Grounds and Defenses to Divorce in Pennsylvania

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GROUNDS AND DEFENSES TO DIVORCE
IN PENNSYLVANIA

I. Introduction

Since 1929 there has been no major revision in Pennsylvania divorce law.¹ Reform legislation has, however, recently been introduced in the Pennsylvania legislature in an attempt to bring the existing laws into harmony with the realities of the 1960's. The purpose of this Comment is to examine the law in Pennsylvania, as it pertains to the grounds and defenses available in divorce proceedings, and to evaluate the proposed changes in light of the weaknesses of the present system. Initially the existing grounds and defenses will be examined individually. Subsequent examination will focus on the fault principle and whether there is injury to the innocent spouse, the factors which underlie the present grounds and defenses. Particular attention will be paid to the success of these factors in fulfilling the state's interest in maintaining the stability of individual marriages. Finally the proposed legislative changes will be examined, compared to, and evaluated with the law as it presently exists in order to ascertain where legislative reform is necessary.

II. Grounds for Divorce

A divorce proceeding has often been referred to as a three party action involving the state as well as the husband and wife.² In large measure, this approach stems from the ecclesiastical origin of divorce law, with its emphasis on the immorality of divorce.³ Today, while religious-moral pressure is a strong factor in the rigidity of divorce laws, the state's involvement seems to be predicated on the secular belief that only through marriage can stable sexual relations be maintained, proper training of children be accomplished, and a well-ordered society be sustained.⁴

To protect these interests the state allows a divorce only where one spouse has committed a "crime" against the other. These "crimes" or grounds for divorce are in reality, based on the idea that one of the

¹. Act of May 2, 1929, Pub. L. 1237, PA. STAT. tit. 23, §§ 1-69 (1965). Minor amendments were enacted in subsequent years but their effect has been mainly procedural. For a complete history of the divorce law of Pennsylvania see A. FREEDMAN & M. FREEDMAN, LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA 248 (2d ed. 1957) [hereinafter cited as FREEDMAN]. For a succinct summary of the history of divorce law in Western Civilization see Freed & Foster, Divorce American Style, 383 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 71 (1969).
³. See Freed & Foster, supra note 1, at 72.
parties to the marriage is to blame or is at "fault." They are also implicitly rationalized by the fact that the non-culpable party has been so seriously injured that the viability of the marriage has been destroyed.

There are presently six main grounds for divorce a.v.m.: bigamy, conviction and sentence for a crime, adultery, desertion, cruel and barbarous treatment, and indignities to the person. They are subject to the qualification that the party seeking the divorce be an "innocent and injured spouse," thereby preventing a dissolution of marriage whenever the conduct of the libellant has precipitated the marital offense. This section of the Comment will focus on the situations which are required to invoke each of these statutory grounds and on how well these grounds further the state's interest in the stability of the "marriage contract."

A. Bigamy

Divorce is available on the grounds of bigamy to an innocent and injured spouse where the other has knowingly entered into a second marriage. It has been extended, by statute, to the situation where a spouse has remarried on an apparently well-founded rumor of his mate's death even though the act of bigamy is not a knowing one. It is interesting to note that while divorce on the ground of bigamy is available to

5. Divorce a.v.m., a vinculo matrimonii, is a complete dissolution of a marriage and must be distinguished from divorce a.m.t., a mensa et thoro, divorce from bed and board, which is a legal separation available only to the wife. See pp. 165-66 infra. The latter remedy to the problem of settling marital discord was the historical precedent of the former and reflects the early ecclesiastical distaste for divorce. See Freed & Foster, supra note 1, at 73.

6. There are four grounds for divorce which will not be treated in this Comment: physical incapacity or impotence; fraud; duress; and incest. The reasons for these omissions are the relative lack of importance of these grounds, the fact that all but incest pertain to the intent of the parties to get married, and the obvious import of their requirements. It is sufficient to note that the first reflects the state's belief that the purpose of marriage is procreation; the second and third reflect a lack of intention to marry; the last reflects the moral distaste for marriage within families and the fear of genetically defective children; and they all reflect the state's preference for divorce over annulment. For a detailed review of these grounds see Freedman, supra note 1, at 336-418. The new proposal would make them grounds for annulment. Joint State Government Commission, Proposed Marriage and Divorce Code for Pennsylvania § 303, at 36-37 (1961). This is actually a compilation of separate divorce and marriage codes which will hereinafter be cited as Proposed Marriage Code or Proposed Divorce Code as appropriate. See Comment, Pennsylvania Common Law Marriage and Annulment: Present Law and Proposals for Reform, 15 Vill. L. Rev. 134, 143-49 (1969), for a discussion of these grounds.

7. Since the state only grants divorce where its own interests are outweighed, and since the state has historically frowned on divorce, it is to be expected that the state would refuse to grant relief to those at fault themselves. See pp. 167-68 infra for a complete discussion of this doctrine.

8. Pa. Stat. tit. 23, § 10(1) (b) (1965), provides that a divorce will be granted to an innocent and injured spouse where the other spouse "[h]as knowingly entered into a second marriage, in violation of the previous vows he or she made to the former spouse where marriage is still subsisting. . . ."

9. Pa. Stat. tit. 23, § 10(3) (1965), provides in pertinent part that:

[i]f any spouse, upon any false rumor in appearance well founded of the death of the other, when such other has been absent for the space of two whole years, hath married or shall marry again, the party who has not remarried may at his or her return have his or her own marriage dissolved by divorce on the ground of bigamy, leaving the other party to remain with the second husband or wife. . . .
the spouse of the first marriage the remedy for either party to the bigamous second marriage is annulment.\textsuperscript{10} The use of this latter remedy is not surprising, however, since the second marriage is deemed criminal and a nullity in Pennsylvania.\textsuperscript{11} Bigamy is the only major divorce ground not based on fault.\textsuperscript{12} Its validity is predicated instead on the belief that monogamy is necessary for the stability of society and on the consequent moral injury suffered by the other marriage partner.\textsuperscript{13} If one accepts this presumption, the ground must be regarded as being consistent with the state’s interest.

B. Conviction and sentence for a crime

A spouse has grounds for divorce where the other “shall have been convicted, as a principal or an accessory either before or after the fact” of any one of a multitude of criminal offenses where the term of imprisonment is greater than 2 years.\textsuperscript{14} A two-fold rationale for this ground is evident upon cursory inspection: (1) the fact that a spouse would be separated from his mate for a long period of time, and hence the marriage would cease to be functional in the same manner and with a similar culpability on the part of the criminal spouse as occurs in the case of a desertion; and (2) the fact that the innocent and injured spouse would have suffered the moral injury of being married to a criminal, a hardship in excess of that which she had agreed to bear in her marriage vows. However, what on the surface appears to be a rational rule to protect the non-culpable spouse from injury appears upon closer scrutiny to lead

\textsuperscript{10} PA. STAT. tit. 23, § 12 (1965), providing for annulment of void marriages, states in pertinent part:

In all cases where a supposed or alleged marriage shall have been contracted, which is absolutely void by reason of one of the parties thereto having a spouse living at the time of the supposed or alleged marriage . . . the said supposed marriage was absolutely void when contracted . . . and may, upon the application of either party be declared null and void. . .

\textsuperscript{11} PA. STAT. tit. 18, § 4503 (1965), makes bigamy a misdemeanor and expressly declares such a marriage void.

\textsuperscript{12} A divorce can be granted where the respondent honestly believed he was free to marry. Hence, he would not have committed any intentional crime against his spouse, even though his actions may have caused moral injury to her. See note 9 supra. See generally PA. STAT. tit. 23, § 10 (1965). The other non-fault ground is incest. PA. STAT. tit. 23, § 10(2) (1965). It is apparent that the same bias manifested against bigamy on moral grounds would be similarly applicable to incest. Also, the possibility of genetically defective children would appear to outweigh any undesirability of allowing a divorce where such inter-marriage is unintentional and without fault.

\textsuperscript{13} Bigamy is perhaps the least controversial ground for divorce since monogamy is deeply ingrained within the social mores of Western Civilization. So strong is the bias against polygamy that the Supreme Court has ruled that the freedom of religion guaranteed by the first amendment is superceded by the state’s interest in monogamy. Reynolds v. United States, 98 U.S. 145 (1878). With this cultural background it would be quite remarkable if bigamy had not been made a ground for divorce.

\textsuperscript{14} PA. STAT. tit. 23, § 10(1)(h) (1965). Such crimes include arson, burglary, embezzlement, forgery, perjury, rape and murder et al. It has been held that a sentence of a minimum of less than 2 years, but a maximum of more than 2 years for a proscribed crime is sufficient to constitute grounds for divorce. Miller v. Miller, 9 Pa. D. & C. 437, 439 (C.P. Dauph. 1927). Likewise a sentence for an indeterminate length of time was within the terms of the statute. Fagan v. Fagan, 14 Pa. D. & C. 116 (C.P. Dauph. 1929).
to some unwarranted results because of its failure to examine whether a causal nexus exists between criminal conduct and a broken marriage. Further, this ground is objectionable in that it relegates to the criminal law a function normally reserved to the civil law — to decide whether a man or a woman is fit to be a proper spouse. By simply reducing a possible two year sentence to twenty-three months a judge in a criminal proceeding can determine a spouse's right to divorce. Also, the ground is suspect in its reliance on the bad character of the criminal spouse. It has been held, for example, that since the statute does not refer to attempts, a divorce cannot be granted no matter how severe the incompletely offense of the transgressing spouse may be, and consequently the possible injury to the innocent spouse is not a factor in deciding whether a divorce should be granted. It would appear, therefore, that the only valid reason for sustaining the instant ground is the de facto desertion created by the incarceration of the offending spouse. Forbidding a divorce under such circumstances would seem to serve no real purpose in respect to the state's interest. Therefore, despite its objectionable features, the ground of conviction and sentence for a crime is justifiable in most circumstances since the stability of the marriage would generally cease during prolonged incarceration; and if divorce were not granted, the innocent spouse would be injured by disallowing her to lead a normal life.

