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INCOMPETENCE TO MAINTAIN A DIVORCE ACTION: WHEN BREAKING UP IS ODD TO DO

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I. INTRODUCTION

If a married person who has not been adjudicated incompetent¹ seeks a divorce for reasons that sound very odd, bizarre, or crazy,² how should the trial court³ respond? If the

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¹ This Article focuses on the circumstances of legally competent persons—persons, that is, who have not been adjudicated incompetent to handle their own affairs and finances. An adjudication of incompetence has traditionally placed limits on whether an individual may initiate divorce proceedings. See discussion *infra* Part IV.B.

² Here, we use “crazy” with the same intent and for the same reasons as has Professor Stephen Morse:

I use the word “crazy” advisedly and with no lack of respect for either disordered persons or the professionals who try to help them. . . . I chose the word “crazy” because I believe that it is the best generic term to describe the type of behavior that leads to a diagnosis or label of mental disorder. At the same time, it avoids begging questions about whether the crazy person was capable of behaving less crazily. . . . I prefer to use a nonjargon word to describe the type of behavior—crazy behavior—with which the law is concerned in insanity defense cases.

Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 780 n.4 (1985); see also Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 529 (1978). Although this Article does not deal with the insanity defense, the term “crazy”—an everyday word that does imply exercise of any clinical expertise—still has the advantage of holding diagnostic judgment in abeyance. We have used “odd” in this Article’s title with similar intentions and for similar reasons. However, subsequent parts of this Article suggest that the odd or crazy beliefs that might produce incompetence to divorce would be those of persons who suffer from severe mental illnesses.

³ Here and throughout, “trial court” refers generally to a court of appropriate jurisdiction with power to decide divorce actions. In various states, this is the court

trial court knows a husband is seeking to divorce his wife for reasons that represent symptoms of a severe mental illness, but the husband understands the key factual implications of obtaining a divorce—ending the marriage, separating lives and property—should the trial court allow him to proceed? If not, how should the trial court respond to the husband's petition, and under what authority? In an era when "no-fault" and unilateral divorce laws offer unhappy spouses wide latitude to dissolve their marriages, when—if ever—should a psychotic motivation for seeking divorce justify a trial court's blocking the individual's desire?

Because a concrete example may help acquaint readers with the types of situations and mental symptoms addressed in this Article, we present the following fictional case history.⁴

A. *Case Vignette*

John Doe, a retired architect, married his wife Jane when they were both in their twenties. During their four-decade marriage, they struck all who knew them as a loving, happy couple. When their children reached their teens, Mrs. Doe started her own jewelry business. Two decades later, Mrs. Doe's company had more than twenty employees. Mr. Doe admired his wife's accomplishments as a businesswoman, and he often spoke of her success to their friends.

Two years into retirement, however, Mr. Doe began criticizing his wife for spending so much time away from home. Mrs. Doe actually was working fewer hours than previously, and she had delegated many business responsibilities to employees so that she and her husband could take long vacations together. A few months later, Mr. Doe became openly angry each time his wife left for work. One evening, Mrs. Doe asked her husband why he had been acting this way. "You know exactly why!" Mr. Doe replied angrily. "Do you think I don't know what you do there all day?" Mr. Doe then told his wife that he knew she was

of common pleas, *see, e.g.*, S.C. CODE ANN. § 20-3-50 (2009), family court, *see, e.g.*, HAW. REV. STAT. § 580-41 (2009), district court, *see, e.g.*, IDAHO CODE ANN. § 32-715 (2010), or domestic relations court, *see, e.g.*, IND. CODE ANN. § 31-12-1-4 (LexisNexis 2009).

⁴ Though this case vignette is fictional, it describes the plausible development of a psychotic disorder and its possible consequences. The first author bases this assertion on his more than three decades of clinical experience.

seducing the young men she hired as managers. When Mrs. Doe laughed at what sounded like a ridiculous statement, her husband—previously a very even-tempered man—screamed at her and berated her for mocking him.

Mr. Doe's accusations continued over the next several months, and their relationship deteriorated. Mr. Doe had always let Mrs. Doe handle family finances because she was much better at this than he. Now, he spent hours going over the couple's bank statements and often claimed that funds were missing. When Mrs. Doe showed that this was not true by pointing out her husband's arithmetic errors, Mr. Doe accused her of tricking him and of establishing secret "trusts for trysts" where she stashed funds to support her lovers. When Mrs. Doe received an occasional business-related call at home, Mr. Doe insisted on speaking to the caller, and once he even pushed her aside so he could get to the phone first. He made copious notes about the phone calls' times and sources, and he asked callers rude questions.

Eventually, Mr. Doe refused to let callers speak to Mrs. Doe at all, telling her, "I love you, Jane, but if this continues, I'll have no choice but to call the IRS and the FBI." When Mrs. Doe asked what her husband was talking about, Mr. Doe told her he had finally "put two and two together." For some time, he had "heard rumors" that his wife's business success came from her participation in an international "diamond cartel," "back alley cash deals," and money laundering to hide income. The previous week, he had obtained "proof," because he had followed Mrs. Doe and had seen her meet with "smugglers disguised as Orthodox Jews." Mrs. Doe explained that the men were diamond merchants who had taken the train from New York City that morning to meet with her. "Those black hats and beards may fool the U.S. government," replied Mr. Doe, "but they don't fool me."

Two weeks later, the Doe's oldest daughter Susan heard a knock at her back door. It was her frightened-looking father, who was carrying an old army duffle bag filled with his belongings. He pleaded with his daughter to let him in. Mr. Doe had parked on the grass in Susan's backyard so that his car was not visible from the street. He told Susan that Mrs. Doe wanted to have him locked up in a psychiatric hospital because he was planning to "go to the authorities." Not knowing what to think,

Susan let her father come in, then secretly called her mother. Mrs. Doe was frantically wondering why her husband had abruptly driven off without speaking to her. Susan told her mother that Mr. Doe seemed “frightened but coherent.”

Within thirty-six hours, Mr. Doe left Susan's home. As he headed out the door with his belongings and a newly purchased suitcase full of cash, he quickly thanked Susan for sheltering him, and added that “for our mutual safety,” Susan should not ask where he was going or try to follow him. A week later, Mrs. Doe received notice from an attorney in a nearby city informing her that Mr. Doe had filed for divorce. Mrs. Doe retained her own attorney and described what had happened. The attorney suggested that Mrs. Doe file papers to have her husband committed to a mental facility. Mrs. Doe had already tried this, but because her husband was looking after himself adequately, was not suicidal, and had not threatened anyone, the court would not act on her affidavit. Mrs. Doe had also looked into getting her husband a guardian, but this was not possible either as he would not see a doctor for the necessary examination. Besides, Mr. Doe was caring for himself properly, and though Mrs. Doe worried that someone might take advantage of her husband for financial gain, she had no evidence that Mr. Doe was misusing his funds.

B. Aims of this Article

For centuries, the law has made provisions for divorces initiated on behalf of a person previously adjudged incompetent to manage personal affairs who wishes to leave his or her spouse or against an incompetent spouse by a competent individual.⁵ By contrast, cases that address persons like Mr. Doe—an individual who, despite his mental illness, is competent to manage his own person—appear to be rare.⁶ Yet a confluence of events and social

⁵ See discussion *infra* Part IV.A.

⁶ We have found just seven published U.S. cases that deal with this matter, which we review *infra* Part IV.B. To our knowledge, the scholarly literature contains just one four-page discussion of this topic. See MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 276–79 (2008). Two authors have given more extensive treatment to a related topic, competence to participate in divorce mediation. See Connie J. A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence To Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL'Y & L. 1, 1–2 (2006) [hereinafter Beck & Frost I]; Connie J. A. Beck & Lynda E. Frost, *Competence as an Element of “Mediation*

developments over the past half-century have created a legal and social environment in which cases like Mr. Doe's have become much more probable:

- Recent legal developments, including the widespread availability of “no-fault” and unilateral divorce provisions in statutes, courts’ acceptance of the notion that individuals should be found lacking in specific legal competencies—rather than globally *non compos mentis*—and changes in commitment law that restrict involuntary hospitalization;
- Social developments, especially the vastly increased social acceptability of seeking a divorce to resolve marital distress;
- Trends in medical care, including the move to much shorter psychiatric hospitalizations, the availability of pharmacological treatments that produce temporary resolution of psychoses, and treatment of mentally ill outside hospitals;
- Epidemiological developments, including a larger older population susceptible to mental illnesses that generate paranoia without more global psychiatric impairment.⁷

Given the increasing possibility that divorce petitions may be initiated by individuals like Mr. Doe, this Article suggests that domestic relations law should recognize a distinct, potential form of legal incompetence: incompetence to maintain a divorce action.⁸ In Part II, we review the social and legal trends just

Readiness,” 25 CONFLICT RESOL. Q. 255, 255 (2008) [hereinafter Beck & Frost II]. Closely related but distinguishable cases involve persons who have been previously adjudicated as incompetent to manage financial affairs *only*, but who have not been adjudicated as incompetent to manage personal affairs. Courts have held that such individuals may initiate and obtain divorces, unless they are incompetent to do so or some separate legal reason exists for denying this right. *See, e.g., In re Marriage of Kutchins*, 482 N.E.2d 1005, 1007 (Ill. App. Ct. 1985); cases discussed *infra* Part IV.B. This Article suggests that such persons might be denied the right to seek and obtain divorces if they meet certain criteria, despite their competence to handle other personal affairs.

⁷ *See* discussion *infra* Part II.A.

⁸ This Article uses “divorce” as a general term that includes the legal termination of a marriage and the legal annulment or voiding of a marriage. *See* 27A C.J.S. *Divorce* § 2 (2009) (“In . . . its common and wider use, the term [divorce] includes the dissolution of a valid marriage and the annulment of a marriage . . .”). In various jurisdictions, the terms “dissolution” and “annulment” are used instead of or in addition to “divorce.” *See, e.g.,* CONN. GEN. STAT. § 46b-40(a) (2009) (“A

mentioned that may make incompetence to divorce a more likely phenomenon in the twenty-first century than would have been the case in previous times. Part III explains what types of psychiatric conditions might generate the mental problems experienced by Mr. Doe; conditions that might profoundly affect a sufferer's judgment about certain specific matters while leaving most mental functioning intact. Part IV reviews the currently limited existing case law related to this issue that could be a source for legal standards or criteria by which courts would determine whether a petitioner might be barred from suing for divorce on ground of specific incompetence to divorce.

In Part V, we suggest a rationale for requiring competence of divorcing parties that is consistent with existing divorce case law, existing laws, decisions governing other specific competencies, and with a widely used framework that mental health professionals use to evaluate and conceptualize competencies. Part VI describes a model statute on competence for divorce that legal decisionmakers might use to address the problems we identify, accompanied by examples of evaluation questions that might help courts or mental health examiners discern whether certain "crazy" motivations reflect judgment-distorting mental illnesses have indeed impaired an individual's competence to divorce.

II. A CHANGING SOCIAL CONTEXT

A. *More Divorce-Eligible Individuals*

1. Psychiatric Management of Individuals with Mental Illness

Through the middle of the twentieth century, much of the psychiatric care received by severely mentally ill individuals took place in hospitals. In 1955, when the total U.S. population stood

marriage is dissolved only by (1) the death of one of the parties or (2) a decree of annulment or dissolution of marriage by a court of competent jurisdiction.”).

For simplicity of exposition, this Article's examples and terminology assume that the divorce proceedings involve a man and woman who have been legally tied by a marriage relation. Although we do not consider the matter in detail here, we recognize that some states allow marriages or civil unions between two persons of the same sex. We believe that the points made in this Article concerning competence to divorce would apply to proceedings that terminate civil unions or marriages involving same-sex couples.

at 166 million,⁹ approximately 550,000 persons were confined in public psychiatric institutions, often termed “state hospitals.” Two decades later, this number had fallen to under 200,000, and today, fewer than 50,000 persons are committed to state and county psychiatric hospitals despite a near-doubling of the U.S. population over the same period.¹⁰ Several factors have contributed to this decrease:

- The mid-1950s witnessed the development and first use of psychotropic medications which stabilized many persons who previously would have suffered from devastating mood and thought disorders, which allowed them to manage successfully in the community.¹¹
- The 1963 passage of the Mental Retardation Facilities and Community Mental Health Centers Construction Act¹² signaled a growing belief that mentally disabled persons should be provided with community services that would allow them to receive treatment as outpatients rather than only in hospitals.¹³
- In the 1960s, Congress enacted changes in Medicare, Medicaid, and Social Security laws that created financial support for mentally ill persons to receive care in community hospitals.¹⁴ In the late 1960s and

⁹ Information Please, U.S. Events, <http://www.infoplease.com/year/1955.html> (last visited Apr. 15, 2010).

¹⁰ Ronald W. Manderscheid et al., *Changing Trends in State Psychiatric Hospital Use From 2002 to 2005*, 60 PSYCHIATRIC SERVICES 29, 30–31 (2009). Table 1 states that 49,947 persons were residing in state and county hospitals in 2005. *Id.* at 30. Figure 1 shows the number of residents equaled 550,000 in the mid-1950s and was well below 200,000 by 1980. *Id.* at 31.

