

# COMMENTS

## DIVORCE REFORM—ONE STATE'S SOLUTION

*Although New York has long been a leader in reform legislation, it has also had one of the most ineffective divorce laws in the nation. Therefore, it was not unrealistic to hope that when New York recently revised its divorce laws the new product would serve as a model for future reforms in other jurisdictions. While the new law as finally enacted is defective in several respects, its provisions reflect an attempt to accommodate the basic reform trends in current divorce law. This comment investigates briefly the evolution of governmental controls of divorce, the American tradition prior to the New York reform, and the implications of the procedures finally adopted by that state.*

### EVOLUTION OF DIVORCE LAW AND POLICY

THE DEVELOPMENT of the basic elements of the system of divorce law prevalent in the United States can be traced primarily to Roman and early Christian antecedents.<sup>1</sup> The earliest rudiments of current principles appeared in Roman society prior to the Empire. There the method of termination of marriage depended upon whether ceremonial formalities accompanied the inception of the marriage.<sup>2</sup> Since marriage was a consensual relationship not controlled by the state,<sup>3</sup> a marriage based on consent alone without the appropriate ceremony was dissoluble at the will of either party.<sup>4</sup> If the marriage

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<sup>1</sup> See 2 J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 786 (1901) [hereinafter cited as BRYCE]. See generally R. DE POMERAI, *MARRIAGE PAST, PRESENT AND FUTURE* 168-81 (1930) [hereinafter cited as DE POMERAI]; J. LICHTENBERGER, *DIVORCE* 74-99 (1931) [hereinafter cited as LICHTENBERGER]; 3 E. WESTERMARCK, *HISTORY OF HUMAN MARRIAGE* 319-77 (1925); E. WESTERMARCK, *A SHORT HISTORY OF MARRIAGE* 286-98 (1926) [hereinafter cited as WESTERMARCK].

<sup>2</sup> 2 BRYCE 800-01; LICHTENBERGER 54-59; C. THWING, *THE FAMILY* 39-40 (1913) [hereinafter cited as THWING]; WESTERMARCK 286-87.

There were two types of binding marriage. *Confarreatio*, originating in an early religious ceremony, was the formal rite that placed the patrician wife in the power (*manus*) of her husband. The plebian marriage was initially a free association with no legal incidents, but after the granting of citizenship to the plebians in 455 B.C., they could contract legal marriages by ceremony in the form of a symbolic sale, *coemptio*. DE POMERAI 170-73.

<sup>3</sup> 2 BRYCE 798-99.

<sup>4</sup> *Id.* at 799-800; DE POMERAI 173.

were accompanied by the prescribed ritual, a husband could sever the union only upon a finding of fault by a family council.<sup>5</sup> Later, consensual dissolution and perhaps even dissolution at the will of either party was extended to ritual marriages.<sup>6</sup> By the time of the Empire, the ritualistic aspects of marriage were no longer required, with the result that the relationship was terminable at will.<sup>7</sup>

By the beginning of the fifth century, the Christian church had begun to exert its influence on the prevailing divorce laws. While marriage could still be terminated at will,<sup>8</sup> capricious dissolution in the absence of fault was subject to penal sanctions. As the influence of the church became predominant, marriage was subsumed as a sacrament of the church, and the law of divorce underwent a fundamental change. Unlike the more liberal Roman law, the church viewed marriage as indissoluble.<sup>9</sup> Yet, the prerequisites to the formation of a valid marriage became so complex that a scholar could find an impediment to the sufficiency of almost any union.<sup>10</sup> In addition to the theoretical indissolubility of marriage, spouses were under an affirmative duty to cohabit.<sup>11</sup> While relief from this obligation could be had in the form of a divorce *mense et thoro*, which is similar to a judicial separation, the marriage bond itself was not dissolved,<sup>12</sup> thereby preventing remarriage.<sup>13</sup> In contrast to the Roman law under which absolute divorce could be based on the will of one spouse, the duty to cohabit could not be waived by

<sup>5</sup> 2 BRYCE 800; DE POMERAI 171. Divorce in earlier times was the right of the husband, and the acceptable causes seem to have been limited to adultery, preparing poisons, and falsification of keys. Under the Twelve Tables the right became reciprocal. LICHTENBERGER 57.

<sup>6</sup> THWING 39-40; WESTERMARCK 287. When first allowed, the right to dissolve the union seems to have been rigidly circumscribed by the censors and public opinion. See 2 BRYCE 800-01.

<sup>7</sup> LICHTENBERGER 57-58.

<sup>8</sup> 2 BRYCE 803-05; DE POMERAI 173-78.

<sup>9</sup> 2 BRYCE 825-26. See generally T. BOUSCAREN, A. ELLIS, & F. KORTH, CANON LAW (4th ed. 1939). Although theoretically indissoluble, see Canon 1013, a valid marriage may be terminated under two exceptions. If the marriage is not consummated, it may be dissolved by papal dispensation. Canon 1119. If a married person converts and his or her spouse makes practice of the new religion difficult, the first marriage may be dissolved by remarriage under the Pauline privilege if neither spouse was baptized at the time of the first marriage, see *Corinthians* 7:12-15, or by papal authority if one of the spouses in the first marriage was baptized and one was not.

<sup>10</sup> E.g., 2 BRYCE 826-27; DE POMERAI 179; WESTERMARCK 290.

<sup>11</sup> Canon 1128; see WESTERMARCK 289.

<sup>12</sup> 2 BRYCE 827; LICHTENBERGER 89.

<sup>13</sup> 2 BRYCE 827; DE POMERAI 178-79; LICHTENBERGER 89.

consent. Separation required a finding of fault on the part of one spouse in the form of heresy, adultery, or cruelty.<sup>14</sup>

While there is some dispute as to the binding effect on the Church of England of decisions made in Rome,<sup>15</sup> the system of matrimonial law of the Roman church was enforced in England's ecclesiastical courts even after Henry VIII assumed authority over marriage and divorce in 1532.<sup>16</sup> Although absolute divorce became available through action of Parliament after 1669,<sup>17</sup> the theory of indissoluble marriage was enforced by ecclesiastical tribunals until the Matrimonial Causes Act of 1857.<sup>18</sup> The system of ecclesiastical courts, which was not terminated in England until 1857, was in effect during the period from the settlement of the English colonies in America until their independence. Consequently, the law of that period was arguably part of the common law incorporated into the law of the several states.<sup>19</sup> However, since this type of court was never utilized in this country, the only courts with jurisdiction over marital causes were statutorily created.<sup>20</sup> Apparently influenced by new social conditions and ideas of the reformation, colonial legislators provided for absolute divorce rather than restricting relief to judicial separations.<sup>21</sup> Although the form of relief was changed, the principles on

<sup>14</sup> 2 BRYCE 827; see DE POMERAI 178-79.

<sup>15</sup> Compare C. DUGGAN, TWELFTH CENTURY DECRETAL COLLECTIONS (1963), with F. MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND (1898).

<sup>16</sup> It has been said that during the reign of Queen Elizabeth absolute divorce for adultery was available but that this position was contracted in *Foliamb's Case* in 1602 wherein only divorce *a mense et thoro* was allowed. 91 Eng. Rep. 738 (K.B.). This view of divorce was retained despite Henry VIII's assumption of authority over marriage and divorce. See 24 Hen. VIII (1533); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 588-92 (1922) [hereinafter cited as HOLDSWORTH].

<sup>17</sup> Surprisingly, considering the source of Henry's difficulties with the church in Rome, see McCurdy, *Divorce—A Suggested Approach*, 9 VAND. L. REV. 685, 686 (1956), the first absolute divorce through Parliament was not until the case of Lord deRoos in 1669. See 1 J. BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 1425 (1891) [hereinafter cited as BISHOP].

<sup>18</sup> 1 HOLDSWORTH 622-23; see 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 393-94 (2d ed. 1923).

<sup>19</sup> See 1 BISHOP §§ 116-49.

<sup>20</sup> 1 BISHOP § 116; 2 BRYCE 830.

<sup>21</sup> See W. GOODSSELL, A HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION 341-82 (1938); G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 195 (1960). Absolute divorce was not granted in the middle and southern colonies until after the revolution. See GOODSSELL, *supra* at 380-82. New York serves as an example of the effect of the English influence in these colonies. As a state which had been ruled by the Dutch and English, its policies shifted with its colonial masters. There were absolute divorces under the Dutch; but except for a few divorces granted by the royal governor, apparently under the misapprehension that Dutch law still applied,

which relief was based were not. The nonwaivable fault grounds and defenses which developed for judicial separations in the ecclesiastical courts became the colonial "common law" of divorce.<sup>22</sup>

After the removal of marriage from the exclusive jurisdiction of the church, the courts generally held that the relationship resulted from a civil contract formed by the consent of the parties. However, under the new view, the lack of a theoretical justification for a state's disallowing termination by consent caused some difficulty.<sup>23</sup> In 1852 Bishop suggested a basis in theory when he contended that marriage was a status and not a contract,<sup>24</sup> a view which gained substantial judicial recognition.<sup>25</sup> Despite the groping for a satisfactory rationalization for governmental sanctioning of divorces, the judiciary never doubted the necessity of such control.<sup>26</sup> However, in the view of Justice Story, even though state approval of a dissolution could be made prerequisite to its validity, governmental power to control divorce was not absolute.<sup>27</sup> Because some contractual aspects of marriage could be found, Story speculated that termination of marriage in the absence of consent or fault might be unconstitutional as an impairment of the obligation of contract. This idea was refuted, however, in *Maynard v. Hill*<sup>28</sup> when the Supreme Court upheld a legislative divorce granted to a domiciliary whose non-resident spouse had not been at fault and from whom no consent had been obtained.<sup>29</sup>

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none were granted under English rule. Responding to public pressure, the legislature provided for absolute divorce after independence. See notes 63 & 64 *infra* and accompanying text. On the other hand, with only slight exception, South Carolina, another English colony in this class, provided no absolute divorce until 1950. See note 31 *infra*.

<sup>22</sup> See *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952); *McCurdy*, *supra* note 17, at 685; Neuner, *Proposed New Techniques in the Law of Divorce—The Compromise Solution*, 28 IOWA L. REV. 272 (1943); *Silving, Divorce Without Fault*, 29 IOWA L. REV. 527 (1944).

<sup>23</sup> See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517, 694 (1819) (Story, J., dissenting); *Maguire v. Maguire*, 7 Dana 181 (Ky. Ch. 1838); *Wood v. Wood*, 2 Paige 108, 111 (N.Y. Ch. 1830); 1 KENT, COMMENTARIES 417-18 (12th ed. 1896). See also 1 BLACKSTONE, COMMENTARIES 433, 442 (5th ed. 1773).

<sup>24</sup> See 1 BISHOP § 34.

<sup>25</sup> *Id.* §§ 11, 34.

<sup>26</sup> See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>27</sup> Story suggested that fault of the divorced party was required. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517, 694 (1819) (dissenting opinion). See 1 KENT, COMMENTARIES 418 (12th ed. 1896).

<sup>28</sup> 125 U.S. 190 (1888).

<sup>29</sup> The Court indicated that the divorce could have had no effect on *vested* property rights although it would terminate dower and curtesy. *Id.* at 216. However, the Supreme Court subsequently decided that support rights are not terminated by an *ex*

Granting that the state can terminate a marriage without the consent or fault of the party against whom a petition is filed,<sup>30</sup> a more difficult question occurs as to the circumstances under which a state *should* grant a divorce.<sup>31</sup> Most commentators find an answer by correlating the state's interest with the functional status of each individual marriage: it 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.<sup>32</sup> Various

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*parte* decree of a jurisdiction other than the domicile of the unrepresented spouse, whether or not those rights were reduced to judgment in a separation action prior to the *ex parte* decree. See *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). These decisions overrule the language in *Maynard* as to jurisdiction to terminate property rights, but not as to power to dissolve marriages.

<sup>30</sup> Although there is dictum in an old leading case to the effect that marriage may be terminated without the fault or consent of *either* party if in the public interest, see *Maguire v. Maguire*, 7 Dana 181, 184 (Ky. Ch. 1838), no holding on this precise issue has been found.

<sup>31</sup> Absolute prohibition of divorce has generally proven undesirable. In South Carolina, where divorce was prohibited until 1950 except for a brief period during reconstruction, disgruntled spouses merely migrated to nearby states or established illicit liaisons. See P. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 109-12 (1959) [hereinafter cited as JACOBSON]; Brearley, *A Note Upon Migratory Divorce of South Carolinians*, 2 LAW & CONTEMP. PROB. 329 (1935). In "divorceless" England where migration was not so easy, there was widespread adultery, desertion, and bigamy. Mueller, *Inquiry into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957); see Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 649-51 (1956). Furthermore, there is nothing to indicate that the welfare of children, sometimes offered as a justification of prohibition, is protected by such a policy. That children are adversely affected by divorce seems established, see J. DESPERT, *CHILDREN OF DIVORCE* (1953); W. GOODE, *AFTER DIVORCE* 310 (1956), but a separation may affect them more adversely and so may a continued unhappy home, though adequate evidence is lacking, see GOODE, *supra* at 310-11.

In fact, provided some grounds are available, the restrictiveness of grounds bears no significant relationship to the rate of or desire for divorce. See LICHTENBERGER 171-86. Although there may be some question of the efficacy of these criteria to measure actual marriage breakdown, the limited information available indicates that the effect of other social and economic variables greatly overshadows the effect of variation in divorce laws. See Rheinstein, *supra* at 658-64. Therefore, it is more probable that the phenomena of family instability and a relaxed divorce law were both products of more basic economic and social changes rather than that the relaxed divorce law created a higher rate of instability. See JACOBSON 88-96. However, it is important to note that the U.S.S.R. was forced by family instability and juvenile delinquency to replace restrictions on divorce after a period of almost complete freedom of dissolution. See J. HAZARD & I. SHAPIRO, *THE SOVIET LEGAL SYSTEM*, pt. 3, at 99-102 (1962).

<sup>32</sup> See, e.g., N. KOHUT, *A MANUAL ON MARITAL RECONCILIATIONS* 11 (1964); Alexander, *The Family Court—An Obstacle Race*, 19 U. PITT. L. REV. 602, 614-18 (1958); Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 389-92 (1937), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 937, 948 (1950); Fenberg, *Can Divorce Be Made Respectable?*, 45 WOMEN LAW. J., Summer, 1959, at 13; Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital Discord Cases*, 31 ORE. L. REV. 297, 301-02 (1952); Rheinstein, *supra* note 31, at 645-48; Rutman, *Departure from Fault*, 1 J. FAM. L. 181, 182 (1961). See also *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Reynolds v.*

phrases have been employed to describe the marriage at this stage, among them "dead,"<sup>33</sup> "broken,"<sup>34</sup> and "permanently disrupted."<sup>35</sup> However, there is no agreement in defining the status so labeled.<sup>36</sup> Recommendations for nonfault legal, as opposed to sociological, criteria have generally fallen into two categories: separation for a period and failure of conciliation procedures.<sup>37</sup> Strong appeals also have been made by eminent authorities for the establishment of "socialized," nonadversary, consolidated family courts having jurisdiction over *all* actions in order to facilitate more effective employment of the conciliation approach.<sup>38</sup>

The separation period approach is based on the premise that a lengthy separation serves both as a check on capricious dissolution of marriages and as an indication that the marriage is sufficiently dis-

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United States, 98 U.S. 145 (1878); *Coe v. Hill*, 201 Mass. 15, 86 N.E. 949 (1909); *Atkeson v. Sovereign Camp W.O.W.*, 90 Okla. 154, 216 P. 467 (1923); COLO. REV. STAT. ANN. § 46-5-1 (1963); C. HOWARD & R. SUMMERS, *LAW: ITS NATURE, FUNCTION AND LIMITS* 181-82 (1965).

