decision-making (Li 2015a:173). Woven into the fabric of judges' reasoning and embroidered in high relief in their written decisions are threads of this political discourse about supporting family stability as a means of achieving the larger political goal of social stability.

Political ideology is not the only tool shaping judicial decision-making. Ideological signals from above exert direct pressure on judges and are also indirectly mediated by judicial performance evaluation systems.

## JUDICIAL PERFORMANCE EVALUATION SYSTEMS

Judicial performance evaluation systems (variously 绩效考核体系, 绩效考评制度, and 案件质量评估体系), also known as judicial responsibility systems (法官责任制), serve to shape judicial behavior by delivering tangible rewards and punishments to judges according to their degree of compliance with prevailing political policies and ideologies. As civil servants without tenure, Chinese judges are highly responsive to incentive structures designed to support shifting political priorities. Their risk-averse practices are captured by the idiom "Seek not to do good work but rather to avoid blame" (不求有功, 但求无过; Li and Zhou 2018:64; Xiao, Ma, and Tuo 2014:63). In their efforts to minimize "incorrectly decided cases" (错案), judges' institutionalized practice of "seeking guidance from and reporting back to" (请示汇报) higher-level authorities responsible for evaluating their performance (Chen 2016a:214, 2016b:116; Tang 2016) has roots not only in the Mao era (Minzner 2009:75) but also parallels contemporary manifestations of the Soviet institutional norm of "telephone justice" (Hendley 2009, 2017; Ledeneva 2008). Judges' imperative to satisfy the demands of judicial responsibility systems (He 2009; Kinkel and Hurst 2015; Liebman 2015; Zhu 2016:194), which are institutional legacies of imperial China and the Mao era (Cui 2016; Minzner 2009), as well as of the Soviet Union (Solomon 2010, 2012), and which remain salient in contemporary Russian courts (Paneyakh 2014), compete with their incentives to uphold China's domestic laws and international legal commitments.

Courts across China have established systems for quantifying judge performance assessment indicators. Performance is assessed primarily according to a judge's volume of closed cases, average closing times, mediation rates, appeal rates, rates of requests for judicial review, rates of reversing and remanding decisions for retrial, rates at which decisions are announced at the time of the trial, written decision approval rates, rates of petitioning caused by dissatisfaction with court decisions, rates by which parties abide by court decisions, and volume of research articles. This is the basis of rewards and punishments. Quantitative scores determine a judge's awards, promotions, economic compensation, and so on, and even influence a judge's reputation and image. (An 2015:179)

No different from their Soviet and Russian counterparts (Solomon 2015:169), Chinese judicial performance evaluation systems, since at least the 1990s, have emphasized moving caseloads (Zhu 2016:121n6). Although a reform to the system in 2014 ended some common practices, such as ranking entire courts, and introduced greater flexibility to accommodate local conditions (Chen 2016a:213–14; Xu, Huang, and Lu 2015:135), incentives that reward clearing dockets and that punish incidents of social unrest persist. Measures of social instability include incidents of petitioning and complaining to higher authorities about – and incidents of violence stemming from – court decisions (Liebman 2011a, 2014). In some courts, paralleling practices elsewhere in the state bureaucracy, an incorrectly decided case resulting in the “harmful social influence” of a litigant improperly petitioning to Beijing or the provincial capital, is a so-called “priority target with veto power” or “single item veto” (一票否决) that entirely wipes out a judge's accumulated merit points (Pan 2019:139; Yanhong Wang 2013:33; Z. Wang 2018; Yang 2017). Judges have even been criminally prosecuted for the crime of “abuse of power” (Article 168 of the Criminal Law) on the grounds of harming society by causing an unhappy litigant to petition repeatedly (Lou 2018:111). The slogan “six noes” (六无) captures judges' incentives to achieve the goal of no remands for retrial, no reversals, no petitioning by dissatisfied parties, no missed decision time limits, no legal or disciplinary infractions, and no negative media coverage (Y. Wang 2015).

Nothing will derail the career of a judge faster than an “extreme incident” (极端事件) that inflames public outrage fanned by media exposure.

In the course their work, judges face immense risk, such as demotions and even terminations at the whim of superiors. As soon as a litigant

petitions in the complaints system or creates an incident that affects social stability, the judge will be investigated and even punished. The perennial possibility of an investigation of an incorrectly decided case is a Sword of Damocles hanging over the heads of judges. (C. Hu 2015:204)

Judges, no different from officials elsewhere in the state apparatus, make discretionary ad hoc concessions to litigants who pose credible threats of carrying out or inciting a quintessentially “extreme” incident such as petitioning, public protest, suicide, and murder. Judges complain that their courts have been hijacked by litigants who get what they want by threatening unrest (X. Li 2014:220). In the words of a judge from Fujian Province, one female defendant “screamed at me and climbed up to the courtroom window with the intention of committing suicide. We had to erect a safety net at the base of the building to protect her, and spent a long time pacifying her” (Cao 2018). Another judge in Anhui Province heeded a defendant’s threat to drink the bottle of pesticide she clutched in her hand (Zhou and Qiu 2018).