In July 2005, the U.S. population was estimated at 295,753,151. U.S. Census Bureau, National and State Population Estimates, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Apr. 15, 2010). Thus, over the course of fifty years, the U.S. per capita rate of public sector psychiatric hospitalization fell nearly 95%, from 3.3 to 0.17 persons per 1,000 persons.

¹¹ See Douglas Mossman, *Unbuckling the “Chemical Straitjacket”: The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1062–65 (2002) (describing the development and impact of the first psychotropic medications for psychoses).

¹² Pub. L. No. 88-164, 77 Stat. 282 (1963).

¹³ See Jeffrey L. Geller, *The Last Half-Century of Psychiatric Services as Reflected in Psychiatric Services*, 51 PSYCHIATRIC SERVICES 41, 47 (2000) (discussing beliefs about the relative virtues of non-hospital treatment).

¹⁴ For example, the Social Security Amendments of 1965 added Title XIX (Medicaid) to the Social Security Act. Pub. L. No. 89-97, 79 Stat. 286 (1965). This Act meant that Medicaid would fund psychiatric treatment in general hospitals for

1970s, court decisions and legislative alterations changed involuntary psychiatric hospitalization from a putatively benevolent, paternalistic enterprise guided by medical professionals' judgments about the need for treatment to a court-controlled mechanism that responds primarily to manifestly dangerous behavior.¹⁵

- In the 1990s, managed care contributed forcefully to the perception that persons should be hospitalized for much shorter times than doctors had previously thought wise, and also made it more likely that any hospitalization would take place in local facilities offering rapid treatment.¹⁶

The combined effect of these changes in medical care—the move to much shorter psychiatric hospitalizations, the availability of pharmacological treatments that produce temporary resolution of psychoses, and treatment of mentally ill patients outside hospitals—is that most persons with conditions that would formerly have led to lengthy hospitalization now remain in the community despite their severe psychiatric illnesses. They thus have more and better opportunities to do the things other adults do, including meet others, marry, and—if things “don't work out”—file for divorce.

2. Legal Categorizations of Individuals with Mental Illness

We just noted that changes in commitment laws have led to a focus on risk and danger as justifications for commitment,

indigent persons in categorical assistance programs, and it improved Medicare coverage for psychiatric illnesses. See Mossman, *supra* note 11, at 1064–65 (describing the treatment of psychiatric patients before these enactments).

¹⁵ For example, an express purpose of California's Lanterman-Petris-Short Act, passed in 1969, was “to promote the legislative intent . . . [t]o end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons” and “[t]o safeguard individual rights through judicial review.” CAL. WELF. & INST. CODE § 5001(g) (2010). There are several key legal decisions of the 1970s that affected civil commitment. See, e.g., *Addington v. Texas*, 441 U.S. 418, 431–33 (1979) (holding that civil commitment requires proof by clear and convincing evidence); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that a state may not “constitutionally confine without more [justification] a nondangerous individual who” can live in community safely with “help of willing and responsible family members or friends”); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1090 (E.D. Wisc. 1972) (entitling persons facing involuntary civil commitment to procedural safeguards similar to those guaranteed criminal defendants).

¹⁶ See, e.g., Jeffrey L. Geller et al., *The Effects of Public Managed Care on Patterns of Intensive Use of Inpatient Psychiatric Services*, 49 PSYCHIATRIC SERVICES 327 (1998) (documenting shorter stays in Massachusetts).

rather than a need for treatment. From a legal standpoint, involuntarily hospitalization is “a massive curtailment of liberty.”¹⁷ Until relatively recently, persons hospitalized because of a mental impairment lost many of their civil rights.¹⁸ Further, courts were likely to regard persons with mental illnesses as simply *non compos mentis*, that is, globally incompetent for all purposes, including management of financial and personal affairs.¹⁹ A formal adjudication of incompetence led to appointment of a guardian who made decisions on behalf of the individual.²⁰

For the last few decades, however, civil commitment statutes have expressly preserved many or all of a person’s customary civil rights during hospitalization, including *inter alia* the right to make personal decisions, including marriage.²¹ Moreover, courts now may make competence adjudications concerning specific incapacities—such as incompetence to make treatment decisions or to stand trial—rather than simple plenary adjudications about all legal capacities.²² A person who is adjudicated incompetent to manage financial affairs is not necessarily deemed incompetent to make personal decisions.²³ Even if a person is adjudicated incompetent for several discrete purposes, a court’s order listing these purposes preserves the respondent’s rights in other areas of decisionmaking.²⁴ Thus, having a severe mental illness is no longer the legal barrier to marriage it was a half-century ago.

¹⁷ *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

¹⁸ *See Gillis v. Cameron*, 324 F.2d 419, 423 (D.C. Cir. 1963) (“[W]ithout any inquiry or finding as to actual competence in the given area, a patient [who was civilly committed in Washington, D.C.] . . . may apparently be deprived of the right to vote, to drive an automobile, to enter into binding legal arrangements and to exercise other civil rights.”) (citations omitted); *THE MENTALLY DISABLED AND THE LAW* 220–23 (Frank T. Lindman & Donald M. McIntyre, Jr. eds., 1961) (summarizing laws as they existed in 1960).

¹⁹ *See Alan Meisel, Ethics and Law: Physician-Assisted Dying*, 8 J. PALLIATIVE MED. 609, 613 (2005).

²⁰ JESSICA W. BERG ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* 96 (2d ed. 2001).

²¹ *See, e.g.*, OHIO REV. CODE ANN. § 5122.301 (LexisNexis 2010) (protecting employment rights and rights to contract, hold licenses, marry, divorce, make wills, vote, sue, and be sued).

²² *See Meisel, supra* note 19.

²³ *See id.* (including medical, social, marital and other types of decisions as “personal decisions”).

²⁴ BERG ET AL., *supra* note 20, at 97.

3. Divorce: More Common, More Acceptable

During the last third of the twentieth century, divorce became more common and much more socially acceptable.²⁵ Between 1960 and 1981, the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons.²⁶ Rates have decreased steadily since, and in 2006, the divorce rate was 3.6 per 1,000 persons. However, this rate is still well above the 1960 rate,²⁷ and the drop in divorce rates has been accompanied by a much lower marriage rate. Thus, over the last half-century, the probability that a marriage will end in divorce has doubled.²⁸

The rapid rise in U.S. divorce rates between 1960 and 1980 was “unprecedented”²⁹ and coincided with less disapproving social attitudes toward divorce. In 1945 and 1966, “not strict enough” was the most popular response to public survey questions about state divorce laws.³⁰ Between 1968 and 1974, however, the fraction of survey respondents who favored easier access to divorce rose substantially, and the fraction wanting stricter rules declined.³¹

These attitude changes did not *cause* increasing divorce rates; rather, the attitudinal changes appear to have followed and in some sense ratified what everyone could observe. In any event, couples who feel distressed by their marriages are no longer confronted by a social taboo against divorce.

4. Larger Vulnerable Population

As we explain further in Part IV, persons above age sixty years are particularly vulnerable to new-onset mental illnesses

²⁵ For a fascinating discussion of this phenomenon, the factors contributing to it, and its international and historical context, see WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 135–82 (1993).

²⁶ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2008* 63 tbl.77 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/vitstat.pdf>.

²⁷ *Id.*

²⁸ During the period of 1950 to 1965, the annual U.S. marriage rate ranged from 8.5 to 11.1 per 1,000, and the divorce rate ranged from 2.2 to 2.6 per 1,000. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2003* 72 tbl.83 (2003), available at <http://www.census.gov/prod/2004pubs/03statab/vitstat.pdf>. Thus, the ratio of marriages to divorces was around 4:1. In 1970, this ratio was 10.6:3.5 (about 3:1), and since 1976, the ratio has consistently hovered around 2:1. *Id.*

²⁹ ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 46 (1981).

³⁰ *See id.* at 45–46.

³¹ *See id.* at 46–49.

that can generate paranoia *without causing more global psychiatric impairment*—the clinical constellation that Mr. Doe’s case exemplifies. Over the past half-century, the fraction of the U.S. population age sixty years and older has grown enormously. In 1950, average life expectancy was 65.6 years for men and 71.1 years for women; by 1980, life expectancy had risen to 77.4 years for women and 70.0 years for men; in 2006, U.S. life expectancy was 77.7 years overall—80.2 years for women and 75.1 years for men.³² These increases have resulted in a much larger aging population currently living in the U.S.. Between 1950 and 2006, the U.S. population roughly doubled, but the population over age sixty-five years tripled.³³ By 2030—when all the “baby boomers” will have reached age sixty-five years—the population age sixty-five to seventy-four years will have grown from six percent to ten percent of the total U.S. population.³⁴ The susceptibility of elderly persons to mental problems is demonstrated by the finding that, in 2007, approximately four million persons aged sixty-five and over suffered from some type of mental disability.³⁵

5. Comment

Social changes may have created a larger population of individuals who might seek divorce and who are susceptible to the kinds of mental impairments that severely distort thinking about one’s spouse while leaving other aspects of functioning intact. However, a key factor enabling persons to divorce for delusional reasons³⁶ has been the advent of more liberal grounds

³² Melonie Heron et al., *Deaths: Final Data for 2006*, in 57 NAT’L CTR. FOR HEALTH STATISTICS, NATIONAL VITAL STATISTIC REPORTS 27 (2009).

³³ NAT’L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2008, at 20 (2009) [hereinafter NAT’L CTR. FOR HEALTH STATISTICS]; see also U.S. CENSUS BUREAU, THE 2010 STATISTICAL ABSTRACT: OVERVIEW 34 (2009) [hereinafter U.S. CENSUS BUREAU].

³⁴ NAT’L CTR. FOR HEALTH STATISTICS, *supra* note 33.

³⁵ U.S. CENSUS BUREAU, *supra* note 33, at tbl.35. Note that these numbers exclude the populations housed in institutions and only account for persons within the household population. *Id.*

³⁶ That is, reasons based on delusions. Here and throughout, the words “delusion” or “delusional” refer to an idea that is

[a] false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person’s culture or subculture (e.g., it is not an article of religious faith).

for divorce and the removal of requirements to prove a legally recognized justification for a divorce. To understand this, we review “traditional” grounds for divorce that existed prior to 1969, underscoring the need for credible proof that these grounds required.

B. “Traditional” Grounds for Divorce

Although the advent of “no-fault” grounds altered divorce law substantially during the last third of the twentieth century, most states have preserved at least some of the traditional fault-based grounds for divorce that previously existed.³⁷ Fault-based grounds have always been regulated by the state legislatures.³⁸ Statutes typically have included adultery, abandonment or desertion, and cruelty or inhuman treatment as fault-based grounds for divorce;³⁹ other fault-based grounds available in some states include insanity, conviction of a crime, habitual drunkenness, and drug addiction.⁴⁰

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 821 (4th ed. 2000) [hereinafter DSM-IV-TR].

An additional feature of Mr. Doe's clinical presentation is his *lack of insight* with regard to the delusions. That is, Mr. Doe is unaware that he is ill and that he is experiencing symptoms—here, delusional ideas—of his illness. In many patients with severe mental disorders, “[t]he rational faculty . . . although they are often quite capable in other arenas, seems to stop short at the line where their diagnosis is made.” S. NASSIR GHAEMI, *THE CONCEPTS OF PSYCHIATRY: A PLURALISTIC APPROACH TO THE MIND AND MENTAL ILLNESS* 231 (2003). The relationship between delusions and lack of insight is complex, and the two phenomena are not coterminous. Nonetheless, studies suggest that approximately two-thirds of patients with schizophrenia and manic-depressive (bipolar) illness have some impairment in their capacity for insight. *Id.* at 232.

³⁷ See 27A C.J.S. *Divorce* § 27 (2009) (citing S.B. v. S.J.B. 609 A.2d 124 (N.J. Super. Ct. Ch. Div. 1992)); Restifo v. Restifo, 489 A.2d 196, 198–99 (Pa. Super. Ct. 1985) (stating that adultery, cruelty, and desertion are traditional fault grounds for divorce).

³⁸ “Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated.” Pomraning v. Pomraning, 682 S.W.2d 775, 776 (Ark. Ct. App. 1985). “It is not within the power of the parties to terminate [a marriage] at pleasure, or for any cause. Its dissolution can only be declared by a court of competent jurisdiction, for some specified cause prescribed by law . . .” Adams v. Adams, 25 Minn. 72, 77–78 (1878).

³⁹ See Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270 (1997).

⁴⁰ There are various broad fault categories, including: voluntary separation, 24 AM. JUR. 2D *Divorce and Separation* §§ 25–33 (2009), cruelty, *id.* §§ 34–55, adultery, *id.* §§ 56–57, desertion, *id.* §§ 58–60, conviction of crime, *id.* §§ 81–82, habitual drunkenness or drug addiction, *id.* §§ 83–86, nonsupport, *id.* §§ 87–88, and indignities, *id.* §§ 89–94.