However, it has been noted that: "The State has a profound and continuing interest in preserving the family as the basic unit of society and in promoting the welfare of the home; and . . . the legislature finds that the increase in divorces and annulments is seriously detrimental to society and especially to the welfare of the children affected thereby . . ." REPORT JOINT LEG. COMM. ON MATRIMONIAL AND FAMILY LAW, N.Y. Leg. Doc. No. 8, p. 9 (1966) [hereinafter cited as JLC REPORT] (quote from concurrent resolution re-establishing the JLC for 1966).

<sup>33</sup> 1966 JLC REPORT 21-23.

<sup>34</sup> KOHUT, *supra* note 32, at 9.

<sup>35</sup> McCurdy, *supra* note 17, at 706.

<sup>36</sup> For a survey of various attempts at definition, see KOHUT, *supra* note 32, at 13-25.

<sup>37</sup> See notes 39-56 *infra* and accompanying text. Another nonfault ground that has received some support from the commentators is incompatibility. See Rutman, *supra* note 32, at 192. This ground, however, has received very limited official acceptance and is presently a recognized ground in only two states, New Mexico and Oklahoma. N.M. STAT. ANN. § 22-7-1 (1954); OKLA. STAT. ANN. tit. 12, § 1271 (1961). *But see* Rutman, *supra* note 32, at 190. One of these jurisdictions has considerably weakened the nonfault basis of the ground by allowing consideration of recriminatory defenses in the discretion of the court. Compare *Pavletich v. Pavletich*, 50 N.M. 224, 174 P.2d 826 (1946), with *Clark v. Clark*, 54 N.M. 364, 225 P.2d 147 (1950).

<sup>38</sup> See Alexander, *supra* note 32; O'Connell, *Divorce—A Public or Private Affair*, 1965 PROCEEDINGS ABA SEC. OF FAM. L. 40; Pound, *The Place of the Family Court in the Judicial System*, 5 NPPA J. 161 (1959). See generally Committee on the Standard Family Court Act, *Standard Family Court Act—Text and Commentary*, 5 NPPA J. 97-211 (1959).

The Children's Court of Conciliation in Los Angeles has demonstrated that conciliation procedures need not be associated with a consolidated family court system in order to be successful. See Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 364-67 (1966). The new New York conciliation machinery in divorce cases, which is to be considered in detail below, was made part of the Supreme Court, a court of general jurisdiction, rather than being annexed to the state's Family Court which does not have divorce jurisdiction. See notes 120-21 *infra* and accompanying text.

rupted to establish that the state's goal of preserving a stable social unit is no longer attainable.<sup>39</sup> It is argued that such a criterion covertly recognizes consent—the factor that is the basis for most divorces anyway—and, therefore, provides a much more reliable indicator of the extent of disharmony in a particular marriage than is provided by a fault requirement.<sup>40</sup> Separation period grounds are no longer unique, having been adopted in fifteen states with the requisite periods varying from one to ten years.<sup>41</sup> Most of the states allowing divorces on this basis have abandoned the fault principle at least to the extent of refusing to recognize the common law defense of recrimination.<sup>42</sup> The courts of other jurisdictions in which abandonment will not satisfy this ground consider fault in ascertaining the voluntary nature of the separation.<sup>43</sup> Those states requiring voluntary separation have provided nonfault relief to approximately eighty five or ninety percent of those persons seeking divorce, but have left fault grounds as the only alternative to the ten or fifteen

<sup>39</sup> See *Jolliffe v. Jolliffe*, 76 Idaho 95, 100-01, 278 P.2d 200, 202-03 (1954); *Matysek v. Matysek*, 212 Md. 44, 50-54, 128 A.2d 627, 631-32 (1957); *George v. George*, 56 Nev. 12, 41 P.2d 1059 (1935); *Smith v. Smith*, 54 R.I. 236, 172 A. 323 (1934); *McCall, Living Separate and Apart for Five Years and the Federal Matrimonial Causes Act*, 5 U. WEST. AUST. L. REV. 51, 54 (1960); *McCurdy*, *supra* note 17, at 706-07; *Rutman*, *supra* note 32, at 192; *Wadlington, Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 81-87 (1966).

<sup>40</sup> See *Rheinstein*, *supra* note 31, at 645-46; *Rutman*, *supra* note 32, at 192; *Wadlington*, *supra* note 39, at 81-87; *Note*, 97 U. PA. L. REV. 705, 706-09 (1949); *Note*, 1959 WASH. U.L.Q. 189, 194-95, 199.

<sup>41</sup> ARIZ. REV. STAT. ANN. § 25-312 (1956) (five years for any reason); ARK. STAT. ANN. § 34-1202 (Supp. 1965) (separation by voluntary act or mutual consent—three years); DEL. CODE ANN. tit. 13, § 1522 (Supp. 1966) (three years voluntary and no reasonable expectation of reconciliation); IDAHO CODE ANN. § 32-610 (1963) (five years); KY. REV. STAT. § 403.020 (1962) (five years); LA. CIVIL CODE ANN. art. 138, 139 (Supp. 1966) (one year after separation decree—voluntarily and no reconciliation has taken place); MD. ANN. CODE art. 16, § 24 (Supp. 1966) (voluntarily live apart for eighteen months); NEV. REV. STAT. § 125.010 (1963) (after three years separation at discretion of court); N.C. GEN. STAT. § 50-6 (Supp. 1965) (one year); R.I. GEN. LAWS ANN. 15-5-3 (1956) (after ten years at discretion of court); TEX. REV. CIV. STAT. ANN. art. 4629 (Supp. 1966) (seven years); VT. STAT. ANN. tit. 15, § 551 (1959) (three years without fault of libellant; resumption of marital relations not reasonably possible); VA. CODE ANN. § 20-91 (Supp. 1966) (two years); WASH. REV. CODE § 26.08.020 (Supp. 1965) (two years—regardless of fault in separation); WIS. STAT. ANN. § 247.07 (Supp. 1967) (five years—voluntarily living entirely apart).

<sup>42</sup> See, e.g., cases cited note 39 *supra*. In considering petitions alleging satisfaction of the statutory separation period, some courts inquire into fault only as an aid in evaluating whether conciliation is possible. See *Pearson v. Pearson*, 77 Nev. 76, 80, 359 P.2d 386, 388-89 (1961); *Smith v. Smith*, 54 R.I. 236, 172 A. 323 (1934).

<sup>43</sup> See *Pickens v. Pickens*, 258 N.C. 84, 127 S.E.2d 889 (1962); ARK. STAT. ANN. § 34-1202 (Supp. 1965); DEL. CODE ANN. tit. 13, § 1522 (Supp. 1966); LA. CIVIL CODE ANN. arts. 138-39 (Supp. 1966); MD. ANN. CODE art. 16, § 24 (Supp. 1966); WIS. STAT. ANN. § 247.07 (Supp. 1967).

percent whose spouses will not consent.<sup>44</sup> Finally, some states permit conversion of separation decrees into decrees for absolute divorce by either spouse after a specified period of continued separation.<sup>45</sup> Apparently the premise of this procedure is that after spouses have lived apart for the requisite period, the proof of a broken marriage is sufficient to discount any interest the state had in its continuation.<sup>46</sup> As in the case of separation by agreement, this conversion procedure seems necessarily to contain an element of consent since a spouse agreeing to a judicial separation would probably have knowledge of the statutory conversion feature.

Some commentators and a recent English proposal have gone further toward abolishing fault than any of the above procedures and have recommended that marriage disharmony evidenced by separation or certain other indicia be the *only* ground for divorce.<sup>47</sup> The English proposal provides that divorce should be possible even in the absence of mutual consent.<sup>48</sup>

A second criteria recommended as a determinant of marital breakdown is the failure of attempts at conciliation through formal procedures. This criteria is usually denoted mandatory or compulsory conciliation.<sup>49</sup> Advocates of this standard argue that not only are fault grounds inadequate, but that separation periods, in effect, leave the decision of whether the union is severed entirely to the spouses. To give legal significance to a decision so made, a couple merely has to live apart for the requisite period, while with the assistance of counseling their marriage might have been preserved.<sup>50</sup>

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<sup>44</sup> Between 1946 and 1950 only 14.8% of divorces were contested. JACOBSON 120. More recent New York figures show an even smaller percentage of contested actions. From July 1, 1946, to July 1, 1956, only 7% were contested. In the final year of the period, 1955-56, the figure was 9%. 1966 JLC REPORT 21-23.

<sup>45</sup> See ALA. CODE tit. 34, § 22 (1) (1959) (four years); COLO. REV. STAT. ANN. § 46-I-1 (1964) (three years); MINN. STAT. ANN. § 518.06 (Supp. 1966) (five years under limited divorce and two years under separate maintenance decree); TENN. CODE ANN. § 36-802 (Supp. 1966) (two years—in discretion of court up to two years); UTAH CODE ANN. § 30-3-1 (Supp. 1965) (three years); WIS. STAT. ANN. § 247.07 (Supp. 1967) (five years).

<sup>46</sup> See *Barrington v. Barrington*, 206 Ala. 192, 89 So. 512 (1921).

<sup>47</sup> See A DIVORCE LAW FOR CONTEMPORARY SOCIETY, REPORT OF GROUP APPOINTED BY ARCHBISHOP OF CANT. IN JAN. 1964, at 57 (1964); McCurdy, *supra* note 17, at 706-07; Note, 1959 WASH. U.L.Q. 189, 194-95, 199. Such recommendations, however, do not eliminate the possibility of conciliation as an additional consideration. *Id.*

<sup>48</sup> See A DIVORCE LAW FOR CONTEMPORARY SOCIETY, REPORT OF GROUP APPOINTED BY ARCHBISHOP OF CANT. IN JAN. 1964, at 33, 41, 57 (1964).

<sup>49</sup> See generally Foster, *supra* note 38; Lawless, *Compulsory Conciliation for New York?*, 14 BUFFALO L. REV. 457 (1965).

<sup>50</sup> See KOHUT, *supra* note 32, at 52-55.

Other commentators contend that mandatory conciliation counseling would be ineffective because individuals react adversely to attempts at forced cooperation.<sup>51</sup> The validity of these objections will be considered in detail in evaluating the New York procedure.

Conciliation procedures have been established by statute in eleven states and the District of Columbia.<sup>52</sup> Further, two states have abandoned such structures after their application proved unsuccessful.<sup>53</sup> The two basic types of conciliation procedures, mandatory and voluntary, are exemplified by the provisions adopted in the state of Wisconsin and the city of Los Angeles. Wisconsin requires, as a precondition to the filing of a petition for divorce, a report from a conciliation commissioner that mediation was attempted.<sup>54</sup> Los Angeles, on the other hand, maintains a separate tribunal which initiates conciliation procedures on the petition of either spouse, irrespective of whether other matrimonial relief is sought.<sup>55</sup> While in both jurisdictions attendance of one spouse can be compelled if the other seeks conciliation,<sup>56</sup> the Wisconsin mandatory procedure can be employed to compel *both* spouses to participate in the conciliation procedure although *neither* desires to do so.<sup>57</sup>

Delay, a common factor in both the separation period ground and conciliation procedures, is most objectionable to the divorce peti-

<sup>51</sup> See W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 369-74 (1954); M. VIRTUE, FAMILY CASES IN COURT 250 (1956); McCurdy, *supra* note 17, at 706-07; McIntyre, *Conciliation for Disrupted Marriages by or Through the Judiciary*, 4 J. FAMILY L. 117, 120-22 (1964); Rheinstein, *supra* note 31, at 635-40.

<sup>52</sup> See CAL. CIV. PROC. CODE §§ 1730-1747 (West 1955, Supp. 1967); COLO. REV. STAT. ANN. §§ 46-5-1 to 7 (1963); MICH. STAT. ANN. §§ 25.171, 25.175 (1957); MINN. STAT. ANN. §§ 488A.12-17, 488A.68-81, 488A.29-34 (Supp. 1966); N.Y. DOM. REL. LAW §§ 215 to 215-g (McKinney Supp. 1966); OHIO REV. CODE ANN. § 2301.03 (Page Supp. 1966); ORE. REV. STAT. §§ 107.510 to 107.610 (1965); R.I. GEN. LAWS ANN. §§ 8-10-1 to 45 (Supp. 1966); S.C. CODE ANN. § 20-110 (1962); WASH. REV. CODE § 26.12.050 (1958); WIS. STAT. ANN. §§ 247.13, 252.016 (Supp. 1967). See generally Foster, *supra* note 38; McIntyre, *supra* note 51. See also *People ex rel. Christiansen v. Connell*, 2 Ill.2d 332, 118 N.E.2d 262 (1954) (holding Illinois provision unconstitutional); IND. CONST. art. VII, § 19 (unimplemented).

<sup>53</sup> See REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON CONCILIATION AND RECONCILIATION (1963); Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443, 449 (1961).

<sup>54</sup> WIS. STAT. ANN. § 247.081 (Supp. 1967); see Foster, *supra* note 38, at 358-60.

<sup>55</sup> CAL. CIV. PROC. CODE § 1761 (West 1955); see Foster, *supra* note 38, at 364-67.

<sup>56</sup> See CAL. CIV. PROC. CODE §§ 1766, 1772 (West 1955, Supp. 1967); note 204 *infra*.

<sup>57</sup> Reference to agencies outside the court must be voluntary. See WIS. STAT. ANN. § 247.081 (Supp. 1967). Under the Los Angeles procedure, both spouses may be compelled if children will be affected. CAL. CIV. PROC. CODE §§ 1766, 1771 (West 1955, Supp. 1967).

tioner. Historically, provisions in divorce laws prohibiting, limiting, or protracting a grant of relief have had their effectiveness reduced by evasion devices. If only restrictive methods of divorce are provided, spouses simply desert, seek a divorce in another jurisdiction, or find other means of dissolving the marriage. Also, if separation periods are required for some grounds and not for others, spouses tend to choose the statutory provisions without a separation period even though the alternative necessitates admittance of less socially acceptable conduct.<sup>58</sup> Even if a state adopts a divorce law structure which forecloses evasion within the state, consenting spouses can secure a divorce in another state with less stringent prerequisites. Divorces achieved in this manner generally must be recognized by the domiciliary state under the full faith and credit clause of the Constitution.<sup>59</sup>

Two approaches limiting migratory evasion of divorce law have been attempted. First, efforts have been made to amend the Constitution to allow federal control.<sup>60</sup> Divergent state policies concerning divorce and the absence of a pressing urgency on a national scale

<sup>58</sup> Of the jurisdictions having a combination of separation period grounds and fault grounds, without separation periods, most have a much higher percentage of decrees granted on the basis of fault than on separation periods. The following data, which includes only those states in the reporting area for the Census Bureau, graphically demonstrates this conclusion:

State	Total	Adultery	Cruelty	Desertion	Nonsupport	Other	Not Stated
States with Separation Periods							
Idaho	2,548	14	2,194	120	18	40	112
Maryland	5,970	1,100	10	2,400	—	2,130*	330
Virginia	7,640	270	—	6,760	—	600	10
Wisconsin	4,550	30	3,840	90	40	340	210
States with Provisions for Conversion of Separation Decrees							
Alabama	12,380	440	6,780	4,540	20	500	100
Tennessee	9,500	80	6,660	2,280	420	80	60
Utah	2,460	2	1,686	70	82	62	558

\* [Includes 1,960 decrees granted after a period of separation.] See 3 VITAL STATISTICS OF THE UNITED STATES Table 2-19 (1962).