The paramount importance of “maintaining social stability” has incentivized aggrieved citizens to threaten unrest while also incentivizing officials responsible for dealing with them to adopt populist strategies for redressing their grievances in arbitrary ways (Feng and He 2018; He 2014, 2017; Lee and Zhang 2013; Liebman 2011a, 2013, 2014; Zhang 2016a). The president of a basic-level court in Zhejiang’s provincial capital of Hangzhou reported that “as litigants are inclined to use suicide, self-harm, fanatical and unruly petitioning, and other irrational methods of expressing their litigation demands, the pressure of maintaining stability in petitioning has grown” (<https://perma.cc/M6G6-XCB7>). The divorce twofer helps judges placate volatile defendants dead set against divorcing. According to a court official, “in divorce cases that harbor the threat of becoming complaints in the petitioning [信访] system, courts will typically not grant the divorce” (Hu 2019). Police responsible for responding to emergency domestic violence incidents fear disciplinary punishment following an “inharmonious event” in which an abuse victim, under pressure from her family, recants her allegations and files a complaint against the responding officer on the grounds that he broke up her family (J. Jiang 2019:234–35). Judges are sometimes reluctant to issue personal protection orders for the same reason (J. Jiang 2019:235).

In the context of divorce litigation, a plaintiff can sometimes get her way by threatening to commit suicide if her petition is *not* granted.

Meanwhile, a defendant who does not consent can sometimes get his way by threatening to murder the plaintiff if her petition is granted (Diamant 2000b:333, 336). Judges take such threats seriously because they are sometimes carried out (Chapter 9); judges have no way of knowing who is only bluffing (He 2017; Ng and He 2017a:130–31; J. Wang 2013:84). For this reason, social stability considerations compel judges to use the breakdownism test instrumentally and often unlawfully to deny divorce petitions not *despite* but *because* of domestic violence and the perceived potential for worse violence if a divorce is granted. One judge persuaded a plaintiff to reconcile with rather than to divorce her abusive husband: “He says he will kill you if you divorce him, and it seems he is serious. We cannot ensure your safety if we render a divorce decision. To tell you the truth, it is rather easy for us to render a divorce judgment. The reason why I bother to talk you into reconciliation is all for your good” (J. Wang 2013:84). A female plaintiff reported that, when she filed for divorce, a member of the court “staff frightened me that my husband would beat me more seriously if I didn’t go back home immediately” (Wang, Qiao, and Yang 2013:35).

By both helping judges to clear cases efficiently and giving litigants additional time to negotiate and agree on the terms of the divorce in preparation for a subsequent attempt, the divorce twofer alleviates judges’ workloads, boosts volume and efficiency measures, and reduces the probability of dissatisfaction, petitioning, and extreme incidents. This is why I call it a “twofer”: by trying the same case twice, judges can get double credit while minimizing their professional liability. By denying a divorce petition, judges kick the can down the road for at least six months, and in so doing maximize their professional rewards and minimize their professional risks. In the words of a legal scholar and two judges, “To deny a divorce on the first attempt and grant it on the second attempt is safer and more reliable, and of great help raising a judge’s individual performance evaluation scores” (Xiao, Ma, and Tuo 2014:63). The deputy director of a research office in a county court in Hunan Province put it this way: “Under the burden of ‘many cases, few judges’, petitioning and stability maintenance, performance evaluations, and other omnipresent pressures, judges are relatively cautious when they try first-attempt divorce petitions. By routinely denying divorces on the grounds of insufficient evidence, judges can close these cases quickly, avoid appeals, complaints, reversals, and other risks associated with judicial performance evaluation metrics” (Hu 2019).



