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MENTAL CRUELTY: THE JUDGE IN SEARCH OF A PRECEPT

The mind is its own place, and in itself can make a heaven of hell, a hell of heaven.

John Milton, Paradise Lost, Book I, line 253.

JAMES O. MONROE, JR.*

SOLEMNLY, soberly, sincerely, and quite seriously—almost as if it could be done—the Illinois trial judges undertook to define "mental cruelty." The occasion was the annual Judges' Seminar of the Illinois Judicial Conference, which took place in Chicago in September, 1968. As directed by the highest law of the state, the Illinois Constitution, the Conference had been convened by the Illinois Supreme Court. The topic was assigned, and the judges were ordered to attend because, just a year before, the Governor had signed into law an additional three words to the statute authorizing divorce for extreme and repeated cruelty. The three words added were "physical or mental." Since 1874 the cruelty statute was construed as applying only to extreme and repeated physical cruelty. Now it said "extreme and repeated physical or mental cruelty." What does that mean? How should the new statute be construed? The trial judges were now being told to think about it.

A 1965 law review article seemed to invite the addition of mental cruelty as a ground for divorce. Comments subsequent to the new statute seemed to welcome the addition—at least it was not viewed with alarm. In attempts to interpret "mental cruelty," these comments on the new statute relied on the following theories: the Illinois separate

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1. ILL. REV. STAT. ch. 40, § 1 (1967).
2. ILL. REV. STAT. ch. 40, § 1 (1965).
maintenance analogies; the mental cruelty cases of other jurisdictions; some pleading matters; and one divorce judge’s rule of thumb. All of these materials may be helpful, perhaps dispositive, in the typical case, whether default or contested. But if they are taken as categorical imperatives, they may serve to obscure the subtleties of the marriage relationship and impede the imaginative and just solution of the equally subtle problems of ensuing divorce cases. If the stereotypes they suggest become rules without exceptions, they may even be misleading, illusory and deceptive.

In this paper, by contrast, there are no absolutes in the form of rules or dispositions, no law as it is or should be, but instead the possibilities of what it may or might be. It thus offers a basis not for decisions as much as for the state of mind in which to make them. Though some obvious results are indicated, the emphasis is on the approach, the attitude and the process of decision-making. Reflecting the search of a trial judge, it may be taken as a practical and personal study in jurisprudence, containing some items beyond those ordinarily found in law briefs and court opinions.

EXPLORATION—WHAT IS MENTAL CRUELTY?

The question posed by this section title was and is highly current. The new statute is not yet interpreted, and until some broad definitive expressions have come from the Illinois Supreme Court, the case law is likely to develop slowly—by single instances said to be or not to be mental cruelty, and with possible variances among several districts of the appellate court.

The question is highly urgent. Cases have been coming into the trial courts for more than a year throughout the state, with decisions

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8. The unorthodox aspects of this section are best explained as an attempt to present the reader with the dilemmas and problems of a trial judge, who is handed cases with more pressures than precedents, with briefs (if any) of varying quality and extent, and with little real guidance except his own background.
at hand in both default and contested matters. They cannot be deferred. The urgency is compounded by the fact that divorce suits constitute one of the largest and most significant categories of cases in the state trial courts.

The question is highly practical. It involves incidents in the most important relationship in life—incidents which may be utilized as a key to freedom from unbearable situations if accepted as grounds for divorce and which must be suffered without relief if not accepted as grounds.

The question is delicate. In most marriages there are seldom really any incidents permitting divorce under traditional Illinois grounds. Impotence, bigamy, venereal disease communicated, attempt to kill, and felony are so rare that they are considered bizarre. Adultery is probably far less prevalent than indicated in the novels and movies which we may enjoy but do not follow. Drunkenness is not often habitual for more than two years. Except in rare cases, a man's physical pain from a spouse's blow is less than he would shake off in a football game, a woman's less than she would cherish in childbirth; and most such "physical cruelty" is actually provoked. Separations are brief, agreed, childish or splenetic; few separations, if justified in the first place, last a year. In short, Illinois has not been a "divorce state."

But now, suddenly, there is a new ground, or an old ground newly expanded. Will items heretofore not quite grounds now become part of mental cruelty? Will the items heretofore insufficient—desertion less than a year, drunkenness less than two years, physical cruelty not quite extreme or repeated, philandering short of adultery—will they become ingredients of mental cruelty? What about items differing from the traditional grounds not only in degree but in kind? For example: irritation; yelling; nagging; sulking; cursing; spending the paycheck; calling the boss; embarassing the bridge club; playing poker all night; going home to mother; rings around the bathtub; dirty feet; that television; that radio; that golf; that guy; that kid; all the "Excedrin headaches." Will these now become evidence in divorce cases?

Before we consider the new ground, though, the present status should be examined. Illinois may not be a "divorce state," but divorce in Illinois is acceptable and accepted. In the mid-fifties, our
governor, our senior senator, and our former governor, were all divorced. As in most other states, our “rate” was one divorce for about three marriages.9

How is this possible if we are not in a “divorce state?” How is it possible when there are seldom really any incidents permitting divorce under traditional Illinois grounds? Very simply, the parties wait out the separation for a year and say it was not by agreement, or they stretch some other traditional ground into a clean and non-perjurious set of terse answers to adroit questions which would not stand up sixty seconds under penetrating cross-examination.10 But the court does not cross examine, and lawyers and judges, even of the faiths most vocally opposed to divorce, have agreed they should not. Without “divorce by agreement”11 many divorces could not be granted at all.

Still there is a bad taste about such practice. The parties leave court sadder if more free, as if a great weight were gone, but wishing that the trip had not been necessary. They know the testimony was half-truth. So do the lawyers. So does the staff. So do the judges. And it was disturbing. How can we think straight about law and order if the law is bent or twisted in our most personal concerns?

One explanation concerning the desirability of the new statute bears precisely on this question. It contends that, heretofore, the practice has involved not only half-truth, but also perjury, and that the purpose of the new statute was simply to remove perjury from Illinois divorces.12 Whatever the rationale, here was the new statute, the new phrase “mental cruelty” and the crucial question: What does it mean? The judges in conference were indeed faced with a difficult question.

One judge suggested that mental cruelty is a course of conduct, carried out by the one spouse against the other, in connection with the marriage, which need not cause physical harm but which renders life miserable and unendurable or unbearable and makes it impossible

9. Data presented at the 1968 Judges Seminar included: national average, 1 divorce for every 2.5 marriages; last year in Cook County, 43 divorce decrees for every 100 marriage licenses; and in Phoenix, 100 divorce decrees for every 100 marriage licenses.
10. See Bundesen, supra note 4, at 235, and Schiller, supra note 3, at 163.
11. See Schiller, supra note 3, at 163.
12. See Bundesen, supra note 4, at 235, and Schiller, supra note 3, at 163.
to continue the marriage. This definition was termed the *course of conduct concept*. There was similar language in the advance reading materials, in the separate maintenance cases,\textsuperscript{13} in the first published comments,\textsuperscript{14} and also in the first complaints.\textsuperscript{15} The trouble with this definition is that the language is not sufficiently specific. What kind of conduct must be alleged and proved—action, words, gestures, contact? The failure or refusal to do what an ordinary, reasonable and prudent married person would do, or the doing of something an ordinary, reasonable and prudent married person would not do? Why must it be a *course* of conduct? Two acts make out repeated physical cruelty.\textsuperscript{16} Why not two acts of extreme mental cruelty? "In connection with the marriage," someone asked, "does that mean rising out of and in the course of?" What proof shows a person is miserable—the person’s own opinion; or must she at least go to bed or take an aspirin; must he escape to the office, or take to drink? Is the definition too vague?