<sup>59</sup> See notes 221-25 *infra* and accompanying text.

<sup>60</sup> See LICHTENBERGER 197-209. It is possible that such amendment is no longer necessary in order for the federal government to regulate divorce. See Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371, 388 (1933); D. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 63-64 (1966); Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 COLUM. L. REV. 54, 59-61 (1954); cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Caminetti v. United States*, 242 U.S. 470 (1917) (Commerce Clause).

have apparently defeated these attempts.<sup>61</sup> Also, case precedent has rendered futile unilateral efforts by a state to stop migratory divorce by its domiciliaries; for it has been held that where both parties appear and collateral objection to the finding of domicile is barred in the rendering state by *res judicata*, the decree cannot be attacked in any state.<sup>62</sup> Finally, no uniform law would seem to be able to satisfy all of the various policies of the several states.<sup>63</sup>

From the brief outline provided here, it can be observed that fault, which was introduced as a ground for divorce in Roman law and became the basic concept under the influence of canon law, has lost its exclusive status, and consent, limited by separation periods and conciliation procedure, is frequently being introduced. Evasion, intra- and interstate, is a threat, however, to effective implementation of such reforms.

#### HISTORY AND SUBSTANCE OF NEW YORK DIVORCE REFORM

Following a period of over one hundred years as colony and state during which no judicial procedure for divorce was available,<sup>64</sup> New York finally granted divorce jurisdiction to its equity courts in 1787. The enabling statute was in some ways more restrictive than its ecclesiastical predecessors, for adultery was specified as the only ground for dissolution.<sup>65</sup> As a result of legislative inaction, the substantive grounds for divorce remained unchanged until 1966.<sup>66</sup>

Nurtured by the existence of this single basis for termination

<sup>61</sup> See LICHTENBERGER 187-209. The rate of migratory divorce probably amounts to no more than three to five percent annually. JACOBSON 109. See also Currie, *supra* note 60, at 63.

<sup>62</sup> See *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

<sup>63</sup> See 2 C. VERNIER, *AMERICAN FAMILY LAWS* 7 (1932). Ten states have adopted the UNIFORM DIVORCE RECOGNITION ACT; only two of these took the action subsequent to the time when the full effect of the *Sherrer* decision became known. Of those states employing the format of the uniform law, several have applied restrictive qualifications to the original provisions. See 9A *UNIFORM LAWS ANNOTATED* 457 (1965). Withdrawal of the law is under consideration by the commissioners. See H. FOSTER & D. FREED, *LAW OF THE FAMILY—NEW YORK* 34 (Supp. 1966) [hereinafter cited as FOSTER & FREED]; Note, 16 *HASTINGS L.J.* 121 (1965).

<sup>64</sup> See *Erkenbrach v. Erkenbrach*, 96 N.Y. 456, 459 (1884); *Griffin v. Griffin*, 47 N.Y. 134, 138 (1872); *Burtis v. Burtis*, 1 Hopk. Ch. 628, 637 (N.Y. 1825). See generally Spalletta, *Divorce in Colonial New York*, 39 N.Y. HISTORICAL SOC. Q. 422 (1955).

<sup>65</sup> See N.Y. Sess. Laws 1787, ch. 69. Although theoretically power remained in the legislature to grant divorces, no such case has been found; and in the 1846 Constitution, the courts were granted exclusive jurisdiction. See N.Y. CONST. art. 1, § 10 (1846) (now art. 1, § 9) (no divorce to be granted except by due judicial proceeding).

<sup>66</sup> Compare N.Y. Sess. Laws 1787, ch. 69, with N.Y. Sess. Laws 1962, ch. 313, § 7, repealed by N.Y. Sess. Laws 1966, ch. 254, § 2.

of the marriage status, intrastate evasion devices reached their ultimate development in New York.<sup>67</sup> A discontented spouse could obtain a dissolution if his marriage partner had disappeared for at least five years,<sup>68</sup> had been found to be incurably insane for a five year period or impotent,<sup>69</sup> or had been finally sentenced to life imprisonment.<sup>70</sup> In practice, the courts increased the availability of annulment by interpreting fraud in the inducement of a marriage promise in a manner similar to that given fraud in the law of contracts.<sup>71</sup> Also, the use of fraudulent evidence and the exploitation of indifference of the bench provided a less acceptable liberalization of a too restrictive law.<sup>72</sup> Finally, for those possessing sufficient financial resources, divorce was always available in a sister state and, more recently, in Mexico.<sup>73</sup>

A widespread public interest that originated with the *lower* court decisions in 1963-64 in the *Rosenstiel v. Rosenstiel* and *Wood*

<sup>67</sup> In 1965 New York marriages were dissolved by the following means: annulments—2,942; divorce—4,149; dissolution for absence—327. 1966 N.Y. JUD. CONF. REP. 425. See generally Wels, *New York: The Poor Man's Reno*, 35 CORNELL L.Q. 303 (1950).

<sup>68</sup> N.Y. DOM. REL. LAW §§ 220-21 (McKinney 1963). See also CONN. GEN. STAT. ANN. § 46-13 (1960).

<sup>69</sup> N.Y. DOM. REL. LAW §§ 140 (d), (f) (McKinney 1963). See also ALA. CODE tit. 34, § 20 (1958); COLO. REV. STAT. ANN. § 46-1-1 (1963); IND. ANN. STAT. § 3-1201 (1946); KAN. GEN. STAT. ANN. § 60-1601 (Supp. 1965); MINN. STAT. ANN. § 518.06 (Supp. 1966); NEB. REV. STAT. § 42-301 (1943).

Annulment has been given the primary characteristics of divorce by provisions for alimony, N.Y. DOM. REL. LAW § 236 (McKinney 1963), legitimation, N.Y. DOM. REL. LAW § 145 (McKinney 1963), and custody of children, N.Y. DOM. REL. LAW § 240 (McKinney 1963).

<sup>70</sup> See N.Y. DOM. REL. LAW § 6-2 (McKinney 1963) (does not apply if marriage contracted during parole); *In re Lindewall's Will*, 287 N.Y. 347, 357, 39 N.E.2d 907, 912 (1942). See also HAWAII REV. LAWS § 324-20 (1955); MASS. ANN. LAWS ch. 208, § 2 (1955).

<sup>71</sup> See N.Y. DOM. REL. LAW § 140 (e) (McKinney 1963); Wels, *supra* note 67, at 318-21; Note, 41 COLUM. L. REV. 503 n.4 (1941). The general leniency of the courts did not go unnoticed. In 1962 in New York there were 2,331 annulments and only 4,224 divorces as compared to 400,308 divorces and 12,692 annulments in the Census Bureau's reporting area. See 3 VITAL STATISTICS OF THE UNITED STATES Tables 2-2, 2-3 (1962).

<sup>72</sup> See 1966 JLC REPORT 21-23; JACOBSON 115; H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES 25-30 (1963). "The investigation confirmed what had long been suspected, widespread fraud, perjury, collusion and connivance pervade matrimonial actions of every type . . . . Moreover, examination of the records of the Supreme Court leads to the conclusion that those charged with the administration of justice in this type of litigation could not have been unaware of these conditions." 1948 New York County Grand Jury Presentment, *reprinted in* 1957 JLC REPORT 105.

<sup>73</sup> "[The actual number of divorces] . . . has probably been about one third to one half greater than the number recorded in New York State; currently, it may even be double, in view of the marked increase of Mexican divorces to Americans following . . . 1952 . . . . New York Supreme Court [recognition] . . . ." JACOBSON 116. See Caswell v. Caswell, 111 N.Y.S.2d 875 (Sup. Ct.), *aff'd*, 117 N.Y.S.2d 326 (App. Div. 1952).

*v. Wood* cases,<sup>74</sup> which held two bilateral Mexican divorces invalid, apparently stimulated legislative action to formulate more realistic divorce procedures. While these cases were before the Court of Appeals, the legislature authorized the Joint Legislative Committee for Matrimonial and Family Laws (hereinafter JLC) to study the substantive law of divorce.<sup>75</sup> Under pressure generated by the subsequent Court of Appeals decision in the *Rosenstiel* and *Wood* cases,<sup>76</sup> public JLC hearings,<sup>77</sup> endorsements of JLC proposals by prominent political leaders,<sup>78</sup> and Catholic lay support,<sup>79</sup> the legislature was prodded into action. After the legislative leaders resisted the bill proposed by the JLC<sup>80</sup> and drafted their own,<sup>81</sup> the legislature accepted a compromise between the JLC-proposed Wilson-Sutton Bill and the Leaders' Bill.<sup>82</sup> Although the reform is less than pervasive,<sup>83</sup>

<sup>74</sup> See *Rosenstiel v. Rosenstiel*, 21 App. Div. 2d 635, 253 N.Y.S.2d 206, *vacating annulments granted in* 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct. 1964); *Wood v. Wood*, 41 Misc. 2d 95, 245 N.Y.S.2d 800 (Sup. Ct. 1963).

<sup>75</sup> The JLC was created in 1957, but its functions were limited to inquiries into the procedural aspects of divorce law; however, a concurrent resolution authorizing investigation of *substantive* grounds was passed on June 8, 1965. See FOSTER & FREED, Supp. at 5. *Rosenstiel* was argued Feb. 1, 1965, and decided July 9, 1965.

<sup>76</sup> 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 383 U.S. 943 (1966) (*Rosenstiel* and *Wood* consolidated for decision).

<sup>77</sup> The committee held a total of eight days of hearings in New York City, Buffalo, and Albany. See 1966 JLC REPORT 13-16.

<sup>78</sup> See, e.g., N.Y. Times, Dec. 20, 1965, § 1, at 40, col. 2 (Mayor Wagner of New York City); N.Y. Times, Feb. 8, 1966, § 1, at 31, col. 4 (Mayor Lindsay of New York City); N.Y. Times, Feb. 8, 1966, § 1, at 1, col. 2 (Senator Robert F. Kennedy).

<sup>79</sup> A group of eighteen prominent Catholic laymen formed a Committee of Catholic Citizens to Support Divorce Reform in New York State. N.Y. Times, Feb. 4, 1966, § 1, at 1, col. 4.

<sup>80</sup> See 1966 JLC REPORT 85-106 for the JLC proposal.

<sup>81</sup> See First Draft of Leaders' Bill (on file Duke University School of Law Library).

<sup>82</sup> The three primary innovations of the bill are drawn from both proposals. The final statute contained substantially the same type grounds proposed by the JLC. Compare N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966), with 1966 JLC REPORT 85. However, clarifying language was added to the definition of cruel and inhuman treatment to ensure its extension to purely mental cruelty. Compare N.Y. DOM. REL. LAW § 170 (1) (McKinney Supp. 1966), with 1966 JLC REPORT 85-86. Criteria for divorce for imprisonment were altered. Compare N.Y. DOM. REL. LAW § 170 (3) (McKinney Supp. 1966), with 1966 JLC REPORT 88-89. Written, recorded separation agreements were added as a requirement for the ground of separation for two years, see N.Y. DOM. REL. LAW § 170 (6) (McKinney Supp. 1966); and a new provision for conversion of judicial separations to divorces after two years was provided, see N.Y. DOM. REL. LAW § 170 (5) (McKinney Supp. 1966). The Los Angeles type "voluntary" conciliation procedure recommended by the JLC was rejected in favor of a procedure somewhat similar to that used in Wisconsin. See FOSTER & FREED 21. Compare N.Y. DOM. REL. LAW §§ 215 to 215-g (McKinney Supp. 1966), with 1966 JLC REPORT 99-103. A provision concerning migratory divorce was carried over from the Leaders' Bill. See N.Y. DOM. REL. LAW § 250 (McKinney Supp. 1966).

<sup>83</sup> See notes 144-241 *infra* and accompanying text.

the overall plan of the statute is commendable as an attempt to deal with all the major reform proposals previously discussed. The new law attempts to provide more realistic bases for divorce, including nonfault grounds based on a separation period;<sup>84</sup> to establish a conciliation procedure intended to preserve viable family units;<sup>85</sup> and to restrict migratory evasions.<sup>86</sup>

The new grounds for divorce in New York include cruel and inhuman treatment, expanded from the former separation ground to include mental cruelty,<sup>87</sup> abandonment for two years,<sup>88</sup> confinement in prison for three consecutive years,<sup>89</sup> and two years separation under a separation decree<sup>90</sup> or a recorded separation agreement.<sup>91</sup> The combined effect of a redefinition of the original ground of adultery,<sup>92</sup> the newly enacted bases, and the relief available under annulment and dissolution in cases of absence or final life sentence,<sup>93</sup>

<sup>84</sup> See N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966).

<sup>85</sup> See *id.* §§ 215 to 215-g.

<sup>86</sup> See *id.* § 250.

<sup>87</sup> Compare N.Y. DOM. REL. LAW § 170 (1) (McKinney Supp. 1966) ("conduct of the defendant [which] . . . endangers the physical or mental well being"), with N.Y. Sess. Laws 1962, ch. 313, § 8, *repealed by* N.Y. Sess. Laws 1966, ch. 254, § 2.

<sup>88</sup> N.Y. DOM. REL. LAW § 170 (2) (McKinney Supp. 1966).

<sup>89</sup> *Id.* § 170 (3): "[an action for divorce may be maintained on grounds of] the confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant." The use of the preposition "for" in the phrase "confinement . . . for a period" has already caused some confusion. While the press release announcing the compromise bill states, "sentence is not material as a consideration but only the period of confinement," Press release, Wednesday, April 20, 1966, distinguished commentators have stated that the section probably is intended to refer to sentence, FOSTER & FREED, Supp. at 13. The sounder interpretation seems to be that the "for" should be read as "during" and that actual confinement during three years is required, since the introduction of waiting periods seems to have been a prime objective of the new law and the original proposal from which this provision is derived requires sentence for five years and confinement for two. See 1966 JLC REPORT 85, 88-89.

<sup>90</sup> N.Y. DOM. REL. LAW § 170 (5) (McKinney Supp. 1966). This provision is similar to those existing in several states. See, e.g., COLO. REV. STAT. ANN. § 46-1-1 (j) (1963) (3 years); MINN. STAT. ANN. § 518.06 (8) (Supp. 1966) (5 years, limited divorce; 2 years, separate maintenance).

<sup>91</sup> N.Y. DOM. REL. LAW § 170 (6) (McKinney Supp. 1966). See notes 114-18 *infra* and accompanying text.

<sup>92</sup> N.Y. DOM. REL. LAW § 170 (4) (McKinney Supp. 1966) makes adultery a ground for divorce, and defines it as "the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant." This proviso is in response to *Cohen v. Cohen*, 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951), which held homosexual acts were not adultery. This provision, by restricting the grounds to acts with another *person*, does not make bestiality a ground for divorce. See FOSTER & FREED, Supp. at 14.

<sup>93</sup> See notes 68-70 *supra*.

now provides New York with a divorce law system encompassing most of the procedures recommended.