C. Adultery

Adultery is defined as voluntary sexual intercourse of a married person with one other than the spouse. From this definition it is apparent that certain sexual activities, such as sodomy, which do not involve intercourse do not qualify under this ground for divorce. Since the act must be voluntarily performed, rape does not constitute a cause

15. See Wheeler v. Wheeler, 2 Pa. Dist. 567 (C.P. Lack. 1892) (attempted rape). This case was decided under prior law; but nothing in the present statute or latter decisions has altered its conclusion.

16. However, this rationale is somewhat eroded by decisions holding that a spouse who aided and abetted her husband is unable to obtain a divorce under this ground. Murphy v. Murphy, 204 Pa. Super. 575, 203 A.2d 647 (1964). Using the rationale that the offending spouse had deserted, there seems to be no rational basis for forbidding the divorce other than the innocent and injured spouse doctrine.


18. Sodomy can, however, lead to a divorce on the ground of conviction and sentence for a crime. Pa. Stat. tit. 23, § 10(1)(h) (1965). It is interesting to note that similar conduct forced upon the wife against her will has been considered a basis for divorce on the grounds of indignities. See, e.g., Best v. Best, 171 Pa. Super. 629, 630, 91 A.2d 296, 297 (1952); Quinn v. Quinn, 6 Pa. D. & C. 712, 714 (C.P. Schuyl. 1925). Originally adultery was only available to the husband; and then only because it was felt that he should not be required to leave his wealth or support the children of another. See Note, 6 Vill. L. Rev. 419 (1961). In modern America this ancient rationale is outmoded, and it is difficult to see any valid reason to find intercourse automatically objectionable while at the same time finding other sexual relations unobjectionable within the same legislative context.
of action for divorce. Similarly, mistake of fact — e.g., a husband having intercourse with a third party believing her to be his wife — is a valid defense to a divorce action based on adultery.

Due to the difficulty in obtaining eye witness testimony to the adulterous act, adultery is usually established from circumstances that “lead to it by fair inference as a necessary conclusion.” The doctrine of “inclination and opportunity” aids in establishing such circumstances by creating a presumption of adultery where both an adulterous inclination is shown on the part of the spouse and the co–respondent and an opportunity is available to satisfy this inclination. Although the cases turn on factual determinations, the interplay of these two elements can be summarized as follows:

1. A divorce will be granted where:
   a. inclination and opportunity is clearly shown;
   b. inclination is clearly shown but opportunity was slight;
   c. opportunity was clearly shown but inclination was slight.

19. Although this particular question has not been litigated in Pennsylvania, the law appears to be settled. See Dietrich v. State, 187 Wis. 136, 203 N.W. 755 (1925).


21. While this is a logical evidentiary requirement, given the difficulty of catching a person in the act, it would appear that in many instances where the alleged adulterer is innocent a divorce would still be granted. See Brown v. Brown, 121 Pa. Super. 74, 78, 183 A. 90, 92 (1936).


24. In such cases the inclination must be shown more clearly than where both inclination and opportunity is present. See, e.g., Asher v. Asher, 161 Pa. Super. 609, 611, 56 A.2d 321, 322–23 (1948) (where husband found respondent and co-respondent scantily attired; but together for too short a time to have committed intercourse on that occasion); Pierpoint v. Pierpoint, 108 Pa. Super. 108, 164 A. 808 (1933) (wife was seen kissing co-respondent and spent night together); Cook v. Cook, 5 Pa. D. & C. 481 (C.P. Phila. 1924), aff’d, 85 Pa. Super. 403 (1925) (evidence of lewd letters expressing passion of respondent and co-respondent and a few daytime visits was held sufficient to prove adultery). For a complete study of various factual situations see Freedman, supra note 1, at 466–67.

25. In such cases the opportunity for the adultery must be shown more clearly than in a situation where both requisites are met. See, e.g., Fulton v. Fulton, 142 Pa. Super. 512, 515, 17 A.2d 222, 223–24 (1940) (wife rented room to man 20 years her junior and was seen there with him but no evidence of affection); Brown v. Brown, 121 Pa. Super. 74, 183 A. 90 (1936) (wife entertained co-respondent late at night occasionally with lights extinguished; but only once was she heard to state affection for him); Hitt v. Hitt, 4 Chest. Co. Rep. 409 (1950) (co-respondent leaving respondent’s bed at night; but no known statements of affection). See Freedman, supra note 1, at 468–71, for a statement of various factual situations.
(2) A divorce will not be granted where:

(a) neither inclination or opportunity were shown;\(^{26}\)
(b) inclination was shown without opportunity;\(^{27}\) or
(c) opportunity was shown without inclination.\(^{28}\)

This evidentiary rule may at times lead to unwarranted results by allowing a divorce where no adulterous act has in fact been committed. However, a reasonable apprehension of such behavior by the innocent spouse would still cause her mental injury and there would appear to be no other means available whereby adequate enforcement of this ground would be feasible.

It would appear that under normal circumstances the application of the ground of adultery furthers the state’s interest since the granting of a divorce for adultery is predicated on the commission of the forbidden act and consequent injury to the innocent spouse. However, in most circumstances the court need not undertake an examination of the marital condition. Therefore, it is possible for divorces to be granted where the marriage was still capable of fulfilling the state’s interests.\(^{29}\)

D. Desertion

Another ground for divorce is established where a spouse willfully and maliciously leaves his place of co-habitation with his or her mate for more than two years.\(^{30}\) To sustain a divorce action for desertion three

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26. See, e.g., Baxter v. Baxter, 147 Pa. Super. 207, 209, 24 A.2d 15, 16 (1942) (wife found sleeping with man fully clothed); Houck v. Houck, 5 Chest. Co. Rep. 6 (1951) (wife found talking to co-respondent late at night in front of respondent’s six year old child); Dawson v. Dawson, 12 Leb. L.J. 139 (1926) (woman’s voice heard in respondent’s house when wife was away). See Friedman, supra note 1, at 471, for a synopsis of the factual situations.

27. See, e.g., Graham v. Graham, 153 Pa. 450, 25 A. 766 (1893) (letter from co-respondent making an appointment to meet with respondent at church together with a picture of that women in his possession and a receipt for a lady’s watch which was not given to wife was held insufficient to prove adultery); Wolford v. Wolford, 100 Pa. Super. 251 (1931) (respondent found with woman on his lap at a partially lit gas station open for business); Peters v. Peters, 4 Pa. D. & C. 287 (C.P. Beaver 1923) (friendliness of wife for a man and his frequent presence generally in the company of third persons is insufficient). See Friedman, supra note 1, at 471-72, for a more complete study of various factual situations.

28. See, e.g., Brower v. Brower, 157 Pa. Super. 426, 43 A.2d 422 (1945) (respondent and co-respondent together in unlighted living room); Thomas v. Thomas, 76 Pa. Super. 54 (1921) (respondent in darkened house with a improvised bed in the kitchen, she denied the presence of the co-respondent, but he was found, fully clothed in bed with libellant’s son); Paul v. Paul, 72 Pa. Super. 70 (1919) (libellant alleged seeing respondent committing intercourse with co-respondent through window; wife denied it and since there was no inclination court held evidence insufficient). See Friedman, supra note 1, at 472-74, for a more complete chronicle of factual situations.

29. Statutory defenses often prevent dissolution in most cases. A typical situation arises where A commits adultery and B, her husband, knows of her action, but forgives her. The marriage, providing the husband can live with his forgiveness, would appear viable and the defense of condonation would be a bar to a divorce action by the husband. For a more complete analysis of how statutory defenses generally bar a divorce where the marriage is viable, see the discussion of condonation, connivance and recrimination pp. 167, 168-70 infra.

elements are required: (1) there must be actual physical withdrawal;31 (2) such withdrawal must be uninterrupted for two years;32 and (3) the withdrawing spouse must have the intent to desert.33 The requisite intent has been held to be the desire for a permanent withdrawal even though such an intent need not have existed at the time of original withdrawal.34 However, under Pennsylvania law, the mere refusal of sexual intercourse by a spouse for a period of 2 years is insufficient to constitute a desertion.35

In practice this ground allows a divorce where one party has been deserted over his spouse's objections and disallows a divorce where both marriage partners separate by mutual consent.36 This result is incongruous in light of the state's alleged interests, since in the latter case both parties have, in effect, decided that a marriage has ceased to be


The two year period is to allow the guilty spouse a chance to repent and therefore reflects the state's desire to preserve marriages. See Bothwell v. Bothwell, 83 Pa. Super. 345, 348 (1924); Neagley v. Neagley, 59 Pa. Super. 565, 568 (1915).


34. See, e.g., Lodge's Estate, 287 Pa. 184, 187–88, 134 A. 472, 473 (1926) (where the court found the necessity for a "positive and unequivocal act indicating an intention to desert"); Dodson v. Dodson, 150 Pa. Super. 437, 28 A.2d 821 (1942) (where a letter indicating the wife's belief the marriage was over was held sufficient to constitute change to separation to desertion). See also Obidinski v. Obidinski, 49 Lack. Jur. 86, 87 (1947) (where the husband's telling the wife to get out was not such consent as to prevent her leaving from being considered desertion).


36. Such consent has been held to arise: (1) where there is an express separation agreement, Doering v. Doering, 157 Pa. Super. 9, 41 A.2d 358 (1945); Bennett v. Bennett, 14 Luz. L. Reg. Rep. 425 (1909); (2) where the allegedly innocent party has forced his spouse to leave, even where his conduct is not in itself a grounds for divorce, Hodgins v. Hodgins, 75 Pa. Super. 187 (1920) (husband removed furniture removed); Sexton v. Sexton, 10 Chest. Co. Rep. 289 (1962) (libellant insisted that they live with his parents though he could afford a separate residence); (3) where there is any encouragement or consent within the statutory period, Benny v. Benny, 87 Pa. Super. 318 (1926) (where deserting party attempted to return and was repulsed); Hartner v. Hartner, 75 Pa. Super. 342 (1921) (parties met frequently during period of alleged desertion); (4) where the remaining spouse speeds his spouse's departure, Lane v. Lane, 81 Pa. Super. 494, 496 (1923) (where libellant wished respondent luck and made no effort to persuade her to return in subsequent meetings); (5) where the libellant contrives to get respondent to leave, Smith v. Smith, 147 Pa. Super. 542, 24 A.2d 660 (1942) (husband displaying greater affection to cousin than wife); Shore v. Shore, 107 Pa. Super. 566, 164 A. 110 (1933) (libellant tried to get respondent arrested) and; (6) where an offer of reconciliation of respondent to libellant is refused. Helm v. Helm, 143 Pa. Super. 77, 17 A.2d 758 (1941); Wilhelm v. Wilhelm, 130 Pa. Super. 143, 197 A. 496 (1938); Reinhardt v. Reinhardt, 111 Pa. Super. 191, 194, 169 A. 408, 409 (1933).