Another judge suggested that mental cruelty involves *fault*—at least some concept of duty, breach and injury. The defendant must violate some duty, in some way affecting the marriage, with some substantial harm to the spouse. The defendant’s conduct could be action or omission; to be grounds it ought to be intentional or wilful, or wanton, or at least negligent—unless we have marriage liability without fault. It ought to be causally connected to the harm claimed. The harm ought to be substantial—some observable condition, ailment, or reaction of physical, mental, psychic or emotional consequence. Thus we have a *tort concept*.\textsuperscript{17} But this definition is too restrictive as the other is too loose. There must be thousands of things a person could do freely if living alone, but which would be offensive to a spouse and which the law ought not permit to the detriment of the complaining spouse and the disruption of the mar-

\textsuperscript{13} Johnson v. Johnson, 125 Ill. 510, 16 N.E.2d 366 (1888); French v. French, 302 Ill. 152, 134 N.E. 33 (1922).

\textsuperscript{14} Bundesen, supra note 4; Harrod, supra note 7; Gitlin, supra note 5; and Rosenberg, supra note 6.

\textsuperscript{15} Holland v. Holland, 67-D-752 (Madison Co. 1967) and McKean v. McKean, 67-D-824, (Madison Co. 1967). In each case, the complaint was withdrawn with leave, more evidence secured, and a decree granted later.


\textsuperscript{17} See Johnson v. Johnson, supra note 13; Henderson v. Henderson, 88 Ill. 248 (1878); and Levy v. Levy, 388 Ill. 179, 57 N.E.2d 462 (1944).
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riage. The conduct of the defendant which constitutes mental cruelty need not be a crime or a breach of the peace. It need not be conduct which would be a tort between strangers. If fault were to be construed as tortious fault, there may indeed be liability without such fault.

If a person builds a reservoir or brings dynamite on his land, and the reservoir leaks or the dynamite explodes causing damage to neighboring property, even though that person was without fault and had used the highest care possible, he may be held liable to the damaged neighbor. Suppose instead of bringing deep water or dynamite onto land, a person brings into the marriage scene a philanderer, or boorish friends, or domineering in-laws, or vicious personal habits, and this causes damage to the marriage. Should not that person be likewise held liable to the damaged spouse? Is one's duty not to cause harm through use of inherently dangerous items greater toward a neighbor than toward a wife or husband? Is a neighbor's right to property free from harm greater than a spouse's right to a marriage free from harm? Does the law protect one and not the other, or one more than the other? On the other hand, philanderers, drinking buddies, in-laws and bad manner may be uncouth or even immoral, but evoking them is not usually thought to be a crime or even a tort. Is it wrong at all?

With these arguments in mind, it was offered that: "Mental cruelty obviously includes conduct which is neither a crime nor a tort." Examples support this view:

1) H is a classical concert pianist, married to W, a former student of his at Juilliard. She suddenly takes to rock and roll music and plays such records several hours a day. Avoiding the din, H works so hard at the studio he becomes the greatest performer of the decade. But his home is intolerable.

2) W, an English teacher, wins national standing with her view, in articles and on television, that obscenity is best met not by ineffective banning but by supplanting it with reading and movies of good taste. Her husband H becomes addicted to pornography, takes up with hippies, and writes four-letter words on the apartment walls.

3) W, wife of a conservative Episcopalian priest, starts visiting different churches to see how "God's other children" live, and winds up holding "holy roller" meetings in the parsonage parlor.

These examples present a relative conduct concept. In each

case, the offending spouse has done no legal wrong. Does the other spouse have to put up with such conduct? Is a married person not entitled to his own way of life, free from jarring and obnoxious conflicts? In the marriage relation, if we expect "love and affection," can we not have at least consideration? On the other hand, if you marry a farmer, don't you have to expect manure tramped into the kitchen? Is a person inherently tied to the rules of his spouse's social set? What about mutuality? Who is putting up with whom? Whose taste prevails? In case 3, if $W$ loves $H$, why should not she remain in the church; but if $H$ loves $W$, and if he is a good Christian, why should not he tolerate her change? *De gustibus non disputandi.* The question is not whether one spouse has an abstract legal right to act contrary to the other's tastes, but whether it is mental cruelty to do so. Must one spouse accept the idiosyncracies of the other, long standing or new? Can one spouse get tired of the marriage? How long must patience last? Is a married person estopped against change? If change is permitted, must it always be progress? Or could it be backward, or simply sidewise and personal? Who is to say which is which?  

19. In case 1 above, the offending spouse has actually caused material benefit to the spouse offended—who, like Puccini, has been driven to fame. Success has been attributed to "a little talent, a lot of work, an inferiority complex, and a wife that nags."

20. While these hypothetical situations may appear to be contrived, in actuality they are very realistic. Consider the following examples, which, although compressed, epitomized, sharpened and paraphrased, are but a small sampling of cases currently heard in one Illinois trial court. These examples are taken from a memo of the court, prepared by this writer, in **v.**, 68-D-27 (Circuit Court of Madison Co. 1969):

"He ate so fast he belched at the table. He even passed gas. And he came to the table in filthy underwear. He bathed only once or twice a week and he never brushed his teeth. He went to bed dirty and pawed around with dirty hands—he even got me infected. He would go a long time without any love, then he'd want to make love all of a sudden. He would come to bed doused with cologne, but between the body odor and the bad breath I couldn't stand him. He was rude to guests and only went to church when he thought it would help him out. He wouldn't take care of the yard. He was terrible about the children. He let the kids hitchhike and play on the lake, burn rags, blow money, stay out after midnight and play with knives. I couldn't sleep, or think, or reach him. I lost weight, and went to the doctor. I took equinal tranquilizers. Since he's gone, the strain is gone. I don't need any tranquilizers." **v.**, 68-D-323 (Madison Co. 1969).

"We had her mother and her sister. I had the house refinanced twice to buy cars for her mother, and the mother borrowed $2,000 to have cash for her retirement—I signed the note each time. I asked her not to have her sister in the home, but she brought the sister in, and she refused to keep house unless I paid her. . . . She never fixed breakfast. There was no lunch on school days. She
BACKGROUND AND ANALYSIS

With a statute recently passed and not yet interpreted, what leads are there? In Illinois, there is a long background and a sizeable group of analogous cases.