The most significant aspect of the new grounds is not their number but their approach. More specifically, the nonfault theory of divorce is extensively employed.<sup>94</sup> Two of the grounds, abandonment and imprisonment, contain waiting periods beginning with the occurrence of the requisite culpable acts and lasting until the accrual of a cause of action.<sup>95</sup> These are not purely "cooling off" periods in the usual sense of an interim during which spouses can contemplate their actions before pursuing a divorce,<sup>96</sup> but rather are longer periods intended to evidence a breakdown of the marriage as well as to allow for reevaluation by the partners,<sup>97</sup> and as such are composite grounds importing a nonfault element. Separation for two years under a separation agreement is a true nonfault ground requiring only a showing that the marriage partners have lived apart pursuant to the terms of the agreement.<sup>98</sup> Separation for two

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<sup>94</sup> See notes 8-28 *supra* for a discussion of the history of the fault principle. For an exhaustive treatment of the nonfault approach in contemporary statutes, see Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

<sup>95</sup> N.Y. DOM. REL. LAW §§ 170 (2), (3) (McKinney Supp. 1966). The statute of limitations as applied to divorce and separation provides that no action may be brought on a ground which arose more than five years before. N.Y. DOM. REL. LAW § 210 (McKinney Supp. 1966). There should be no difficulty in applying § 210 to the ground of abandonment because the ground arises two years after the initial abandonment. See N.Y. DOM. REL. LAW § 170 (2) (McKinney Supp. 1966). However, when the ground of confinement to prison arises depends on whether "confinement . . . for a period" refers to sentence or confinement during sentence. As to the effect of confinement in other jurisdictions see Note, 12 N.Y.L.F. 105, 107 (1966).

<sup>96</sup> See, e.g., COLO. REV. STAT. ANN. § 46-1-6 (1963) (90 days); CONN. GEN. STAT. ANN. § 46-16 (1960) (90 days); N.C. GEN. STAT. § 50-8 (Supp. 1965) (6 months); OHIO REV. CODE ANN. § 3105-09 (Supp. 1966) (6 weeks).

<sup>97</sup> "The [JLC's] proposal . . . is to permit divorce by reason of abandonment only where it has continued for a period of two years or more, thus, *demonstrating to the state that the marriage is now a mere legal formality . . .*" 1966 JLC REPORT 8 (emphasis added). As to its proposal for a ground of imprisonment for two years, lengthened to three years in the statute, the JLC states: "[T]he proposal provides that the divorced spouse must be imprisoned for at least two years prior to the divorce being granted; this serves the purpose of (1) *breaking the natural but sometimes too rash inclination to dissolve a marriage* upon the conviction of the wrongdoing party; (2) giving the convicted party an opportunity to obtain his or her release from prison prior to dissolution of the marriage through reversal of the conviction on appeal." *Id.* at 89 (emphasis added).

<sup>98</sup> In reference to its proposal for two years separation as a ground, which was similar to the separation ground appearing in the statute, the JLC states: "If a couple demonstrates to the state that their marriage is dead, the state should then, with appropriate safeguards for the parties and their children, recognize the need for divorce . . . . One of the most convincing ways in which it can be demonstrated that a marriage is 'dead' is proof that a particular couple had lived separate and apart for

years under a judicial decree can also be classified as a nonfault ground, since either party to the separation action may "convert" the original court order into a divorce decree by showing two years of living apart and adherence to the terms of the separation decree.<sup>99</sup> The remaining grounds, adultery and cruel and inhuman treatment, are traditional fault grounds, requiring no waiting or separation period.<sup>100</sup>

In addition to the de-emphasis of culpability in the present statute, the legislature also refrained from providing defenses for all grounds except adultery.<sup>101</sup> Although the legislative history of this omission is enigmatic,<sup>102</sup> it was apparently intended that none of the traditional defenses be available for the new grounds.<sup>103</sup> Such

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a continuous period of years." 1966 JLC REPORT 90. See McCurdy, *Divorce—A Suggested Approach*, 9 VAND. L. REV. 685 (1956) (cited by committee report).

To avoid the trap laid by *Viles v. Viles*, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964), where the court held that a separation agreement made in contemplation of divorce even without express provision for attaining a divorce was subject to attack as against public policy, N.Y. GEN. OBLIGATIONS LAW § 5-311 (McKinney Supp. 1966) was passed barring attack in the absence of such an express provision.

<sup>99</sup> Considering § 170 (6) separately, it is not clear that the defendant in the original action can apply for a conversion to divorce, since that clause states that the *plaintiff* may so apply. There is no specification of which plaintiff is intended—the one in the initial separation suit or the one in the petition for conversion to divorce. Any doubt is dispelled by reference to the immediately preceding clause, § 170 (5), which refers to *plaintiff* in identical language, since that clause concerns application for divorce on grounds of living apart for two years under a separation agreement—a procedure in which there is no plaintiff in any proceeding except the one for divorce. It is therefore apparent that *plaintiff* in both clauses refers to the plaintiff in the divorce proceeding.

<sup>100</sup> N.Y. DOM. REL. LAW §§ 170 (1), (4) (McKinney Supp. 1966).

<sup>101</sup> Although the title to the reform law indicates that N.Y. DOM. REL. LAW § 171 (McKinney Supp. 1966), which provides for defenses to adultery, is repealed, it apparently is merely a carryover from an earlier draft of the Leaders' Bill which provided for such repeal. See First Draft of Leaders' Bill; FOSTER & FREED, Supp. at 9. In the absence of a specific provision in the text, the new title would not have the effect of repealing the original statute. Cf. *Squadrito v. Griebisch*, 1 N.Y.2d 471, 472-73, 136 N.E.2d 504, 506-07 (1956); *People v. O'Neil*, 280 App. Div. 145, 112 N.Y.S.2d 756 (1952); FOSTER & FREED, Supp. at 9. Therefore, § 171 is not repealed, and by its terms it applies only to adultery.

<sup>102</sup> Both the JLC proposal and the Leaders' Bill as originally drafted provided for repeal of § 171. See 1966 JLC REPORT 95-97; First Draft of Leaders' Bill § 2. Since the law as passed deletes any specific reference to § 171, the inference is that it was deliberately left in effect and no other provided. See also note 101 *supra*.

<sup>103</sup> The failure to provide statutory defenses arguably results in no defenses being available, since divorce law in New York is entirely statutory, see *Erkenbrach v. Erkenbrach*, 96 N.Y. 456, 462-63 (1884); *Griffin v. Griffin*, 47 N.Y. 134, 138-39 (1872); *Burtis v. Burtis*, 1 Hopk. Ch. 557, 564-68 (N.Y. 1825), except for matters traditionally within the equity jurisdiction, see *Griffin v. Griffin*, *supra* at 139 (awarding counsel fees to defendant's wife); *Wightman v. Wightman*, 4 John. Ch. 343 (N.Y. 1820) (lunacy of one party at time of marriage renders marriage void); *Ferlat v. Gojon*, 1 Hopk. Ch. 478, 493-94 (N.Y. 1825) (recognizing fraud as voiding marriage). But see 1 BISHOP § 129.

a result is logically justifiable upon analysis of the philosophical change attempted by the reform. The ground of adultery, based on fault, has been accorded the full range of fault-based defenses including the basic ones of recrimination, collusion, connivance, and condonation.<sup>104</sup> Since separation by judicial decree or agreement is based on principles of nonculpability, the defenses developed in a fault oriented system would appear to be inapplicable,<sup>105</sup> except insofar as the statutory defense of justification is made applicable in the initial action for separation.<sup>106</sup> Finally, the statutory definitions of the remaining provisions—cruel and inhuman treatment, abandonment, and confinement for three years—place an evidentiary burden on the petitioner sufficient to eliminate the need for the traditional defenses.<sup>107</sup>

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There has been, however, no decision in New York on point, and several New York courts have applied the defense of condonation in separation proceedings apparently without statutory authorization. See, e.g., *Knapp v. Knapp*, 273 App. Div. 993, 78 N.Y.S.2d 729 (1948), *aff'd*, 299 N.Y. 660, 87 N.E.2d 57 (1949); *Wirth v. Wirth*, 184 App. Div. 643, 172 N.Y.S. 309 (1918); *Reynolds v. Reynolds*, 9 Abb. R. 35, 36-37 (App. Div. 1867). One case has expressly noted its judicial origin. See *Pellegrino v. Pellegrino*, 66 N.Y.S.2d 297 (Sup. Ct. 1946). See also FOSTER & FREED § 15:15.

<sup>104</sup> See N.Y. DOM. REL. LAW § 171 (McKinney Supp. 1966); note 107 *infra*.

<sup>105</sup> See, e.g., *Matysek v. Matysek*, 212 Md. 44, 51, 128 A.2d 627, 631 (1957); *Gerdts v. Gerdts*, 196 Minn. 599, 604, 265 N.W. 811, 814 (1936); *George v. George*, 56 Nev. 12, 18, 41 P.2d 1059, 1060 (1935); *Pickens v. Pickens*, 258 N.C. 84, 86, 127 S.E.2d 889, 890 (1962) (separation which was the result of abandonment, not agreement, is the only defense); *Smith v. Smith*, 54 R.I. 236, 239; 172 A. 323, 324 (1934).

<sup>106</sup> Cf. N.Y. DOM. REL. LAW § 211 (McKinney Supp. 1966).

<sup>107</sup> Recrimination is basically the defense that even though the defendant may have committed a marital offense the plaintiff has also and should not, therefore, be granted relief. See N.Y. DOM. REL. LAW § 171 (McKinney Supp. 1966); *Mohrmann v. Kob*, 291 N.Y. 181, 51 N.E.2d 921 (1943). This defense has been attacked as an unsound application of the equitable clean hands doctrine, for it requires continuation of marriage the deterioration of which has been doubly demonstrated. See *Pullen v. Pullen & Holding*, 123 L.T.R. 203, 206 (1920); *Hendricks v. Hendricks*, 123 Utah 178, 257 P.2d 366 (1953); *Beamer, Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 243 (1942); *McCurdy, supra* note 98, at 694-99; *Raskin & Katz, The Dying Doctrine of Recrimination in the United States*, 35 CAN. B. REV. 1046 (1957); *Scott, The Doctrine of Recrimination in Divorce Proceedings*, 21 ROCKY MT. L. REV. 407 (1949). There would, therefore, seem to be no compulsion to allow this defense other than as provided by statute, and § 171 only provides for the adultery of plaintiff as a recriminatory defense. See *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952).

Collusion is an agreement between the plaintiff and defendant that defendant will not contest the action or that the act which will be a ground for divorce will be committed. See *Fuchs v. Fuchs*, 64 N.Y.S.2d 487 (Sup. Ct. 1946). Denying divorce because the defendant agrees not to defend would seem to have little application now that consent and living apart for two years can be a basis for divorce. The one circumstance in which the collusion doctrine might serve a useful function is in the case of cruel and inhuman treatment which has no required separation or waiting period, for the parties will be tempted to avoid the separation or waiting periods by colluding

Restriction on remarriage by the party at fault has also been eliminated by the reform law.<sup>108</sup> Originating in the canon law dogma concerning the indissolubility of a marriage bond,<sup>109</sup> restraints on remarriage were apparently later conceived in part as a punitive measure.<sup>110</sup> A proposal in the Leaders' Bill that restraints on remarriage be extended to both spouses and be reduced to six months must have been contemplated as a deterrent to divorce.<sup>111</sup> The en-

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to establish evidence. However, the objection here is not that there is an agreement but that the ground itself does not exist. If satisfactory proof is shown as required by statute, N.Y. DOM. REL. LAW § 211 (McKinney Supp. 1966), there appears no reason to deny relief because of the agreement. Furthermore, if the parties actually collude for commission of the offense in the case of cruel and inhuman treatment and abandonment, the requisite mental state of the plaintiff is lacking. See *DeVide v. DeVide*, 186 App. Div. 814, 174 N.Y.S. 774 (1919) (physical violence—no apprehension); *Heylmun v. Heylmun*, 119 Misc. 113, 195 N.Y.S. 335 (Sup. Ct. 1922) (mental cruelty—reasonably intolerable); *McBride v. McBride*, 56 Hun. 649, 9 N.Y.S. 827 (Sup. Ct. 1890) (physical violence—no fear). In case of confinement for three years, it seems unlikely that the parties will collude to have one imprisoned in order to obtain a divorce.

Connivance is corrupt consenting to have the other party commit the marital offense, *Santoro v. Santoro*, 55 N.Y.S.2d 294 (Sup. Ct.), *aff'd*, 269 App. Div. 859, 56 N.Y.S.2d 539 (1945), in which case the necessary mental state on the part of the plaintiff, see *DeVide v. DeVide*, *supra*; *McBride v. McBride*, *supra*; *Heylmun v. Heylmun*, *supra*, would again be lacking. Since conniving for commission of a crime would itself be a crime with an appropriate remedy, it seems unnecessary further to sanction the connivance by forcing continuance of a marriage in which neither party has an interest.

Condonation is the defense that the marital offense has been forgiven. See N.Y. DOM. REL. LAW § 171 (McKinney Supp. 1966) (adultery—affirmative proof of forgiveness or cohabitation with knowledge); *Wood v. Wood*, 2 Paige Ch. 108 (N.Y. 1830) (divorce); *FOSTER & FREED* §§ 15:15, :16 (separation—subsequent cohabitation raises inference of condonation). Since the defense tends to penalize the forgiving spouse, *FOSTER & FREED* § 7:10, the courts have established the doctrine of revival under which offenses prior to the act of forgiveness are revived by subsequent derelictions. See *Smith v. Smith*, 4 Paige Ch. 432 (N.Y. 1834). In separation cases where condonation is a judicial creation, *Pellegrino v. Pellegrino*, 66 N.Y.S.2d 297 (Sup. Ct. 1946), courts have given the defense the force of an inference only. See *In re Chandler's Will*, 175 Misc. 1029, 26 N.Y.S.2d 280 (Sup. Ct. 1941). It would seem more advisable to treat subsequent acts importing forgiveness as indicating an absence of the requisite mental state on the part of the plaintiff in instances of cruel and inhuman treatment and as evidence of previous consent to separation in instances of abandonment.

<sup>108</sup> N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1966) provides that either party to a divorce may remarry. Under the previous section only the complainant could remarry without permission of the court, and the court could modify the decree to give permission to the defendant only after three years and on condition of good behavior. Compare N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1966), with N.Y. Sess. Laws 1909, ch. 19, as amended, N.Y. Sess. Laws 1915, ch. 266, and N.Y. Sess. Laws 1919, ch. 265 (former § 8).

<sup>109</sup> See notes 9-13 *supra*.

<sup>110</sup> See *In re Salmon*, 34 Misc. 251, 252-53, 69 N.Y.S. 215, 216-17 (Sup. Ct. 1901); *FOSTER & FREED* § 6:16.