But see Cobaugh v. Cobaugh, 160 Pa. Super. 362, 51 A.2d 354 (1947), where it was held that an offer of reconciliation after the 2 year statutory period was not made in good faith and need not be accepted. Accord, Ussler v. Ussler, 158 Pa. Super. 215, 218, 44 A.2d 526, 527 (1945); Hunsecker v. Hunsecker, 21 Leh. L.J. 171, 172 (1944).
viable, while in the former no permanent injury may have occurred and the withdrawing spouse might well be accepted if he could be persuaded to return through some sort of conciliation service. If unilateral desertion is a valid reason for the state to allow termination of a marriage then, a non-fault consensual separation would appear to be an even more compelling reason to allow such dissolution.

E. Cruel and Barbarous Treatment

Under Pennsylvania law cruelty constitutes a ground for divorce where there is shown to be actual personal violence,\(^\text{37}\) the reasonable apprehension of such violence,\(^\text{38}\) or a course of conduct which endangers the spouse’s life or health and renders continued cohabitation unsafe.\(^\text{39}\) While cruelty is generally held to be present where a prolonged course of conduct is involved, a single act of severe and atrocious proportion has been held to constitute cruelty.\(^\text{40}\) Further, while the usual case involves beating, fights or other types of assault or battery, miscellaneous occurrences such as the wilful communication of venereal disease have also been classified as cruel and barbarous treatment.\(^\text{41}\) But, strangely, such apparently cruel acts as sexual excesses,\(^\text{42}\) mental cruelty,\(^\text{43}\) refusal of sexual intercourse,\(^\text{44}\) refusal to bear children,\(^\text{45}\) bad temper,\(^\text{46}\) incompat-

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42. Such conduct is generally categorized as indignities unless it endangers life or health of the innocent spouse and renders cohabitation unsafe. See Krug v. Krug, 22 Pa. Super. 572, 573–74, 40 A. 890, 892 (1903), where forced intercourse over a period of time where the wife was ill constituted grounds for divorce on the basis of indignities. See also Diehl v. Diehl, 188 Pa. Super. 491, 149 A.2d 133 (1959), where such sexual excesses cause danger, divorce may be granted for cruelty.
iability,\textsuperscript{47} and non-support with the wilful denial of necessities,\textsuperscript{48} have been held insufficient because no actual or threatened physical contact was involved.\textsuperscript{49}

Although it is readily apparent that physical violence — actual or threatened — is a valid ground for divorce where the threatened spouse is given cause to fear for his or her safety, given the existing state of the law in other areas, it is questionable whether actual physical contact should be the only behavior which forms the basis of cruelty. In recent years the Supreme Court has recognized that in the sphere of criminal law there can be fear or coercion without violence or the threat of violence.\textsuperscript{50} Likewise, tort law now recognizes that mental damage can be sustained without precedent physical injury.\textsuperscript{51} In light of these developments it seems incongruous that the law of marriage and divorce would fail to recognize that injury could occur in these possible situations. It is not difficult to imagine situations in which refusal to have intercourse may have a greater disruptive effect on a marriage than slight, though continuous, physical assaults. Likewise, it is not inconceivable that the constant nagging and extravagance of a spouse may cause irreparable damage to a marriage where physical violence would not. Consequently, it appears that cruel and barbarous treatment should be expanded to include what is commonly referred to as mental cruelty or incompatibility in order to reflect the realities of a marriage situation, protect the non-culpable spouse from injury, and promote the valid interests of the state.

\textbf{F. Indignities to the Person}

Indignities is the most comprehensive ground for divorce in Pennsylvania. The statute establishing it as a ground merely provides that

\begin{itemize}
  \item \textsuperscript{49} This result is inevitable under the statutory language, since respondent must "have, by cruel and barbarous treatment, endangered the life of the injured and innocent spouse..." Pa. Stat. tit. 23, § 10(1) (e) (1965).
  \item \textsuperscript{50} See, Miranda v. United States, 384 U.S. 436, 457 (1966), where the Court stated:
    \begin{quote}
      It is obvious that such an interrogation environment [unfamiliar surroundings and police presence] is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.
    \end{quote}
  \item \textsuperscript{51} Pennsylvania has yet to allow recovery for mental distress unrelated to physical injury. See Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958); Gelfter v. Rosenthal, 394 Pa. 123, 119 A.2d 250 (1956). However, other, more liberal jurisdictions have begun to repudiate such precedents. See, e.g., Battala v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).
\end{itemize}
the offending spouse "shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome."\(^{52}\) Due to this nebulous phrase the courts have been able to fashion a many faceted ground for allowing the dissolution of marriage; subject only to the qualifications that the activity complained of be continuous and that the libellant be an innocent and injured spouse.\(^{53}\) While the wide range of opinions makes a succinct definition of indignities impossible, the following behavior has been held sufficient to constitute a valid cause of action: vulgarity,\(^{54}\) unmerited reproach,\(^{55}\) studied neglect,\(^{56}\) intentional incivility,\(^{67}\) manifest disdain,\(^{58}\) abusive language,\(^{59}\) malignant ridicule,\(^{60}\) and plain manifestation of settled hate and estrangement.\(^{61}\)

From a purely legal standpoint the ground of indignities would appear to be objectionable. It leads to flagrant abuse of evidentiary requirements and places a great burden on the courts. By being so indefinite, it fails to adequately protect the parties to a divorce action since the granting or denial of a divorce will depend on how individual judges interpret the statutory language and apply it to the case before them. Consequently the parties and their attorneys may slant the evidence to place the facts within the scope of an earlier decision or exaggerate the injury suffered. However, from the viewpoint of the state's interest, this ground would seem quite desirable since it allows the court to predicate its decision on whether the marriage is viable and on the extent of the marital injury. This ground may tend to encourage collusion, perjury, and subornation of perjury in the sense that testimony may often be slanted to make


\(^{55}\) See, e.g., Yohey v. Yohey, 205 Pa. Super. 329, 208 A.2d 902 (1965) (accusations of infidelity); Pore v. Pore, 189 Pa. Super. 615, 151 A.2d 650 (1959) (public accusations of sexual perversion). However, where the respondent has reason to believe her allegations are correct such reproach will not be grounds for divorce. See Thoms v. Thoms, 199 Pa. Super. 369, 186 A.2d 42 (1962), where a wife's reasonable belief in her husband's adultery barred his divorce on grounds of indignities.


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the arguments and disagreements of a normal marriage appear to create a situation which fits within the judicial interpretation of indignities.\(^62\) However, this evil is mitigated by the ability of the judges to view the entire marital situation and the fact that a gross misrepresentation of the facts is not necessary to ensure the granting of a divorce.

**G. Grounds for Divorce A Mensa et Thora**

The grounds for divorce a.m.t. (divorce from bed and board) are similar to those for divorce a.v.m.\(^68\) The principal distinctions between the two causes of action are that divorce a.m.t. is only available to the wife;\(^64\) that under divorce a.m.t. permanent alimony may be obtained;\(^65\) and unlike the situation in divorce a.v.m., the libellant need not be an innocent and injured spouse.\(^66\) Also, the parties to a divorce a.m.t. cannot

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63. Pa. Stat. tit. 23, § 11 (1965), provides:
Upon complaint, and due proof thereof, it shall be lawful for a wife to obtain a divorce from bed and board, whenever it shall be judged, in the manner hereinafter mentioned, in cases of divorce, that her husband has:
(a) Maliciously abandoned his family; or
(b) Maliciously turned her out of doors; or
(c) By cruel and barbarous treatment endangered her life; or
(d) Offered such indignities to her person as to render her condition intolerable and life burdensome; or
(e) Committed adultery.


The ground based on the husband's maliciously turning the wife out of doors requires that the ejection be accomplished by force, the threat of force, or a refusal on the part of the husband to allow her to enter the house. Sower's Appeal, 89 Pa. 173 (1879). For a husband to have a defense to a divorce a.m.t. on this ground, the wife must be guilty of some serious marital offense such as adultery. Angier v. Angier, 63 Pa. 450 (1870).

As in divorce a.v.m. a course of conduct is generally required to sustain an action for divorce a.m.t. for cruel and barbarous treatment; Knaus v. Knaus, 173 Pa. Super. 111, 95 A.2d 358 (1953).

The standards for establishing indignities is the same as for divorce a.v.m. See, e.g., Wick v. Wick, 352 Pa. 25, 42 A.2d 76 (1945) (must consist of more than one act); Arnold v. Arnold, 128 Pa. Super. 423, 194 A. 229 (1937) (same prerequisites as divorce a.v.m. enumerated).

The prerequisites for a divorce a.m.t. on the grounds of adultery are identical to those of divorce a.v.m.

64. Pa. Stat. tit. 23, § 11 (1965), states in pertinent part: "Upon complaint, and due proof thereof, it shall be lawful for a wife to obtain a divorce from bed and board. ..." when any ground for divorce a.m.t. is proved (emphasis added). The availability of the remedy to the wife alone might be explained by the notion that there is no reason why the husband could want alimony. However, this thought seems somewhat spurious.


remarry since they have been granted what is in effect a legal separation. Because divorce a.v.m. and a.m.t. are so similar the major portion of this section will be devoted to a general discussion of the desirability of this remedy as a means to resolve marital conflicts.