Another judge in Guangxi agreed: “Denying first-attempt divorce petitions closes cases quickly, raises judicial efficiency, and cools off litigants, thereby lowering rates of complaints and appeals” (Xu 2016). He then elaborated:

A divorce should be granted when one side files for divorce and mutual affection has indeed broken down. However, when the other side cites objective reasons such as “I’ll have trouble finding another wife” or “the family will lose its backbone,” does so with an unyielding attitude and maniacal personality, steadfastly refuses to divorce, and even displays extremist behavior and speech, intimidates the presiding judge, and so on, the judge will not dare decide the case lightly. (Xu 2016)

The architects of China’s domestic relations trial reform hoped that marital preservation would promote social stability by promoting family stability. In theory, intensive intervention and cooling-off periods would nip conflicts in the bud before escalating into full-blown extreme incidents (Du 2018; J. Guo 2018; Hou 2018; Liu and Zheng 2018; Wang and Luo 2016; J. Zhou 2018). Ideally, the couple would reconcile. If reconciliation is beyond hope, however, reform measures were designed to help the couple divorce peacefully. According to a legal scholar, cooling-off periods are particularly well suited for situations such as “marriages that are dead beyond resuscitation in which one party, for example, acting emotionally and overly dramatically, threatens to commit suicide. In a case like this, the cooling-off period is not for reconciliation purposes but rather for psychological intervention, to let the litigant cool off and better exit the marriage” (M. Wang 2018). Another law professor similarly justified cooling-off periods: “If some litigants display extreme behavior before going to court, such as threatening to commit suicide, judges should not mediate but rather provide psychological aid” (Cao 2018).

Judges may be even more concerned about the threat of social unrest posed by male litigants. Regardless of its legal merits, a judge is unlikely to grant a divorce petition if he perceives a risk of violent retaliation against the plaintiff. According to Chen Min (陈敏), a leading voice in China’s anti-domestic violence movement and author of the 2008 Guidelines, abusive defendants sometimes threaten their wives in court for precisely this reason. Most abusers deny their wives’ allegations of domestic violence. Some, however, try to prevent divorces by deliberately threatening or even carrying out violence in full view of judges.

Consider an example of a divorce case involving domestic violence tried in a basic-level court. A woman filed for divorce the first time in 2014. The court affirmed that the male side “sometimes beat the female side, causing her physical and mental harm.” Nonetheless, the court denied the divorce petition. In 2015 the woman filed for the second time. While they were waiting for the trial to begin, the male side beat the female side. The presiding judge had no choice but to reschedule the trial. Later, as the trial approached its conclusion, the male side suddenly banged the table with his fist and threatened to murder the female side if the divorce were granted. The judges once again denied the divorce petition. In 2016, after the Anti-Domestic Violence Law had already taken effect, the woman filed for the third time. While the judge was carrying out mediation, the male side once again expressed his determination to do everything to murder the female side if the court were to grant the divorce. In 2017, the court affirmed the male side’s “domestic violence tendencies” but once again denied the divorce petition. (Chen 2018:8)

Chen concluded that the judge in this case “may have continuously denied the plaintiff’s divorce petition in consideration of the possibility that the defendant would carry out his threats of violence if the divorce were granted.” She further argued that a man’s threat to murder his wife can be an *indirect* threat against the judge, particularly in a context in which “maintaining stability trumps everything” (Chen 2018:8).

## JUDGES’ SAFETY AND HEALTH

Litigants also *directly* threaten judges with violence. Judges take their personal safety into account when ruling on divorce petitions (Li 2015a:141). Judges who handle divorce cases say they live in a constant state of fear of attack (Zhou and Qiu 2018). In a survey of frontline judges in a basic-level court in Guangxi Province’s city of Nanning, 99% of respondents reported having experienced – to varying degrees – abuse, intimidation, malicious accusations, and other threats to their personal safety and reputation. On several occasions, litigants carried weapons through the security check at the courthouse entrance (X. Li 2014:220).

In 2018, a disgruntled former litigant stormed into the courtroom of the judge who tried his divorce case. After he reportedly shouted something like, “Bullshit verdict!” (“判个××!”), the judge ordered him

to leave and come back after the trial. Disobeying the judge's order, he toppled desks and threatened to kill the judge. The offender was reportedly infuriated because the judge approved his ex-wife's divorce petition. Ultimately, the judge had granted this divorce only on the third attempt (Chuncheng Evening News 2018). Perhaps the judge's reluctance to grant the divorce stemmed from the defendant's established history of violence. If female judges feel particularly vulnerable to such threats of physical violence, they may favor abusive husbands even if they are more sympathetic than male judges to abuse victims seeking divorce.

In a 2019 divorce case in Guangxi Province, the Rongan County People's Court notified the defendant by phone and WeChat message, instructing him to retrieve litigation materials in preparation for his trial. The defendant replied that he was too busy, and refused to follow court procedures. So the court sent hardcopies of the materials and his court summons to his officially registered residential address, and his father signed the delivery slip on his behalf. On the day of the trial, the court sent the defendant a text message reminder. The defendant replied with a threat: "I don't have time. Do whatever you want. Please tell her that when she gets together with someone else, she needs to return my bride price or else members of her family will absolutely die. If you harass me with any more texts, your family members will die sooner." After the trial was held with the defendant in absentia, the defendant sent several abusive and threatening text messages to the judge, including, "You guys at the court forced me onto the road of criminality" and "Prepare to collect corpses" (Rongan County People's Court 2019).