Obtaining a divorce on fault-based grounds requires statutorily specified levels of proof and corroboration.⁴¹ When the marriage is of long duration, substantial evidence may be required to dissolve it. The following paragraphs summarize the types of evidence required to support fault-based divorce actions.

1. Cruel and Inhuman Treatment

Proof of cruel and inhuman treatment typically requires “something more than unkindness or rudeness or mere incompatibility or want of affection,”⁴² isolated acts of mistreatment, or a single physical assault.⁴³ Showing that the marriage is acrimonious or strained usually is not sufficient⁴⁴ if the alleged cruel and inhuman treatment has a causal relation to the separation request.⁴⁵

To dissolve long-term marriages on grounds of cruel and inhuman treatment, trial courts generally must find that the accused party’s actions would endanger the physical or mental well-being of the spouse seeking divorce⁴⁶ and must hear testimony from the accusing spouse that the defendant’s

⁴¹ “[A] marriage should not be lightly terminated. A plaintiff is required to prove a statutory cause for divorce by competent evidence . . .” *Lowrance v. Lowrance*, 335 N.E.2d 140, 143 (Ill. App. Ct. 1975). The court must also find corroboration of claims and “[c]orroborating testimony may not consist of mere generalities or opinions, beliefs and conclusions on the part of the witness but must be directed toward specific language, acts and conduct.” *Pomraning*, 682 S.W.2d at 777. Traditionally, admissions or confessions alone are insufficient, and proof traditionally requires at least a preponderance of evidence. 24 AM. JUR. 2D *Divorce and Separation* § 321 (2009).

⁴² *Smith v. Smith*, 614 So. 2d 394, 396 (Miss. 1993) (quoting *Wires v. Wires*, 297 So. 2d 900, 902 (Miss. 1974)); see also *Steen v. Steen*, 641 So. 2d 1167, 1170 (Miss. 1994).

⁴³ See *Palin v. Palin*, 213 A.D.2d 707, 707–08, 624 N.Y.S.2d 630, 632 (2d Dep’t 1995). But see *McKee v. Flynt*, 630 So. 2d 44, 48 (Miss. 1993) (one incident may be so violent and of sufficient gravity to establish grounds); *Rojek v. Rojek*, 234 A.D.2d 1011, 1011, 651 N.Y.S.2d 813, 813–14 (4th Dep’t 1996) (one severe beating or other violent episode may suffice to prove “cruel and inhuman treatment”).

⁴⁴ See, e.g., *Walczak v. Walczak*, 206 A.D.2d 900, 900, 614 N.Y.S.2d 835, 835–36 (4th Dep’t 1994) (finding that, despite limited communication, sleeping in separate bedrooms, and some arguments, these strained relations were insufficient to end a twenty-five year marriage parties because they talked to each other in a civilized manner and committed no physical violence).

⁴⁵ See, e.g., *Morris v. Morris*, 804 So. 2d 1025, 1031 (Miss. 2002) (finding that when the wife was the only person who testified that husband acted in a cruel and inhuman manner, the husband’s conduct was not cruel and inhuman treatment).

⁴⁶ See *Brady v. Brady*, 64 N.Y.2d 339, 343, 476 N.E.2d 290, 292, 486 N.Y.S.2d 891, 893 (1985).

calculated cruelty renders cohabitation inappropriate.⁴⁷ Courts have recognized, however, that even without physical displays of violence, atrocious conduct alone may constitute cruelty⁴⁸ and “may more perniciously affect health and life than bodily bruises.”⁴⁹ Requirements concerning the types, precise duration, and number of acts of cruelty differ from jurisdiction to jurisdiction. Cruelty claims have been sustained when evidence established a substantial risk of violence or harm,⁵⁰ conduct that threatens to impair health,⁵¹ substance abuse,⁵² deviant sexual behavior,⁵³ threats of violence,⁵⁴ cursing, hollering, throwing things, and mean behavior toward the other spouse and children.⁵⁵

Notwithstanding any formal evidentiary requirements, cruelty was the most popular ground for a fault-based divorce by the mid-twentieth century.⁵⁶ Thus, appellate decisions on what

⁴⁷ See *Feeny v. Feeny*, 241 A.D.2d 510, 510, 661 N.Y.S.2d 26, 26 (2d Dep't 1997).

⁴⁸ See *Krauss v. Krauss*, 111 So. 683, 685 (La. 1927).

⁴⁹ See *Tschida v. Tschida*, 212 N.W. 193, 194 (Minn. 1927).

⁵⁰ See, e.g., *Brown v. Brown*, 704 S.W.2d 528, 529–30 (Tex. App. 1986) (discussing what constitutes a reasonable apprehension of violence or conduct that impairs or threatens another's health permanently).

⁵¹ See, e.g., *Rheinheimer v. Rheinheimer*, 235 A.D.2d 742, 742, 652 N.Y.S.2d 410, 411 (3d Dep't 1997) (discussing verbal and physical abuse that made cohabitation unsafe).

⁵² See *Routhier v. Routhier*, 514 A.2d 825, 826 (N.H. 1986) (holding that excessive drinking formed part of claim's substantiation).

⁵³ See *Cherry v. Cherry*, 593 So. 2d 13 (Miss. 1991) (noting that the husband's impotence and cross-dressing could constitute cruel and inhuman treatment).

⁵⁴ See, e.g., *McKee v. Flynt*, 630 So. 2d 44, 48–49 (Miss. 1993) (finding that the risk of life, limb, or health must be real, rather than imaginary); *Stoothoff v. Stoothoff*, 226 A.D.2d 209, 210, 640 N.Y.S.2d 553, 553 (1st Dep't 1996) (holding that a pattern of threatening violent acts met the standard of proof for divorce).

⁵⁵ See *Eppling v. Eppling*, 537 So. 2d 814, 817 (La. Ct. App. 1989) (regarding cursing and similar behavior as proof); *Smith v. Smith*, 206 A.D.2d 255, 255, 613 N.Y.S.2d 866, 866–67 (1st Dep't 1994) (holding that constant denigration met standard); *Moro v. Moro*, 589 N.E.2d 416, 419 (Ohio Ct. App. 1990) (finding the refusing to speak to one's spouse for periods of time met standard).

⁵⁶ The adaptability of cruelty to various fact patterns made it “the dazzling success story of family law.” Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 79–80 (1976). One-eighth of all divorces in the 1860s were based on cruelty; by 1950, cruelty had become the stated ground for more than half of divorces. J. HERBIE DIFONZO, *BENEATH THE FAULT LINE*, 53–54 tbl.3 (1997). In 1937, a *Time* magazine article noted that cruelty was easier to prove than other grounds; also, many couples in adulterous relationships asserted cruelty to avoid having to admit adultery. *Id.* at 54–55.

constitutes cruelty may not fully reflect the laxity with which trial courts applied evidentiary requirements in most cases heard prior to the advent of no-fault divorce options.

2. Adultery

Because adultery⁵⁷ is often committed in private, eyewitness testimony is not needed to corroborate a claim. But the evidence submitted must create more than a “mere suspicion” of guilt; “proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed.”⁵⁸ When circumstantial evidence is used, the burden of proof may be similar to, though not as high as, the proof of guilt required for criminal conviction.⁵⁹ An accused party’s admission may be evaluated under a clear preponderance standard and should be supported by independent proof establishing when, where, and under what circumstances the adulterous act occurred.⁶⁰ Overcoming the presumption of innocence takes more than showing that the accused party had the opportunity to commit adultery.⁶¹ Additional matters to be considered include the parties’ inclinations, the amount of time they spent together, whether their relationship was open, surreptitious, or openly amorous, and whether others were present when the alleged adultery occurred.⁶²

⁵⁷ “Voluntary sexual intercourse between a married person and a partner other than the lawful spouse.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 80 (1988).

⁵⁸ *Loftis v. Loftis*, 325 S.E.2d 73, 74 (S.C. Ct. App. 1985).

⁵⁹ See, e.g., *Billington v. Billington*, 531 So. 2d 924, 924 (Ala. Civ. App. 1988) stating that circumstantial evidence proving adultery must be “such as would lead the guarded discretion of a reasonable and just man to conclude that the act of adultery has been committed”); accord *Rowe v. Rowe*, 575 So. 2d 584, 587 (Ala. Civ. App. 1991); *Sibley v. Sibley*, 693 So. 2d 1270, 1271 (La. Ct. App. 1997) (stating that circumstantial proof “must be so convincing that it establishes” adultery by “the party accused to the exclusion of any other reasonable hypothesis”).

⁶⁰ See *Nemeth v. Nemeth*, 481 S.E.2d 181, 181 (S.C. Ct. App. 1997); *Brown v. Brown*, 56 S.E.2d 330, 335 (S.C. Ct. App. 1949).

⁶¹ Circumstantial evidence, however, showing the opportunity *and* inclination to commit adultery establishes a prima facie case. See *Panhorst v. Panhorst*, 390 S.E.2d 376, 377 (S.C. Ct. App. 1990).

⁶² See *Sibley*, 693 So. 2d at 1271.

3. Desertion or Abandonment

Proof of desertion or abandonment involves showing that one spouse has resolved not to live with the other⁶³—for example, that one spouse has left the state without saying when he will return, or has made an unjustified or nonconsensual departure from the home.⁶⁴ A plaintiff may also demonstrate desertion or abandonment by showing that the accused party has ceased sexual relations without explanation or reason and has neglected “marital duties”—laundry, cleaning, and cooking—even though the couple continue to reside together.⁶⁵ Single instances of denying sexual relations or neglecting marital duties, however, do not constitute abandonment, and if an accused party’s action appears justifiable, a trial court usually will not grant a divorce on grounds of abandonment.⁶⁶ States that permit divorce on grounds of desertion usually require that the desertion or abandonment has occurred for a specified period.⁶⁷

4. Mental Incapacity or Insanity⁶⁸

Though mental incapacity or “insanity” is an independent ground for divorce in some jurisdictions,⁶⁹ in others, mental

⁶³ See, e.g., *Hage v. Hage*, 112 A.D.2d 659, 661, 492 N.Y.S.2d 172, 175 (3d Dep’t 1985) (demanding that the “evidence must show a ‘hardening of resolve’ by one spouse not to live with the other”).

⁶⁴ See *id.*; see, e.g., *Sanchez v. Sanchez*, 490 So. 2d 434, 437 (La. Ct. App. 1986) (stating that mere friction, dissatisfaction, or incompatibility is not enough to justify a withdrawal from the common dwelling); *Sprott v. Sprott*, 355 S.E.2d 881, 883 (Va. 1987) (stating that the gradual breakdown in the marital relationship does not legally justify one spouse leaving the other).

⁶⁵ See *Jamison v. Jamison*, 352 S.E.2d 719, 721 (Va. Ct. App. 1987) (quoting *Chandler v. Chandler*, 112 S.E. 856, 860–61 (Va. 1922)).

⁶⁶ See *Caprise v. Caprise*, 143 A.D.2d 968, 970, 533 N.Y.S.2d 622, 624 (2d Dep’t 1988) (finding that the single refusal of sex was insufficient, and that the accusing party should submit evidence of repeated requests).

⁶⁷ See, e.g., ALASKA STAT. § 25.24.050(4) (2010) (one year); IDAHO CODE ANN. § 32-609 (2010) (one year); N.Y. DOM. REL. LAW § 170(2) (McKinney 2010) (one year).

⁶⁸ We note that a suit for divorce predicated on the respondent’s mental illness presents the opposite circumstance of this Article’s main subject.

⁶⁹ In 1949, twenty-six states and territories allowed divorce on grounds of mental illness. See *Dribin v. Superior Court*, 231 P.2d 809, 813 (Cal. 1951). The following are examples of currently valid statutes. See IND. CODE ANN. § 31-15-2-3(4) (LexisNexis 2009) (stating that grounds for a dissolution decree include “[i]ncurable insanity of either party for a period of at least two (2) years”); N.C. GEN. STAT. § 50-5.1 (2009) (permitting divorce to be granted if couple have lived apart for three consecutive years without cohabitation because of one spouse’s “incurable insanity,” and specifying the requirements to demonstrate incurability).

incapacity *precludes* a suit for divorce against the mentally incapacitated respondent on other statutory grounds.⁷⁰ However, in some states where insanity is not an independent ground for divorce, a divorce on other grounds may be commenced against a mentally ill person where certain requirements are met.⁷¹ Generally, divorce will not be granted because of insanity unless the statute specifically provides for divorce on this ground.⁷² In some older cases, insanity could be a *defense* to a divorce action if the behavior of the accused emanated from an illness so severe that it would satisfy the insanity test as applied to alleged criminal acts.⁷³

Proving insanity for purposes of divorce typically requires that the respondent suffer from a very severe form of mental illness that meets specific statutory criteria.⁷⁴ For example, the Idaho statute permits divorce on grounds of “permanent insanity” only if the mentally ill person has been “confined in an insane asylum” for three years prior to commencement of the divorce action and it appears “that such insanity is permanent and incurable.”⁷⁵ Statutes have often been strictly scrutinized by courts and may be strictly construed.⁷⁶

⁷⁰ A. Della Porta, Annotation, *Requisites of Proof of Insanity as a Ground for Divorce*, 15 A.L.R.2d 1135, § 1 (2009) (observing that insanity of one spouse precludes divorce sought by the other spouse on other grounds because divorce should be grounded on fault, not misfortune).