From 1845 to 1874, divorce could be granted in Illinois for certain named grounds and for unspecified grounds. Conceivably, the unspecified grounds might have included mental cruelty. The broad provision for unspecified grounds was deleted, however, in the 1874 statute; the specified grounds were the only grounds permitted. The only cruelty constituting a ground for divorce was physical cruelty, and this was strictly construed. It had to be grave, extreme, endangering, or subjecting the spouse to great bodily harm. It had to be repeated. It did not include “harsh language,” or “mental suffering”—i.e., mental cruelty.

Such “mental cruelty,” although insufficient to obtain a divorce, was nevertheless sufficient to obtain separate maintenance—relief for a spouse living “separate and apart without fault.” Conduct may not be such “extreme and repeated physical cruelty” as to warrant divorce, and yet make life with the offender miserable and unendurable. In such a case, the offended one may move out of the house with impunity, and live separate and apart without fault, warranting separate maintenance. The offender, having caused the breach, could not successfully claim abandonment or desertion as ground for or defense against separate maintenance.

cooked everything in one pot or pan four or five days out of the week.

“We had sexual intercourse about nine times in the last five years. She said: ‘Leave me alone. I don’t feel like it. I don’t want to. I want to lay in bed and read.’” ——— v. ———, 68-D-864 (Madison Co. 1969).

These actual cases may show that truth is not only often as strange, but also as cruel as fiction. But they may not fully dramatize the elements of character and sensibility involved in these things. For these, we can perhaps learn a great deal from drama and literature. Consider the domestic relations cases from the following literary works: Shaw, The Girls in Their Summer Dresses, in SHORT STORIES FROM THE NEW YORKER 3 (1940); Coates, The Net, id. at 22; Lockridge, The Nice Judge Trowbridge, id. at 389; Rawlings, The Pelican’s Shadow, id. at 291; Schorer, Portrait of Ladies, id. at 313; Benson, Little Woman, id. at 337; Maloney, A Toast to Captain Jerk, id. at 38; Asch, The Words, id. at 129; Mauriac, THERESE DESQUEYROUX (1963).

A wife who is not herself at fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health, nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render life miserable, and living as his wife unendurable. Incompatibility of disposition, occasional ebullitions of passion, trivial difficulties, or slight moral obliquities, will not justify separation. If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife.23

Conversely, if in the varying circumstances of domestic strife it became the offended one who remained in the family home, the one remaining would be without fault and with a right to separate maintenance; the abandoner could neither secure separate maintenance nor defend against it.24

The legislature, by adding mental cruelty as a ground for divorce, indicated that the phrase “mental cruelty” means something different from physical cruelty—otherwise the legislative enactment meant nothing. (It need not have meant something less severe, for mental pain can be more agonizing than physical.)25 At least we may assume that mental cruelty is, in the language of the young, “something else.” What is that something else?

An analogy between separate maintenance grounds and mental cruelty has been suggested. Thus, consider cruel words expressing dissatisfaction, scorn and abuse, or threatening to cut off credit and support, or repeated unjust accusations of infidelity.26 These fall short of physical cruelty, and were not thus grounds for divorce. They are less than or at least different from physical cruelty; but they may render the abandoned spouse’s life unendurable, and hence may

23. Johnson v. Johnson, supra note 13, at 515. The presumption of intent is accepted even though “no one but a lawyer would say that I must be presumed to have intended to put my ball in the bunker because that was the natural and probable result of my shot.” Brown, Cruelty without Culpability, 26 MoD. L. REV. 625 (1963).

24. For an instance of recriminatory abandonment, first by the wife, then, on her return, by the husband, see Garvy v. Garvy, supra note 18.

25. Schiller, supra note 3.

be grounds for separate maintenance.

The analogue logic is simple: cruel words, not being physical cruelty, are nevertheless cruel: they must be mental cruelty. The logic, as such, is superficial—a plain non sequitur. There may be many kinds of cruelty: physical, mental, emotional, social. The legislature may very well have meant any cruelty not physical to be included in mental cruelty and thus be a ground for divorce under that label. But this is a matter of terminology and legislative intent—not of logic.

To bring other items warranting separate maintenance, items other than quasi-physical cruelty items, into the area of mental cruelty, involves not one non sequitur but two. Logically, whatever warrants separate maintenance by being unendurable is therefore cruelty, and if it is not physical, it is therefore mental cruelty. But, a separate maintenance ground may not be “cruelty” at all. It could be desertion, or stinginess. Many things are unendurable, or unbearable, without being cruel.

Nevertheless, the analogy between grounds for separate maintenance and mental cruelty might indeed have been intended by the legislature, non sequitur or not. Legislators do not live by Euler’s circles. Metaphysically, there could be six kinds of cruelty—physical, mental, emotional, social, direct, indirect. However, physical and mental are the only two kinds of cruelty generally considered in divorce law—quite likely the only two that occurred to the many lawyers in the legislature. “Physical” and “mental” cruelty may have been taken to exhaust and to include all the possibilities.

Thus the separate maintenance cases may be very much in point. At least they seem more applicable than “other jurisdictions.” Of course the other jurisdictions should be explored. A scanning discloses three broad matters worth noting here: 1) divorce without fault, possible in certain jurisdictions, especially abroad; 2) divorce when both parties are at fault; and 3) divorce by agreement, which was proposed as currently as December, 1968, not in radical

Russia or Sweden, but in once conservative England.\textsuperscript{31}

CATALOGUE OF CONDUCT: A MULTITUDE OF SINS

In determining what is or is not mental cruelty in Illinois, trial court judges will probably have to pass on at least three classes of cases: 1) cases involving other statutory grounds for divorce, couched as mental cruelty; 2) similar cases, falling short of other statutory grounds; and 3) miscellaneous cases.

OTHER STATUTORY GROUNDS

Cases involving other statutory grounds for divorce, it has been suggested, could and should be considered mental cruelty.\textsuperscript{32} Those acts or conditions have been considered so offensive to the legislature that they were made express and independent grounds for divorce. An act so offensive to the legislature not personally involved must surely be so offensive to the directly affected spouse as to constitute mental cruelty to that person. Thus mental cruelty might be shown by allegations and proof\textsuperscript{33} of the following conduct or conditions:\textsuperscript{34}

\textsuperscript{31} Saint Louis Post-Dispatch, Dec. 18, 1968 reported that: Baroness Summerskill, a former Labor Party health minister, planned to lead the fight against a British divorce reform bill in the House of Lords. Divorce could be granted under the bill if the parties were apart for two years, have no intention of living together again, and both consent to divorce; or if they were apart for five years, and only one requested divorce—even though the other opposed it. Lady Summerskill called the bill "a Casanova's charter" by which a man could abandon his wife and children every five years and marry a younger woman. Sponsors of the bill said financial arrangements for the first wife and family would be required in such cases. They justified the bill as enabling some 100,000 men with extra-marital families but legal wives who refused divorce, to get divorces, legalize their irregular unions and legitimize children. "Irreconcilable differences which have caused the irreremediable breakdown of the marriage" is now a ground for divorce in California. Family Law Act, West's Calif. Legis. Serv., No. 7, par. 4506, at 3108 (Supp. 1969). A bill which has been passed by the Italian Chamber of Deputies, but must still go to their Senate for approval, would allow divorce for five years of actual separation. The Chicago Tribune, Nov. 29, 1969, § I, at i, col. 1.