Divorce a.m.t. has been widely criticized as placing an impossible burden of remaining chaste on both parties\(^7\) as being unfairly available to only one party,\(^8\) and as creating a generally unnatural situation.\(^9\) Excluding the religious reasons for refusing to obtain a divorce a.v.m., the only reasons for choosing a legal separation would appear to be vindictiveness, the desire for alimony, and to encourage a later reconciliation. Given these objections to divorce a.m.t., it would appear that no valid reason exists for including it in modern divorce law. The religions which disapprove of absolute divorce — divorce a.v.m. — do not forbid it; but merely refuse to recognize its validity. Therefore, the subsequent remarriage by the divorced parties is bigamy and a sin in the eyes of the church.\(^10\) Likewise, divorce a.m.t.'s financial desirability could be eliminated by granting permanent alimony in divorce a.v.m. and the possibility of reconciliation would not seem to be enhanced by this remedy absent mandatory conciliation procedure. Hence, it would appear that only those wives who through some vindictive motive were desirous of hurting their husband might be deprived by the abolition of this remedy since protection against injury can be attained under divorce a.v.m.\(^11\) It is submitted that there is no valid interest which could cause the state to encourage such vindictive treatment on the part of a wife. Therefore there appears to be no valid reason for the continuance of divorce a.m.t. if alimony is added to the remedies available under divorce a.v.m.

III. DEFENSES TO DIVORCE IN PENNSYLVANIA

There are three statutory defenses which are theoretically available only against actions brought on the ground of adultery as well as the four common law defenses applicable to all grounds for divorce in Pennsylvania or in other states. The three statutory defenses are recrimination, condonation and connivance. The four common law defenses are laches, collusion, the innocent and injured spouse requirement, and insanity. Each of these defenses will be explored to determine whether

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68. This criteria is abandoned under the Proposed Code. Proposed Divorce Code § 302. For criticism of the present law see the comment to this proposed section.
69. See Bishop, supra note 19, §§ 67-68, cited in Friedman, supra note 1, n. 21, at 797; 2 Vernier, Amer. Family Laws § 114 (1932).
70. Canon Law does not recognize the possibility of a divorce a.v.m. E. Taunton, The Law of the Church 301 (1906). Therefore, any remarriage would be bigamy, but a person who had received a civil divorce would merely be viewed as still married under that dogma.
71. Such permanent alimony is an integral part of the proposed new code. Proposed Divorce Code § 504.
each is a rational basis for denying a divorce, whether its application obtains results compatible with the state’s interest and whether it reflects the extent of the parties’ injury.

A. Recrimination

The doctrine of recrimination is essentially the equity doctrine of clean hands which requires a court to deny relief to a party who is guilty of a like offense. In many states the doctrine of recrimination is available where the libellant is guilty of any marital offense. However, in Pennsylvania the defense is statutorily mandated only in those cases where the libellant is seeking the divorce on the grounds of adultery and is guilty of the same offense. Thus, in the classic case of *Ristine v. Ristine* the Pennsylvania Supreme Court held that adultery occurring after the 2 year period for desertion was not a defense to desertion. This case has been the precedent for a long line of Pennsylvania cases holding that adultery is no defense to any ground for divorce except adultery.

Of all the laws in the area of divorce none is as irrational as the law of recrimination. In practice, it maintains those marriages in which stability is least likely to exist by necessitating a refusal of divorce where both spouses are engaged in a continual course of action constituting adultery, where the injury to both parties is usually the greatest, and where there usually is little or no feeling left within the marriage on either side. Recrimination, thus, appears to be contrary to the interests of the state. Instead of promoting stable marriages and allowing dissolution of those which could only perpetuate injury to the marriage partners, this defense relegates the interests of the parties, and others who could be affected by the divorce action, to a position subservient to the fault concept.

B. Innocent and Injured Spouse

In all divorce actions except those based on consanguinity and affinity, and marriage on false rumor of death, the libellant must be an injured

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73. For a complete synopsis of the differing state policies see Moore, supra note 72, at 157-59.
74. Pa. Stat. tit. 23, § 52 (1965), states in pertinent part: “In any action or suit for divorce for the cause of adultery, if the respondent shall allege or prove, or it shall appear in evidence that the libellant has been guilty of the like crime, . . . it shall be a good defense and a perpetual bar against the same.”
75. 4 Rawle 460 (Pa. 1834).
76. Id. at 462.
and innocent spouse. This requirement is a bar to a libellant who is himself "guilty" of a cause for divorce or has contributed to the commission of the alleged marital wrong. Though it is one of the requisite elements for the libellant to prove in establishing grounds for divorce, the rule resembles the defense of recrimination when the divorce is challenged. This application would appear to contradict the statutory statement that recrimination is only a defense to a divorce action based on adultery.

To modify this harsh result several states have adopted the comparative rectitude doctrine which maintains that even where both parties are guilty of marital transgressions a divorce may still be granted to the party most injured and least at fault. Pennsylvania has, thus far, refused to fully accept the comparative rectitude doctrine except to the extent that a libellant no longer need be completely without fault, i.e., he may be the cause of some injury himself. Therefore, it appears that Pennsylvania would refuse a divorce in those cases where the injury is the greatest and the marriage is most dysfunctional, a posture that is contrary to the state's interest in promoting marital stability.

C. Condonation

Condonation is essentially the act of forgiveness and is only available as a defense to a divorce action based on adultery. If the libellant is aware of the defendant's adulterous behavior and forgives him or her then the libellant is forever barred from obtaining a divorce on the grounds of that adultery. Thus, a completely new and independent marital offense is necessary before a valid divorce action can arise. This is contrary to the majority common law rule under which condonation is revocable by any act that is inconsistent with proper

78. See generally PA. STAT. tit. 23, § 10 (1965).
81. See Rech v. Rech, 176 Pa. Super. 401, 107 A.2d 601 (1954), where the court stated that a divorce could not be granted on the ground of adultery unless the libellant was not guilty of adultery, indignities, or cruel and barbarous treatment.
82. See Moore, supra note 72, at 158.
84. PA. STAT. tit. 23, § 52 (1965), states in pertinent part:
In any action or suit for divorce for the cause of adultery, if the respondent shall allege or prove, or it shall appear in evidence, that the libellant . . . has admitted the respondent into conjugal society or embraces after he or she knew of the criminal fact . . . it shall be a good defense and a perpetual bar against the same.
conduct of a husband or a wife. Unlike the majority of jurisdictions, Pennsylvania adheres to the rule that one act of intercourse between the spouses constitutes absolute proof of condonation. However, for the defense to be valid the act of intercourse or any other act of forgiveness must be made with an absolute knowledge or reasonable belief that adultery had actually been committed by the "guilty" spouse.

The rationale behind the defense of condonation is probably, in theory, the most easily understandable and defendable. If the offended party is willing to reconcile and forgive the offending spouse, it would appear that no real injury had occurred and the couple would have no difficulty in maintaining a stable marriage. However, under more careful scrutiny it becomes apparent that inequities exist under this defense. For example, a spouse deeply in love with the husband or wife may forgive the spouse's act of adultery only to find out later that he is psychologically unable to accept the new situation. He will be, however, barred from seeking the divorce on that ground because of a subsequent act of intercourse (or a similar act of forgiveness) even though he is suffering a manifest injury and there is no semblance of an existing marriage which can fulfill the state's purposes. These inequities are the result of the absolute nature of this defense, the fact that a single act of intercourse establishes a definite condonation and the fact that no consideration is given to the actual injuries of the parties and condition of their marriage.

D. Connivance

Connivance exists where the husband had previous knowledge of his wife's adulterous behavior, and either encouraged, or profited by it.


88. See Shumaker v. Shumaker, 50 Lanc. Law Rev. 431, 432 (1947), where the court held that living for 5 weeks with a woman 6 months pregnant led to the presumption husband knew of her adultery when she had been outside the country for 13 months.

89. This state of mind which is the crucial factor in most states is completely irrelevant in Pennsylvania. See FREEDMAN, supra note 1, at 518-19.

90. PA. STAT. tit. 23, § 52 (1965), states in pertinent part:

In any action or suit for divorce for the cause of adultery, if the respondent shall allege evidence . . . that the said libellant (if the husband) allowed the wife's prostitution, or received hire from it, or exposed his wife to lewd company whereby she became insnares to the crime aforesaid, it shall be a good defense and a perpetual bar against the same.
It is available only to the wife and only against a charge of adultery. The courts, in practice, have not been satisfied with the one-sided nature of this remedy. Thus, in situations where the wife has been guilty of conduct which fits within the definition of connivance the courts have found collusion, fraud, lack of sincerity or truth, or lack of clean hands in the wife's conduct and have denied the divorce for those reasons. The close questions arise in interpreting what action by the husband is sufficient to constitute encouragement. It has been held, for example, that if a husband hires detectives to obtain evidence against his wife and the agents act to induce her to commit an adulterous act to produce the evidence — i.e., arrange for her to meet a third party in a hotel room — the husband is guilty of connivance whether he was aware of their actions or not.

The defense of connivance is closely analogous to the criminal law defense of entrapment, and if divorce is to remain fault oriented then this defense would seem to be just as applicable to the law of divorce as entrapment is to criminal proceedings. As a natural product of the fault system this defense appears on its face to be free from objection. In practice it is highly objectionable. In the normal connivance situation the husband deliberately plots to force the wife into providing him with the evidence necessary to secure a divorce. Unlike other defenses, the conniving party is not only at fault by his own actions but he is also willing to encourage or entrap his spouse into committing a marital crime to obtain a divorce. Under these circumstances it is hard to imagine that a husband or wife would be able to maintain a stable marriage after being denied a divorce because of connivance even though libellant can not be said to be injured and therefore the state's interest in maintaining the marriage would appear negligible.