⁷¹ *See, e.g.*, DEL. CODE ANN. tit. 13, § 1505(b)(3) (2010) (permitting divorce upon showing of separation caused by respondent’s mental illness). In some states, however, insanity of a respondent may imply that he could not consent or acquiesce to a separation. *See Cox v. Cox*, 109 So. 2d 703, 705 (Ala. 1959) (finding that “[a]n insane person cannot be said to have or maintain . . . an intention” to abandon a spouse).

⁷² *See Dribin*, 231 P.2d at 813.

⁷³ Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if, at the time the alleged acts of cruelty were committed, the defendant was laboring under such a defect of reason as not to know the nature of his or her acts or that they were wrong. *Dankers v. Dankers*, 172 N.W.2d 318, 320 (Minn. 1969) (quoting *Longbotham v. Longbotham*, 137 N.W. 387, 389 (Minn. 1912)); *see also Kunz v. Kunz*, 213 N.W. 906, 907 (Minn. 1927) (noting that this test “is the statutory one for mental responsibility for criminal acts”).

⁷⁴ *See Porta, supra* note 70.

⁷⁵ IDAHO CODE ANN. § 32-801 (2010); *see also* ALA. CODE § 30-2-1(a)(8) (1975) (allowing divorce from spouse after hospitalization for at least five successive years if the spouse is “hopelessly and incurably insane”); ARK. CODE ANN. § 9-12-301(b)(6)(A) (2009) (allowing divorce from spouse who has been hospitalized for at least three years); CONN. GEN. STAT. ANN. § 46b-40(c)(10) (2009) (allowing divorce after confinement based on mental illness totaled a period of five years within six years of filing); FLA. STAT. § 61.052(1)(b) (2010) (allowing dissolution following three

5. Conviction of a Crime

Conviction of a felony or imprisonment for a determined period of time constitutes grounds for divorce in some states.⁷⁷ If a state lacks a statute specifically delineating conviction or imprisonment as a ground for divorce, however, relief may not be granted based on these circumstances.⁷⁸ If a statute provides only for divorce *against* an imprisoned spouse, an imprisoned spouse may not seek divorce from the other spouse on grounds of his own imprisonment.⁷⁹ It may not be necessary that the convicted spouse be serving a sentence.⁸⁰ Many statutes do not create a distinction between state or federal and civil or military convictions, and offer the right to divorce on this ground in all cases.⁸¹ It is not necessary, under some statutes, to wait until all

consecutive years of incapacitation); GA. CODE ANN. § 19-5-3(11) (2010) (citing "incurable mental illness" as a ground for total divorce and requiring institutionalization for at least two years before divorce proceedings); Glisson v. Glisson, 237 A.2d 393, 395 (Del. 1967) (interpreting DEL. CODE ANN. tit. 13 § 1522(10) to require five years of institutionalization in addition to adjudication of insanity).

⁷⁶ "[F]or humanitarian reasons, [the statutes making postnuptial insanity ground for divorce seem] to have been subjected to a strict construction . . ." C. C. Marvel, Annotation, *Insanity as Substantive Ground of Divorce or Separation*, 24 A.L.R.2d 873, § 6 (2009); see, e.g., Finkelstein v. Finkelstein, 198 P.2d 98, 99 (Cal. Dist. Ct. App. 1948) (refusing to grant a divorce because the wife had been released from the hospital at various intervals and had lived with her mother, precluding her from meeting the statutory requirement of a three-year hospitalization). Other states do not require specific time periods of institutionalization or evidence of hospitalization, but only a showing of "incurable insanity" at the time of the divorce complaint. See, e.g., CAL. FAM. CODE § 2312 (West 2010) (requiring no duration of institutionalization, but only evidence of incurable insanity continuing from the time of filing for divorce).

⁷⁷ See, e.g., LA. CIV. CODE ANN. art. 103(3) (2007) (permitting divorce if the "other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor").

⁷⁸ See *Sitterson v. Sitterson*, 131 S.E. 641, 643 (N.C. 1926) ("To hold that a separation brought about by imprisonment . . . would constitute a cause of action for absolute divorce would in effect constitute a judicial enactment of a new ground for divorce in North Carolina.").

⁷⁹ See *Anderson v. Anderson*, 300 A.2d 186, 186 (N.J. Super. Ct. Ch. Div. 1973) (exemplifying a statute that provides for divorce *against*, not *by*, imprisoned spouse).

⁸⁰ See *Tauzier v. Tauzier*, 466 So. 2d 565, 567 (La. Ct. App. 1985) (finding that divorce may be granted because of a spouse's felony conviction even if conviction is on appeal or the sentence is suspended).

⁸¹ See *Clark v. Clark*, 54 A.2d 166, 167 (N.H. 1947).

delays for appeal have expired to seek divorce based on a spouse's criminal conviction.⁸² A sentence does not end a marriage automatically, but will require legal action.⁸³

6. Habitual Intoxication or Substance Dependence

Currently, around half of U.S. jurisdictions allow for divorce based on "habitual intemperance"⁸⁴ or substance dependence, more commonly called "addiction."⁸⁵ Generally, to grant a divorce based on the respondent's habitual intoxication, a court must hear testimony showing that the episodes of intoxication occurred frequently—more than two or three times.⁸⁶ A Louisiana appeals court sustained a divorce based on habitual intoxication where the respondent consumed several beers every night and underwent a violent personality change when drunk.⁸⁷ However, in a case in which the respondent drank frequently but had a doctor and psychologist testify that he showed no signs of alcohol or substance abuse, an appeals court concluded that the trial judge had erred in finding habitual intemperance.⁸⁸

C. "No-Fault" Divorce

In 1970, California enacted the U.S.'s first "no-fault" divorce statute.⁸⁹ By 1987, all states effectively had laws that allowed a couple to obtain a divorce without ascribing fault to one party.⁹⁰

⁸² See *Nickels v. Nickels*, 347 So. 2d 510, 510 (La. Ct. App. 1977).

⁸³ See *Ferrin v. N.Y. State Dep't of Corr. Servs.*, 71 N.Y.2d 42, 46, 517 N.E.2d 1370, 1372, 523 N.Y.S.2d 485, 487 (1987).

⁸⁴ Defined as "[t]hat degree of intemperance from the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party. Habitual or excessive use of liquor." BLACK'S LAW DICTIONARY 727 (5th ed. 1979).

⁸⁵ LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 647 (2d ed. 2006).

⁸⁶ See *Braswell v. Braswell*, 494 So. 2d 1333, 1336 (La. Ct. App. 1986).

⁸⁷ See *Smith v. Smith*, 528 So. 2d 1055, 1056–57 (La. Ct. App. 1988).

⁸⁸ See *Blanchard v. Blanchard*, 490 So. 2d 361, 364 (La. Ct. App. 1986). The trial court's judgment was affirmed, however, because evidence sustained a conclusion of cruelty. *Id.* at 364–65.

⁸⁹ Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 320 tbl.1 (2002); Ted Gest, *Divorce; How the Game Is Played Now*, U.S. NEWS & WORLD REP., Nov. 21, 1983, at 39.

⁹⁰ Vlosky & Monroe, *supra* note 89; Gest, *supra* note 89 (noting that no-fault divorce was available in every state except South Dakota in 1983). Vlosky and Monroe make the interesting point that states took a variety of courses to effect no-

Though no-fault options are available to couples throughout the U.S., some states make obtaining a no-fault divorce more difficult than others. Strictly speaking, New York state does not have a no-fault law.⁹¹ Residents may divorce through conversion of a separation judgment⁹² or through a mutually acknowledged separation agreement after living apart for a year or more.⁹³ In Illinois, a couple may obtain a no-fault marital dissolution only if the court finds that they have lived apart for two years, "irreconcilable differences have caused the irretrievable breakdown of the marriage and . . . efforts at reconciliation have failed or . . . would be impracticable and not in the best interests of the family."⁹⁴ By contrast, California requires only that "[i]rreconcilable differences . . . have caused the irremediable breakdown of the marriage," where such differences need only "be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."⁹⁵

Though scholars debate the reasons why, no-fault divorce arrived at a period in U.S. history when divorce rates were already increasing.⁹⁶ Some researchers suggest that the availability of no-fault divorce accelerated this trend.⁹⁷ Others believe that no-fault statutes were largely redundant.⁹⁸ Even before no-fault laws were enacted, many judges were using fault

fault options for consensual divorce. For reasons of efficiency or political expedience, "[s]ome states eased their divorce laws . . . by . . . decreas[ing] the period of separation required before a divorce could be granted, in some cases to as little as 6 months." Vlosky & Monroe, *supra* note 89, at 317. The details of these changes appear in their Table 2. *Id.* at 322–23 tbl.2 (demonstrating, for example, that New York is a separation only state and a divorce can be obtained after one year of separation).

⁹¹ Vlosky & Monroe, *supra* note 89, at 319 (recognizing that some authors do not classify New York's separation provision as "no-fault").

⁹² N.Y. DOM. REL. LAW § 170.5 (McKinney 2010).

⁹³ *Id.* § 170.6.

⁹⁴ 750 ILL. COMP. STAT. ANN 5/401(a)(2) (West 2009).

⁹⁵ CAL. FAM. CODE §§ 2310–2311 (West 2010).

⁹⁶ See *supra* notes 25–28 and accompanying text (discussing marriage and divorce rates).

⁹⁷ See, e.g., Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543, 544, 563 (1989) (finding that "on the average, the no-fault laws increased divorces by some twenty to twenty-five percent"); Joseph L. Rodgers et al., *Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No*, 61 J. MARRIAGE & FAM. 803, 804 (1999) (noting that, in states that implemented no-fault divorce between 1965 and 1974, "a substantial number of divorces [took place] that would not have occurred otherwise").

⁹⁸ See Marvell, *supra* note 97, at 544.

grounds—such as cruelty⁹⁹—as “de facto no-fault grounds” for anyone “who wanted to divorce and who was willing to pay the social and economic costs.”¹⁰⁰

D. Unilateral Divorce

During the 1970s and 1980s, most legislatures passed laws that allowed one spouse to unilaterally petition for and obtain a divorce.¹⁰¹ In some jurisdictions, these laws let one spouse initiate and obtain a divorce upon showing that the couple have lived apart for a certain time period.¹⁰² In other states, no time period is necessary.¹⁰³

Economic analyses suggest that unilateral divorce statutes—rather than no-fault laws—bear responsibility for the increased likelihood of divorce observed in the U.S. during the last third of the twentieth century.¹⁰⁴ The basic thesis behind these studies is that, in combination with other legal changes that affected property distribution, unilateral divorce laws altered the economic incentives to stay married as well as the bargaining positions of spouses.¹⁰⁵ Initial work using this perspective applied a “contract-theoretic framework” to marital bargaining structures under the assumption of symmetric information, and

⁹⁹ See *supra* note 56 and accompanying text.

¹⁰⁰ Norval D. Glenn, *Further Discussion of the Effects of No-Fault Divorce on Divorce Rates*, 61 J. MARRIAGE & FAM. 800, 802 (1999); see also Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 3 (2000) (noting that “the divorce rate began climbing long before no-fault divorce was adopted, and that no durable acceleration in the rate of increase followed its adoption”).

¹⁰¹ See Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799, 803 tbl.1 (2004) (table showing dates of no-fault and unilateral divorce legislation). Before 1970, six states permitted unilateral divorce and by 1987, thirty-four states did. See *id.* For a table displaying various types of unilateral laws and the role of fault in determining settlement, see Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AMER. ECON. REV. 608, 612–13 tbl.1 (1998).

¹⁰² See, e.g., OHIO REV. CODE ANN. § 3105.01(J) (LexisNexis 2010) (permitting courts to grant divorce “[o]n the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation”).

¹⁰³ Thus, California’s divorce law is both a no-fault and a unilateral divorce statute without a separation requirement. See CAL. FAM. CODE §§ 2310–2311 (West 2010).

¹⁰⁴ See Kristie M. Engemann & Michael T. Owyang, *Splitsville: The Economics of Unilateral Divorce*, REGIONAL ECON., Jan. 2008, at 12, 16.