\textsuperscript{32} See Harrod, \textit{supra} note 7.

\textsuperscript{33} This view may never be tested. If facts showing a separate statutory ground are presented in a plain and concise statement of the cause of action, as required by the Civil Practice Act, then words characterizing the facts as a form of mental cruelty may be regarded as surplusage. If the separate statutory ground is the essence of the charge, \textit{e.g.}, conviction of felony with a penitentiary sentence, constituting no loss but "good riddance" for the plaintiff who may in fact even be glad the defendant is gone, the surplusage may be ignored or even stricken. On the other hand, if the essence of the matter is the mental cruelty effect, \textit{e.g.}, a woman slapped twice without permanent or serious physical harm but emotionally crushed and broken-hearted, the mental cruelty effect may be pointed up, and the pleading could even be amended to this end.

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impotence; bigamy; adultery; desertion, actual or constructive, for more than one year; habitual drunkenness or drug addiction for more than two years; attempt to kill the spouse by malicious means; extreme and repeated physical cruelty; conviction of felony or infamous crime; communicable venereal disease, infecting spouse.

Cases involving actual statutory grounds, couched nevertheless as mental cruelty, may become increasingly the vogue in Illinois, for several reasons. In this form, with general allegations and the only proof hidden in a court reporter's notebook or a singlecopy transcript, still-loving children and nosey neighbors may never know the nasty truth—and why should they? In this form, the press may carry and the public learn only vague generalities—scandal may be avoided. In those cases where it would seem that the real offender, instead of being punished, is actually gaining his freedom, the offense by which freedom is gained may seem less heinous and the irony less perturbing. Any implicit invitation to misconduct may be less apparent.

SIMILAR CASES, SHORT OF STATUTORY GROUNDS

Cases involving conduct or conditions similar to statutory grounds, but falling short of those express and exacting causes, may or may not be mental cruelty. They have not all been covered in Illinois separate maintenance cases, but they afford a useful catalogue of marital misconduct or conditions, and may have to be considered eventually.

Conditions or Conduct Similar to Impotence

Of all the heretofore standard Illinois statutory grounds for divorce, only one—impotence, permitted divorce for only a condition. The ground was some organic or physical disability precluding or rendering inadequate any sexual relation between the spouses. This ground could be proved without any intent or act of the offending spouse even though the offending spouse might fervently wish it otherwise. It was an admittedly tragic situation for which the offending

35. See Bundesen, supra note 4, at 237. Cf. Rosenberg, supra note 6, at 16, 17; and Gitlin, supra note 5, at 140.
36. Lorenz v. Lorenz, 93 Ill. 376 (1879).
spouse need not be blamed, but from which the other person was set free. Oddly enough, actual conduct causing temporary impotence, such as drinking oneself into a stupor for days or weeks, and thus becoming not organically but factually impotent, *i.e.*, sexually useless, was not a ground, for this, presumably, was curable, and "hopefully" was to be cured.88

What about conditions and conduct short of impotence? Unwillingness, called a condition or an "act" of refusal, over a long period with no excuse, might on the premise of strict-duty marriage concepts, be considered mental cruelty. Persistent coldness, refusal or failure to respond to advances might also be so considered.89 Failure or refusal to take any initiative might be so considered on the premise of American male-dominated marriages of fifty years ago when the young man was rather expected to advance himself. On the other hand, such aggression may now be accepted or even expected from the girl. What about a girl brought up to be prim who never overcomes her psychological taboos against nudity? What about a spouse whose timidity, even respect, is taken for coldness? What about matters of frequency? What length of time becomes sexual abandonment? What about space—separate beds, separate rooms, separate apartments; for a night, for a week, for a summer?

*Conditions or Conduct Similar to Bigamy*40

These would be rare, as bigamy itself is rare, and technical. The statutory ground consists of having had a wife or husband living at the time of the marriage. What about the case where that first wife or husband had not yet been divorced, or was not really widowed. What about Mr. Tutt's case where a charge that defendant married Number 3 while still *lawfully* married to Number 2 fell short of a valid bigamy charge—not because defendant was guiltless, but because he was even more guilty, having gone through the ceremony to Number 2 without being finally divorced from Number 1!


Conduct Similar to Adultery\textsuperscript{41}

Except for the rare case of the detective and the flash photograph, adultery is seldom proved directly in court by a witness who can say he saw the spouse and the co-respondent together having sexual relations. Rather the proof lies in circumstantial evidence—a suspicion and an inference which we accept or reject according to the nature of the situation and our wisdom or experience in the ways of the world.

Now, under the mental cruelty provision, the fact patterns of male-female human conduct which, with an inference, could lead to divorce for adultery, may be said, without an inference, to warrant divorce for mental cruelty. Those patterns will doubtless vary now as before, from the most casual and expected civility to the most gross and brazen philandering.\textsuperscript{42} There will doubtless be required an act and an intent; either alone could probably be explained. The conduct in question may be variously interpreted—by the complaining spouse, by the defending spouse, by concerned third parties, especially children, by neighbors and friends; but the ultimate interpretation must come from the judge or jury, and perhaps by the appellate court. Let him who is without comparative fault perhaps cast the first stone.

Conduct Similar to Statutory Desertion\textsuperscript{43}

The standard case of desertion as such means absence for more than a year, and “did you give him any ground for leaving?—no.” In default cases, the answers are accepted. In contested cases, they are not. The separation may be the fault of the one who leaves or the one who remains. It may be without any agreement, without any words, and without much real fault—just a sorry and tragic parting of the ways.\textsuperscript{44} It may be by violent disagreement, with a bitter dispute and recrimination. It may be with gross fault on both sides.

\textsuperscript{41} See French v. French, \textit{supra} note 13; Cash v. Cash, \textit{supra} note 26.

\textsuperscript{42} Lascivious philandering may be mental cruelty. See 157 A.L.R. 638 (1945). But mere indiscretion, imprudence, flirting, or affection for another without action may not be mental cruelty. See 157 A.L.R. 641 (1945).


\textsuperscript{44} See Garvy v. Garvy, \textit{supra} note 18.
The critical questions are matters of evidence. In separation cases couched as mental cruelty, the same contentions may be made. When the separation is less than a year, the time requirement is less stringent, but the mutual recriminations become more important.\(^\text{45}\)

It has been said that to warrant constructive desertion, the cause of one's leaving must itself be a ground for divorce;\(^\text{46}\) to constitute mental cruelty, the cause for one's leaving probably need not be so grave.\(^\text{47}\) In an ordinary desertion case, while brief reunion would not toll or terminate a desertion period, substantial reunion would, and the ensuing time must "start over" to count toward the requisite year.\(^\text{48}\) Such is surely not the case with separations leaving abandonment couched as mental cruelty. Indeed, interrupted or separate periods of absence may be essential to make the offense "repeated" as the statute requires.