A judge in a basic-level court recounted a divorce case she tried that involved domestic violence. The male side, adamantly opposed to the divorce, said to the judge, "I know where your daughter goes to school." Although she saw through his bluff, she also realized her work made her daughter's personal safety the target of the abuser's threats. In another example, on December 15, 2017, the public WeChat account of the municipal government of Putian in Fujian Province sent out a message with the headline, "sender of text messages threatening numerous judges is in a police detention center." According to a local court in the area, the detained person was a litigant in a divorce case several years earlier. Because his extremely serious domestic violence caused the breakdown of mutual affection, the presiding judges, on the basis of their determination of the facts, granted the divorce. Afterwards,

the person in detention continued violently harassing his ex-wife. In order to escape his harassment, stalking, intimidation, and beatings, his ex-wife had no choice but to flee. No longer able to control his ex-wife, he redirected his wrath towards the presiding judges. Over the years he continuously, in fits and starts, harassed and intimidated the judges in online posts until, on this particular occasion, he sent intimidating messages directly to the judges' cell phones and got himself locked up in detention. However, in practice, not all judges who are intimidated by litigants are able to receive the support and protection of local police. (Chen 2018:8)

Some litigants carry out their threats. According to one study, family disputes, particularly those in rural areas, are more likely than other kinds of disputes to precipitate violence against judges (Tian and Wang 2016:83). In the words of a former high-level SPC judge,

improperly handled family disputes may give rise to extreme criminal cases and even the murder of judges. I frequently receive reports of such incidents from across China, many of which are suicides, homicides, assaults, familicides, and other such vicious incidents. In 2016 Ma Caiyun [马彩云], a judge in Beijing's Changping District People's Court, was murdered. In 2017 Fu Mingsheng [傅明生], a retired domestic relations judge from Guangxi Province's Luchuan County People's Court, was murdered. In each case the motive was a family dispute. (Du 2018:4)

Ma Caiyun died from gunshot wounds sustained in an attack by a male litigant aggrieved by the outcome of a divorce case she tried (Tian and Wang 2016:83). Fu Mingsheng was stabbed to death by a litigant upset by the outcome of a divorce case he had tried years earlier (Jin 2017). In 2000, Li Yuechen (李月臣), a judge in Shandong, was abducted and murdered with a cleaver and iron rod by a litigant who was unable to come to grips with his divorce verdict. In Gansu Province, five people were killed and 22 injured in 2006 when a bomb was detonated in the Yongle County People's Court for reasons related to a divorce case. In 2010, a litigant who was upset with the outcome of his divorce case killed four people, including himself, and injured another three with a handheld submachine gun in Hunan Province's Yongzhou Municipal Lingling District People's Court (He 2017:485n2; Tian and Wang 2016:83).

In August 2020, Hao Jian (郝剑), a judge in Heilongjiang Province's Harbin Municipal Shuangcheng District People's Court, granted a

divorce to a woman who claimed her husband frequently carried out domestic violence. She submitted medical documentation of a perforated eardrum caused by a beating she received from her husband the previous month. The husband admitted to the allegations of wrongdoing and agreed to divorce. Dissatisfied with the judge's property division ruling, however, he appealed the decision. Before the Harbin Municipal Intermediate Court tried the case, the husband snuck a boning knife past security and into the original basic-level court and used it to stab Judge Hao once in the chest. He was already dead by the time paramedics arrived (Suo 2020; Zhao 2020).

Owing to their fear of violent retribution, judges are "exceptionally cautious" when handling divorce cases (J. Zhang 2018:110). In my collection of annual work reports from Zhejiang Province, 50 out of 87 basic-level courts specifically mentioned the problem of violence and threats of violence against judges. For example, in his 2009 work report, the president of the basic-level court in Zhejiang's city of Pinghu discussed

Confronting challenges vis-à-vis stability maintenance. At the current time, some litigants, out of self-interest, make threats of violent disturbances, suicide, self-harm, and so on; attack, verbally assault, and physically injure judges; petition without cause, petition disruptively, and even make scenes in the courtroom in violent defiance of the law; and severely influence the smooth performance of trial and enforcement work. (<https://perma.cc/Y75D-9D8U>)

Similarly, the president of Zhejiang's Wuyi County People's Court reported in 2014 that "litigants have hurled invectives at, threatened, and even physically attacked judges, and in some instances have gone to their homes to make disturbances; handling cases is like walking on thin ice" (<https://perma.cc/JCU6-HB3U>). In his 2010 work report, the president of Henan's Provincial High Court, Zhang Liyong (张立勇), stated that "a small number of litigants have threatened, intimidated, insulted, and beaten judges, and have even used extreme methods of violence" (<https://perma.cc/4FFZ-L9XE>).