¹⁰⁵ See *id.*

concluded that unilateral divorce laws had not affected divorce rates.¹⁰⁶ Subsequent work in the 1990s reached different conclusions, with some of the discrepancies accounted for by disagreements about what constitutes a “unilateral” divorce law,¹⁰⁷ and some explained by differences in statistical models.¹⁰⁸ Leora Friedberg concludes that wide adoption of unilateral divorce laws “accounted for 17% of the increase in divorce rates between 1968 and 1988 . . . and that the effect of unilateral divorce on divorce behavior was permanent, not temporary.”¹⁰⁹ Some recent economic scholarship has disagreed, suggesting that unilateral divorce laws raised divorce rates about eight years after their adoption but that thereafter, the impact of these laws was minimal.¹¹⁰

E. Comment

Given the trends in U.S. divorce rates that were taking place before 1970, it is difficult to know whether the changes in divorce laws that occurred in the 1970s and 1980s have much statistical impact on the current likelihood of divorce in the twenty-first century. What is clear, however, is that the widespread availability of unilateral and unilateral/no-fault divorce makes it far easier for individuals to maintain divorce actions for irrational reasons and—particularly if they can successfully separate and live independently from their spouses—to obtain a divorce.

To be able to initiate a divorce action, a delusional litigant like Mr. Doe would need to retain the cognitive and behavioral competencies that permit independent living and coherent articulation of his wishes, despite having a mental illness that generated irrational beliefs about his spouse. Whether courts

¹⁰⁶ H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 452 (1986) (noting, however, that settlements were lower in unilateral states).

¹⁰⁷ See Douglas W. Allen, Commentary, *Marriage and Divorce*, 82 AM. ECON. REV. 679, 679, 683 (1992) (commenting on an article by H. Elizabeth Peters, *supra* note 106).

¹⁰⁸ See Friedberg, *supra* note 101, at 608 (presenting an analysis of time-series data, state- and year-specific fixed effects models, and linear and quadratic time trends).

¹⁰⁹ *Id.*

¹¹⁰ See Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802, 1802, 1813 (2006).

should allow persons with focal but serious mental impairments and delusional motivations to divorce is a matter that we address in later Parts of this Article. In the next Part, we provide short descriptions of mental illnesses that answer the question, “What might be wrong with Mr. Doe?”¹¹¹

III. PSYCHIATRIC CONDITIONS THAT MIGHT PRODUCE INCOMPETENCE TO DIVORCE

Many individuals suffer from mental disorders.¹¹² Though these conditions by definition cause dysfunction or discomfort,¹¹³ relatively few affected persons experience alteration in judgment severe enough to be incompetent in any legal sphere. Moreover, research suggests that even among those persons who have mental disorders that might potentially impair competence, in only a minority of cases is competence actually impaired.¹¹⁴ From the standpoint of psychiatric diagnosis, this Article focuses on a minority within that minority: individuals whose mental conditions deprive them of mental competence to initiate a divorce without incapacitating them in other aspects of their lives. In other words, psychiatric conditions that could conceivably create specific incompetence to maintain a divorce action must leave their sufferers ineligible for civil commitment,

¹¹¹ In medical jargon, we are presenting a “differential diagnosis” of Mr. Doe. Psychiatrist Michael First and co-authors describe the process of generating a differential diagnosis thus: “Confronted with one (or a couple) of specific symptoms, it is our job to cull from the wide universe of [psychiatric] conditions those that could possibly account for them.” MICHAEL B. FIRST ET AL., *DSM-IV-TR HANDBOOK OF DIFFERENTIAL DIAGNOSIS* xiii (2002).

¹¹² According to one authoritative recent estimate, 26.2% of American adults suffer from a mental disorder in any given year, and 6% have a serious mental illness. Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of Twelve-Month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 *ARCHIVES GEN. PSYCHIATRY* 617, 619 (2005).

¹¹³ Psychiatrists define a mental disorder as “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress[;] . . . disability[;] . . . increased risk of suffering death, pain, disability[;] or an important loss of freedom.” *DSM-IV-TR*, *supra* note 36, at xxxi. In the U.S. and Canada, neuropsychiatric disorders are the leading cause of disability among persons aged 15–59 years. *WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2004: CHANGING HISTORY* 128–29 tbl.3 (2004).

¹¹⁴ *See, e.g.*, Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients To Consent to Psychiatric and Medical Treatments*, 19 *L. & HUM. BEHAV.* 149, 149 (1995) (finding significant impairments in decisional abilities in only a minority of persons with depression or schizophrenia).

able to care for themselves, and capable of managing day-to-day finances well enough to avoid harm. Candidate diagnoses also would have to leave individuals mentally intact enough to communicate with attorneys who might take their cases after accepting as factually based the stated explanations for wanting to divorce. At the very least, a mental illness could not be so severe as to render a petitioner unable to pursue a divorce pro se.¹¹⁵

In this Part, we describe four psychiatric illnesses that could produce symptoms that might induce sufferers to seek a divorce, leave their communication and day-to-day functioning relatively unimpaired, yet create specific impairments in judgment and perception that, in our view, should make them ineligible to maintain divorce actions. Other psychiatric conditions might, under the right combination of circumstances, produce similar gaps in an individual's functioning. However, the conditions we describe are those most likely to produce specific thoughts and perceptions that would impair competence to divorce while sparing most mental faculties.

A. *Incipient Dementia*

The term "dementias" refers to a group of neurological disorders that cause a loss of various intellectual functions, especially memory. Although dementias can occur at any age, they typically are disorders that affect the elderly. The best known of these conditions—"dementia of the Alzheimer's type," more commonly termed "Alzheimer's disease"—afflicts roughly 1.5% of persons in their late sixties; in persons over age eighty-five years, the incidence is 20% or more.¹¹⁶ Many other diseases and degenerative processes can lead to dementia, however.

¹¹⁵ All kinds of resources are available to help a delusional litigant who could not convince an attorney to take his or her case to file for a divorce pro se. On February 3, 2010, a Google search using the phrase "pro se divorce" (including the quote marks) turned up 14,200 hits offering help and information, including websites sponsored by government organizations in Wisconsin, <http://www.wicourts.gov/services/public/prose.htm> (last visited Apr. 15, 2010), North Carolina, <http://www.nccourts.org/County/Durham/Courts/Family/ProseDivorce.asp> (last visited Apr. 15, 2010), Texas, http://www.co.travis.tx.us/records_communication/law_library/ref_attorney.asp (last visited Apr. 15, 2010), and Wyoming, <http://www.courts.state.wy.us/DandCS.aspx> (last visited Apr. 15, 2010).

¹¹⁶ DSM-IV-TR, *supra* note 36, at 152.

Alzheimer's disease is one of the "primary dementias,"¹¹⁷ that is, a dementia that results from deterioration of or damage to brain cells that is not attributable to some other external cause. Dementia may also follow repeated small blood vessel occlusion in the brain,¹¹⁸ exposure to chemicals,¹¹⁹ infectious diseases,¹²⁰ structural brain damage,¹²¹ metabolic abnormalities,¹²² and other neurological diseases.¹²³

¹¹⁷ Other primary dementias besides Alzheimer's disease are frontal lobe dementia, Pick's disease, and Lewy body dementia. *See generally* National Institutes of Health, National Institute of Neurological Disorders and Stroke, http://www.ninds.nih.gov/disorders/disorder_index.htm (last visited Apr. 15, 2010). As the name implies, frontal lobe dementia is an often-genetic disease affecting a brain's front portions. *See id.* Pick's disease is accompanied by progressive deterioration of social skills, language, memory, personality, and sometimes moral judgment. *See id.* Lewy bodies, which are accumulations of alpha-synuclein protein inside neuronal nuclei in those parts of the brain that control certain aspects of memory and movement, are present in Alzheimer's and Parkinson's diseases. *See id.* Scientists think Lewy bodies may be related to, or are a variant form of Alzheimer's or Parkinson's disease, or that they may simply co-occur. *See* David Weisman & Ian McKeith, *Dementia with Lewy Bodies*, 27 SEMINARS IN NEUROLOGY 42, 43 (2007) (discussing neuropathological findings).

¹¹⁸ This syndrome is often called multi-infarct dementia or vascular dementia, and results from multiple blockages of small blood vessels in the brain, often caused by clots. In general, an "infarct" is an area of dead organ tissue caused by a loss of circulation to the affected portion of the organ. The infarcted areas are relatively small, are distributed in various areas of the brain, and do not individually cause the gross, abrupt losses of specific functioning—for example, the ability to speak—observed in "strokes." Rather, their cumulative impact is to cause deterioration in cognitive functions, such as memory, that involve coordinated activity across multiple brain regions. For a recent review, see Kurt A. Jellinger, *The Pathology of "Vascular Dementia": A Critical Update*, 14 J. ALZHEIMER'S DISEASE 107, 107, 112, 115 (2008).

¹¹⁹ Such chemicals include alcohol, inhaled organic compounds—such as toluene, found in airplane glue—and heavy metals such as arsenic. Linda Chuang, *Mental Disorders Secondary to General Medical Conditions*, <http://emedicine.medscape.com/article/294131-overview> (last visited Apr. 15, 2010).

¹²⁰ A variety of infectious agents may cause dementia, including viruses (such as HIV), bacteria (syphilis, Lyme disease), and prions (the agents that cause Creutzfeldt-Jakob or "mad cow" disease). Osvaldo P. Almeida & Nicola T. Lautenschlager, *Dementia Associated with Infectious Diseases*, 17 INT'L PSYCHOGERIATRICS S65, S65 (2005).

¹²¹ Causes may include traumatic injury, intracranial accumulations of spinal fluid (hydrocephalus) or blood (such as subdural hematoma), or benign or malignant tumors. MARC E. AGRONIN, *ALZHEIMER DISEASE AND OTHER DEMENTIAS* 168 (2d ed. 2008).

¹²² For example, deficiencies of thyroid hormone, *id.* at 57, or B vitamins (including thiamine, niacin, and cyanocobalamin), *id.* at 183–85.

¹²³ For example, Huntington's and Parkinson's diseases. *Id.* at 4.

Under current psychiatric diagnostic criteria, a diagnosis of dementia, whatever its source,¹²⁴ requires a significant impairment in ability to remember either new information or information previously learned, coupled with at least one of the following problems:

- Impaired language ability¹²⁵
- Impaired ability to carry out intentional movements¹²⁶
- Loss of ability to recognize or identify objects¹²⁷
- Disturbances in abstract thinking, planning, or organization of activities¹²⁸

More significant, for our purposes, are the changes in personality and emotional makeup that may accompany *early* dementia—in other words, dementia that has not reached a point at which it would cause impairment that is immediately obvious. A substantial fraction of demented individuals become paranoid.¹²⁹ They believe, for example, that their belongings have been stolen because they cannot remember that they used and moved them.¹³⁰ The paranoia may take the form of diffuse

¹²⁴ Standard medical evaluation of individuals with dementia includes history taking, a physical examination, and blood and urine testing, which can be helpful in ruling out metabolic problems, infections, and organ failure as causes. Brain imaging with a CT or MRI scan can often detect evidence of vascular lesions, structural changes, or regional deterioration of brain tissue. *Id.* at 14–70.

¹²⁵ The technical term is aphasia. For example, persons with dementia may have trouble recalling and using names of objects, so they use more general terms such as “it” or “thing.” See Karen S. Santacruz & Daniel Swagerty, *Early Diagnosis of Dementia*, 63 AM. FAM. PHYSICIAN 703, 705 (2001). As some dementias progress, volume of speech decreases; eventually, some sufferers stop speaking. See Mario F. Mendez & Beth A. Zander, *Dementia Presenting with Aphasia: Clinical Characteristics*, 54 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 542, 542–44 (1991) (providing descriptions, examples and discussions of progressing dementias).

¹²⁶ The technical term is apraxia. The impairment occurs despite the individual’s having intact motor function and sense of touch. Apraxic persons may have trouble writing or tying shoelaces. See S. Della Sala et al., *Ideomotor Apraxia in Patients with Dementia of Alzheimers Type*, 234 J. NEUROLOGY 91 (1987).

¹²⁷ The technical term is agnosia, and the impairment in recognition occurs despite intact visual and touch perception. See Santacruz & Swagerty, *supra* note 125, at 706–07. As dementia progresses, its sufferers may fail to recognize even close family members. See *id.*

¹²⁸ These difficulties, termed “loss of executive functioning,” include problems with carrying out steps of a task in the proper order, making appropriate decisions, and evaluating situations. CHARLES SETH LANDEFELD ET AL., CURRENT GERIATRIC DIAGNOSIS & TREATMENT 62 (2004). Examples include problems with cooking (lighting a burner without putting water in the pot) and loss of ability to balance one’s checkbook. See *id.*

¹²⁹ See DSM-IV-TR, *supra* note 36, at 150.

¹³⁰ See *id.*

suspiciousness or specific delusions about being persecuted or mistreated.¹³¹ Anxiousness, abrupt changes in mood, and anger outbursts may also occur, especially when demented individuals are confronted by their limitations or a failure to cope with situations they once handled easily.¹³²

Studies of persons with Alzheimer's dementia show that they often experience impairments in their abilities to make decisions even when their overall impairment is relatively mild.¹³³ For example, persons with early Alzheimer's may display problems understanding information and reasoning.¹³⁴ As the dementia progresses, many persons show significant impairment of decisionmaking capacity even during simple tests.¹³⁵

B. *Schizophrenia, Paranoid Type*

Schizophrenia affects approximately one out of two-hundred persons.¹³⁶ The condition usually makes its appearance in the late teenage years or young adulthood, but occasionally onset occurs well after middle age.¹³⁷ The classic, "positive" signs of schizophrenia are hallucinations, delusions, and disorganized speech or behavior.¹³⁸ Over the last two decades, however, it has become increasingly clear that cognitive impairments and "negative" symptoms—diminished affect, verbal production, and initiative—account for much of the disability caused by

¹³¹ See *id.*

¹³² See *id.*

¹³³ See Daniel C. Marson, *Loss of Competency in Alzheimer's Disease: Conceptual and Psychometric Approaches*, 24 INT'L J.L. & PSYCHIATRY 267, 276–78 (2001) (summarizing studies).