How long must the separation be, or how short can it be to constitute mental cruelty of the one at fault? Ten months, six, three, one, three weeks, one week, a week-end, overnight? Could seven days of absence be considered seven separate, hence repeated offenses?

**Conduct Similar to Habitual Drunkenness or Drug Addiction**\(^\text{49}\)

Drunkenness, or drug addiction, is usually a voluntary matter. Even though the offender may loudly protest that the spouse "drove me to drink," there are many forms of psychological solace, and most of them are not liquid forms. If the one "driven to it" happens to "choose booze," it is his doing. Some method of escape may have been vital, but the alcoholic way was a choice. In drunkenness cases, recrimination or contributory fault is given but slight regard. To establish mental cruelty, acts similar to drunkenness or drug addiction may not have to be for the full two years, nor quite so


\(^{46}\) Fritz v. Fritz, 138 Ill. 436, 28 N.E. 1058 (1891).

\(^{47}\) See Ross v. Ross, *supra* note 43, where the spouse claimed she was locked out of the house; Houts v. Houts, *supra* note 43, where the parties had to move from rented rooms.

\(^{48}\) See Albee v. Albee, 141 Ill. 550, 31 N.E. 153 (1892).

mental cruelty

habitual, nor quite so severe.

Conduct Similar to Attempt to Kill

Three elements make up an attempt to kill by means showing malice: the attempt, the objective, and the means. To make out mental cruelty based on similar conduct, it may be taken as sufficient showing that there were mere threats to kill, express or veiled, or mere talk about it, or the dramatose: "I wish you were dead." The attempt may be not to kill, but to maim, to wound, to harm, to hurt. The means may be not malicious, but indifferent, subtle, obtuse, pig-headed.

What about a fourth element. Need not the grounds be an attempt (or as mental cruelty a threat) to kill the spouse? What about an attempt to kill oneself? How better could it be shown that I am an unfit spouse than that my spouse took her life—she was that miserable? How could she cut me more deeply than to threaten suicide? "Oh, I can't live with you. . . . I wish I were dead." This may be the tragic lament of a hopeless situation reflective of the viciousness of the defendant complained of; but it just might be wholly unwarranted, wholly unfair, and a bitterly cruel slander of an innocent spouse who is devoted, diligent, and made desolate by the charge.

Conduct Similar to Physical Cruelty

In a standard cruelty case, the acts must be "extreme" and "repeated," and obviously must be harmful to the other spouse. The shoddy proof bordering on perjury that has made sophists of lawyers and cynics of judges lies mainly in this field. Without cross-examination, the slightest contact can be called a blow, the slightest twinge can be called pain, and two times triviality makes cruelty.

50. "Diligent research has failed to unearth any case in the Illinois reports wherein a divorce was granted on this ground." Weinberg, supra note 40, at 138. See also Alanen v. Alanen, 84 Ill. App. 2d 53, 228 N.E.2d 492 (1967).


52. See Weinberg, supra note 40. See Johnson v. Johnson, supra note 13; Henderson v. Henderson, supra note 17; Mason v. Mason, supra note 18; and Alanen v. Alanen, supra note 50; Hellrung v. Hellrung, supra note 43 (pushing); and Lemanski v. Lemanski, 87 Ill. App. 2d 405, 231 N.E.2d 191 (1967) (knocking the complainant against a dresser or wall).

53. "Bruises, cuts, limping, and the like are not usually the result of slight acts of cruelty . . . . [T]hey may aid a trial judge to find that the acts of violence were acts of cruelty within the statute . . . ." Alanen v. Alanen, supra note 50, at 57, 228 N.E.2d at 494, quoting Stockman v. Stockman, 38 Ill. App. 2d 186, 189, 186 N.E.2d 547, 549 (1962).
The same conduct couched as mental cruelty may indeed be that. A hand raised in anger but never struck can be just as frightening, just as devastating as when it strikes. In most cases, psychologically the harm is done when it is raised, and the blow is an anti-climax. There is a crucial difference! Physical hurts can be cured with a salve; psychological harm may be permanent.

**Conduct Similar to Felony**

Conviction of a felony is a technical matter, involving a fact shown simply by court records, and raising questions only of law as to whether the offense was a common law or statutory item in the felony category. Compared with a burglary or grand theft, many offenses not constituting state felonies may be most offensive to the spouse. They include some state misdemeanors, statutory breaches, quasi-crimes, municipal or county ordinance violations, federal matters, offenses under military law.

Consider the following: a shameful and cowardly departure from the scene of an accident; poaching or taking innocent game out of season; littering or dumping trash or burning leaves illegally; voting twice; soliciting bribes; breaking building lines; burning a draft card; spitting on the flag; cheating on income tax or going absent without leave.

**Conduct Similar to Infecting with a Venereal Disease**

Giving the other spouse a venereal disease is a specific and very rare case. Assuming one can refrain from communicative contacts, mental cruelty might be claimed by far less than giving a venereal disease: e.g., by giving the other spouse leprosy, scarlet fever, measles, a bad cold. Or trying to, or failure to guard against communicating the disease. What about simply acquiring a venereal disease—whether it is communicated to the spouse or not, whether contacts are made in indifference to the chance of communication or

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54. See Getz v. Getz, 332 Ill. App. 364 (1947), court martial conviction for desertion held not conviction of a felony or other infamous crime, even in time of war.

55. "Diligent research has failed to unearth any case in the Illinois reports wherein a divorce was granted on this ground." Weinberg, supra note 40, at 157. See Williams v. Williams, 77 Ill. App. 229 (1897) (defendant's syphilis justifies wife's refusal of relations in separate maintenance suit).
not, whether the spouse even knows of it or not. What about telling the other that one has a venereal disease? What about telling the other falsely that one has such a disease?

MISCELLANEOUS CASES

The listings of divorce grounds found in standard texts fairly cover the categories, if not the instances. They actually add very little to the catalogue of possibilities covered in the foregoing discussion of conduct similar to or short of Illinois statutory grounds; and even as specifics, they are helter-skelter. They should be listed, however, if only to indicate what other state legislatures have seen fit to specify. Excluding items obviously already covered above, the specifics include these: violence; indignities; joining a religious order which disbelieves in marriage; incompatibility; gross misbehavior or wickedness; wife being a prostitute; husband being a vagrant; insanity, incurable, for a certain length of time; crime against nature.