In Hunan Province's Hengyang County, Ning Shunhua's Sisyphean struggle to divorce her abusive husband, Chen Dinghua, stemmed in no small part from his thinly veiled threats against the court's judges. Between 2016 and 2020, she filed for divorce four times, and each time the Hengyang County People's Court denied her petition. According to one report, "Ning Shunhua said that Chen Dinghua, during almost

every trial, openly stated his intent to pursue relentlessly whomever grants her divorce petition, exact revenge against society, produce a terrorist incident, etc.” In the words of a member of the Hengyang Municipal Women’s Federation, which intervened numerous times, “Her husband was unwilling to divorce and displayed extreme emotions....At one moment he would say he was calming down and a moment later he might once again threaten revenge” (Zhu 2021). Ning’s lawyer said that “Chen once smashed his [the lawyer’s] car and had made death threats to judges” (Feng 2021).

Between 2016 and 2021, Chen was held in administrative detention on six occasions for gambling, violence, and threats of violence. Between 2018 and 2020, the same court granted all three of Ning’s applications for personal protection orders against Chen. On the day of their fourth divorce trial, Chen attacked Ning at the courthouse entrance, causing multiple injuries documented in a certified medical appraisal. Chen was put in administrative detention as a result, and two days later the court granted Ning’s second application for a protection order (Feng 2021; Sohu.com 2021a; Zhu 2021). From the standpoint of the law, therefore, the judges should have affirmed Ning’s fault-based grounds for divorce. Owing to the extra-judicial institutional pressures on courts I have thus far documented in this chapter, however, the judges did their utmost to disaffirm any grounds for divorce.

Ning’s experience in divorce court illustrates additional themes of this book. After she filed her fifth divorce petition in March 2021, media coverage of her plight prompted the Hengyang County People’s Court to issue a statement on the matter. In it, the court explained its rationale for denying all four of Ning’s divorce petitions. “Chen Dinghua repeatedly expressed admission of his mistakes to Ning Shunhua and his determination to fix them as a way of seeking her forgiveness. Ning Shunhua expressed to the defendant by text messages and other means her willingness to give him more time and another chance. In the five years since her first divorce petition, Chen Dinghua, from beginning to end, fiercely pleaded his wish to reconcile” (Hengyang County Court 2021). In typical fashion, the court denied Ning’s fourth divorce petition “in order to protect family stability and social harmony.” It made light of Ning’s complaints by chalking them up to poor relationship skills shared by both sides: “Husband and wife have hope for reconciliation provided that both sides correctly handle their marital and family problems, calmly and properly deal with their conflicts, effectively strengthen their communication,

and engage in self-reflection to identify their shortcomings and correct them” (Sohu.com 2021a). As we will continue to see in Chapters 7 and 8, courts have commonly cited reconciliation potential in precisely this way as a pretext for sidelining documented claims of domestic violence, particularly when the defendant withheld consent to divorce.

In April 2021, the court finally granted Ning’s fifth divorce petition, but – as with so many women seeking divorce – only after she waived her right to a share of the marital house and returned items of jewelry. Chen appealed the verdict, demanding that the court of second instance restore their marriage by reversing the original court of first instance’s decision to grant the divorce. The court of second instance instead supported Chen’s secondary request that, in the event it upheld the original divorce verdict, she return his bride price, and ordered Ning to compensate Chen ¥85,000 (Sohu.com 2021b).

Chinese judges’ burdens of heavy dockets, performance evaluations, and their own and litigants’ physical safety have reportedly taken a toll on their well-being in the form of burnout, mental health issues, including post-traumatic stress disorder, alcohol and drug use, and even suicide (Liu 2017:64; Zhou and Qiu 2018). Between 2008 and 2012, 156 judges across China died from illness related to work (often caused by overwork), accidents at work, and violent attacks by disgruntled litigants (Yuan 2013). In 2017, SPC President Zhou Qiang (周强) reported that 36 judges across China died of overwork in the previous year alone (<https://perma.cc/3W35-XJWW>). Judges have reported abysmally low levels of work satisfaction (C. Hu 2015). Not surprisingly, for these reasons courts have reportedly had trouble retaining judges (Fang 2015; X. Li 2014; X. Zhang 2014; Zheng, Ai, and Liu 2017:190). According to a large survey of judges, prosecutors, police officers, and lawyers, judges registered far and away the highest levels of work pressure. Moreover, judges identified performance evaluation systems as far and away their greatest source of pressure. Finally, compared to members of the other groups, judges identified attrition through resignation as a far more serious problem (Wu 2015). Crushing dockets and the risk of grave career repercussions from decisions that could potentially go awry have dampened judges’ work enthusiasm, as reflected in another catchphrase, “three noes and one outflow” (三不一流失): judges have no courage, no ability, and no willingness to try cases, and they flow out of the court system (Y. Wang 2015).