91. Pa. Stat. tit. 23, § 52 (1965). While connivance is not mentioned by name, the common law definition is embodied within the Pennsylvania statute. See Wisnewski v. Wisnewski, 126 Pa. Super. 540, 543-44, 191 A. 182, 185-86 (1937), where libellant, during the pendency of his suit for a divorce on the grounds of desertion, arranged a trip with respondent and his friend who succeeded in seducing her, was not allowed a divorce on grounds of adultery. See also Nacrelli v. Nacrelli, 228 Pa. 1, 136 A. 228 (1927) (prostitution); Berezin v. Berezin, 186 Pa. Super. 340, 142 A.2d 741 (1958); Heimer v. Heimer, 63 Pa. Super. 476 (1916) (husband had reason to believe wife was having an affair with his business partner, but allowed her to continue meeting with him).

92. Freedman, supra note 1, at 527. See Mayberry v. Mayberry, 10 Pa. D. & C. 257, 260 (C.P. Schuyl. 1927), where the wife allowed her husband's mistress to live within their house.


94. Entrapment occurs where an officer of the law actively encourages an otherwise innocent party to break the law and then arrests him. In order for that defense to prevail it is required that the defendant would not have committed the crime unless encouraged to do so. For a discussion of this defense see M. Paulsen & S. Kadish, Criminal Law and Its Process, 900, 916 (1962).
E. Insanity

Insanity is a complete defense to all causes of action for divorce because the requisite intent for a ground for divorce can not be manifested while a defendant is insane. Therefore, the courts have held that insanity within the two year statutory desertion period bars a divorce even where the requisite intent was present at the inception of the separation. Similarly it has been held that the grounds of indignities and cruel and barbarous treatment are not available where the threatening or insulting party is not capable of discerning the meaning of what he says.

This defense seems rational and totally acceptable within the fault rationale of divorce, and in most factual situations it seems reasonable. However, a different and more rational approach would be to make postnuptial insanity itself a ground for dissolution of marriage. If a husband or wife is found insane for a specific period of time, the other spouse should be able to sue for divorce provided that measures would be adopted requiring the libellant to retain financial responsibility for the institutionalized spouse. While an insane individual is not at fault in any legal sense, there seems to be no reason why his spouse should be kept from leading a normal married life and from avoiding injury.


96. See Freedman, supra note 1, at 512.


It is not surprising that voluntary intoxication is no defense to the acts which constitute grounds for divorce since the inability to distinguish what is being done is caused by the erring spouse himself.

For a synopsis of the significant of voluntary intoxication as a criminal defense see M. Paulsen & S. Kadish, supra note 94, at 353-62. Cases have held, however, where a spouse has a drinking problem and the libellant has encouraged her or not tried to stop her he may not obtain a divorce on the grounds of her actions while under the influence of alcohol. Ghent v. Ghent, 191 Pa. Super. 432 (1959); Scheller v. Scheller, 188 Pitts. Leg. J. 32 (1960); Girard v. Girard, 46 Luz. L. Leg. Rep. 125 (1954); Faynor v. Faynor, 54 Schuyl. Leg. Reg. 24 (1953).

99. Premarital insanity is a ground for annulment and thus no problem is created in this context. Pa. Stat. tit. 23, § 12 (1965). While such a result is more explicit within the statute the courts have so interpreted it. Paire v. Paire, 182 Pa. Super. 365, 128 A.2d 139 (1957). For a complete discussion of this remedy see Comment, supra note 6, at 145-48.
Viewed from the prospective of the offending spouse, insanity differs greatly from criminal conduct. However, from the prospective of the injured spouse the result of the institutionalization of an insane spouse is identical to that of the incarceration of a criminal spouse since in both cases the non-culpable spouse has suffered injury by being forced to live alone through no fault of her own. If the state in the latter situation will allow the divorce to be effected, it would appear that it is unwise to forbid a divorce after a period of time on the grounds of insanity simply because the insane spouse is without fault.

F. Laches and Limitation of Actions

Many states have a statute of limitations for divorce actions. However, the only time requirement in Pennsylvania is in an action for divorce on the grounds of bigamy upon false rumor of death. Here, the absent and assumed dead, party is required to file suit within 6 months after his return. While the passage of time does not act as a bar to any other action for divorce, it does have relevance as to the weight and credibility of the evidence introduced to establish the libellant’s case. It also has a bearing on some of the defenses available — i.e., failure to bring an action within a long period of time would seem to indicate condonation and consequent lack of injury where the libellant had a prior awareness of the act of adultery. Such delay would also make it appear more likely that a collusive element is involved.

The use of laches is the most enlightened aspect of the fault concept of divorce in the Commonwealth. Its use as a means of weighing the depth of libellant’s injuries allows the court to focus on the viability of the marriage sought to be dissolved. Given the state’s interest, it would appear that the length of time which passes prior to the bringing of an action bears some relevance to the depth of the alleged injury and to the possibility of keeping the marriage viable, i.e., a marriage which has functioned for 10 years despite a former act of adultery would

100. See 2 Vernier, supra note 69, at § 79.
101. PA. STAT. tit. 23, § 10(3) (1965), states in pertinent part: If any spouse, upon any false rumor in appearance well founded of the death of the other, when such other has been absent for the space of two whole years, hath married or shall marry again, the party who has not remarried may at his or her return have his own marriage dissolved on the ground of bigamy. . . . Any such action shall be instituted within six months after such return.
104. The bringing of a suit years after an alleged marital offense would seem to indicate that the libellant was not really aggrieved by respondent’s actions. Therefore an inference would appear to arise that libellant was now trying to exaggerate the depth of the guilt with the libellant’s acquiescence.
appear presumptively more stable and show a lesser degree of injury than one where a divorce action was immediately instituted. The law of laches is therefore an exception to the general rules concerning grounds and defenses because it is flexible and allows the court to focus on the actual ability of a marriage to fulfill the state’s interest.

G. Collusion

Collusion is an absolute bar to a divorce, invoked by the state, where a cause of action is feigned or created for the purpose of divorce; when a party fails to defend, even when he considers the allegation to be justified; or when any false appearance of an adversary proceeding is created where none in fact exists. Although it is theoretically available as a defense to the defendant in a divorce proceeding, it is seldom used since the conspiring parties are very unlikely to admit their own guilt or that they are practicing a fraud on the court. In practice it has been held that an essential element of collusion is agreement between the parties. It is not enough that both parties desire an end to the marriage, or that the defendant fails to appear. However, it has been held that coming into a jurisdiction to accept process or to enter an appearance, while not in itself conclusive, gives reason for the court to suspect collusion. Likewise, agreements on alimony and separation are acceptable, but if they are made as consideration for the divorce the action will be barred.

105. See Freedman, supra note 1, at 855.
106. Id.
107. Id. The basis for this doctrine in Pennsylvania was PA. Stat. tit. 23, § 25 (1965). It states in pertinent part: “The petition or libel shall set forth therein ... that the said complaint is not made ... by collusion between the said husband and wife ...” It has been suspended by PA. R.C.P. No. 1126(7) which merely provides that the complaint must allege “that the action is not collusive.”
108. See Freedman, supra note 1, at 854.
112. In Loomis v. Loomis, 20 Pa. Dist. 731, 733-34 (C.P. Berks 1910), the court stated:
If ... in instituting his action and in the conduct of it, he proceeded adversely, the fact that the respondent failed to oppose it, or even put herself in the way of service of process, notices, etc., could not possibly affect his rights or visit him with the consequences of an unlawful scheme to which he was not in any way committed. ... Let it be granted that a case circumstanced as this one calls for close scrutiny of the facts; that ... there were features about it which required explanation.

Collusion is a necessary evil of the fault concept of divorce. In promoting a system by which parties cannot decide to terminate their marriage by mutual consent and, thus, curtail their marital injuries, the legislature of Pennsylvania has fostered a system in which lying is more beneficial than the truth. Since the state has failed to take cognizance of the effects of the fault system and, therefore, failed to eliminate the desirability of lying it has been forced to adopt the doctrine of collusion to protect the integrity of the courts. It is posited that the only effect of the fault concept of divorce is to create a predisposition on the part of parties who mutually desire a termination of their marriage to practice deceit; and while there are no statistics available it would not seem incongruous to believe that some judges overlook collusive acts. Until the state recognizes the defects of the fault system and adopts a system that reflects the realities of the marital arrangement and the injuries suffered by its parties the prevalence of collusive actions will continue to be a detriment to the judicial system and will place the state in the untenable position of either forcing the continuation of marriages which retard the state's interest or countenancing the commission of fraud.

IV. NON-FAULT GROUNDS AND THE STATE'S INTEREST

In the preceding sections the inequities resulting from the fault grounds and defenses in Pennsylvania have been observed. These inequities are generally caused by the failure of fault grounds to reflect the realities of a marital situation and the injury to the non-culpable parties. This has led to a failure to adequately protect or further the state's interest in the durability of marriage. This section of the Comment will focus on two alternatives to the fault concept of divorce: the addition of a non-fault ground to the existing fault grounds, while keeping a basically fault based rationale of divorce law; and a total


The furnishing of evidence by the respondent to the libellant has also been held to constitute collusion. See, e.g., Miller v. Miller, 284 Pa. 414, 418, 131 A. 236, 237 (1925); Commonwealth v. Glennon, 92 Pa. Super. 94, 100, 102 (1927). For a contrary view see Annot., Collusion as Bar to Divorce, 109 A.L.R. 832, 837 (1937).

However, paying the costs and expenses of the libellant has been held merely a ground for suspension. In Klair v. Klair, 3 Pa. D. & C. 419, 430 (C.P. Dauph. 1923), the court stated, "In offering to pay the expenses of obtaining his wife's divorce and actually paying the same, the respondent only did what the court would have required him to do had a petition been presented to us." Accord, Conrad v. Conrad, 5 Pa. D. & C. 47 (C.P. Lanc. 1923); Wilson v. Wilson, 73 Pitts. Leg. J. 510 (1925); Brown v. Brown, 71 Pitts. Leg. J. 856 (1923).