Other cases of conduct which might be held to constitute mental cruelty will doubtless include a broad range of matters. Illinois domestic relations cases afford a good sample: words which are rude, vulgar, profane or obscene; words expressing the defendant's dissatisfaction with the plaintiff or indicating that the defendant no longer loves the plaintiff, or contemplates getting a divorce; words charging the other unjustly with unchastity or infidelity; or words that are generally cruel and abusive; poor housekeeping; locking the other spouse out of the house; query, as to a breakdown of communications and mutual endearment; or "incompatibility;"

57. See Johnson, supra note 13; Vignos, supra note 22; Schoop, supra note 26; Harris, supra note 28; Ross, supra note 43; and Hansen v. Hansen, 2 III. C.C. 22, 6 N.E. 333 (1885) (all indicating rude or obscene words); French, supra note 13; Goldstine, supra note 26; and Cash, supra note 26 (all indicating refutations of love); Johnson, supra note 13; Schoop, supra note 26; Schriner, supra note 26; and Annot., 72 A.L.R.2d 1197 (1959) (all indicating words charging unchastity); and French, supra note 13; Johnson, supra note 13; Vignos, supra note 22; Goldstine, supra note 26; Harris, supra note 28; and Miller v. Miller, 333 Ill. App. 642, 78 N.E.2d 131 (1948) (all indicating words of general abuse).
59. See Ross v. Ross, supra note 43.
60. See Johnson, supra note 13; French, supra note 13; Cash, supra note 26; Garvy, supra note 18; Slaight, supra note 27; and Haste v. Haste, 1 Ill. App. 2d 417, 117 N.E.2d 789 (1953). Expressions in these cases may indicate that "incompatibility" is not enough to establish a ground for divorce in Illinois, though couched as
failure or refusal of sexual activity, or infrequency thereof; \(^6\) dissatisfaction with married life (\(A\) sues \(B\), charging that \(B\)'s conduct has been such that \(A\) is dissatisfied; distinguished from \(A\) sues \(B\), charging that \(B\) was cruel by declaring \(B\) is dissatisfied); \(^6\) loss of economic benefit or opportunity; \(^6\) stinginess, such as cutting off, or threatening to cut off credit or means of supplying family necessaries; \(^6\) mistreatment of children dear to the other spouse, or taking children away from the care or company of the other spouse; \(^6\) bringing, inviting or permitting in the family household in-laws who interfere, meddle or dominate household affairs, or inducing near family members to do violence to the spouse. \(^6\)

This is but a sampling of miscellaneous offensive conduct between spouses. Whether any or all of the sample items will be considered as instances of mental cruelty under the new Illinois law remains to be seen. Until then, it must be kept in mind that these are not precedents but only analogies, that facts mean more than opinions, and that dicta may be delusive.

Realizing that the varieties of human conduct are infinite, one may be inclined to discard the specifics of single instance samples for the more eclectic approach of a formula. Such an approach has been attempted in the Third Circuit of Illinois. The formula used there, by way of suggestion only, is that conduct claimed to constitute mental cruelty ought to be presented in three aspects: 1) some action or omission of the defendant; 2) relating to subject matter involved in the marriage relationship; and 3) having a harmful or deleterious effect on the plaintiff.

The defendant's action might be committed against the person or property of the plaintiff, or against other persons or property (e.g.,

mental cruelty. Cf. Annot., 58 A.L.R.2d 1218 (1958). \(^5\) Cash refers to a breakdown of communications and mutual endearment, but the language is dictum. \(^5\) Garvy refers to mutual incompatibility; divorce for the husband and separate maintenance for the wife were both denied.

\(^6\) See Slaight v. Slaight, supra note 27.


\(^8\) Id.

\(^9\) See French, supra note 13; Schoop, supra note 26; Goldstine, supra note 26; Harris, supra note 28; Ross, supra note 43.


that of the children). It might be a neglect or refusal or failure or omission as well as an affirmative physical act. It could be an aggravation.

The subject matter could involve such mundane matters as: living arrangements (eating, sleeping, bathing, hobbies, entertainment); caring for the household (paying bills, household maintenance, cooking, cleaning, laundry, heating); work (cooperation or interference); money, appearance and neatness, relations, friends, children, education, recreation, property, or social status.

The effect on the plaintiff, in order to constitute ground for divorce, ought to reach the state of some physical illness, some mental illness or disturbance, nervousness, overwork, loss of money, loss of employment, loss of affection, and so on. A proper combination of defendant's conduct in regard to a marital matter with harm to the plaintiff could, if extreme and repeated, constitute mental cruelty and ground for divorce.

On the other hand, it is likely that matters of mere attitude, mood, taste, appearance, style, or eccentricity would not rise to the level of such mental cruelty, especially if they were trivial, not directly affecting the spouse, nor adversely affecting the spouse, merely contrary to the spouse's taste, or if they were superficial, spurious or feigned.

Another formula approach lists these factors: 1) the type of behavior of the defendant; 2) the defendant's intent; 3) the degree of the conduct; 4) its duration; 5) its effect on the plaintiff; 6) its effect on their home life; and 7) the prospects of reconciliation.⁶⁷

PANDORA'S BOX: AFFIRMATIVE DEFENSES

Charges against a defendant in a divorce case can be denied, which is the standard negative defense: "I didn't do it." Or they can be admitted, and met with one of several affirmative defenses, which on various theories make the charges unavailing for the complaining party. These affirmative defenses may be shortly summarized as follows:

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⁶⁷ Bundesen, supra note 4, at 237. A point system has also been suggested, such as that used for driver's license offenses; e.g., a black eye could mean 10 points; a vulgarism 5; out all night 15; insults to mother-in-law 3; and when you get so many points, you get your divorce.
DEFENSE INVOLVING THE ACT CHARGED

This might be a justification or excuse, usually some form of provocation\(^6^8\) by the plaintiff, precipitating the defendant's conduct. It might be some participation by the plaintiff in the incident itself—connivance,\(^6^9\) or contributory fault. These involve conduct by the plaintiff. Or the defense might vitiate the legal effect of the defendant's act, by the plaintiff's condonation,\(^7^0\)—not conduct of the plaintiff, but forgiveness by the plaintiff.

DEFENSE INVOLVING SOME OTHER INCIDENT

A frequent defense is recrimination,\(^7^1\) conduct of the plaintiff involving a degree of fault equal to the defendant's, and neutralizing that fault as a ground for divorce. Like provocation, it may occur before and justify or excuse the defendant's fault; but it may occur after the defendant's fault, in an entirely different incident or set of circumstances, and rather than justify or excuse the defendant's fault, simply disqualify the plaintiff from utilizing the defendant's fault as a ground for divorce.

DEFENSE INVOLVING THE PROCEEDINGS

The most frequent bar in the proceedings is collusion,\(^7^2\) usually not a defense presented by the party charged at all, but something discovered and raised by the court in support of public policy or the court's integrity. Related but rare are the matters of insincerity, and ambivalence.