¹³⁴ See *id.* at 278.

¹³⁵ See *id.*

¹³⁶ Dinesh Bhugra, *The Global Prevalence of Schizophrenia*, 2 PUB. LIBR. SCI. MED. 372, 372 (2005) (citing study results of 0.0046 for point prevalence, 0.0033 for period prevalence, and 0.0072 for lifetime morbid risk).

¹³⁷ See DSM-IV-TR, *supra* note 36, at 314.

¹³⁸ See *id.* at 312. A diagnosis of schizophrenia requires that individuals experience these symptoms for at least six months, that they experience a marked deterioration in social or occupational functioning, and that other conditions—including medical conditions, intoxicants, and mood disorders—be eliminated as potential causes of the symptoms. *Id.* A closely related syndrome, schizophreniform disorder, has the same signs and symptoms as schizophrenia, but its duration is under six months and it need not be accompanied by functional deterioration. *Id.* at 317–19.

schizophrenia.¹³⁹ Antipsychotic medication, the mainstay of treatment for schizophrenia, can in most cases reduce or eliminate many positive symptoms, but residual signs and negative symptoms often remain.¹⁴⁰ Even without treatment, though, the severity of schizophrenia often fluctuates, as does the impairment in functioning that accompanies the illness.¹⁴¹

As is the case with most mental disorders, researchers and clinicians regard the development of schizophrenia in an individual as the outcome of biological, psychological, and social forces. Five lines of evidence support the assertion that biological factors contribute substantially to the development of schizophrenia: (1) Strong genetic evidence comes from examining co-occurrence of the condition in twins and other genetically close family members,¹⁴² and more recently, from studies identifying specific genetic variations that influence the probability of the disorder;¹⁴³ (2) Evidence for an impact of congenital influences

¹³⁹ See, e.g., Victoria Villalta-Gil et al., *Neurocognitive Performance and Negative Symptoms: Are They Equal in Explaining Disability in Schizophrenia Outpatients?* 87 SCHIZOPHRENIA RES. 246, 246–47 (2006) (“Negative symptoms are the major source of disability of our sample.”). These features are termed “negative” symptoms because they reflect the absence of normal psychological features.

¹⁴⁰ Julie Kreyenbuhl et al., *Adding or Switching Antipsychotic Medications in Treatment-Refractory Schizophrenia*, 58 PSYCHIATRIC SERVS. 983, 983–84 (2007) (noting that “[a] substantial proportion of patients with schizophrenia, estimated at 10% to 30% of outpatients, are considered resistant to standard antipsychotic treatment,” and citing studies).

¹⁴¹ See Thomas H. Jobe & Martin Harrow, *Long-Term Outcome of Patients with Schizophrenia: A Review*, 50 CAN. J. PSYCHIATRY 892, 898 (2005) (“Even [though] with current treatments, schizophrenia patients as a group show poorer outcome than patients with other types of psychiatric disorders... a subgroup of schizophrenia patients shows intervals or periods of recovery.”).

¹⁴² See, e.g., Alastair G. Cardno & Irving I. Gottesman, *Twin Studies of Schizophrenia: From Bow-and-Arrow Concordances to Star Wars Mx and Functional Genomics*, 97 AM. J. MED. GENETICS 12, 12 (2000) (based on concordance rates in identical (monozygotic) twins and fraternal (dizygotic) twins, heritability is approximately 80 to 85%); Judy L. Thompson et al., *Indicators of Genetic Liability to Schizophrenia: A Sibling Study of Neuropsychological Performance*, 31 SCHIZOPHRENIA BULL. 85, 85 (2005) (observing that “[t]win and adoption studies have clearly indicated that genes have a major role in the etiology of schizophrenia”).

¹⁴³ See, e.g., Xiao-Wei Chen et al., *DTNBP1, a Schizophrenia Susceptibility Gene, Affects Kinetics of Transmitter Release*, 181 J. CELL BIOLOGY 791, 791 (2008) (studying the link dysbindin gene to schizophrenia, which provides a plausible mechanism by which the gene might cause illness); Junxia Tang et al., *Dysbindin-1 in Dorsolateral Prefrontal Cortex of Schizophrenia Cases Is Reduced in an Isoform-Specific Manner Unrelated to Dysbindin-1 mRNA Expression*, 18 HUM. MOLECULAR GENETICS 3851, 3851 (2009) (decreased dysbindin-1C in portions of the brain may

comes from observations that people born in winter or spring are more likely to develop schizophrenia,¹⁴⁴ as are people who were exposed to certain infections while in utero;¹⁴⁵ (3) Evidence suggests that, in persons with underlying vulnerability, marijuana use can trigger the development of schizophrenia, implying a biological causal mechanism for the disorder.¹⁴⁶ Also, administration of certain pharmaceuticals to persons without the disorder can lead to development of symptoms that mimic schizophrenia.¹⁴⁷

contribute to the cognitive deficits of schizophrenia by promoting under-functioning of specific receptors).

¹⁴⁴ See Geoffrey Davies et al., *A Systematic Review and Meta-Analysis of Northern Hemisphere Season of Birth Studies in Schizophrenia*, 29 SCHIZOPHRENIA BULL. 587, 587 (2003) (finding that the excess population attributable risk for winter/spring births is 3.3%).

¹⁴⁵ See Alan S. Brown, *Environment and Schizophrenia: Prenatal Infection as a Risk Factor for Schizophrenia*, 32 SCHIZOPHRENIA BULL. 200, 200 (2006) (“Prenatal infections . . . associated with schizophrenia include rubella, influenza, and toxoplasmosis.”).

¹⁴⁶ See Sven Andréasson et al., *Cannabis and Schizophrenia: A Longitudinal Study of Swedish Conscripts*, 330 LANCET 1483, 1483 (1987) (relative risk for schizophrenia among high cannabis users was 6.0); Michael T. Compton et al., *Association of Pre-Onset Cannabis, Alcohol, and Tobacco Use with Age at Onset of Prodrome and Age at Onset of Psychosis in First-Episode Patients*, 166 AM. J. PSYCHIATRY 1251, 1255 (2009) (citing studies suggesting that pre-onset cannabis use may be associated with an earlier age at onset of psychosis, showing a “possible effect of pre-onset cannabis (and tobacco) use on age at onset of symptoms,” and describing possible biological mechanisms); Louisa Degenhardt & Wayne Hall, *Is Cannabis Use a Contributory Cause of Psychosis?* 51 CAN. J. PSYCHIATRY 556, 563 (2006) (finding that marijuana can precipitate schizophrenia in persons with personal or family history of schizophrenia); Stephen M. Eggen et al., *Reduced Cortical Cannabinoid 1 Receptor Messenger RNA and Protein Expression in Schizophrenia*, 65 ARCHIVE GEN. PSYCHIATRY 772, 772 (2008) (concluding that the link between marijuana use and schizophrenia may be due to reduced expression of the cannabinoid receptor in brains of persons with schizophrenia).

¹⁴⁷ Adrienne C. Lahti et al., *Effects of Ketamine in Normal and Schizophrenic Volunteers*, 25 NEUROPSYCHOPHARMACOLOGY 455, 455 (2001) (finding that, in normal persons, ketamine can cause short-lived psychotic symptoms similar to responses of persons with schizophrenia).

(4) Brain imaging studies have documented differences in brain configurations¹⁴⁸ and neural activity¹⁴⁹ among people diagnosed with schizophrenia. (5) Finally, overwhelming evidence shows that medications—especially those that block activity of the brain's dopamine D₂ receptor¹⁵⁰—are effective in alleviating some symptoms of schizophrenia, suggesting an impact on a pathological condition that is biological.¹⁵¹

Although biological factors create an individual's vulnerability to developing schizophrenia, social and individual psychological factors influence the risk of having the condition, its impact, and its clinical course. Living in cities, poverty, and minority status are among the social factors that increase the risk of developing schizophrenia.¹⁵² Childhood abuse or trauma appears to affect symptoms and the severity of schizophrenia later in life,¹⁵³ and unsupportive, dysfunctional family relationships are a risk factor for relapse following recovery from an episode of psychosis.¹⁵⁴ Persons with schizophrenia exhibit psychological traits, particularly an impaired capacity to appreciate their own and other persons' mental states, that adversely affect their social competence.¹⁵⁵ Also, depressed mood,

¹⁴⁸ See Laura A. Flashman & Michael F. Green, *Review of Cognition and Brain Structure in Schizophrenia: Profiles, Longitudinal Course, and Effects of Treatment*, 27 PSYCHIATRY CLINICS N. AM. 1, 3 (2004) (reviewing “[n]umerous studies [that] have examined neuroanatomical features of schizophrenia”).

¹⁴⁹ See Heather C. Whalley et al., *Correlations Between fMRI Activation and Individual Psychotic Symptoms in Un-Medicating Subjects at High Genetic Risk of Schizophrenia*, 7 BMC PSYCHIATRY 61 (2007) (hallucinations related to altered functioning of lateral temporal cortex; other psychotic symptoms related to altered medial temporal lobe function).

¹⁵⁰ See H. M. Jones & L. S. Pilowsky, *Dopamine and Antipsychotic Drug Action Revisited*, 181 BRIT. J. PSYCHIATRY 271, 271 (2002) (finding that all “antipsychotic drugs have at least some degree of antagonism of the dopamine D₂ receptors”).

¹⁵¹ See *id.* at 272–73 (abnormal dopamine transmission in schizophrenia).

¹⁵² See generally Jim van Os et al., *The Schizophrenia Envirome*, 18 CURR. OPIN. PSYCHIATRY 141 (2005) (discussing evidence for increased risk and suggesting biological pathways that may mediate or transmit impact of environment).

¹⁵³ See Lindsay S. Schenkel et al., *Histories of Childhood Maltreatment in Schizophrenia: Relationships with Premorbid Functioning, Symptomatology, and Cognitive Deficits*, 76 SCHIZOPHRENIA RES. 273, 281, 283 (2005) (contending that childhood maltreatment influences specific forms of cognitive dysfunction).

¹⁵⁴ See Ronald L. Butzlaff & Jill M. Hooley, *Expressed Emotion and Psychiatric Relapse: A Meta-Analysis*, 55 ARCHIVES GEN. PSYCHIATRY 547, 548–49 (1998) (synthesizing results from twenty-seven studies of expressed emotion).

¹⁵⁵ See Martin Brüne et al., *Mental State Attribution, Neurocognitive Functioning, and Psychopathology: What Predicts Poor Social Competence in Schizophrenia Best?* 92 SCHIZOPHRENIA RES. 151, 152, 158 (2007).

low self-esteem, and negative views of oneself and others correlate with having persecutory delusions that are more severe and more preoccupying,¹⁵⁶ and specific types of symptoms in schizophrenia are comprehensible as types of cognitive biases or emotional states.¹⁵⁷ Thus, although psychosis is biologically based, symptoms of schizophrenia are amenable to techniques, such as cognitive-behavioral therapy, that have proven useful for persons with nonpsychotic conditions such as depression and anxiety disorders.¹⁵⁸

Because schizophrenia has various manifestations, Eugen Bleuler referred to “schizophrenias” when he coined the term.¹⁵⁹ The current U.S. diagnostic system lists five subtypes of schizophrenia; of these, the “paranoid type” is of chief interest here because it is the type most likely to produce beliefs about one’s spouse that might provide motivate one to seek a divorce without causing other impairments—such as the ability to communicate coherently—that are needed to initiate a divorce action.¹⁶⁰ Persons with paranoid schizophrenia display normal amounts of affect, and their speech, behavior, and thinking are

¹⁵⁶ See Ben Smith et al., *Emotion and Psychosis: Links Between Depression, Self-Esteem, Negative Schematic Beliefs and Delusions and Hallucinations*, 86 SCHIZOPHRENIA RES. 181, 186 (2006).

¹⁵⁷ See Aaron T. Beck, *A Cognitive Model of Schizophrenia*, 18 J. COGNITIVE PSYCHOTHERAPY 281 (2004).

¹⁵⁸ See Elizabeth Kuipers et al., *Cognitive, Emotional, and Social Processes in Psychosis: Refining Cognitive Behavioral Therapy for Persistent Positive Symptoms*, 32 SCHIZOPHRENIA BULL. S24, S27–29 (2006) (describing therapeutic procedures and their rationale).

¹⁵⁹ See EUGEN BLEULER, *DEMENTIA PRAECOX OR THE GROUP OF SCHIZOPHRENIAS* 9–10 (Joseph Zinkin trans., International Universities Press 1950).