114. See Baum, supra note 62; Bodenheimer, supra note 62, at 179; Sayre, Divorce for the Unworthy: Specific Grounds for Divorce, 18 LAW AND CONTEMP. PROB. 26, 27 (1931); Traynor, supra note 62. See A.B.A. CANONS OF PROFESSIONAL ETHICS No. 29, which states in pertinent part: "The counsel upon trial of a cause in which perjury has been committed owes it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities."

115. Furthermore, if judges do condone such action they are condoning fraud and perjury, which, if allowed to continue, will be countenanced.
rejection of fault principles for a non-fault rationale based on the vitality of the marriage which is sought to be dissolved. To effectuate this analysis the newly enacted divorce law of New York and a divorce reform bill, recently amended and passed, in California will be examined, as models of the two alternatives, to determine if they more adequately protect the interests of the state which, as previously noted, consist of maintaining societal stability by: (1) regulating the sexual activity of society; and (2) providing a means of training children.

A. The New York Experience

Prior to 1967 the divorce law of New York was one of the most stringent in the nation, allowing divorce only on the grounds of adultery\textsuperscript{118} or on the disappearance, not desertion, of the spouse for 5 years.\textsuperscript{117} In 1966 legislation was enacted, effective in 1968, which expanded the fault grounds;\textsuperscript{118} and added a non-fault ground which provides for divorce where:

The husband and wife have lived separate and apart pursuant to a written agreement or separation, subscribed and acknowledged . . . by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement.\textsuperscript{119}

Upon cursory examination it would appear that the state had abrogated, at least in part, its third party status in divorce proceedings, but in actuality the reverse is the case.

Section 215 of the Domestic Relations Law indicates that while the legislature was taking a more modern approach to the problems of marriage and divorce, it was also attempting to provide a more sensible method to salvage marriages. This section authorizes the establishment of Conciliation Bureaus in all judicial districts of the New York Supreme Court.\textsuperscript{120} Plaintiffs in any fault or non-fault divorce proceeding must file a notice of the instituted divorce action within 20 days with the


\textsuperscript{117} N.Y. Dom. Rel. Law § 220 (McKinney 1964).

\textsuperscript{118} The new grounds are cruel and inhuman treatment, abandonment, imprisonment for 3 years, and proof that the terms of a decree or judgment of separation had been carried out for 2 years. N.Y. Dom. Rel. Law § 170 (McKinney Supp. 1969). The judicial judgment or decree of separation can only be obtained under fault grounds. N.Y. Dom. Rel. Law § 200 (McKinney Supp. 1969).


\textsuperscript{120} N.Y. Dom. Rel. Law § 215 (McKinney Supp. 1969), states in pertinent part: There is hereby created and established a conciliation bureau . . . in each judicial district of the supreme court. The head of such bureau in each judicial district shall be a supreme court justice. . . . Such justice shall be the chief administrative officer of the bureau and shall have the responsibility for administering and supervising the affairs of the bureau in accordance with rules and regulations promulgated by the appellate division of the appropriate judicial
local conciliation bureau or the action will be discontinued.\textsuperscript{121} Once this notice is filed and divorce proceedings are instituted, a court-appointed commissioner is to call one conciliation conference which all parties are required to attend.\textsuperscript{122} The purpose of this conference is to facilitate and promote a reconciliation; and the assistance of physicians, psychiatrists, or clergymen may be sought if the parties consent.\textsuperscript{123} While the procedural details outlined by the statute for these conferences are vague, the conciliation counselor assigned to the case by the commissioner must issue a final report to the supervising justice of the conciliation bureau in the district where the divorce action is to be litigated.\textsuperscript{124} The statute does not specify what use this report will serve once it reaches the justice. However, since the report is only made if reconciliation has not been accomplished, and since, under a fault ground, all elements of the ground must be alleged and proved, it appears safe to assume that the only bearing it could have is in establishing the depth of injury. Consequently, a divorce can still be granted regardless of the chance of re-establishing a viable marriage and this procedure will have no value except that of effectuating reconciliations.

New York's new divorce code and procedures establish the principle that while the state retains an interest in the stability of marriage, that interest only extends to those marriages which can fulfill the purposes supported by the state. Consequently, while permitting divorce by mutual consent under the non-fault ground, the New York legislature at the same time demanded an attempted reconciliation in both fault and non-fault proceedings to see if the marriage could be made functional. It further provided for a statutory waiting period under the non-fault ground presumably theorizing that: (1) if the parties could not resolve their problems within 2 years there would be real injury to the parties and the marriage would not be functional; and (2) if the state allowed immediate dissolution of the marriage, it would abrogate its position

\textsuperscript{121} N.Y. Dom. Rel. Law § 215-c(A) (McKinney Supp. 1969), states in pertinent part:

\begin{quote}
Within twenty days after the commencement of a matrimonial action . . . the party plaintiff in such action shall file with the conciliation bureau in the judicial district where the action is pending, a notice of commencement of such action. Failure to file the notice . . . shall be deemed a discontinuance of the cause of action except for good cause shown to the court.
\end{quote}

\textsuperscript{122} This requirement is waived on a showing of good cause. The statute is vague as to what circumstances constitutes such good cause, and it is conceivable that the purpose of the conciliation service will be made meaningless by a broad interpretation of this phrase. N.Y. Dom. Rel. Law § 215-c(b)(2) (McKinney Supp. 1969).

\textsuperscript{123} N.Y. Dom. Rel. Law § 215-c(e) (McKinney Supp. 1969), states:

\begin{quote}
In conducting a conciliation conference, a counselor shall do such acts as he feels necessary to effect a reconciliation of the spouses or an adjustment or settlement of the issues of the matrimonial action. To facilitate and promote the reconciliation the counselor may, with the consent of the parties, recommend or make use of the assistance of physicians, psychiatrists or clergymen of the religious denomination to which the parties belong.
\end{quote}

\textsuperscript{124} Note, A New Look for New York Divorce, 2 Portia L.J. 315, 319 (1967).
as an interested party to the action and make the existing fault grounds meaningless in the new legislative context.

It is posited that given the vigorous opposition to divorce reform by religious groups a complete abolition of the fault concept of divorce was impossible despite any possible contrary inclinations of the New York legislature. Thus, the criticism of the New York law will focus only upon the desirability of the non-fault ground.

It must be noted that it is too early to tell what effect the conciliation service or the new ground will have in New York except that under this new ground it will be easier to obtain a divorce where both parties desire termination. Evidence as to its possible efficacy may be derived from a voluntary conciliation service which has been in effect in Los Angeles County since 1939. This system, with a highly qualified staff accomplished a 63.8 percent reconciliation record in 1962 for those cases where both parties attended the hearings and three out of four of those couples remained together for at least a year. Though these results appear encouraging, it is essential to realize that only those couples interested in reconciliation requested this service, and that in 1962 those requesting help constituted only six percent of those filing divorce actions. This indicates that only four percent of the total population starting divorce proceedings were reconciled through this service. Therefore, observing the overall situation, the only conclusion that can safely be drawn is that reconciliation is of value when the parties themselves are amenable to resolving their differences.

Thus, an initial criticism to adopting this type of law in Pennsylvania would be that the creation of a compulsory conciliation service would be wasteful and time consuming. If a voluntary system can achieve positive results with only 63.8 percent of those couples desiring reconciliation, it is apparent that it would be less effective with those who have no desire to reconcile. Given the limited amount of state funds available for such services and the lack of qualified psychiatrists, psychologists, and sociologists to perform its functions, a more effective approach would appear to be the adoption of a voluntary service whereby the state could devote its limited energies and resources to saving those marriages most susceptible to reconciliation. The argument against making such a service

125. If there were no waiting period parties would be encouraged to use the non-fault grounds in all cases where they could agree to terminate the marriage, and the state would lose all control over uncontested divorce proceedings.
126. Id. at 315, citing N.Y. Times, April 28, 1966, at 36, col. 1. This opposition was especially acute from the Catholic Church.
129. Id.
130. Lawless, supra note 128, at 459.
mandatory is especially strong where there are no minor children. In such circumstances an invasion of a couples privacy would not appear justified because there is no compelling state interest other than its moral distaste for divorce in keeping the marriage together. Further, one would hope that the non-legal officers of such a court would not be appointed as in New York but would be chosen by merit as in Los Angeles to assure that persons qualified by education and experience will be in control of the delicate problems of resolving marital differences. Finally, if such a service must be made mandatory then it should be done as part of the separation and not the divorce proceedings. The chance of reconciliation would appear to be greater at the advent of the marital disharmony than after a 2 year separation during which the differences of the parties have had a chance to magnify.

The non-fault ground itself would appear to be objectionable for two reasons. First, since the non-fault ground requires a 2 year waiting period before an action can be commenced, it would appear that the state has implicitly encouraged the use of the available fault grounds by effectuating a faster settlement of marital difficulties under the latter concepts. While this 2 year waiting period is not objectionable, it is a weakness when coupled with fault grounds for divorce because parties who desire a divorce in order to remarry may still resort to collusion, perjury, and fraud in order to establish a fault ground rather than wait 2 years to consummate their desires. Another possible result of allowing this procedure to coexist with the fault grounds is to place the state in a somewhat inconsistent position. It would claim a third party interest in all actions for divorce except those under the non-fault ground, where it would deny itself any interest save for one possibly meaningless conciliation session. The judiciary, in the face of this inconsistency, may be encouraged to attempt to make the fault and non-fault grounds consistent through its decisions. This could result, through an evolutionary process, in a system whereby divorces would either be difficult or easy to obtain under both fault and non-fault grounds. The courts could accomplish this end through a liberal interpretation of the statutory fault requirements or an exceedingly stringent interpretation of the non-fault ground by requiring that all terms of a separation agreement be explicitly followed.