These defenses are relevant to our discussion of mental cruelty for only one reason, but a very important one—what they imply in the construction and applications of that term.\(^7^3\) Those implications

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68. KEEZER, MARRIAGE AND DIVORCE 573 (3d ed. 1946); Garrett v. Garrett, 252 Ill. 318, 96 N.E. 882 (1911).
69. KEEZER, supra note 68, at 550; BURBY, DOMESTIC RELATIONS 44 (1960); Reisen v. Reisen, 148 Ill. App. 460 (1909); Eames v. Eames, 133 Ill. App. 665 (1907).
70. KEEZER, supra note 68, at 553; BURBY, supra note 69, at 45; WEINBERG, supra note 40, at 141; Hunt v. Hunt, 211 Ill. App. 410 (1918).
71. KEEZER, supra note 68, at 563; WEINBERG, supra note 41, at 151; BURBY, supra note 70, at 46; Garrett v. Garrett, supra note 69.
72. KEEZER, supra note 69, at 546; WEINBERG, supra note 40, at 147; BURBY, supra note 69, at 44; Borin v. Borin, 335 Ill. App. 450, 82 N.E.2d 70 (1948).
73. The defenses have been extensively criticized along lines summarized in
shall now be examined.

Apart from defenses and counterclaims, a loose attitude toward mental cruelty, or to the whole proposition of divorce may very well mean that "anyone can get a divorce" on that ground; that is, the charge can be made to stick on very little or very dubious evidence. But suppose that to a complaint charging mental cruelty, there is filed a counterclaim charging the counterdefendant also with mental cruelty. In all fairness, the elements of the offense, the nature of the evidence, or the quantum of proof required for the counterclaim should be no greater than that required for the complaint.

Now suppose instead of counterclaiming for divorce on the plaintiff's mental cruelty, the defendant defends against divorce, claiming recrimination on the basis of the plaintiff's own mental cruelty. Again, in all fairness, since each party has the same charge, the nature of the evidence and the quantum of proof should still be the same.

Going further, suppose the defendant's affirmative defense is not full-scale recrimination but merely provocation. The defendant says yes, I was mentally cruel, but she drove me to it. Before 1967 and even today it has taken substantial elements, grave evidence and clear proof for the plaintiff to show physical cruelty, and therefore substantial elements, grave evidence and clear proof for the de-

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Blake, The Road to Reno 237 (1962): "Standing in the way of a genuine inquiry are not only the divorce court judge's lack of time and staff but also certain antiquated legal doctrines. Originally erected as safeguards against easy divorce, these 'defenses' are rooted in the premise that divorce is an adversary proceeding in which an 'innocent' party attempts to prove his mate 'guilty' of certain sins for which divorce is the proper punishment. Under this concept, when both parties are substantially at fault, no divorce can be granted. Yet this doctrine of 'recrimination' is patently unrealistic. In most unhappy marriages, husband and wife have both fallen short of perfection. Reconciliation can be achieved only if both recognize their faults and make a cooperative effort to repair the union. If such a reconciliation cannot be achieved, a rational divorce procedure would dissolve the union without attempting to brand one party innocent and the other guilty. Equally troublesome is the doctrine of 'condonation.' If the 'innocent' party continues to live—or sleep—with the 'guilty' party after he becomes aware of the latter's wrong behavior, this bars divorce. A more ingenious way of discouraging reconciliation could scarcely be devised. If a marriage counselor persuades a separated couple that they should try living together again, they may find it difficult to establish grounds for divorce in case the reconciliation fails. Similarly unrealistic is the doctrine that divorce must be refused if there is evidence of 'collusion' between the parties. This principle hampers realistic marriage counseling by preserving the fiction that parties contemplating divorce can safely deal with each other only at arms' length."

fendant to show provocation.\textsuperscript{76} Now, if it takes "different" (lesser?) evidence for the plaintiff to show mental cruelty, it should therefore take "different" (lesser?) evidence for the defendant to show provocation. More simply, if, prior to the addition of the mental cruelty provision, requirements to support a charge of physical cruelty were strictly construed, with the same strict construction being applied to the defense of provocation, then it would follow that if it now takes slight evidence to show mental cruelty, it should require no more than slight evidence to defend against a charge of mental cruelty by a counter-charge of provocation.

A similar situation would prevail with connivance, contributory fault or condonation. If it takes only slight evidence to show the defendant's mental cruelty, it should take only slight evidence to show plaintiff's connivance or contributory fault. And if mental cruelty may be a matter of some few words, so with some few words it can be forgiven, condoned and lost as a ground for divorce. In sum, if "nit-picking" has become a ground for divorce, so "nit-picking" may be a defense. Instead of opening wide the doors of divorce, we have slammed them shut.

If at this point we return to the fundamental questions about public morals and the position of the court, it is a problem involving the court itself. Thus, as the elements of the requisite charges or the nature of the evidence become "easier," the question as to whether a defense could be raised becomes more acute. With "stricter," more traditional grounds, defenses are raised in contested matters. Could they not be raised in default cases? Should they not be? If, as grounds are "easier," defenses are also "easier," is the court's duty to recognize or suggest defenses not more obvious? Or should the court view the existence of the new ground as a legislative mandate for the court to close its eyes?\textsuperscript{76}

One answer may be that the legislature has not given the courts any mandate to close their eyes, and that it is not, or should not, be any "easier" to prove mental cruelty than to prove physical cruelty.

\textsuperscript{75} Wesselhoeft v. Wesselhoeft, 369 Ill. 419, 17 N.E.2d 56 (1938).

\textsuperscript{76} ILL. REV. STAT. ch. 40, § 9(a) (1967) adopted in the same session of the legislature as the "mental cruelty" amendment, provides: "the fault or conduct of the plaintiff, unless raised by the pleadings, is not a bar to the action nor a proper basis for the refusal of a decree of divorce." If there were a mandate for the court to close its eyes, it would be under this limitation on the recrimination defense, not under the "mental cruelty" amendment.
MENTAL CRUELTY

The Henderson case, requiring since 1878 that physical cruelty be "extreme," and the Alanen case, reasserting that principle by way of dictum as late as 1967, are still the law: not every physical contact is cruelty. The statute still says "extreme and repeated" physical cruelty, and the case law is in accord.\(^7\) The statute applies the same adjectives to both types of conduct: "extreme and repeated physical or mental cruelty." The case law should be the same. If this is so, it is not "easier" to prove the charge, and therefore it should not be considered easier to prove an affirmative defense. The question should not arise.\(^8\)

Technically, the new ground may open up or invite some very nice questions of comparative fault. In the field of tort law on negligence, contributory fault of the plaintiff, though minimal, bars the plaintiff completely from securing a liability judgment against the defendant, despite the defendant's fault and even though his fault is greater, so long as the fault of each party is of the same nature; i.e., negligence against negligence. This traditional position has recently been reaffirmed; a comparative fault concept, apportioning loss by the same ratio as the fault was apportioned, has been specifically rejected.\(^9\) Likewise, dividing liability more or less equally by the number of responsible parties has long been rejected: "no contribution among joint tort feasors."\(^{10}\) Only in the field of indemnity has there been a recognition of and a relief according to comparative fault—and this with a rather bland oblivion toward the traditional rule between plaintiff and defendant or among co-defendants, of contributory bar and non-contribution.\(^{11}\)

77. Ill. Rev. Stat. ch. 40, § 1 (1967); Henderson, supra note 17; Alanen, supra note 50, Collinet, supra note 16.
78. The problem assumes an affirmative defense pleaded, so the statute limiting the recrimination defense does not apply.
Consider raising such questions in regard to mental cruelty. Should recrimination by way of the plaintiff’s mental cruelty bar the plaintiff from divorce? Should it bar separate maintenance? Should it bar child support? If mental cruelty by the defendant makes life for P and D together unendurable, should mental cruelty by both P and D not make it doubly unendurable, or impossible? Yet the law of recrimination ends the unendurable marriage, but perpetuates the one doubly unendurable. When both are guilty of mental cruelty, should the law permit a divorce “for” the one least at fault?