To sum up so far, pressures from three endogenous institutional logics – limited judicial resources, political ideology, and performance

evaluations – incentivize judges to deny first-attempt divorce petitions, particularly when they involve claims of domestic violence. Denying a first-attempt divorce petition is a rational strategy for both minimizing the risk of negative fallout and maximizing performance evaluations.

Judges face case closing time limits, case closing rates, appeal rates, and other pressures from the judicial performance evaluation system. Under these kinds of work pressures, rational judges will do their utmost to minimize harmful risk, maximize case closing rates, and minimize appeal and complaint rates. Under the pressure of performance evaluations, and with the goal of maximizing self-protection and minimizing risk, judges deny first-instance divorce petitions. (J. Guo 2018:30)

The divorce twofer can only be understood as a consequence of norms and practices endogenous to the institutional environment in which China's courts are embedded. Although I have explained why judges routinely deny first-attempt divorce petitions, I have not explained why they might disproportionately deny the first-attempt divorce petitions of women. Routinely denying first-attempt divorce petitions is more than a rational strategy adopted by risk-averse, career-maximizing judges. Judicial decision-making also adheres to a cultural logic.

## PATRIARCHY

The impact of the global diffusion of norms and laws promoting gender equality may be stymied by the persistence of countervailing local cultural schemas (Ridgeway 2011). Cultural categories of moral worthiness and deservingness can undermine women's efforts to get justice through the law (Lazarus-Black 2007:89–90; Michelson 2006:6–7; on “cultural categories of worth” more generally, see Steensland 2006). Divorced women in China belong to a stigmatized and socially disgraced cultural category of “outcasts” deemed “morally bankrupt” (Honig and Hershatter 1988:212–13, 224, 237–40; also see Buck 1931:907 and Mo 2017:391). Just as narratives about “frivolous lawsuits” helped justify a clampdown on tort litigation in the United States (Haltom and McCann 2004), narratives about “frivolous divorce” helped justify China's judicial clampdown on divorce in general and on female-initiated divorce in particular. A prevailing trope in Chinese narratives about “frivolous” and “impulsive” divorce is a woman recklessly rushing to divorce her husband only to harbor regrets after cooling off and regaining her composure (e.g., Chang 2017). Allegations of



widespread “abuse of the freedom of divorce” are seemingly uniformly supported by anecdotes of “impetuous and capricious” (冲动任性) women initiating the litigation process (Ma 2018; Tian 2016:25; also see Honig and Hershatter 1988:212, 224). Narratives about a selfish generation of only-children – born in the 1980s and 1990s after the nationwide implementation of the one-child policy – fueling China’s allegedly runaway divorce problem are supported by anecdotes of outrageously trivial arguments leading to female-initiated divorce, such as the wife who filed for divorce after her husband changed the Wi-Fi password and failed to share it with her, and the wife who filed for divorce because her husband failed to tear toilet paper on the perforations (Ma 2018:17).

This is hardly a uniquely Chinese phenomenon. Media narratives in the United States are likewise awash with “metaphors that blame women for frivolously wanting to end bad marriages and characterizing single and divorced mothers as short-sighted and self-serving” (Coltrane and Adams 2003:369). American judges thus invoke and reproduce shared, taken-for-granted cultural assumptions about gender when they “*unjustly discount women’s personal trustworthiness*” (Epstein and Goodman 2019:405, emphasis in original).

Patriarchal cultural beliefs such as these help explain why women seeking help from China’s courts bear the brunt of institutional pressures to maximize judicial efficiency. When “efficiency overrides due process” (效率压倒公平), litigation is biased in favor of men. When “efficiency takes priority over due process” (效率优先于公平), judges render decisions mechanically and mindlessly, “without the need to use their brains” (不需要动脑筋的), and in so doing bring gender stereotypes, implicit bias, and prejudice into play (Lin, Bu, and Li 2015:124). In an institutional context such as this, characterized as having undergone “judicial patriarchalization” (司法男权化), judges – the majority of whom are men – take men’s claims more seriously than women’s and are more likely to grant men’s divorce petitions than women’s (Lin, Bu, and Li 2015). Owing to the central role of prejudices and preconceptions in judicial decision-making (法官先入为主), the trial has been characterized as little more than a formalistic exercise (形式主义) of judges going through the motions (走过场) to render a predetermined judgment (先定后审; Li and Ye 2015). In the context of gender violence elsewhere in the world, stereotypes about women as unstable, unreasonable, emotional, hysterical, overly sensitive, flighty, and irrational undermine their credibility and thereby undermine

gender equality in court (Epstein and Goodman 2019; Frohmann 1991; Goodmark 2005; Stanko 1982; Sweet 2019). Chinese judges are more likely to respond dismissively with impatience and annoyance to female litigants than to male litigants, often by interrupting with a raised voice, interjecting with belittling comments, pointing at them, striking the bench, and ignoring their questions (Bu, Li, and Lin 2015; Chen 2007; Li and Friedman 2016:161–62).