<sup>111</sup> See First Draft of Leaders' Bill (on file Duke University School of Law Library). Lichtenberger, writing in 1931, collected evidence that should have raised strong questions concerning deterrence resulting from restrictions on remarriage. He noted that in

acted bill abandoned this proposal in favor of elimination of all restraints except during the three month period between the interlocutory decree and final judgment.<sup>112</sup> The rejection of the archaic restrictions on remarriage was partially motivated by a realization of the practical ineffectiveness of such limitations insofar as they would not affect subsequent marriages contracted outside of New York.<sup>113</sup>

Although the legislature seems to have sought a compromise between fault and nonfault principles in providing for grounds and defenses, in one respect it has gone very far toward complete adoption of the nonfault principle. If parties separate under the required recorded agreement or by judicial separation after the effective date of the statute, there is no way to prevent conversion to divorce by either party at the end of two years.<sup>114</sup> A person, the stability of whose marriage is becoming doubtful and who wishes some sort of binding readjustment of his marital status short of divorce, is not only deterred from seeking such solutions<sup>115</sup> but also has very limited

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one U.S. study only 12.7% of divorced spouses remarried within one year and that in another conducted in Switzerland, a country with a similar divorce rate, there was little difference between the remarriage rate of divorced and widowed spouses. LICHTENBERGER 174. While Lichtenberger's conclusions were tentative because of insufficient data, current information tends to substantiate his conclusions. Although a very high percentage of divorced persons eventually remarry, through the mid-1930's the percentage of remarriage within one year was less than 25% for both males and females. See JACOBSON 70. Thus, the basic premise upon which restrictions on remarriage are based—that a person obtains a divorce in order to marry his paramour immediately and that therefore a delay in ability to so marry will discourage divorce—is undercut. This conclusion is also supported by one study in which only 6% of the sample indicated that the cause of their divorce was affection for a nonspouse. See W. GOODE, *AFTER DIVORCE* 123 (1956). In fact, Lichtenberger argues that restricting the availability of divorce procedures might encourage divorce, since persons knowing that they must wait a period of time before they can remarry might seek an immediate divorce in order to be eligible for remarriage as soon as possible. LICHTENBERGER 176; 1966 JLC REPORT 104. The effectiveness of the past restrictions in New York was also limited by the holding that they did not apply to marriages obtained outside the jurisdiction. *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929); *Moore v. Hegeman*, 92 N.Y. 521 (1883).

<sup>112</sup> See N.Y. DOM. REL. LAW § 242 (McKinney Supp. 1966).

<sup>113</sup> See N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1966). For cases holding sister state marriages valid if valid where contracted, see, e.g., *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929); *Moore v. Hegeman*, 92 N.Y. 521 (1883); *Beaudoin v. Beaudoin*, 270 App. Div. 631, 62 N.Y.S.2d 920 (1946). When, however, the state of the remarriage would hold the marriage invalid if it would have had no validity in the state of the spouses' domicile, then New York will hold it invalid. *Beaudoin v. Beaudoin*, *supra*.

<sup>114</sup> See N.Y. DOM. REL. LAW §§ 170 (5), (6) (McKinney Supp. 1966). See also notes 151-60 *infra* and accompanying text.

<sup>115</sup> A wife might be deterred from converting her separation into absolute divorce by the prospect of loss of her election and intestate succession rights, for under N.Y. DECED. EST. LAW § 50 (a) (McKinney Supp. 1966), conversion extinguishes those rights. Furthermore, if the wife seeks to protect her marital property rights by agreement, she

alternatives.<sup>116</sup> There is some indication that the significance of these reform provisions might become even more far-reaching, for the only decision interpreting the new law, *In re Curatolo*<sup>117</sup> held that the statute's conversion provisions can be applied to *pre-existing* separations without modification of a decree or re-execution of agreement. The Attorney General has issued an opinion providing for a similar effect.<sup>118</sup>

The second major reform in the New York system is the establishment of an elaborate conciliation procedure.<sup>119</sup> This machinery will be administered through a state-financed<sup>120</sup> Conciliation Bureau located in each judicial district,<sup>121</sup> supervised by a supreme court justice,<sup>122</sup> and staffed by commissioners and counselors appointed by the supervising justice.<sup>123</sup> Provisions are included for the appoint-

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may find her husband unwilling to acquiesce, for INT. REV. CODE OF 1954, § 2516 would require payment of a gift tax if the agreement were not followed *within* two years by divorce. See notes 162-66 *infra* and accompanying text.

<sup>116</sup> Procedures which would not raise the possibility of absolute dissolution of the marriage seem to be limited to support and custody actions, see N.Y. DOM. REL. LAW § 240 (McKinney 1963); N.Y. FAMILY Ct. Acr §§ 412, 651 (McKinney 1963), and actions for separation for a period less than two years, see N.Y. DOM. REL. LAW § 200 (McKinney Supp. 1966).

<sup>117</sup> 52 Misc. 2d 31, 274 N.Y.S.2d 514 (Sup. Ct. 1966).

<sup>118</sup> See Informal Opinion A.G. 1050, Sept. 12, 1966, printed in 156 N.Y.L.J., Oct. 26, 1966, at 1, col. 3.

<sup>119</sup> See generally Note, 4 HARV. J. LEGIS. 149, 153-59 (1966).

<sup>120</sup> See N.Y. DOM. REL. LAW § 215-b (a) (McKinney Supp. 1966). This is one of the more important provisions of Article 11-B, the article establishing the conciliation provision, since the county-financed conciliation services in Family Courts have not been effectively implemented. See 1966 N.Y. JUD. CONF. REP. 309. This is probably due in part to difficulty in county financing. See Larsen, *Trends and Developments in Oregon Family Law: Court, Counsel, and Conciliation*, 43 ORE. L. REV. 97, 104 (1964). Concern over county financing has resulted in a bill that will be introduced in the 1967 legislature to provide for state financing for all courts. 157 N.Y.L.J., Jan. 5, 1967, at 1, col. 6.

<sup>121</sup> See N.Y. DOM. REL. LAW § 215 (McKinney Supp. 1966). This provision has been strongly criticized as uneconomical, primarily because of the small demand in some districts, and the administrative organization of the New York courts on the department rather than the district level. See, e.g., FOSTER & FREED 22; *The Report of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York* (Part I), 156 N.Y.L.J., Oct. 17, 1966, at 4 [hereinafter cited as *A.B.C.N.Y. Report*]; *Report of the Special Committee on Matrimonial Law of the New York County Lawyer's Association* 30-31 (1966) [hereinafter cited as *N.Y. County Bar Report*].

<sup>122</sup> N.Y. DOM. REL. LAW § 215 (McKinney Supp. 1966). The New York City and County Bar Associations recommended an amendment substituting an administrative official for the supervising justice. *A.B.C.N.Y. Report*, at 4; *N.Y. County Bar Report*, at 31-32.

<sup>123</sup> N.Y. DOM. REL. LAW § 215-b (a) (McKinney Supp. 1966). Concern has been shown over the method of compensation and lack of required qualification for the commissioner and counselor positions. Since the statute specified compensation by fee, it apparently requires payment at a fixed rate per case rather than set salaries, with the probability

ment of special guardians to represent the interests of any children.<sup>124</sup> The only jurisdiction granted the Conciliation Bureau is specified in section 215-a: "The Conciliation Bureau shall have the power to conduct all conciliation proceedings after the commencement of an action for divorce. . . ." Nothing is said about jurisdiction in separation proceedings.<sup>125</sup> Since Article 9 of the Family Court Act had already provided for a Family Court conciliation service in *any* case in which either spouse petitions for conciliation,<sup>126</sup> the apparent intention of the legislature in its subsequent formation of the Conciliation Bureau was that conciliation rendered by the Family Court would now be limited to cases falling outside the exclusive jurisdiction of the Bureau. Thus, in separation actions, presumably a stage in marriage breakdown earlier than divorce, conciliation proceedings are not required, but are available on petition to the Family Court.

After commencement of a divorce action by service of summons,<sup>127</sup> a notice of such commencement must be filed with the Bureau within ten days or the action will be discontinued.<sup>128</sup> Commencement by summons rather than complaint not only avoids any objection of denial of speedy access to the courts,<sup>129</sup> but also prevents

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of ad hoc appointments which will inhibit development of requisite skills. See *A.B.C.N.Y. Report*, at 4; *N.Y. County Bar Report*, at 31. The role of the conciliation commissioner is pivotal, since he provides initial contact with the feuding spouses. However, the only qualification required by statute is that he be an attorney admitted to practice in New York for at least five years. See N.Y. DOM. REL. LAW § 215-b (b) (McKinney Supp. 1966). Furthermore, no qualifications are listed for counselors. See N.Y. DOM. REL. LAW § 215-b (McKinney Supp. 1966). However, additional standards adopted by statute or court rule have been urged. See Address of Professor Henry H. Foster, Jr., 156 N.Y.L.J., Oct. 14, 1966, No. 73, at 1, col. 6; *N.Y. County Bar Report*, at 33. Fears of political patronage have also been expressed. See *N.Y. County Bar Report*, at 33.

<sup>124</sup> See N.Y. DOM. REL. LAW §§ 215-b (a), (d), 215-c (c) (McKinney Supp. 1966).

<sup>125</sup> See FOSTER & FREED, Supp. at 22-23.

<sup>126</sup> See N.Y. FAMILY CT. ACT § 921 (McKinney 1963), implementing N.Y. CONST. art. 6, § 13b (6).

<sup>127</sup> See N.Y. DOM. REL. LAW § 211 (McKinney Supp. 1966).

<sup>128</sup> See N.Y. DOM. REL. LAW § 215-c (a) (McKinney Supp. 1966).

<sup>129</sup> In Illinois, *People ex rel. Christiansen v. Connell*, 2 Ill.2d 332, 118 N.E.2d 262 (1954), held that forcing a sixty-day waiting period prior to filing was unconstitutional under the state constitution as a denial of immediate access to the courts. In *People ex rel. Doty v. Connell*, 9 Ill.2d 390, 137 N.E.2d 849 (1956), a statute requiring a waiting period between service of summons and filing of a complaint was held constitutional. That such problems have concerned the legislature is apparent from a JLC memorandum to the governor relative to a statute providing for referrals of spouses on a voluntary basis to private or county-supported conciliation sessions: "In any event, if either spouse withdraws his or her consent at any time, the conciliation services cease and the parties are immediately returned to the Court with their action. This is necessary because of the Constitutional rule that parties cannot be deprived for an

exacerbation of the defendant's feelings by an inflammatory complaint.<sup>130</sup> Discontinuance of the action for failure to file the requisite commencement notice is one of the features lending compulsoriness to conciliation proceedings.

To begin the conciliation procedure, the Bureau's supervising justice assigns the matter to a conciliation commissioner who, within five days thereafter, gives notice of the date of a conciliation conference.<sup>131</sup> Another compulsory feature appears at this point in the form of a power in the supervising justice to order attendance if either party fails to appear at the conciliation conference.<sup>132</sup> A finding by the commissioner of "no necessity" for further conciliation proceedings "for good cause shown" can terminate the entire conciliation procedure at this juncture.<sup>133</sup> While the statute gives no indication of the nature of good cause, it would seem that if the long separation periods associated with all but two of the statutory grounds are sufficient indicators of the death of the marriage, additional conciliation procedures, which could last as long as 120 days,<sup>134</sup> would be superfluous. However, the legislature apparently intended counseling as an additional rather than an alternative safeguard to the separation period, since a finding of "no necessity" was left

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*unreasonable period of time of the services of our Judicial system.*" 1966 JLC REPORT 37 (emphasis added). See generally *Brooklyn Law Review Study*, 1958 JLC REPORT 129.

<sup>130</sup> See Lawless, *Compulsory Conciliation for New York?*, 14 BUFFALO L. REV. 457, 462 (1965); cf. Baum, *A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 11 WAYNE L. REV. 451, 466-67 (1965). See also WIS. STAT. ANN. § 245.001 (Supp. 1965).

<sup>131</sup> See N.Y. DOM. REL. LAW § 215-c (b) (McKinney Supp. 1966). Section 215-c (b) (1) also permits at this point the appointment of a special guardian for any minor, handicapped, or incompetent children.

<sup>132</sup> See N.Y. DOM. REL. LAW § 215-c (b) (3) (McKinney Supp. 1966). See also N.Y. FAMILY CT. ACT § 92 (4) (McKinney Supp. 1966), which contains a similar procedure that is not automatic but requires a request by the spouse seeking aid of the Family Court conciliation service before attendance will be compelled.

<sup>133</sup> N.Y. DOM. REL. LAW § 215-c (b) (2) (McKinney Supp. 1966).

<sup>134</sup> No action for divorce can be tried until the commissioner submits his final report, or 120 days after the filing of notice with the Bureau. N.Y. DOM. REL. LAW § 215-g (McKinney Supp. 1966). In addition, no *verified* complaint, which includes all complaints except those alleging adultery, may be served in a *divorce or separation* until 120 days after service of summons. N.Y. DOM. REL. LAW § 211 (McKinney Supp. 1966). The requirement of a 120 day waiting period in separation actions has been soundly criticized because of the absence of any conciliation requirement in separation actions. "[This provision] . . . is patently a typographical error which should be eliminated. A compulsory delay of 120 days between the service of a summons in a separation action and the filing of a complaint has never been suggested by anybody." *The Report of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York* (Pt. II), 156 N.Y.L.J., Oct. 18, 1966, at 4.

completely discretionary and was not in any way correlated to specific grounds.<sup>135</sup> Nevertheless, causes which seemingly should be sufficient to render conciliation unnecessary include prior unsuccessful counseling by approved counselors, particularly a prior failure of reconciliation by the Family Court, and unavailability of one spouse, as in a suit based on abandonment or imprisonment.

If a finding of no necessity cannot be justified, the commissioner is directed to hold an informal conference to determine if the parties are to be referred to counselors.<sup>136</sup> Since attendance at these counseling sessions may be compelled, whether such counseling is made mandatory is within the combined discretion of the commissioner and the supervising justice.<sup>137</sup> Within thirty days after the report of the counselor, the conciliation commissioner *may* hold a conciliation *hearing* at which each party is entitled to be heard, present evidence, cross-examine, and be represented by counsel.<sup>138</sup> The primary purpose of this post-counseling hearing is, according to the statute, to determine if a sixty-day reconciliation period should be ordered.<sup>139</sup> After this final hearing if the commissioner reports that reconciliation is not possible, statutory procedures are at an end,<sup>140</sup> and the plaintiff may file his complaint.<sup>141</sup>

The legislature also passed a provision apparently aimed at interstate evasion by migratory divorce.<sup>142</sup> This provision, adopted from Section 2 of the Uniform Divorce Recognition Act, is in the form of a presumption of domicile within New York in cases where a party obtaining a divorce in another jurisdiction was domiciled in New York within twelve months prior to the decree and returns to New York within eighteen months after departure. Domicile is also presumed if at all times between departure and return a place of residence has been maintained within New York.<sup>143</sup>

#### LIMITS OF THE REFORM

Within the context of the history of divorce law and the present status of that law, the New York reform is not a unique departure.

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<sup>135</sup> See N.Y. DOM. REL. LAW § 215-c (b) (2) (McKinney Supp. 1966).

<sup>136</sup> *Id.* § 215-c (b) (4).

<sup>137</sup> See *id.*

<sup>138</sup> *Id.* § 215-d.

<sup>139</sup> See *id.* § 215-d (e).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* § 215-g (1).

<sup>142</sup> See N.Y. DOM. REL. LAW § 250 (McKinney Supp. 1966).

<sup>143</sup> See notes 218-41 *infra* and accompanying text.

Nonetheless, serious weakness can be found in the statutory structure finally adopted. Compromise of nonfault, nonadversary policies with traditional concepts of divorce law has resulted in a system which leaves uncertain whether separation as a basis for divorce applies only when the spouses live apart subsequent to the enactment of the present statute and to fulfillment of filing requirements. The compromise has also created intrastate evasive devices which encourage the self-defeat of many of the motivations for the reforms. Further, the recently articulated constitutional right to marital privacy raises doubts as to the validity of the conciliation procedure adopted. Finally, the jurisdiction of the courts has been restricted in an attempt to limit recognition of sister state decrees.