Second, is the fact that the non-fault ground is only available to couples who have agreed to end their marriage. The requirement of the statute that there be a signed and witnessed separation agreement between the parties seems to preclude any non-fault divorce for non-consenting

132. N.Y. Dom. Rel. Law § 170(6) (McKinney Supp. 1969), provides for a divorce where:

The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged ... by the parties thereto in the form required to entitle a deed to be recorded, for a period of two years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and

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couples. This prerequisite notes a valid distinction in divorce proceedings and acknowledges the greater state duty accruing where a stronger possibility of reconciliation may exist. However, it makes the ground virtually nugatory by limiting its application to divorce proceedings in which a default decree could be secured more rapidly under fault ground — presumably if both parties could agree to a separation agreement they could agree not to contest a divorce action based on fault, provided no social stigma attaches to that ground. This total preclusion to non-consenting parties cannot be justified since there are cases where no fault exists but the state's interest would still demand termination of the marriage due to the injury to the non-culpable spouse.

It is submitted that the adoption, in Pennsylvania, of a coexistent non-fault ground, with or without conciliation procedure, is preferrable to the law as it presently exists. This change would at least give implicit recognition to the fact that the mutual desire of the parties to end a marriage creates a situation where the continuation of the marriage would not further the state's interest in the "marriage contract."

B. A California Proposal

California's divorce law was essentially identical with that of Pennsylvania, with several fault grounds available to the libellant and statutory defenses available to the defendant. In 1966 the Governor’s Commission on the Family was established to undertake a "concentrated assault on the high incidence of divorce in our society and its often tragic consequences." The Commission's final report and recommendation was summarized as follows:

[...]he Commission recommends, in essence, the creation of a statewide Family Court system as part of the Superior Court, with jurisdiction over all matters relating to the family. The Family Court is to be equipped with qualified professional staff to provide counseling and evaluative services. We recommend that the existing fault grounds of divorce and the concept of technical fault as a determinant in the division of community property, support and alimony be eliminated, and that marital dissolution be permitted only upon a finding that the marriage has irreparably failed, after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation. We recommend that a neutral petition be substituted for the present adversary pleading by complaint and answer. In short, it has been our

conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged as was the agreement of separation . . . .

133. CAL. CIV. PRO. §§ 92, 111 (West 1955). Grounds include adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of a felony and incurable insanity. Defenses include connivance, collusion, condonation, recrimination and laches.

goal to establish procedures for the handling of marital breakdown which will permit the Family Court to make a full and proper inquiry into the real problems of the family — procedures which will enable the Court to focus its resources upon the actual difficulties confronting the parties, and will at the same time safeguard their rights and preserve the confidentiality of the information thus acquired.\textsuperscript{135}

In furtherance of these objectives Senate Bill 252 was introduced in the California Senate. It was the first major attempt to adopt a totally non-fault divorce code and will be examined as originally introduced as a possible alternative solution to codes based on fault, even though it was so amended that many of its desirable features were removed. Senate Bill 252 proposes that the legal aspect of the divorce procedure be minimal, with the essential fact-finding being done by sociologists and psychologists employed by the court, who will guide the parties and inform the judge whether the parties are reconciled or wish to proceed with the divorce.\textsuperscript{136} If the latter choice is made, the counseling service will provide help in working out child support, alimony and property settlement agreements pursuant to a final divorce decree. The judge granting the decree can do nothing to prevent the divorce except delay the final action for 90 days.\textsuperscript{137} Thus, the fault concept is completely eliminated and the entire focus of the process is on the discovery of the true status of the marriage and the possibility of its continued viability. It is submitted that this is the proper procedure for investigating and possibly terminating a marriage; however, certain variables which would effectuate a more realistic and desirable law have been overlooked by the drafters of this proposed bill.\textsuperscript{138}

First it proceeds on the tacit assumption that the social and psychological workers of the family court will be told the complete truth and


\textsuperscript{137} Senate Bill 252, at § 4615(a), provides in pertinent part:

At the hearing, the court shall render its judgment decreeing the dissolution of the marriage . . . unless it finds that the legitimate objects of matrimony have not been destroyed because there is a reasonable likelihood that the marriage can be saved. If the court so finds, it shall continue the proceeding for a period not to exceed 90 days during which time the parties may avail themselves of the services of the professional staff . . . . At any time after the termination of such 90-day period, either party may move for dissolution of the marriage . . . and the court shall enter its judgment decreeing the dissolution of the marriage . . . . (emphasis added).

Since there is no requirement for conciliation procedure during the 90-day period it is posited that this procedure may often be inadequate as a means of effectuating a reconciliation. Therefore, a better alternative might be to have mandatory counseling during this period, especially if there are minor children involved.

\textsuperscript{138} Senate Bill 252 as finally enacted is totally non-fault in theory. It allows divorce on the grounds of irreconcilable differences regardless of the fault of the parties. However, it also allows a divorce on the ground of incurable insanity. This ground is also non-fault, but only in the sense that the respondent has committed no intentional act that adds to the marriage instability. S.B. 252 Calif. Legislature, Reg. Sess. as amended March 4, March 17, May 15, June 5 and June 13; adopted
will therefore be better able to effectuate a reconciliation. It would appear that while this system may achieve significantly better results in avoiding perjury,\textsuperscript{139} reconciliation will only be achieved where the parties are amenable to effectuating that result.

Second, the proposed reform totally disregards the state's interest in perpetuating a marriage. While "[r]ecognizing that the family is the essential basis of society,"\textsuperscript{140} Senate Bill 252 proposes divorce by consent or by the desire of either party. The only time that the legal machinery of the state becomes involved is in custody or support proceedings after the divorce has been determined consensually by the parties or by decision of either spouse. It would appear that, where there are minor children or where only one party seeks a divorce, the state's interests in societal stability and the training of children would supersede the individual's right of privacy. However, where these variables are non-existent the state interest ceases to predominate; since society's moral distaste for divorce should not be allowed to be imposed on an individual right to privacy. Therefore, a neutral position would appear justified where the divorce is either consensual or non-consensual and there are no minor children or possibly even where the divorce is consensual and such children exist. However, where only one party desires a divorce and there are minor children, it is unjustified and the state has a right to demand an attempted reconciliation. The only difference under the proposal between the aforesaid situations is the requirement that, in the latter case, both parties be present at the initial interview with the counselors.\textsuperscript{141} It would appear that at least a longer waiting period should be required in the latter case since the presence of children increases the state's interest in opposing dissolution regardless of the extent of injury caused by the parties.

While it would appear that there were some shortcomings in the California proposal even in its imperfect form, it was far superior to either the fault or mixed fault non-fault systems. Had the legislation been adopted intact, California would have had a system designed to pursue its legitimate objectives. The entire focus of the legislation was on the process of determining whether the extent of the injury precluded the viability of a marriage. The search for an innocent and injured spouse

\textsuperscript{by assembly conference report July 24; adopted by Senate conference report July 28, at § 4506 (1969).}

Under this act the relatively undefined term of irreconcilable differences as "substantial reasons for not continuing the marriage" would appear to give the judiciary discretion to determine their results by taking evidence in a manner similar to, if not identical to, fault proceedings. \textit{Id.} at § 4507. This discretion seems to be an unfortunate provision in the enacted legislation as is the lack of a conciliation service.

\textsuperscript{139} There would be no power vested in the court to deny a divorce, only a 90-day delay could be required and, therefore, there would have been no penalty for telling the truth and an unhappy couple could not be judicially required to remain together. \textbf{Senate Bill 252}, at § 4615. \textit{See} note 135 supra for a discussion of this provision.

\textsuperscript{140} \textbf{Senate Bill 252}, at § 4001.

\textsuperscript{141} \textbf{Senate Bill 252}, at § 4605(a).
would have been abandoned.\textsuperscript{142} By establishing a proceeding whereby sociological and psychological study would have replaced legal maneuvering the state would have placed the problem in the hands of those most able to effectuate a reconciliation. Only through an actual reconciliation can a troubled family possibly fulfill the state's goals; for, the mere refusal to grant a divorce does not guarantee the functioning home necessary to achieve those ends.

V. \textbf{Pennsylvania — The Proposed Changes}

The proposed Pennsylvania Divorce Code is essentially patterned after that of New York. The existing divorce grounds are retained and expanded, the defenses are limited,\textsuperscript{143} and a non-fault ground — a 2 year separation — is added.\textsuperscript{144} These changes would appear to facilitate the granting of a divorce under the fault grounds and to guarantee a divorce to those willing to wait the statutory period under the non-fault ground. The Proposed Code also includes a provision for the retention and expansion of the Domestic Relations Division, which previously dealt only with custody problems,\textsuperscript{145} so that it now gains the additional function of marriage counseling.\textsuperscript{146} This division would only perform mandatory services in a case where the parties had minor children.\textsuperscript{147} By this requirement it is posited that Pennsylvania, unlike New York, would properly make a differentiation between divorce actions involving minor children and those where no children are involved.\textsuperscript{148} However, since there are no requirements pertaining to the qualifications of the counselors,\textsuperscript{149} it is questionable whether they will be able to provide an adequate service to couples whose marriages are in danger of dissolution. The new service may, therefore, only be valuable as an initial recognition by Pennsylvania of the state's proper function in divorce proceedings.


\textsuperscript{143} The grounds are set forth in \textbf{Proposed Divorce Code $\S$ 301}. Insanity is the only additional ground. \textbf{Proposed Divorce Code $\S$ 301(1)(b)}.

The proposals would eliminate the defenses of recrimination, condonation, connivance and collusion, but the last three would be considered by the judge in determining whether to grant a divorce. \textbf{Proposed Divorce Code $\S$ 304}.

\textsuperscript{144} \textbf{Proposed Divorce Code $\S$ 301(1)(c)}, provides that a divorce will be granted where a couple have been "[I]living apart for a continuous period of two years because of estrangement due to marital difficulties."

\textsuperscript{145} \textbf{Proposed Divorce Code $\S$ 201}. \textit{See also Proposed Divorce Code $\S$ 201}, Comment at 83-84.

\textsuperscript{146} \textbf{Proposed Divorce Code $\S$ 201}.

\textsuperscript{147} \textbf{Proposed Divorce Code $\S$ 202}.

\textsuperscript{148} One of the prime interests of the state in the success of marriages is the maintenance of adequate facilities for the training of children. \textit{See Broadway, supra} note 3, at 384. \textit{See pp. 155, 175 supra}.