¹⁶⁰ The other four subtypes of schizophrenia usually are much more disabling, and the outward signs of these disorders are quickly recognized—even by nonclinicians—as indications of severe mental problems. Sufferers of “disorganized” schizophrenia have disorganized speech and behavior accompanied by inappropriate emotional responses. Persons with “catatonic” schizophrenia display motor immobility, stupor, rigid posturing, mutism, stereotyped and repetitive movements, or excessive poorly organized activity (“catatonic excitement”). Persons with “undifferentiated” schizophrenia hallucinate and have disorganized thinking; they do not usually have the types of delusions that would motivate one to seek a divorce, and they also lack initiative or interest in extended, determined activity. Similarly, persons with “residual” schizophrenia lack delusions that would provide “reasons” for a divorce; they also usually have impaired motivation. See DSM-IV-TR, *supra* note 36, at 313–17.

organized and coherent.¹⁶¹ When ill, however, they typically have delusions that they are being persecuted and that their persecutors intend to harm them, and if the illness that generates these ideas is left untreated, delusions may become more-than-ample justification for taking action to respond to threats that seem very real.¹⁶²

C. *Delusional Disorder*

In schizophrenia, delusions typically have “bizarre”¹⁶³ content—that is, the delusions contain elements that could not possibly be true, such as that one’s brain contains an electronic thought transmission device. Also, persons with schizophrenia experience other symptoms, as has just been discussed, and deterioration in overall functioning. By contrast, persons with delusional disorder experience the insidious development of systematized delusions about things that are physically possible. They often do not experience the psychosocial dysfunction that accompanies schizophrenia, and their thinking and behavior remain clear and orderly. They hallucinate little or not at all, though much of what they feel, say, and do may reflect their delusional ideas.¹⁶⁴ Thus, a person with delusional disorder who believes he is being targeted by “Mafia hit men” may stop working, leave his house only at night, and wear disguises—that is, his decisions and behavior are logical, organized responses to a premise which, though physically possible, has no basis in reality.¹⁶⁵

¹⁶¹ Another way of saying this is that the *form* of their thoughts and behavior are normal, but the *content* of their thoughts can be quite irrational, and their actions may be motivated by delusional ideas.

¹⁶² See DSM-IV-TR, *supra* note 36, at 313–14 (noting “relative preservation of cognitive functioning and affect” in paranoid schizophrenia, along with potential for delusions with themes of persecution or jealousy that are “organized around a coherent theme” and that can be associated with argumentativeness and anger that “may predispose the individual to violence”).

¹⁶³ Though “bizarreness” can be hard to evaluate, DSM-IV-TR deems delusions “bizarre if they are clearly implausible . . . and not derived from ordinary life experiences.” *Id.* at 324.

¹⁶⁴ The full requirements for a diagnosis of delusional disorder are (a) nonbizarre delusions that have lasted at least one month, (b) never having met diagnostic criteria for schizophrenia, (c) neither bizarre behavior nor marked impairment in functioning (apart from the direct impact of the delusion(s)), (d) absence, or at most brief, duration of mood symptoms, and (e) absence of a medical or substance-induced cause for the delusion(s). See *id.* at 329.

¹⁶⁵ *Id.* at 324.

Delusional disorder is an uncommon condition.¹⁶⁶ Psychiatrists have therefore studied it less than schizophrenia, and they know much less about the origin of delusional disorder.¹⁶⁷ Because individuals with neurological conditions affecting the basal ganglia and limbic system can have a clinical presentation similar to delusional disorder—that is, complex delusions but intact cognitive functioning—it is theorized that delusional disorder may itself involve disturbances in the basal ganglia and limbic system.¹⁶⁸ However, a number of psychosocial factors—social isolation, sensory deprivation such as deafness, socioeconomic conditions, and personality characteristics—are associated with delusional disorder and may play an a role in the condition’s pathogenesis not yet fully understood.¹⁶⁹

Delusional disorder is currently classified in several subtypes. The subtypes of greatest interest for this Article’s concerns are those accompanied by delusions that might produce a basis—in the sufferer’s mind—for seeking a divorce. Thus, the erotomaniac type,¹⁷⁰ jealous type,¹⁷¹ and persecutory type¹⁷² are all conditions that might generate a delusional motivation for seeking divorce but a potential lack of competence to do so.¹⁷³

Despite its relative rarity in the general population, several factors give delusional disorder a substantial diagnostic significance in the present context. First, unlike schizophrenia,

¹⁶⁶ See BENJAMIN J. SADOCK ET AL., KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY 504 (2007) [hereinafter SADOCK ET AL.] (finding that the U.S. prevalence is 0.025–0.03%, “much rarer than schizophrenia”).

¹⁶⁷ See, e.g., Alastair G. Cardno & Peter McGuffin, *Genetics and Delusional Disorder*, 24 BEHAV. SCI. & L. 257 (2006) (observing that the rarity of multiply affected families has prohibited genetic linkage studies and has limited studies of molecular genetics).

¹⁶⁸ SADOCK ET AL., *supra* note 166, at 506.

¹⁶⁹ *Id.*

¹⁷⁰ This subtype is characterized by delusions that another individual, often someone of higher status, loves the person with the disorder. See DSM-IV-TR, *supra* note 36, at 329.

¹⁷¹ A person with this subtype has delusions that his sexual partner is unfaithful. See *id.*

¹⁷² Persons with this subtype have delusions that they are being treated malevolently in some way. See *id.*

¹⁷³ Other subtypes of delusional disorder are characterized by grandiose delusions (delusions of inflated worth, power, or knowledge, or having a special relationship with a deity or famous person), somatic delusions (delusions about having some physical defect or medical condition), and mixed delusions (having delusions of more than one type, though no single theme predominates). *Id.*

delusional disorder has a relatively late onset,¹⁷⁴ meaning that individuals are more likely to develop the disorder after the ages at which most people first marry. Second, though persons with delusional disorder may seem odd or eccentric, they usually have no behavioral disturbance that would make their illness obvious to persons who are not mental health professionals.¹⁷⁵ Third, many persons with delusional disorder neither recognize their own problems nor see any need to get treatment,¹⁷⁶ and they may not experience impairments that would qualify them for involuntarily imposed psychiatric care.¹⁷⁷ Finally, persons with delusional disorder attempt to engage clinicians in accepting their delusions, and because they are sometimes litigious,¹⁷⁸ they may consult and even convince attorneys that they have reality-based grievances against a spouse that would legitimize a divorce.¹⁷⁹ Thus, given that a person seeking divorce has a psychotic motive for doing so, delusional disorder obtains a diagnostic probability far above what its comparatively low incidence in the general population would imply.

D. Affective Disorders

In general, “affective disorders” are mental conditions of which the salient symptom is pervasively and persistently abnormal mood. These disorders may include manic episodes—multi-day periods of elated, expansive, or irritable mood, coupled with markedly increased activity, rapid or “pressured” speech, and inflated self-esteem¹⁸⁰—depressive episodes—multi-week

¹⁷⁴ The mean age of onset is forty years, but the range stretches from late adolescence to the very elderly. SADOCK ET AL., *supra* note 166, at 505.

¹⁷⁵ “The most remarkable feature of patients with delusional disorder is that the mental status examination shows them to be quite normal except for [their] markedly abnormal delusional system.” SADOCK ET AL., *supra* note 166, at 506.

¹⁷⁶ That is, they lack insight into their illness. *Id.* at 508.

¹⁷⁷ *But see* Phillip Fennell & Robert Lloyd Goldstein, *The Application of Civil Commitment Law and Practices to a Case of Delusional Disorder: A Cross-National Comparison of Legal Approaches in the United States and the United Kingdom*, 24 BEHAV. SCI. & L. 385, 385 (2006) (discussing potential commitment of a person with delusional disorder because of dangerousness).

¹⁷⁸ *See* SADOCK ET AL., *supra* note 166, at 506.

¹⁷⁹ *See* JOHN PARRY & ERIC YORK DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES, AND MENTAL DISABILITY PROFESSIONALS 63 (2007) (noting that delusional disorder may be difficult to detect in part because “the state of affairs alleged by a patient or client could conceivably occur in real life” (emphasis added)).

¹⁸⁰ *See* DSM-IV-TR, *supra* note 36, at 362.

periods of low mood, much-diminished enjoyment of normally pleasant activities, decreased or increased sleep, low energy, altered motor activity, and feeling guilty or worthless¹⁸¹—or episodes in which manic and depressive symptoms occur simultaneously.¹⁸² In the most severe cases, persons with affective disorders experience delusions, hallucinations, or other psychotic symptoms; when mood disorders display these features, they are termed “affective psychoses.”¹⁸³ Sufferers of a related syndrome, schizoaffective disorder, have some episodes in which they primarily experience the symptoms of schizophrenia, and other episodes in which affective symptoms are predominant.¹⁸⁴

Affective psychoses and schizoaffective disorders have a biopsychosocial causation, that is, their onset and manifestations reflect a combination of neurological, hereditary, and environmental influences. For example, a Danish population study of 2.1 million persons showed that having a first-degree relative with bipolar disorder greatly heightened one’s risk of developing the condition, as did the death of one’s mother before age five years.¹⁸⁵ Individuals’ statistical risk of developing depression is greatly influenced by family history¹⁸⁶ and

¹⁸¹ See *id.* at 356.

¹⁸² *Id.* at 362–63.

¹⁸³ See, e.g., RICHARD SLOANE, *THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY* 591 (1987).

¹⁸⁴ “Since schizoaffective disorder was first introduced as a concept in 1933, there has been no clear consensus about its definition.” Thomas Munk Laursen et al., *Family History of Psychiatric Illness as a Risk Factor for Schizoaffective Disorder: A Danish Register-Based Cohort Study*, 62 *ARCHIVES GEN. PSYCHIATRY* 841, 841 (2005). Current U.S. diagnostic criteria for schizoaffective disorder are complicated, but in essence they require: (1) a one-month period in which the individual has a combination of delusions, hallucinations, disordered thinking, or “negative” symptoms typical of schizophrenia; (2) the individual must have experienced episodes of affective illness for a substantial portion of the time he or she has been ill; (3) at some point, the individual had delusions or hallucinations for at least two weeks without prominent mood symptoms; (4) the disturbance is not caused by a substance of abuse, a medication, or another medical condition. See *DSM-IV-TR*, *supra* note 36, at 323.

¹⁸⁵ See Preben Bo Mortensen et al., *Individual and Familial Risk Factors for Bipolar Affective Disorders in Denmark*, 60 *ARCHIVES GEN. PSYCHIATRY* 1209, 1209 (2003).

¹⁸⁶ See Myrna M. Weissman et al., *Families at High and Low Risk for Depression: A 3-Generation Study*, 62 *ARCHIVES GEN. PSYCHIATRY* 29, 29 (2005) (noting higher rates of psychopathology in children whose parents and grandparents had moderately to severely impairing depression).

personality characteristics.¹⁸⁷ Studies of familial patterns of affective and psychotic disorders suggest that schizoaffective disorder has genetic components¹⁸⁸ and is genetically related to both schizophrenic and bipolar illnesses.¹⁸⁹

Mood disorders alter persons' decisionmaking. Individuals with *nonpsychotic* depression may have problems with concentration, processing information,¹⁹⁰ and reasoning,¹⁹¹ and these problems may be accentuated and exacerbated by the simultaneous presence of delusional motivations for certain actions.¹⁹² Persons with mania characteristically display poor judgment. The heightened energy associated with a manic episode may make persons more prone to act precipitously on delusional ideas, or respond rashly to grandiose ideas or perceived slights.

¹⁸⁷ See Kenneth S. Kendler et al., *Personality and Major Depression: A Swedish Longitudinal, Population-Based Twin Study*, 63 ARCHIVES GEN. PSYCHIATRY 1113, 1113 (2006). "[N]euroticism strongly reflects" vulnerability to depression, though "substantial proportions of the genetic vulnerability to [depression] are not reflected in neuroticism." *Id.*

¹⁸⁸ See Aksel Bertelsen & Irving I. Gottesman, *Schizoaffective Psychoses: Genetical Clues to Classification*, 60 AM. J. MED. GENETICS 7, 7 (1995). Though findings from family, twin, and adoption studies diverge, they support a separate classification of schizoaffective psychoses with relationships to affective psychoses and schizophrenia. *Id.*

¹⁸⁹ See Laursen et al., *supra* note 184, at 847. Familial illness patterns suggest schizoaffective disorder may be either a subtype of bipolar disorder and schizophrenia or a genetically intermediate form. *Id.*

¹⁹⁰ See Meryl A. Butters et al., *The Nature and Determinants of Neuropsychological Functioning in Late-Life Depression*, 61 ARCHIVES GEN. PSYCHIATRY 587, 587 (2004) ("Late-life depression is characterized by slowed information processing, which affects all realms of cognition.").