*Compromise of Policies.* Of the basic policy decisions represented by the new reform, several represent compromises between traditional principles of divorce and current trends toward nonfault grounds and nonadversary proceedings. In one compromise the legislature chose not to rely exclusively on a nonadversary, family court as the tribunal rendering divorce decisions. Although New York has a family court which handles most family-oriented problems,<sup>144</sup> divorce proceedings have been left in the jurisdiction of the Supreme Court,<sup>145</sup> the court of general jurisdiction in New York. As a further compromise, the Supreme Court procedure is designed to be partly adversary and partly nonadversary in nature. Since a mandatory conciliation procedure is interposed before the trial of the divorce action, a situation is created in which the objectives of each procedure may be defeated by the other. Feuding parties may be discouraged from sincere attempts at reconciliation by the prospect that cooperation in the conciliation sessions might reveal information or strategy which would handicap the prosecution of their case at trial.<sup>146</sup> On the other hand, since most cases will be tried by a judge who will be aware that conciliation has already been found impossible or unnecessary, there will exist an unconscious pressure to allow dissolution of a marriage the further success of which appears doubtful.<sup>147</sup>

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<sup>144</sup> See N.Y. CONST. art. 6, § 13; N.Y. FAMILY CT. ACT § 115 (McKinney Supp. 1966).

<sup>145</sup> Compare N.Y. CONST. art. 6, § 13, with N.Y. CONST. art. 6, § 7.

<sup>146</sup> See notes 183-84 *infra* and accompanying text.

<sup>147</sup> New York judges in the past have gone to extremes to allow dissolution of marriage by annulment for fraud in order to mitigate a restrictive divorce law. See note 72 *supra*.

As have other jurisdictions in this country,<sup>148</sup> New York stopped short of adoption of nonfault grounds exclusively.<sup>149</sup> Unfortunately, the linking of delays with those grounds not based in culpability may promote undesirable results. When the potential petitioner views the protraction necessitated by the combination of a possible 120 day conciliation period and the pre-existing three month interlocutory period, the availability of alternative fault grounds which do not impose the additional delay of a separation period may provide incentive for avoidance of the nonfault grounds.<sup>150</sup>

*Retroactive Effect of Separation Grounds.* The states adopting separation periods which have decided the retroactive effect of the statute have almost unanimously held such provisions applicable to pre-existing separations.<sup>151</sup> Of course, these decisions, based on interpretations of particularized statutes, are not necessarily precedent for a similar interpretation of the New York statute.<sup>152</sup> However, a New York Supreme Court case, *In re Curatolo*,<sup>153</sup> would allow retroactive application of the new separation agreement and separation decree provisions. The court in *Curatolo* based its holding on legislative intent discerned from the inclusion of an express disclaimer of retroactive effect in the original proposal of the Joint Legislative Committee on Matrimonial and Family Law and the absence of such a limitation in the bill as passed.<sup>154</sup> However, this interpretation is at variance with statements by the principal drafter in response to questions on the floor of the legislature,<sup>155</sup>

<sup>148</sup> See notes 39-46 *supra* and accompanying text.

<sup>149</sup> See notes 87-91 *supra* and accompanying text. Both nonfault separation periods and the strictly fault grounds of cruelty and adultery were adopted.

<sup>150</sup> For the effect of alternative fault grounds without a separation period, see note 57 *supra* and accompanying text.

<sup>151</sup> Separation for period: *Rozboril v. Rozboril*, 60 Ariz. 247, 135 P.2d 221 (1943); *White v. White*, 196 Ark. 29, 116 S.W.2d 616 (1938); *State ex rel. Progress v. First Judicial Dist. Court*, 53 Nev. 386, 2 P.2d 129 (1931); *Hagen v. Hagen*, 205 Va. 791, 139 S.E.2d 821 (1965); WASH. REV. CODE § 26.08.020 (Supp. 1965); Wis. Laws 1925, ch. 4, repealed by, Wis. Laws 1959, ch. 595, § 52, presently, Wis. STAT. ANN. § 247.07 (7) (Supp. 1967). Separation under judicial decree: *Fuqua v. Fuqua*, 268 Ala. 17, 104 So. 2d 925 (1958); *Gerdtz v. Gerdtz*, 196 Minn. 599, 265 N.W. 811 (1936); Wis. Laws 1925, ch. 4, repealed by, Wis. Laws 1959, ch. 595, § 52, presently, Wis. STAT. ANN. § 247.07 (7) (Supp. 1967); UTAH CODE ANN. § 30-3-1 (Supp. 1966) (necessary implication). *But see* *Pierce v. Pierce*, 107 Wash. 125, 128-31, 181 P. 24, 25-26 (1919).

<sup>152</sup> See *Wadlington, Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 80-81 (1966).

<sup>153</sup> 52 Misc.2d 31, 274 N.Y.S.2d 514 (Sup. Ct. 1966); *accord*, Informal Opinion A.G. 1050, Sept. 12, 1966, printed in 156 N.Y.L.J., Oct. 26, 1966, at 1, col. 2.

<sup>154</sup> *In re Curatolo*, 52 Misc. 2d 31, 274 N.Y.S.2d 514 (Sup. Ct. 1966).

<sup>155</sup> See FOSTER & FREED, Supp. at 15.

and disregards as "merely evidentiary" the requirement that separation agreements need be recorded within thirty days of their making.<sup>156</sup> Furthermore, since the conversion feature arguably applies only to a spouse who accepts a separation agreement with knowledge of the possibility of conversion, it is rather anomalous to apply it to spouses who, because of lack of such knowledge, could not have been consented to conversion. The ambiguity seems to necessitate legislative clarification. However, contentions that retroactive application would be void as a violation of due process should have only negligible inhibitory effect upon judicial or legislative action to affirm such application.<sup>157</sup> While retroactivity might be viewed as an unconstitutional taking of property since a wife's interest in her husband's estate is terminated by divorce,<sup>158</sup> the United States Supreme Court has upheld a New York termination provision as a valid exercise of legislative power.<sup>159</sup> Any allegation that mere separation is an inadequate justification for imposing the disabilities accompanying divorce would have to overcome the precedential significance of decisions in other jurisdictions dismissing similar challenges.<sup>160</sup>

*Intrastate Evasion.* The effectiveness of the reform law seems certain to be impaired by intrastate evasive devices. The reform structure not only established new incentives for evading the statutory provisions but also left old evasive devices untouched. Under the old law the impetus for evasion of the divorce law came from its restrictiveness. While this incentive has been mitigated by the more liberal grounds, there are several factors which might motivate avoidance of the most significant of the innovations—separation period grounds and conciliation procedures.

<sup>156</sup> N.Y. DOM. REL. LAW § 170 (6) (McKinney Supp. 1966).

<sup>157</sup> Note, 12 N.Y.L.F. 105, 108 (1966). For a brief summary of the relegation of economic due process arguments to the states, see R. POWELL, REAL PROPERTY ¶¶ 754-55 (1962). See generally Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960).

<sup>158</sup> See note 115 *supra*.

<sup>159</sup> In referring to the statutory elective share of a wife in her husband's estate, the New York Court of Appeals stated: "Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights . . ." *In re McGlone's Will*, 284 N.Y. 527, 533, 32 N.E.2d 539, 542 (1940), *aff'd*, 314 U.S. 556 (1941).

<sup>160</sup> See *Fuqua v. Fuqua*, 268 Ala. 127, 104 So. 2d 925 (1958); *Rozboril v. Rozboril*, 60 Ariz. 247, 135 P.2d 221 (1943); *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933); *Hagen v. Hagen*, 205 Va. 791, 139 S.E.2d 821 (1965).

Economic considerations might discourage suit for a separation decree by an "injured" spouse. Part of the leverage in bargaining for a property settlement results from the fact that even after a judicial separation decree, an "innocent" spouse retains her election and inheritance rights in the "guilty" spouse's estate. However, a conversion into a divorce would terminate those rights.<sup>161</sup> Thus, the possibility of conversion deters the "innocent" spouse from seeking a separation until a property settlement agreement is made.

An incentive to avoid the separation agreement ground, at least for persons in the middle and upper income brackets, is found in the federal gift tax law.<sup>162</sup> Under the separation period provisions of other states, no formal agreement is required to begin the running of the statutory period;<sup>163</sup> but under New York law, the commencement of the period is not recognized unless such an agreement is recorded within thirty days of its execution.<sup>164</sup> If separation agreement property settlements are followed *within* two years by divorce,<sup>165</sup> Internal Revenue Code, section 2516, presumes them to have been made for adequate consideration and thereby renders them exempt from the gift tax.<sup>166</sup> Thus, under the New York statute requiring a two year separation period after a written separation agreement, the gift tax provision will be very difficult to satisfy. Although it seems both that the recorded separation agreement requirement of the divorce law could be satisfied by an agreement which did not provide for a property settlement<sup>167</sup> and that any property settlement

<sup>161</sup> See note 115 *supra*.

<sup>162</sup> Incompatibility with the gift tax was first noted by a study committee of the New York Chapter of the American Academy of Matrimonial Lawyers, see N.Y. Times, Dec. 5, 1966, § 1, at 64, col. 1, a group with a vested interest in tax protection of wealthy clients. Under current gift tax rates, a husband transferring residential property worth \$23,000 would have to pay taxes up to \$1,200, depending on the extent to which the specific exemption of § 2521 had been depleted. See INT. REV. CODE OF 1954, §§ 2502, 2503.

<sup>163</sup> See authorities cited note 41 *supra*.

<sup>164</sup> N.Y. DOM. REL. LAW § 170 (6) (McKinney Supp. 1966).

<sup>165</sup> Treas. Reg. § 25.2516-1 (a) (1961) interprets divorce to mean "final decree." This interpretation should be considered in any revision of the separation period since New York employs a three month interlocutory decree procedure. See N.Y. DOM. REL. LAW § 242 (McKinney 1963).

<sup>166</sup> If a settlement is made in appreciated property, the "donor" is subject to an income tax irrespective of his liability under the gift tax provisions. See *United States v. Davis*, 370 U.S. 65, 69 n.6 (1962); *Farid-Es-Sultaneh*, 160 F.2d 812, 814-15 (2d Cir. 1947).

<sup>167</sup> Although the issue is not free from doubt, it appears that satisfaction of § 2516 is not necessary to exempt settlement of *support* as opposed to property rights from

could be postponed until within two years of a final divorce decree, such an arrangement is highly unlikely as a practical matter. The only motive for an agreement without property settlement would be to gain a tax advantage for the prospective donor, a factor hardly compelling consent by the prospective donee. Further, if the latter accepts such an agreement, she loses her leverage in bargaining for a property settlement since the agreement, even without a property settlement, would give rise to conversion rights in the prospective donor. In order for the separation period grounds to attain the objectives intended by their promulgations, it would seem that the legislature must correct the conflict between the federal and state provisions by either removing the recording requirement or shortening the separation period.

Strong incentives also exist for evasion of the conciliation procedures. Although there will be those who generally object to the idea of counseling, the extent of such attitudes is unknown. More troublesome, however, are the potentially significant expense and delay engendered by the increased number of hearings inherent in the conciliation procedure.<sup>168</sup> For the poor, there is the prospect of additional attorney's fees,<sup>169</sup> for not only will an attorney probably appear at the divorce trial, but the two or more additional hearings in connection with conciliation may also require his presence.<sup>170</sup> Such added expense could discourage spouses from initiating divorce proceedings or encourage contrived abandonments which would probably result in an early termination of conciliation through a finding of "no necessity."<sup>171</sup> Further, the separation period required for abandonment could be avoided if divorce on grounds of cruelty were sought.<sup>172</sup>

The more affluent, for whom fault grounds are usually either distasteful or unavailable, and for whom conciliation engenders too much delay, can resort to migratory divorce as an alternative to the intrastate devices. The possibility of a conciliation period which might last 120 days followed by a three month interlocutory period

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the gift tax. See 1946-2 CUM. BULL. 166; Rev. Rul. 60-160, 1960-1 CUM. BULL. 374; Estate of Robert Rodger Glen, 45 T.C. 323, 335 (1966).

<sup>168</sup> See notes 58-59 *supra* and accompanying text.

<sup>169</sup> See *Report of the Special Committee on Matrimonial Law*, 21 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 590 (1966).

<sup>170</sup> See notes 127-41 *supra* and accompanying text.

<sup>171</sup> See text following note 133 *supra*.

<sup>172</sup> See notes 95-100 *supra* and accompanying text.

has little appeal when compared to a sojourn of six weeks in Las Vegas,<sup>173</sup> and divorces of the one day variety in Mexico which might still be valid in New York.<sup>174</sup> Even if a party is not motivated to avoid conciliation, incentive nevertheless exists for non-cooperation during counseling sessions. If the divorce action will be actually contested, the conciliation process may lead to revelations that will be harmful to a spouse's case in the subsequent adversary proceeding.<sup>175</sup> The harshness of this possibility is partially avoided in most jurisdictions having conciliation procedures by restrictions upon admissibility of information revealed in conferences.<sup>176</sup> However, New York provides only that the records are to be confidential and their availability restricted to parties, their attorneys, and the staff of the Conciliation Bureau.<sup>177</sup> While revelation to the counselor is arguably privileged under a New York statute granting a limited privilege to certified social workers and psychologists,<sup>178</sup> there is no specific statutory requirement that these counselors be so categorized.<sup>179</sup>

*Right to Privacy.* The right to privacy in the private law context is a relatively new concept, having been established as an independent right of action during the present century.<sup>180</sup> Various aspects of such a right find expression in the specific provisions of the first ten amendments of the federal constitution. However, it was not until *Griswold v. Connecticut*,<sup>181</sup> which held unconstitutional a Connecticut statute which had been construed as prohibiting the use of contraceptives in marital intercourse, that the right to privacy

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<sup>173</sup> See NEV. REV. STAT. § 125.020 (1963).

<sup>174</sup> See notes 74-75 *supra*.

<sup>175</sup> While only about ten percent of divorces are actually contested, see note 44 *supra*, a lawyer may find it difficult not to react negatively to any revelation which could potentially endanger his case.

<sup>176</sup> See CAL. CIV. PROC. CODE § 1747 (West Supp. 1967) (treated as official information); COLO. REV. STAT. ANN. § 46-5-6 (1963); ORE. REV. STAT. §§ 107.600 (2), (3) (1965); WIS. STAT. ANN. § 247.081 (Supp. 1967). Indeed New York itself has such a provision in reference to its family court conciliation procedure. N.Y. FAMILY CT. ACT § 915 (McKinney 1963).

<sup>177</sup> N.Y. DOM. REL. LAW § 215-f (McKinney Supp. 1966).

<sup>178</sup> See N.Y. EDUC. LAW §§ 7611, 7710 (McKinney Supp. 1966).

<sup>179</sup> See note 123 *supra*.

<sup>180</sup> Warren and Brandeis first conceived of such a right in 1890. *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Today more than thirty jurisdictions recognize such a right by court decision or statute. See W. PROSSER, TORTS § 112, at 831-32 (3d ed. 1964). See generally S. HOFSTADTER & G. HOROWITZ, THE RIGHT OF PRIVACY (1964).