\textsuperscript{149} The proposal merely provides that the domestic relations division "shall appoint such qualified probation officers and other assistants as are necessary for the efficient and useful operation of such domestic relations division." \textbf{Proposed Divorce Code $\S$ 201}. This language allows for appointments made on other than true qualification by merit, and could easily lead to political appointments and inadequate conciliation procedure.
A. Grounds

The new legislation adds one completely new fault ground for divorce and significantly modifies a second. As previously noted, the ground of divorce based on conviction for a crime is inadequate in not providing for relief when the criminal spouse was found guilty of an attempt. The proposed code eliminates this inadequacy by making conviction of the crime of attempt and sentence for 2 years a ground for divorce. It was likewise noted that it was illogical for incarceration for a crime to be a ground for divorce where a similar institutionalization for insanity was not. This defect is also remedied by a new provision providing that commitment to an institution for 5 years will constitute a ground for divorce. Presumably the additional 3 year statutory period reflects the lack of fault on the part of the insane spouse as opposed to that of the convicted felon.

The final proposed change relating to grounds for divorce is the inclusion of a non-fault ground which provides that a divorce will be granted where the parties are "living apart for a continuous period of two years because of estrangement due to marital difficulties." This addition, while beneficial, is subject to many of the same objections as New York's procedure, the most notable being that the 2 year wait will discourage the use of the ground as long as fault grounds are more quickly available. The comment to this section of the Code recognizes this possibility but indicates that the presence of several fault grounds will somehow alleviate that problem. This assumption is seemingly dubious and it is submitted that, if adopted, the non-fault ground will probably be used sparingly. However, it can constitute a meaningful reform especially when used where

150. See p. 158 supra.
151. Proposed Divorce Code § 301(1) (a) (v).
152. See p. 172 supra.
153. Proposed Divorce Code § 301(1) (b), provides that a divorce will be granted for:

- Insanity or serious mental disorder which has resulted in confinement in a mental institution for at least five years immediately before the filing of the complaint, where there is no reasonably foreseeable prospect of the defendant's spouse being discharged from such institution. A presumption that no such prospect of discharge exists shall be established by a certificate of the superintendent of such institution to that effect (emphasis added).

The language of the proposal seems to reflect the non-fault nature of this ground by demanding proof not only of the condition precedent to the divorce, but also of its almost definite continuance.

154. The Proposed Divorce Code § 301(1) (a) (i), retains the 2-year statutory separation period for desertion.
155. Proposed Divorce Code § 301(1) (c).
156. See p. 178 supra.
157. Proposed Divorce Code § 301, Comment at 94-98, states in pertinent part:

The proposed ground — living apart for two years — (1) (c) is . . . based on similar statutes in many jurisdictions. . . . In Denmark there are only two grounds for divorce: adultery and separation for a period of two years. The fact that, since adultery is losing its social stigma, Danes are seeking divorces on the ground of adultery because it is quicker than the omnibus separation grounds, indicates the inadmissibility of having such omnibus grounds without adequate additional grounds. The proposed code, however, contains adequate additional grounds. Id. at 96 (emphasis added).

This conclusion seems incongruous since the additional grounds would have less of a social stigma than adultery and therefore would presumably be used at least as frequently as the Dane's use that ground.
no fault decree could be granted in a contested proceeding since the non-fault divorce ground will be available to either spouse without consent.

The proposed changes in the grounds for divorce a.m.t. are slight. However, they are significant in that they make the grounds for this remedy identical to that for divorce a.v.m. While it has been previously noted that there appears to be no valid reason to retain divorce a.m.t., especially since the Proposed Code adopts alimony for divorce a.v.m., the complete consistancy of the grounds for both actions constitutes an improvement since there would appear to be no valid reason why an act deemed criminal when committed against a spouse for the purpose of one remedy would be deemed unimportant for the purposes of the other. This is especially true since both remedies seek to protect the same societal interests. Also, the additional use of divorce a.m.t., by the court, as a 6 month delaying tactic where the judge feels reconciliation is possible in an action for divorce a.v.m., is meritorious and creates a justifiable reason for its retention, although it is not justifiable when used by individuals as a means to separate and leave open the possibility of such a reconciliation.

B. Defenses

The primary improvement embodied in the Proposed Code, in addition to the enactment of a non-fault ground, is the elimination of the two most invidious defenses: recrimination and the innocent and injured spouse doctrine. The new definition of the individual grounds for divorce carefully exclude the innocent and injured spouse verbiage. In the comments the drafters state two reasons for this change. The first is the recognition of the fact that there are seldom cases in which one spouse is entirely free from fault. The second is recognition of the common judicial practice, which is to hold that complete freedom from fault is not essential under the innocent and injured spouse rationale. With the elimination of these words from the statutory grounds and the specific exclusion of the defense of recrimination the state's greatest abuse of its discretion is eliminated. The families most in need of relief will be able to obtain a

158. See p. 166 supra.
160. Proposed Divorce Code § 301(2), provides in pertinent part:
   (2) In any action of divorce from the bonds of matrimony . . . where grounds for divorce have been established, if the court finds that attempts at reconciliation are practicable and to the best interests of the family, it may of its own motion or at the request of either party:
   . . . issue a temporary decree of divorce from bed and board for a period of six months . . .
161. See pp. 165-66 supra.
163. Proposed Divorce Code § 301.
164. This is a variation of the comparative rectitude doctrine where the less guilty party is allowed to receive a divorce. See, e.g., White v. White, 56 Schuyl. Leg. Reg. 197, aff'd, 185 Pa. Super. 141, 138 A.2d 162 (1958); Trier v. Trier, 43 Del. Co. R. 244 (1956).
divorce under fault or non-fault grounds. This would allow the state to concentrate on reconciling those marriages which retain some characteristics of a functional unit.165

While the innocent and injured spouse and recrimination doctrines would be abolished by the proposed Code, the defenses of condonation and collusion would be retained on a more rational basis. Collusion, which is presently a defense to all actions for divorce, would, under the Proposed Code, retain its applicability to all such actions but on a limited basis. It would be restricted to cases of fabrication of grounds for divorce, perjury, or fraud.166 The doctrine of connivance, however, would be expanded and would now be available both to husband and wife,167 eliminating an objectionable feature of this defense.

The final change in the defenses to a divorce proceeding is the limitation of the defense of condonation to those situations where there is a "willing" forgiveness on the part of the libellant.168 This change is made solely to allow a divorce where there is a renewed cohabitation under fraud or duress and an act of intercourse transpires.169 However, as previously noted,170 this change does not rectify the problems of subsequent mistreatment by the defendant which falls short of a ground for divorce and of the libellant who forgave his spouse but could not live with his forgiveness. In both those cases a divorce would still unjustifiably be denied to a party who is truly injured. While the non-fault ground might be a means of relief for a libellant in either of these two situations, the 2 year waiting period would appear to discourage the use of the non-fault ground where fault grounds are available.171 Therefore, the failure to investigate the effectiveness of the condonation in allowing the family to function172 is a shortcoming which could and should have been rectified by the proposed law. If the fault rationale is to remain, condonation should be made conditional on the subsequent behavior of the guilty spouse and should be made revocable by the libellant for psychological reasons as well as the subsequent conduct of his spouse.

VI. Conclusion

It is entirely conceivable that a system of divorce law which adequately reflects the existent marriage situation and the state's interest is

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165. See Proposed Divorce Code § 102, for the framer's interpretation of the interests which the legislation is attempting to protect. This new law recognizes that: "[I]t is in the state's interest to allow termination of a marriage that has ceased to provide social stability and thereby has failed to fulfill the purposes for which it was established."

Comment, Divorce Reform — One State's Solution, 1967 DUKE L.J. 956, 960. 166. Proposed Divorce Code § 406. This section would presumably allow agreements to secure a divorce where legitimate grounds exist.


169. Proposed Divorce Code § 304, Comment at 103, which states: "[i]f there is physical compulsion, or economic necessity, the court may find that despite cohabitation there was no condonation."

170. See p. 169 supra.

171. Proposed Divorce Code § 301 (1) (c).

172. See note 61 supra.
impossible to establish. To balance the countervailing interests would require a delicate hand. It would appear that the ideal system would demand a simple and dignified divorce procedure together with enough inherent difficulty to offer the parties an inducement to reconcile their differences. Only in this way could the individual desires of a spouse be made compatible with the financial and societal burden placed on the state by the dissolution of marriage. It appears essential that the grounds must be such as to eliminate the abuses and perversions of the judicial process inherent under the present law.173 The only way to adequately meet these often conflicting goals may be through a non-fault divorce procedure carried on by a sociological agency comprised of well-trained individuals. This system would require a 2 year waiting period for divorce with mandatory counseling for families with minor children and/or where both parties do not consent to the dissolution. Where neither of these factors are present, counseling should be available but not on a compulsory basis. It would appear that the distinction between compulsory and non-compulsory counseling would be justified by the higher state interest — financial and societal — in the former situation. The presence of children or the lack of consent by one party would appear to require a conscientious attempt by the state to mediate and end the marital disputes if possible, while the almost total lack of interest of the state where these factors are nonexistent would appear to render state intervention arbitrary. The removal of this process from the courts, whose apparatus and procedures are legalistic rather than sociological and psychological, would seem essential if any meaningful attempt at reconciliation is to be obtained. Lastly, while the concept of the breakdown of the marriage should be central to this system, the final decision as to the breakdown must come from the parties by mutual consent or by the moving party. This is necessary because a judgment by an agency that the parties can coexist together exercises no control over the viability of a marriage.

It can readily be seen that the Proposed Pennsylvania Divorce Code falls far short of these criteria. However, while the commentators on divorce reform are almost uniform in urging the adoption of a total non-fault concept of divorce174 such a law has been enacted in only one state.175 Given the political realities of the situation,176 the Pennsylvania Proposed Divorce Code is a meaningful attempt to eradicate the more obvious abuses of the present system. Its adoption will make the law of the Commonwealth more adequately reflect the social realities of the 1960's.

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173. See note 62 supra.
175. See note 136 supra.

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