Chinese judges are on the lookout for litigants who try to game the system. They are suspicious of litigants who, with malicious intent, give false testimony, submit fake evidence, or use other deceptive methods to achieve their divorce goals (Dong and Ji 2016:89; Sun 2010). In particular, judges fear litigants make false claims about both domestic violence and the unknown whereabouts of their spouses. “Family harmony’s influence on social harmony and the critical role of marital stability for social stability demand that judges exercise caution” and cast doubt on plaintiff’s potentially exaggerated or even fabricated claims of defendants’ unknown whereabouts (Xiong 2012:71).

Judges’ suspicions about the integrity of litigants are not gender-neutral. With respect to domestic violence claims, judges commonly believe, either consciously or implicitly, that women exaggerate or fabricate their claims of marital violence in order to boost their chances of gaining child custody or to vent their frustrations and shame their husbands (Epstein and Goodman 2019; He and Ng 2013a; Jeffries 2016:6–7). Because judges perceive men’s claims as more credible than women’s (Sweet 2019), they tend to support seemingly homicidal men over seemingly suicidal women (He 2017).

Just as they harbor doubts about domestic violence claims, judges are likewise wary of claims of missing defendants. Plaintiffs, either on their own in opposition to their spouses or in cahoots with their spouses, may conceal to the court the whereabouts of their spouses and falsely claim they have tried unsuccessfully to make contact. In efforts to surmount obstructionism from a defendant who does not consent to divorce, and to deprive a defendant of marital property and child custody, a plaintiff may surreptitiously divorce under the false pretense of the defendant’s unknown whereabouts (Tao and Lu 2012:66). Often the plaintiff alone orchestrates the exploitation of the public notice service of process system in this way. Married couples, however, may also be motivated by the shared benefits of a “fake divorce” mentioned in Chapter 2 and hatch a plot jointly to deceive judges (Tan and Wang 2011:116). In either case, litigants may provide fake addresses as decoys, give false

testimony, arrange witnesses and coach them to lie, or falsify affidavits from villagers' committees (Xiong 2012:71). Not surprisingly, scholars have characterized the public notice method of serving defendants as a "legal fiction" (Zhao 2018) grounded in "deliberate fabrication" (Dong and Ji 2016:89). To the extent that judges' vigilance to combat litigation fraud and their skepticism of the veracity of plaintiffs' claims vary according to the gender of the plaintiff, we might expect judges to be warier of female plaintiffs and to give male plaintiffs greater benefit of the doubt.

Given the absence of defendants to challenge plaintiffs' claims, in absentia trials are less contentious and less complicated, and can therefore help judges clear their cases. For this reason, judges have an incentive to look the other way when plaintiffs claim not to know the whereabouts of their spouses. Scholars characterize judges' lax scrutiny of claims of missing spouses as judicial misuse and even abuse of the public notice method of serving defendants (Sun 2010; Y. Wang 2012:120). The same lax evidentiary standards that make them convenient to judges also invite their abuse – or at least the perception of their abuse – by litigants. We will see that judges' willingness to look the other way varies according to the gender of the plaintiff (Chapter 8).

One of China's oldest and most popular reality shows, *Legal Report* (今日说法), nationally broadcast daily on China Central Television, includes an illustrative episode about an unhappily married woman who disappeared without a trace. More than six years later, her husband learned she had married another man in a different city. In order to do so without committing the crime of bigamy, she had first obtained a public notice divorce from a court in the jurisdiction of her natal family by falsely claiming, with the support of fake evidence, that she and the original husband established their marital residence in her natal village, and that, as a migrant worker, he subsequently went missing (Zeng 2008:161). The surprise of discovering that one is no longer married has entered the popular vernacular as "unwittingly divorced" (被离婚; Y. Wang 2012; Zhao 2018).