<sup>181</sup> 381 U.S. 479 (1965).

was recognized in the public law context. On the basis of this limited precedent it has been suggested that the right to privacy may be invaded by a compulsory conciliation procedure such as that enacted by New York.<sup>182</sup>

There are three compulsory features of the reform that must be examined in order to assess the constitutionality of the New York procedure. First, a party is compelled to notify the Conciliation Bureau of the filing of the divorce petition under penalty of dismissal. Second, after notification of the Conciliation Bureau, a party *may* be compelled by court order, backed by the contempt power, to *appear* for a conciliation conference with a conciliation commissioner. Finally, at the discretion of the commissioner or a conciliation counselor, spouses may even be ordered to attempt reconciliation for sixty days.<sup>183</sup> Yet, since a party's action for divorce can be stayed for only a maximum of 120 days, the provision for use of court orders to compel attendance and attempts at reconciliation is, in reality, the primary compulsory element of the procedure. It should be noted that at the counseling stage the parties are only compelled to *appear*; there is nothing in the statute which requires cooperation or communication with counselors in any manner. The orders to compel attempts at reconciliation for sixty days do appear, however, to require a semblance of cooperation.<sup>184</sup>

Since the basis of the right of privacy is unclear<sup>185</sup> and its standard of application unsettled,<sup>186</sup> an analysis of New York's complex divorce procedure by constitutional standards is speculative indeed. Nonetheless, it appears that the standard is to be a balancing test,<sup>187</sup> with

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<sup>182</sup> See Foster, *Divorce Law*, 156 N.Y.L.J., Oct. 14, 1966, at 1, 4, col. 7; *N.Y. County Bar Report*, at 36; *A.B.C.N.Y. Report*, at 3.

<sup>183</sup> N.Y. DOM. REL. LAW § 215-d (e) (McKinney Supp. 1966).

<sup>184</sup> "If . . . the commissioner shall find that reconciliation is possible and would best serve the interest of both parties to the marriage, and any children thereof, the commissioner shall . . . apply for an order . . . requiring the parties, for a period not to exceed sixty days, to attempt to effect a reconciliation." N.Y. DOM. REL. LAW § 215-d (e) (McKinney Supp. 1966).

<sup>185</sup> Although the opinion in *Griswold* is concerned with the basis of the right in the penumbra surrounding the first, third, fourth, fifth, and ninth amendments, 381 U.S. at 484-85, the separate concurring opinions of Mr. Justice Goldberg and Mr. Justice Harlan make more clear the dichotomy between the selective incorporation approach to substantive due process and Harlan's thesis that substantive due process includes those rights fundamental to the concept of ordered liberty without necessity for reference to the Bill of Rights. *Id.* at 488, 499-500. See Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 228-31 (1965); Note, 1966 DUKE L.J. 562, 569-71.

<sup>186</sup> See Emerson, *supra* note 185, at 230-31; Note, 1966 DUKE L.J. 562, 566-69.

<sup>187</sup> Although the opinion of the court in *Griswold* seems to rely solely on the undue

the burden on the state to show a "subordinating" and "compelling" interest.<sup>188</sup> Thus, the initial step must be to determine if the individual's interest falls within the scope of the right to privacy. The *Griswold* holding, the only one to recognize privacy as an independent, constitutionally based right, is rather narrowly restricted to the facts before the Court which dealt only with the privacy of marital intercourse.<sup>189</sup> Nevertheless, there is language in the several opinions of the majority which hints that the scope of the right protected is to be rather wide,<sup>190</sup> and extend to aspects of the marital relationship other than sexual intimacies.<sup>191</sup>

Considering first compelled attendance at conferences, one could argue that a logical extension of the *Griswold* right to marital privacy includes freedom from nonconsensual surveillance of inti-

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breadth of the Connecticut statute, 381 U.S. at 485-86, Mr. Justice Goldberg, joined in a concurring opinion by the Chief Justice and Mr. Justice Brennan, *id.* at 497, and Mr. Justice White's concurrence in the judgment, *id.* at 504, employ a balancing test. See Emerson, *supra* note 185, at 230-31.

<sup>188</sup> 381 U.S. at 497, 504. Since the divorce remedy is entirely statutory and it appears that a state might entirely deny the remedy, see notes 28-30 *supra* and accompanying text, it would seem, by analogy to the procedural due process cases involving public employees, that the state might reasonably condition the remedy, see *United Public Workers of America v. Mitchell*, 330 U.S. 75, 101 (1947). However, the condition must not be arbitrary or discriminatory. *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 555 (1956); *Wiemann v. Updegraff*, 344 U.S. 183, 192 (1952). Although the extent of the burden on the state may vary according to the nature of the rights involved, see *Garrity v. New Jersey*, 385 U.S. 493 (1967), this burden of justification does not seem to be as great as that necessary to sustain the *Griswold* result in favor of private litigants. It therefore would appear that if the *Griswold* criteria can be satisfied, the procedural due process requirements would necessarily be satisfied also. The conclusion below that the conciliation statute will probably stand in the absence of a demonstrated pattern of abuse even under the *Griswold* standards, see notes 205-09 *infra* and accompanying text, renders unnecessary any effort to designate precisely the scope of the state's burden in defending its alleged invasion of privacy.

<sup>189</sup> See 381 U.S. at 482, 485. See generally Beane, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253 (1966); Emerson, *supra* note 176, at 231-33; Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's* (pt. II), 66 COLUM. L. REV. 1205, 1239-52 (1966) [hereinafter cited as Westin (II)].

<sup>190</sup> The Court had previously held that freedom of association was a peripheral first amendment right, *NAACP v. Button*, 371 U.S. 415, 430 (1963); *NAACP v. Alabama*, 357 U.S. 449, 462 (1957), but in *Griswold* the Court aggregates zones of privacy created by several constitutional guarantees and finds it unnecessary to relate the particular right to a specific guarantee, see 381 U.S. at 484-85.

<sup>191</sup> The term "relation" is frequently employed by the Court and nowhere defined, but the Court concludes: "We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486 (emphasis added). Mr. Justice Goldberg also indicates greater breadth when he says, ". . . the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." *Id.* at 495 (Goldberg, J., concurring).

mate relations.<sup>192</sup> Furthermore, both recent congressional investigations into psychological testing<sup>193</sup> and reactions of commentators<sup>194</sup> indicate support for extension of the right of privacy to include protection against nonconsensual psychological surveillance generally. If, as has been suggested, psychological testing and polygraph tests are means of "psychological surveillance,"<sup>195</sup> interviews with psychologists would also seem to qualify as surveillance. Freedom from nonconsensual submission to such sessions could thus be said to be within the scope of the right to privacy. There would seem to be doubt, however, as to whether compulsory attendance at conciliation conferences in practice results in nonconsensual interviews that might be called "psychological surveillance," since rather extensive experience in compelling attendance at conciliation in other jurisdictions indicates no abuse which has resulted in a reported case.

Even if it is assumed that some abuses will occur, against this risk must be balanced the interest of the state in the preservation of the family unit.<sup>196</sup> Although the Supreme Court has given great weight to the governmental interest in this area in the past,<sup>197</sup> the procedure adopted to promote stable family units must be considered

<sup>192</sup> See Beaney, *supra* note 189, at 257-58.

<sup>193</sup> See *Hearings on Invasion of Privacy Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. (1965) [hereinafter cited as *1965 Hearings*]; Creech, *Psychological Testing and Constitutional Rights*, 1966 DUKE L.J. 332, 366-68. Particular concern has been expressed over the possibility of revealing aspects of a subject's personality that he does not desire to reveal and is unaware he is revealing. See *1965 Hearings* (Testimony of Mr. Freedman, 344-50); Creech, *supra* at 366-68. Much of the criticism is directed at the validity of the tests themselves and not the approach of psychology generally, see *1965 Hearings* (Testimony of Mr. Gross, 63-90); Creech, *supra* at 350-58, a criticism that would tend not to apply to conciliation where reliance on testing is minimal, see *1965 Hearings* (Testimony of Mr. Macy, 36-55).

<sup>194</sup> See L. CRONBACH, *ESSENTIALS OF PSYCHOLOGICAL TESTING* 459-60 (2d ed. 1960); Creech, *The Privacy of Government Employees*, 31 LAW & CONTEMP. PROB. 413, 419 (1966); Emerson, *supra* note 185, at 232-33; Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1199-1203 (1965); Westin (II), at 1221-22.

<sup>195</sup> See Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's* (pt. I), 66 COLUM. L. REV. 1003, 1047 (1966) [hereinafter cited as Westin (I)]; Westin (II), at 1221-22.

<sup>196</sup> See note 32 *supra*. The state has regulatory power commensurate with its interest in the marital relationship. See *Haddock v. Haddock*, 201 U.S. 562, 569 (1906); *In re Lindewall's Will*, 287 N.Y. 347, 39 N.E.2d 907 (1942). One state, South Carolina, exercised this power by prohibiting divorce until 1949. Compare S.C. CONST. art. XIV, § 5 (1868), with S.C. CONST. art. XVII, § 3 (1895), as amended (1949).

<sup>197</sup> See *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878).

in light of available alternatives.<sup>198</sup> The most viable alternatives appear to be either a provision requiring the consent of at least one spouse<sup>199</sup> or a compulsory "screening" procedure.<sup>200</sup> Requiring consent of one of the parties reduces the potential for invasion of privacy since one spouse has already indicated willingness to discuss intimate relations by his petitioning for assistance. However, this approach is apparently not as effective in preserving marriages as the Wisconsin compulsory screening system. When Wisconsin shifted from a procedure based on consent to one based on compulsory screening, the number of divorce proceedings abandoned increased by nine percent.<sup>201</sup> The compulsory screening procedure has been proposed as an alternative to the New York procedure because it purportedly infringes less on the dignity of the individual.<sup>202</sup> Such a distinction is illusory, for the only significant difference between the New York and Wisconsin procedures is that while the New York statute expressly provides for compulsion by use of the contempt power,<sup>203</sup> Wisconsin commissioners lack such a *specific* grant.<sup>204</sup> Also, even a procedure specifically providing that a screening before a commissioner could be compelled, although a counseling session with a trained counselor could not, would make the distinction turn on the counseling ability of the interviewer. Thus, there appearing no realistically distinguishable, equally effective alternative to compulsory counseling, determination of the constitutionality of the New York statute is relegated to a balancing of the interests of the individual against the policies of the state as evidenced by present statutory provisions.

The Supreme Court, until recently, has been reluctant to attempt the difficult balancing required in the area of social welfare. Prior to *Griswold*, the Court had relied on the issue of standing to dispose of two appeals under the same Connecticut statute.<sup>205</sup> There are also

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<sup>198</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); cf. *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

<sup>199</sup> See CALIF. CIV. PROC. CODE § 1772 (West Supp. 1966); N.Y. FAMILY CT. ACT § 921 (McKinney 1963).

<sup>200</sup> See notes 54, 56-57 *supra* and accompanying text.

<sup>201</sup> See Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 359 (1966).

<sup>202</sup> See *id.* at 380-81; Foster, *Divorce Law*, 156 N.Y.L.J. Oct. 14, 1966, at 1, col. 6.

<sup>203</sup> N.Y. DOM. REL. LAW § 215-c (b) (3) (McKinney Supp. 1966).

<sup>204</sup> The Wisconsin commissioners are granted the *general* power to hold in contempt for disobedience of any order. See WIS. STAT. ANN. § 252.15 (Supp. 1966).

<sup>205</sup> See *Poe v. Ullman*, 367 U.S. 497 (1961); *Tileston v. Ullman*, 318 U.S. 44 (1943).

indications that the Court, when it undertook the requisite balancing, gave much deference to expressed state policies, especially when these were widely implemented. For example, the Court was willing to accept administrative searches without warrants<sup>206</sup> and to condone the denial of criminal procedural protections to juveniles.<sup>207</sup> However, in addition to the *Griswold* invasion of state policies, the Court has recently stringently applied constitutional standards to both searches by administrative personnel<sup>208</sup> and juvenile court procedures.<sup>209</sup> Yet, as to both of these recent developments, patterns of abuse had been shown. Therefore, it may be doubted whether anything less than a systematic abuse will suffice to invalidate the New York type compulsory conciliation procedure.

*Jurisdiction.* The legislature has not only failed to grant all of the divorce jurisdiction which would be constitutionally permissible, but has also restricted previously existing jurisdictional criteria. Formerly, jurisdiction of an action for divorce was granted if both parties were domiciled within the state when the "fault" leading to the disunion occurred,<sup>210</sup> if the plaintiff were a domiciliary at the time of the offense and the commencement of the action, if the offense occurred in the state and the injured party were a domiciliary when the action commenced; or if the parties were *married in the state*.<sup>211</sup> Now, only if both parties are domiciliaries *and* the cause of action arose within the state is jurisdiction granted without a required period of residence. If the above conditions are not met,

<sup>206</sup> See *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960); *Frank v. Maryland*, 359 U.S. 360 (1959); *Beaney*, *supra* note 189, at 264-65.

<sup>207</sup> The Supreme Court did not take its first juvenile delinquency case until seventy years after the founding of the first juvenile delinquency court. See *Kent v. United States*, 383 U.S. 541, 556 (1966); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1965 SUP. CT. REV. 167.

<sup>208</sup> See *v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

<sup>209</sup> *In re Gault*, 387 U.S. 1 (1967), *rev'g* 99 Ariz. 181, 407 P.2d 760 (1965).

<sup>210</sup> The former section and the provision of the reform law granting jurisdiction are phrased in terms of "residence." Compare N.Y. Sess. Laws 1962, c. 313, § 7, with N.Y. DOM. REL. LAW § 230 (McKinney Supp. 1966). However, residence has been interpreted to mean domicile. *De Meli v. De Meli*, 120 N.Y. 485, 24 N.E. 996 (1890).

<sup>211</sup> N.Y. Sess. Laws 1962, c. 313, § 7, *repealed by*, N.Y. Sess. Laws 1966, c. 254, § 2. The jurisdictional bases for separation and annulment differed slightly. In those actions, jurisdiction existed if both parties were domiciliaries; if the parties were married within the state *and* one party were a domiciliary when the action was commenced; or when the parties were married without the state, if one party had been a resident for one year. N.Y. Sess. Laws 1962, c. 313, § 10, *as amended*, N.Y. Sess. Laws 1963, c. 685, § 3 (now N.Y. DOM. REL. LAW § 230 (McKinney Supp. 1966)).

and if there has been substantial contact with the state by the marriage, or cause for divorce or residence as man and wife within the state, then the waiting period is one year. Otherwise, the required period of residence is two years.<sup>212</sup> All of these New York jurisdictional bases exceed the minimum contact—the domicile of one party within the state—required for recognition under the full faith and credit clause.<sup>213</sup>

Legitimate needs would seem to dictate that New York take a more liberal view of divorce jurisdiction than that currently represented by the reform statute. For instance, several other states have sought to expand jurisdiction with regard to military personnel, who may be resident in a state for an extended period but may not qualify as domiciliaries because of a lack of requisite intent to remain in the state.<sup>214</sup> Although New York cases indicate no great problem in the past, the presence of 41,115 military personnel in the state at the time of the 1960 census<sup>215</sup> foreshadows difficulties under the current statutory reform. However, even assuming the constitutionality of extensions such as special jurisdictional criteria for military personnel,<sup>216</sup> any alteration of current standards is unlikely in the absence of amendment of the new section purporting to limit recognition of out-of-state decrees; for the scope of New York divorce

<sup>212</sup> N.Y. DOM. REL. LAW § 230 (McKinney Supp. 1966).