If so, should it reward the one least at fault and punish the one more at fault by adjusting alimony, support, property, or child-custody time? Or if both parties are equally at fault, both mentally cruel to one another, so that the marriage is doubly unendurable, why condemn the children to such a household? While the parents may despise each other, each may love the child, so that it might be far better for the child to be with one of them alone than with both, or with foster-parents. Should the fault of each bar the other from relief, or, if so, should it bar relief for the “family” unit including the children? Could not divorce for both, or a separation, be granted, thereby rendering life more bearable for parents and children alike?

Considering the potential for confusion in the areas of comparative fault and ease of proof in regard to mental cruelty, we have used the wrong figure. It is not a matter simply of opening wide or slamming shut the doors—it is a matter of opening Pandora’s box.

Perspective: Interdisciplinary Hints

Sociologically, any discussion of divorce will develop into a discussion concerning marriage, and properly so. This paper has given

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82. “The policy of the State that permits divorce when one spouse has been guilty of designated misconduct is often doubly present when both parties have been guilty. The disruption of the family relationship is certainly more pronounced.” BURBY, supra note 69, at 47, citing Pavlevitch v. Pavlevitch, 50 N.M. 224, 174 P.2d 826 (1946).


84. This is suggested by BURBY, supra note 69 at 47.
the new statutory ground a somewhat standard consideration, based
on the traditional legal-judicial approaches, and has shown that they
may be obsolete and self-contradictory, leaving perplexing problems.
We have also observed that the concepts may in some cases seem
hollow or ridiculous. The question of divorce may have been re-
duced to a matter of how much pain a person can take, or should be
asked to take, before the state, the law and the judge step in. Mar-
riage has been considered as a sacrament, as a contract, as a social
institution and as a relationship. This paper has not considered it
as a medium for individual growth and satisfaction. We have not
seen what the psychologists may see: devotion as sometimes the
most subtle kind of dominance, the most insidious mental cruelty,
or abstinence from complaint as the most bitter recrimination. The
question of divorce has been considered paramount, whereas the
pressing question is the question of marriage. As any good psy-
chiatrist would observe, this paper has viewed man and woman only as
they appear in law offices and courts—not as they really are. Law-
yers and, sometimes, judges deal not in reality, but in gloss, super-
ficiality and myth.

And if we suggest the potentials of corruption inherent in a pos-
sible manipulation of so important an institution as marriage through
so flexible a concept as mental cruelty, the historian may suggest
that this is nothing new. Chicago in the forties was in the throes of
legalistic turmoil leading up to the successive “cooling off” laws,
earnestly presented as needed to preserve the family.

85. For an illuminating historical perspective on this whole matter, see Blake,
The Road to Reno, supra note 74. At p. 29, he recites the famous words “What
therefore God hath joined, let no man put asunder,” and quotes Milton’s consid-
eration in Tetrachordon: “Shall we say that God hath joined error, fraud, unfit-
ness, wrath, contention, perpetual loneliness, perpetual discord; whatever lust, or
wine or witchery, threat or incitement, avarice or ambition hath joined together,
faithful and unfaithful, Christian with anti-christian, hate with hate, or hate with
love; shall we say this is God’s joining?”

86. Blake, supra note 74, at 99, quotes Mrs. Elizabeth Stanton, a pioneer woman
advocate of divorce law reform: “The wisest possible reform we could have on
this whole question is to have no legislation whatever. The relations of the sexes
are too delicate in their nature for statutes, lawyers, judges, jurors, or our public
journals to take cognizance of, or regulate.” For many varied insights on the
marriage relationship, see DeBeauvoir, The Second Sex (1953); Friedan, The
Feminine Mystique (1963); and Robinson, The Power of Sexual Surrender
(1959).

87. Virtue, Family Cases in Court, 52-112 (1956).
hundred years ago was a "divorce mill" for the correspondence cases from New York.\textsuperscript{88} New York, with the self-deluding purism of adultery as the sole ground for divorce, had been and is a fake forum, using fraud and fiction to avoid its own rigors and utilizing annulment in lieu of divorce as freely as in the middle ages.\textsuperscript{89} Nothing really appears to be new.\textsuperscript{80}

CONCLUSION: A MATTER OF JUDGMENT

We still have many pressures—from the press, the church, our own feelings and faith, family and society, and all the viewpoints of our background—tested now in all the conflict of the times. Yet these may be as unreliable as the new trends. We may have the ease of doing nothing to change, but this is not the assurance of knowing we are right.

What we lack is authority. The church, even in its stricter sects, does not provide it. A non-authoritarian state likewise does not provide it. The legislature gives a ground but not a definition. Social viewpoint is not only noncompulsive, but highly diverse. New freedom is beneficial, as is diversity. But understanding and reason are essential. "If there were no God," said the skeptic Voltaire, "It would be necessary to invent one." If there is no natural law, it may be useful to devise some. But along what principles?

We also lack precedent.\textsuperscript{81} What comes to us will be slow. It will be on single instances—thus varied and uncertain as a general guide. Trial court cases will be decided on the basis of credibility

\textsuperscript{88} Blake, supra note 74, at 116-19.
\textsuperscript{89} Blake, supra note 74, at 116-19.
\textsuperscript{80} Blake, supra note 74, at 17: "Around 1100, St. Anselm was grieved to hear that in Ireland men exchanged wives 'as publicly and freely as horses.' Some ninety years later Petrus Cantor of the University of Paris lamented that 'for money's sake, at our own choice, we clergy join or separate whom we will.' In England the unknown author of the poem Piers Plowman wrote bitterly that a man could get rid of his wife by giving the judge a fur coat."

\textsuperscript{90} BLAKE, supra note 74, at 116-19.

\textsuperscript{91} Even the highest guides on critical issues are not always reliable. See the variance in: Haddock v. Haddock, 201 U.S. 629 (1906); Williams v. North Carolina, 317 U.S. 269 (1942); Williams v. North Carolina, 325 U.S. 226 (1945); Sherer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 278 (1948); and Estin v. Estin, 334 U.S. 541 (1948). In Estin, id. at 554, Mr. Justice Jackson epitomized the confusion in his dissent: "The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from its incidental obligations."
of witnesses; and, once the facts are determined, they may be so varied that they may not fit into the limited patterns of the precedents we now have.

What is wanted is judgment, for judges especially, and also for lawyers, lawmakers, and the public. Judgment is always a worthy goal, and now in this field it is a vital one. This paper is offered to aid in an approach to that goal.