To be sure, stories of male plaintiffs committing this sort of fraud are also in circulation, including the sensational case of billionaire Du Shuanghua (杜双华), whose wife filed for divorce a decade after he had already obtained a court divorce without her knowledge (Liu 2011; for additional examples of women who became unwittingly divorced, see Sun 2006:122–23 and Xu 2007:204). However, the well-known

narrative of falsely claiming a defendant to be missing, sometimes with the support of fake evidence, in order to mislead the court into improperly using a public notice with the goal of acquiring most or the entirety of the marital estate, winning child custody, or expeditiously marrying a lover (Tan and Wang 2011:116; Y. Wang 2012:120; Zeng 2008:164), arguably carries greater cultural resonance when the plaintiff is a woman. Indeed, cultural stereotypes about duplicitous, wily, conniving women on the make and their ulterior motives to gain unfair advantage in property division and child custody undermine female litigants in US divorce trials (Epstein and Goodman 2019). Judges are more reluctant to grant in absentia divorces to women not only because they regard women's claims as less credible than men's, but also out of their fear of violent retribution exacted by men surprised to discover they are no longer married (S. Wang 2013:174n2).

When defendants are falsely purported to be missing, they are easily deprived of their civil litigation rights and marital rights, and are therefore easily deprived of substantive justice (Dong and Ji 2016:89–90; Xu 2007:204; Zeng 2008:162–63; Zhao 2018). However, just as female plaintiffs may be deemed less deserving of divorce than male plaintiffs, female defendants too may be deemed less deserving than male defendants of legal protections and procedural rights. Defendants may purposely conceal their own whereabouts in order to evade being served notice because they are already living with a new partner and hope to avoid criminal culpability and civil liability for unlawful cohabitation or bigamy (Ningbo Municipal Yinzhou District People's Court 2014:17). Owing to patriarchal cultural beliefs, this possibility may strike judges as more plausible when the allegedly missing defendant is a woman. Male plaintiffs may accrue advantage over otherwise similar female plaintiffs because women are given short shrift as both plaintiffs and as defendants.

Women tend to feature in moralistic narratives about frivolous and fake divorces. One such example tells the story of a woman from Feng County (a rural part of the municipality of Xuzhou in Jiangsu Province) who first conspired with her husband to process a fake divorce before filing a frivolous divorce petition. At the age of 16, after falling in love, she moved in with an 18-year-old man. The next year they had a baby girl. Only six years later, when their daughter approached school age and after they had reached the legal age of marriage (20 for women and 22 for men), did they register their marriage. Six days after

registering their marriage, and after enrolling their daughter in school, they returned to the same marriage registration office to apply for a divorce. They had already resolved their daughter's school enrollment problem, and now wanted a baby boy. By giving birth to a baby boy out of wedlock they would be able to circumvent family planning policies and avoid a hefty fine for an "out-of-quota birth."<sup>13</sup> After carrying out their plan they remarried each other. Not long afterward, the husband became jealous after reading text messages on her phone. Unable to tolerate his suspicion that she was having an affair, she decided to scare him by filing for divorce in the Feng County People's Court. The court denied her request on the grounds that marital affection had not completely broken down and that reconciliation remained possible (Yu 2013). The moral of stories such as this is that courts, by denying meritless divorce petitions, promote family stability and, in so doing, bolster social stability and strengthen the nation.

## SUMMARY AND CONCLUSIONS

Although China's divorce twofer has no legal basis, it dominates divorce litigation. The key to the puzzle of the routine denial of first-attempt divorce petitions in China's courts therefore lies with institutional pressures that countervail against the law. The institutional imperative for judges to uphold China's domestic laws and commitments to global legal norms is trumped by competing institutional imperatives to uphold the family, maintain social stability, and efficiently close cases.

Five sets of endogenous institutional norms and pressures at play in China's courts are reasons to expect that judges privilege both breakdownism over faultism and men over women. A political ideology emphasizing family harmony and marital preservation, heavy caseloads, performance evaluation systems that reward judicial efficiency and punish unrest, judges' perceptions of the possibility of violence carried out against court personnel by litigants accused of domestic violence, and patriarchal cultural values have compelled judges to ignore and subvert laws on the books intended to protect abuse victims, and are key forces behind the ubiquitous divorce twofer. Wide latitude to apply

<sup>13</sup> This story would be more plausible if the first-born child had been a son. Prior to the abolishment of the one-child policy in 2016, rural couples were generally allowed, without penalty, to try for a son if their first child was a girl (Kennedy and Shi 2019; Michelson 2010).

arbitrary, ad hoc, and inconsistent legal provisions concerning conditions of divorce and evidentiary standards (Chapter 2) allows judges to yield to extralegal institutional pressures to deny divorce petitions in general and the divorce petitions of women in particular. When judges do grant divorce petitions, typically only after a failed first attempt, the same extra-level institutional pressures animate their child custody decisions (Chapter 10). We have seen from the secondary literature reviewed so far in this book – and will continue to see from my original empirical findings in the remainder of this book – egregious gender injustice in the form of courts' brazen disregard for legal protections to which women seeking to divorce their abusive husbands are legally entitled.