<sup>213</sup> See *Williams v. North Carolina* (1), 317 U.S. 287, 298-99, 303 (1942). Whether less contact than domicile will satisfy the full faith and credit clause is a matter of controversy. See E. CHEATHAM, E. GRISWOLD, W. REASE & M. ROSENBERG, *CASES ON CONFLICT OF LAWS* 855-57 (5th ed. 1964); A. EHRENZWEIG, *CONFLICT OF LAWS* 238-42 (1962); H. GOODRICH, *CONFLICT OF LAWS* 256, 258 (Scoles ed. 1964).

<sup>214</sup> See *Lauterbach v. Lauterbach*, 392 P.2d 24 (Alaska 1964); *Mills v. Mills*, 153 Fla. 746, 15 So. 2d 763 (1943); *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936); *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958); N.M. STAT. ANN. § 22-7-4 (1953); OKLA. STAT. ANN. tit. 12, § 1272 (Supp. 1966).

<sup>215</sup> *General Social and Economic Characteristics—New York*, UNITED STATES CENSUS OF POPULATION, Table 52 (1960).

<sup>216</sup> In *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1947), a Virgin Island statutory presumption of domicile from six weeks residence was held unconstitutional as a violation of the due process clause of the fifth amendment. Other language has also indicated that domicile is a prerequisite of jurisdiction. See *Bell v. Bell*, 181 U.S. 175, 178 (1901). Such decisions have been employed to restrict special jurisdictional statutes for military personnel. See *Martin v. Martin*, 253 N.C. 704, 118 S.E.2d 29 (1961). Yet, at least one state has expressly found such a status to be a reasonable basis for jurisdiction. See *Wallace v. Wallace*, 63 N.M. 414, 416, 320 P.2d 1020, 1022 (1958); cf. *David-Zieseniss v. Zieseniss*, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954). Furthermore, New York courts have expressly held in cases involving decrees of foreign countries that a valid domicile was not always requisite to recognition. See *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 707 (1965), cert. denied, 383 U.S. 943 (1966); notes 226-28 *infra* and accompanying text.

jurisdiction was apparently constricted in order to be consistent with the new recognition policy.<sup>217</sup>

*Extraterritorial Evasion.* The delay of the conciliation procedure and, for those not wishing to resort to fault grounds, the delay of long separation periods may furnish an incentive for migratory divorce.<sup>218</sup> Apparently in anticipation of such an eventuality, the legislature enacted a provision intended to limit extraterritorial evasion:

Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.<sup>219</sup>

However, the practical effect of section 250 is uncertain: the presumption of domicile in New York as against the granting state raises constitutional questions under the full faith and credit clause, while the reliance on presumed domicile may render the section ineffective as an attempt to prevent recognition of foreign country decrees.<sup>220</sup>

Any decree which qualifies under the full faith and credit clause must be given the same effect in sister states as would be given in

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<sup>217</sup> See notes 218-20 *infra* and accompanying text. To conclude that the legislature attempted to make the jurisdictional statute and the foreign decree recognition sections harmonious requires one to ignore dissimilarities in the wording of the two sections. Jurisdiction is based on "residence" while recognition is based on "domicile." Compare N.Y. DOM. REL. LAW § 230 (McKinney Supp. 1966), with N.Y. DOM. REL. LAW § 250 (McKinney Supp. 1966). There is no doubt, however, that in light of relevant precedent, residence in the jurisdictional clause will be interpreted as domicile. See note 210 *supra* and accompanying text.

<sup>218</sup> There are no statistics indicating that procedures such as those adopted in New York result in increased migration. Wisconsin is the only state with a comprehensive divorce law structure similar to that now adopted by New York. The law when adopted in Wisconsin apparently resulted in no significant effect in the migratory divorce, since the rate of divorces granted in Wisconsin courts actually rose from 1.6 to 1.8 per thousand. See 1965 STATISTICAL ABSTRACT OF THE UNITED STATES 11; 1959 REPORT WIS. JUD. COUNCIL J-46; 1963 REPORT WIS. JUD. COUNCIL 7. However, the effect in New York may be entirely different because of the pre-existing pattern of migratory divorce, and the incentives for evasion generally that remain. See notes 168-171 *supra* and accompanying text.

<sup>219</sup> N.Y. DOM. REL. LAW § 250 (McKinney Supp. 1966).

<sup>220</sup> See FOSTER & FREED, Supp. at 32-33; *A.B.C.N.Y. Report*, at 4.

the state where rendered,<sup>221</sup> if jurisdictional requirements are met.<sup>222</sup> It is settled that courts in the domicile of either one of the parties have jurisdiction to grant a decree which will be entitled to such credit.<sup>223</sup> However, in an *ex parte* proceeding where the defendant does not appear and have the opportunity to litigate the jurisdictional facts, a recital of jurisdiction may be attacked in a forum which would also have had power to hear the case.<sup>224</sup> If both parties appear or are represented and there is an opportunity to contest the jurisdictional issue, resolution of that issue is *res judicata* as between the litigants and as to any third party who would be so barred in the rendering state.<sup>225</sup>

From the above, it appears that section 250 could have no application to bilateral sister state decrees since *res judicata* precludes any relitigation in which the presumption might be applied. Furthermore, the Supreme Court in *Williams v. North Carolina (II)*,<sup>226</sup> an *ex parte* decree case, stated: "The burden of undermining the verity which the [sister state] . . . decrees import rests heavily upon the assailant." Since this statement appears in an exposition of the scope of the full faith and credit clause, that clause apparently requires

<sup>221</sup> "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. 4, § 1. See *Harding v. Harding*, 198 U.S. 317 (1905).

<sup>222</sup> "[T]he Clause does not make a sister-State judgment a judgment in another State. . . . 'To give it the force of a judgment in another state, it must be made a judgment there' . . . . It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. . . . had jurisdiction, that is, to render the judgment." *Williams v. North Carolina (II)*, 325 U.S. 226, 229 (1945).

<sup>223</sup> See *Williams v. North Carolina (I)*, 317 U.S. 287, 298-99, 303 (1942). Whether domicile is necessary, as well as sufficient, for jurisdiction is a question that has been left open by the Supreme Court. See *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955); Comment, 61 Nw. U.L. REV. 584, 592 (1966). See generally Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); Comment, 39 CORNELL L.Q. 293 (1954).

<sup>224</sup> "As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority, in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact." *Williams v. North Carolina (II)*, 325 U.S. 226, 230 (1945). As to limitation of this principle to *ex parte* decrees, see note 231 *infra*.

<sup>225</sup> See *Johnson v. Muelberger*, 340 U.S. 581, 582, 589 (1951) (appearance by attorney bars collateral attack by third parties if barred by rendering state); *Coe v. Coe*, 334 U.S. 378, 384 (1948) (*res judicata* whether or not domicile actually litigated); *Sherrer v. Sherrer*, 334 U.S. 343, 351-52 (1948) (*res judicata* if party appears and has opportunity to be heard).

<sup>226</sup> 325 U.S. 226, 233-34 (1945).

that the burden of proof be placed on the party attacking the validity of a decree. However, section 250 places the burden on the party asserting the validity of the sister state decree under the listed circumstances and as such would be repugnant to the *Williams* directive.<sup>227</sup> It can, therefore, be concluded that in all cases involving sister state decrees, section 250 would probably be either ineffective or invalid if applied. This, however, does not mean that the section is invalid on its face. The section is taken from the Uniform Divorce Recognition Act § 2, and the drafters of that act specifically provide that it is intended to occupy only a constitutionally permissible area.<sup>228</sup>

There remains to be determined the effect of section 250 in cases involving decrees granted by jurisdictions outside of the United States, for such judgments are not covered by the full faith and credit clause. Recognition of such foreign country decrees is determined by comity, a policy-based doctrine.<sup>229</sup> In applying this doctrine in *Rosenstiel v. Rosenstiel*,<sup>230</sup> the Court of Appeals of New York held that domicile was not the only possible basis for divorce jurisdiction and that no policy of the State of New York prevented recognition of the two Mexican divorces before the court, which were valid where rendered.<sup>231</sup> This decision followed a long line of New York decisions extending comity to foreign country decrees.<sup>232</sup> Thus,

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<sup>227</sup> FOSTER & FREED, Supp. at 30.

<sup>228</sup> See § 2, Comment (a).

<sup>229</sup> See *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955).

<sup>230</sup> 16 N.Y.2d 64, 73, 209 N.E.2d 709, 712, 262 N.Y.S.2d 86, 90 (1965), *cert. denied*, 383 U.S. 943 (1966).

<sup>231</sup> *Id.* at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91. One of the actions considered in *Rosenstiel* was based only on submission to personal jurisdiction. In the other, minimal Mexican residence requirements had been satisfied. *Id.* at 70, 74, 209 N.E.2d at 710, 713, 262 N.Y.S.2d at 88, 91.

The liberality of the New York courts in recognizing decrees rendered in foreign countries has not extended to judgments resulting from *ex parte* proceedings. See *Gorie v. Gorie*, 26 App. Div. 2d 368, 274 N.Y.S.2d 985 (1966); *Maltese v. Maltese*, 32 Misc. 2d 993, 224 N.Y.S.2d 946 (Sup. Ct. 1962); *Johnson v. Johnson*, 13 Misc. 2d 891, 181 N.Y.S.2d 73 (Sup. Ct. 1957); *Hirsch v. Hirsch*, 51 N.Y.S.2d 432 (Sup. Ct. 1944). However, in one case a New York court came very close to recognizing such decrees. In *Cannon v. Phillips*, 44 Misc. 2d 986, 255 N.Y.S.2d 753 (Sup. Ct. 1965), the court held it was bound under the full faith and credit clause by a California declaratory judgment which upheld, under a California statute, an *ex parte* Mexican decree obtained by one arguably a New York domiciliary, even though the defendant, also a New York domiciliary, had appeared in neither of the previous actions and had not been personally served. The California statute, apparently CAL. CIV. PROC. CODE § 1915 (West 1955), gave the same effect in California as would be given by the rendering jurisdiction if the rendering jurisdiction had jurisdiction according to its own law.

<sup>232</sup> See, e.g., *Busk v. Busk*, 18 App. Div. 2d 700, 236 N.Y.S.2d 336, *modifying* 229 N.Y.S.2d 904 (Sup. Ct. 1962); *Heine v. Heine*, 231 N.Y.S.2d 239 (Sup. Ct.), *aff'd*, 19 App.

section 250, in form a presumption of domicile in New York, is of no effect unless it is read as changing the policies on which *Rosenstiel* was based by making domicile of one spouse in the rendering state the exclusive basis of recognition.<sup>233</sup> In light of widespread pre-enactment publicity that the law would bar "quickie" Mexican divorces, this interpretation would not seem unreasonable.<sup>234</sup> However, there is an indication that such a result was not intended. Although section 250 adopts section 2 of the Uniform Divorce Recognition Act, it does not enact section 1 which makes domicile the basis for out-of-state decree recognition.<sup>235</sup> By failing to enact section 1, the legislature has refrained from *expressly* overruling the New York cases giving comity to foreign country decrees and has apparently merely opened the door for reconsideration of *Rosenstiel* in light of the new reform law.<sup>236</sup> Since *Rosenstiel* was arguably a judicial attempt at liberalization of a too restrictive divorce law,<sup>237</sup> section 250 provides the New York courts with the opportunity to base a withdrawal from *Rosenstiel* on legislative policy, without requiring such withdrawal. However, since section 250 cannot constitutionally foreclose recognition of sister state decrees, such an interpretation would do little more than increase the cost of evasion of New York policies by requiring a six weeks' residence in Nevada<sup>238</sup>

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Div. 695, 242 N.Y.S.2d 705 (1963); *Skolnick v. Skolnick*, 24 Misc. 2d 1077, 204 N.Y.S.2d 63 (Sup. Ct. 1960); *Costi v. Costi*, 133 N.Y.S.2d 447 (Sup. Ct. 1954); *Caswell v. Caswell*, 111 N.Y.S.2d 875 (Sup. Ct.), *aff'd*, 280 App. Div. 669, 117 N.Y.S.2d 326 (1952); *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct.), *modified*, 254 App. Div. 670, 4 N.Y.S.2d 992 (1938).

<sup>233</sup> See D. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 62-63 (1966); Comment, 18 SYRACUSE L. REV. 71, 86 (1966); Note, 12 N.Y.L.F. 105, 115-16 (1966). If domicile in the rendering jurisdiction becomes the exclusive basis for recognition, such interpretation would be more restrictive than the UNIFORM DIVORCE RECOGNITION ACT § 1, which requires recognition except when *both* parties are domiciled in the state entertaining the action challenging the validity of the decree. However, the uniform law does not extend to cases where the plaintiff in the foreign decree is not domiciled in the state in which the challenge is entered, this circumstance apparently to be decided on comity. See Cannon v. Phillips, 44 Misc. 2d 986, 255 N.Y.S.2d 753 (Sup. Ct. 1965); note 231 *supra*.

<sup>234</sup> See, e.g., N.Y. Times, March 24, 1966, § 1, at 1, col. 2; N.Y. Times, March 29, 1966, § 1, at 15, col. 4.

<sup>235</sup> "A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced." UNIFORM DIVORCE RECOGNITION ACT § 1. See note 233 *supra*.

<sup>236</sup> See FOSTER & FREED, Supp. at 33; *A.B.C.N.Y. Report*, at 4.

<sup>237</sup> See *Rosenstiel v. Rostenstiel*, 16 N.Y.2d 64, 77-78, 209 N.E.2d 709, 715, 262 N.Y.S.2d 86, 94 (1965) (Desmond, C.J., concurring in part), *cert. denied*, 383 U.S. 943 (1966).

<sup>238</sup> See NEV. REV. STAT. §§ 10.020, 125.020 (1963).

rather than a one or two day stay in Juarez and El Paso.<sup>239</sup> Both periods are significantly less than the potential 120 day delay which may be required in *any* case decided in New York<sup>240</sup> or the two to three years that will be required for suits based on grounds other than adultery and cruel and inhuman treatment.<sup>241</sup>

#### CONCLUSION

The New York reform is rife with imperfections. Internal inconsistencies resulting from the compromise of competing policies and incompatibility of the reform with existing tax and property law threaten to perpetuate intrastate evasion of the divorce law and to divert feuding couples from employment of the separation period innovations in favor of the more traditional and less desirable fault grounds. The system of conciliation has the possibility of becoming a mere procedural obstacle because of its complexity, and stands under a perhaps unfounded pall of uncertainty as to its constitutionality. Finally, an abortive attempt to restrict migratory divorce seems to have done little more than elicit renunciation and confusion.

Imperfections notwithstanding, the New York reform can be viewed as a political accomplishment of major proportions. Furthermore, the legislature, apparently in anticipation of difficulties inherent in major reform legislation, delayed the effective date of most of the reform legislation until September 1, 1967. Such delay allowed intensive criticism by the organized bar and other interested groups. The Senate Judiciary Committee considered amendments which would meet most of the criticisms made herein. However, under an avalanche of proposals, the legislature ended its term without acting.<sup>242</sup>

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<sup>239</sup> See *Rostenstiel v. Rostenstiel*, 16 N.Y.2d 64, 73, 209 N.E.2d 709, 812, 262 N.Y.S.2d 86, 90 (1965), *cert. denied*, 383 U.S. 943 (1966): "The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks."

<sup>240</sup> See N.Y. DOM. REL. LAW § 215-g (McKinney Supp. 1966); notes 128, 131, 134, 138-39 *supra* and accompanying text.

<sup>241</sup> See N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966).

<sup>242</sup> See 157 N.Y.L.J., March 17, 1967, at 1, col. 4.