¹⁹¹ See Carl Elliott, *Caring About Risks: Are Severely Depressed Patients Competent To Consent to Research?* 54 ARCHIVES GEN. PSYCHIATRY 113, 113 (1997) (questioning whether decisions of severely depressed persons "are authentically theirs," and whether some severely depressed persons may lack needed concern for their own welfare).

¹⁹² See Paul S. Appelbaum et al., *Competence of Depressed Patients for Consent to Research*, 156 AM. J. PSYCHIATRY 1380, 1383 (1999). Although persons with moderate depression have good decisionmaking capacity, persons with severe depression, "especially those with psychotic depression, may manifest higher levels of decisional incapacity." *Id.*

IV. CASE LAW ON INCOMPETENCE AND DIVORCE

A. *Divorcing a Spouse Who Has Been Adjudicated Incompetent*

Until the twentieth century, a person seeking to divorce a mentally ill person often could not do so.¹⁹³ In general, more recent divorce statutes and case law have allowed competent persons to seek divorces from spouses adjudged mentally ill subject to certain conditions.¹⁹⁴ As we noted earlier,¹⁹⁵ persons may divorce spouses who have “incurable insanity” or who are undergoing long-term psychiatric hospitalization. Given current practices and available treatments, however, relatively few incompetent individuals would now be divorceable on such grounds. In some cases, trial courts have found that the mental illness of a respondent spouse existed when the couple married and have allowed annulment—though not divorce—based on the idea that a marriage is void if entered into by an incompetent.¹⁹⁶

B. *Initiation of Divorce by Individuals Adjudicated Incompetent*

In contrast to the problems posed by Mr. Doe’s divorce petition, most published decisions dealing with issues of competence and divorce concern petitioners who have already been adjudicated incompetent to manage personal affairs. In these situations, the question for the trial court becomes whether

¹⁹³ See FAMILY LAW & PRACTICE, GROUNDS FOR DIVORCE § 4.03(2) (2009). However, divorce actions “may be instituted against insane defendants for a cause of divorce committed before the period of insanity.” *Iago v. Iago*, 48 N.E. 30, 31 (Ill. 1897). This remained permissible in the twentieth century. See *Huguley v. Huguley*, 51 S.E.2d 445, 447–48 (Ga. 1949) (holding that the husband could sue his insane wife for divorce on the grounds of cruelty inflicted prior to her insanity).

¹⁹⁴ See, e.g., *Box v. Box*, 45 So. 2d 157, 159 (Ala. 1950); *Miller v. Miller*, 487 S.W.2d 382, 387 (Tex. Civ. App. 1972) (setting aside divorce decree when an incompetent defendant was not represented by a guardian ad litem or general guardian); see also *Stephens v. Stephens*, 45 So. 2d 153, 154 (Ala. 1950) (setting aside divorce decree where an incompetent defendant’s guardian ad litem ignored the defendant and proceedings were transacted ex parte without notice to defendant).

¹⁹⁵ See *supra* Part II.B.4.

¹⁹⁶ See, e.g., *Cox v. Armstrong*, 221 P.2d 371, 373 (Colo. 1950) (conservator of incompetent person may bring suit for annulment of marriage on ground of insanity, although he or she may not bring suit for divorce); *De Nardo v. De Nardo*, 293 N.Y. 550, 553, 59 N.E.2d 241, 242 (1944) (holding annulment acceptable instead of divorce because the party was mentally ill at time of marriage). *But see* *Geitner v. Townsend*, 312 S.E.2d 236, 238 (N.C. Ct. App. 1984) (finding that the prior adjudication of incompetency was not conclusive on the issue of later capacity to marry; therefore, the marriage was not necessarily subject to annulment).

the jurisdiction permits an incompetent petitioner to maintain a divorce action through a guardian, guardian ad litem, or next friend.

Traditionally, most states have barred incompetent persons from suing for divorce through guardians or intermediaries.¹⁹⁷ Two rationales support this position. First, a guardian's powers are statutory creations, and absent a specific statutory provision to file for a divorce on behalf of a ward, a guardian lacks legal authority to do so.¹⁹⁸ Second, the right to sue for divorce is strictly personal and volitional in nature, and

must . . . remain personal to the spouse aggrieved by the acts and conduct of the other. Inasmuch as there are no marital offenses which in and of themselves work a dissolution of the marriage relation, or which may not be condoned, the marital relation can be dissolved only with the consent and at the instigation of the injured spouse personally, and manifestly, such consent cannot be given by one who is legally insane.¹⁹⁹

Two states—Alabama and Massachusetts—have for decades explicitly allowed an incompetent petitioner to maintain a divorce action through a representative. In Massachusetts, a statutory provision expressly allows a divorce action initiated on behalf of an incompetent person.²⁰⁰ In Alabama, statutory provisions have been interpreted broadly to allow for a divorce action to be brought on the incompetent's behalf.²⁰¹ More recently, other states have permitted guardians to initiate divorce actions on behalf of wards.²⁰²

¹⁹⁷ See J.A. Connelly, Annotation, *Power of Incompetent Spouse's Guardian, Committee, or Next of Friend To Sue for Granting or Vacation of Divorce or Annulment of Marriage, or To Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681 § 2 (1966).

¹⁹⁸ See *In re Marriage of Drews*, 503 N.E.2d 339, 340 (Ill. 1986) (citing several cases from other jurisdictions).

¹⁹⁹ *Scott v. Scott*, 45 So. 2d 878, 879 (Fla. 1950), *superseded by statute*, Fla. Stat. § 61.042 (West 2010) (repealed 1971), *as recognized in Vaughan v. Guardianship of Vaughan*, 648 So. 2d 193 (Fla. Dist. Ct. App. 1994).

²⁰⁰ See *Garnett v. Garnett*, 114 Mass. 379, 380 (1874) (citing statutory authority allowing "a libel for divorce [to] be filed and prosecuted in behalf of an insane person").

²⁰¹ See *Campbell v. Campbell*, 5 So. 2d 401, 402 (Ala. 1941) (noting that statutes "authorize the bill to be filed by the next friend for and in the name of the non compos mentis"); *accord Hopson v. Hopson*, 57 So. 2d 505 (Ala. 1952).

²⁰² See, e.g., *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674, 681 (Ariz. Ct. App. 1993) (holding that a spouse who has been adjudged incapacitated retains the means to dissolve his marriage, and a guardian may assert that right on behalf of the ward);

C. *Specific Incompetence To Divorce*

Our efforts to locate decisions providing competence criteria that might apply to plaintiffs like Mr. Doe—that is, to individuals whose wishes to divorce reflect psychotic motivations, but who are not necessarily incompetent to manage most aspects of their affairs—yielded just seven cases. We review these here.

1. *Shenk v. Shenk*

Mrs. Shenk sought to divorce her husband alleging gross neglect of duty and extreme cruelty.²⁰³ Mr. Shenk responded by asserting that his wife suffered from a mental impairment so serious that she had been awarded total permanent disability for purposes of her life insurance, and that she therefore lacked the requisite mental capacity to maintain a divorce action.²⁰⁴ The trial court refused to let Mr. Shenk put on witnesses to suggest his wife's mental incompetence, but allowed a doctor to testify that he had examined Mrs. Shenk four months following the filing of her divorce petition and found that she was competent then.²⁰⁵ The trial court, noting that it was “not trying this woman's sanity at all,” made no determination concerning Mrs. Shenk's competence during the trial and granted the divorce.²⁰⁶ Mr. Shenk appealed, arguing that the trial court erred (1) in not determining whether his wife was competent before moving forward with the action and (2) in refusing to let him introduce evidence of his wife's mental illness.²⁰⁷

The appeals court reversed the trial court's ruling. A previous case held that in Ohio, an incompetent person could not maintain a divorce action for divorce on his own behalf or through a guardian.²⁰⁸ This meant that the *Shenk* trial court was

Kronberg v. Kronberg, 623 A.2d 806, 811 (N.J. Super. Ct. Ch. Div. 1993) (exercising substituted judgment, concluding that wife “would have filed suit for divorce against her husband”); Nelson v. Nelson, 878 P.2d 335, 340 (N.M. Ct. App. 1994) (holding that, in light of statutory provisions governing both guardianships and divorces, a guardian in New Mexico has authority to file for divorce under certain circumstances). Several cases discussed in the following sections reflect similar views about guardians' powers.

²⁰³ *Shenk v. Shenk*, 135 N.E.2d 436, 437 (Ohio Ct. App. 1954).

²⁰⁴ *Id.* at 437–38.

²⁰⁵ *Id.* at 438.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *See Jack v. Jack*, 75 N.E.2d 484, 488 (Ohio Ct. App. 1947).

obligated, under a statute in force when the case was heard,²⁰⁹ to determine the competence²¹⁰ of a party to a divorce if competence was undetermined at the time of trial and was challenged by an opposing party.²¹¹ The appeals court noted that a divorce action “depends entirely upon the intelligent exercise of the will or volition of the plaintiff,” and the trial court needed to know whether “that will or volition is expressed by a sane and competent person.”²¹²

2. *Higgason v. Higgason*

The case of *Higgason v. Higgason*²¹³ concerned a woman who had been placed under conservatorship and had sought to end her marriage through a guardian ad litem, her adopted daughter. The Supreme Court of California determined that a spouse could petition for dissolution of her marriage through a guardian ad litem, “provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so.”²¹⁴ The court explained that simply having a conservator did “not constitute a determination that the conservatee [was] in any way ‘insane or incompetent.’”²¹⁵ Being a conservatee required the wife to bring her divorce suit through a guardian ad litem, but it did not preclude her from bringing the suit entirely.²¹⁶ The supreme court noted that the trial court had found that the wife “had the ability to think,” had “signed and verified the petition for the dissolution of [her] marriage,” and had signed and verified “two declarations . . . support[ing] . . . an order to show cause for [an] injunct[ion] . . . against [her] husband’s visiting her

²⁰⁹ In the revised numbering system that took effect in October 1953, the relevant statute is § 2307.15, which reads in its entirety, “[w]hen the insanity of a party is not manifest to the court, and the fact of insanity is disputed by a party or an attorney in the action, the court may try the question, or impanel a jury to try it.” OHIO REV. CODE ANN. § 2307.15 (LexisNexis 2010).

²¹⁰ Though the statute refers to “sanity,” “competence” is a better term in the current context, because the question for the court is whether the individual has a requisite legal capacity.

²¹¹ See *Shenk*, 135 N.E.2d at 438–39.

²¹² *Id.* at 439.

²¹³ 516 P.2d 289, 291 (Cal. 1973), *overruled on other grounds by* *Dawley v. Dawley*, 551 P.2d 323 (Cal. 1976).

²¹⁴ *Id.* at 294.

²¹⁵ *Id.*

²¹⁶ *Id.*

[home].”²¹⁷ Moreover, the court saw the wife’s verbal assertion of her desire to dissolve the marriage during a pre-trial deposition as evidence proving she was competent to institute the dissolution proceedings through her guardian ad litem.²¹⁸

3. *Boyd v. Edwards*

In 1968, Charles Edwards filed a divorce action against his wife, Essie.²¹⁹ In 1970, while the divorce action was pending, Mr. Edwards had a serious motorcycle accident that resulted in hypoxic brain damage.²²⁰ After his release from the hospital in 1971, Mr. Edwards went to live with his sister, Ann Boyd.²²¹ The divorce action was dismissed in 1972 because of Mr. Edwards’s incompetence.²²² In 1980, Ms. Boyd, who had become her brother’s guardian in 1976, filed a new divorce action against Mrs. Edwards on behalf of Mr. Edwards.²²³ Mr. Edwards did not appear at the trial,²²⁴ but his sister testified about his inability to express feelings and to dress, bathe, and feed himself.²²⁵ Though Mrs. Edwards contended that her husband had not expressed a desire to divorce,²²⁶ the trial court granted the divorce because the statutory provision of living apart for at least two years had been satisfied.²²⁷

Mrs. Edwards appealed, arguing, *inter alia*, that the court had erred by granting the divorce without having established that Mr. Edwards indeed could not testify.²²⁸ Ms. Boyd maintained that the trial court had no duty to ascertain the wishes of an incompetent spouse where a guardian could prove statutory requirements under Ohio’s “no fault” divorce law.²²⁹

The appeals court agreed with Mrs. Edwards, finding evidence that Mr. Edwards actually could speak and express his

²¹⁷ *Id.*

²¹⁸ *Id.* at 292–93.

²¹⁹ *Boyd v. Edwards*, 446 N.E.2d 1151, 1153 (Ohio Ct. App. 1982).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 1152–53.

²²⁴ *Id.* at 1153.

²²⁵ *Id.* at 1154.

²²⁶ *Id.* at 1153.

²²⁷ *Id.*

²²⁸ *Id.* at 1154.

²²⁹ *Id.* at 1154–55.

feelings,²³⁰ and suggested that the separation may not have been entirely voluntarily.²³¹ Under these circumstances, the trial court had a duty to determine whether Mr. Edwards was competent to testify, and if so, to learn his true desires regarding the divorce.²³² The appeals court cited several cases in which mentally ill persons had been allowed to maintain divorce actions because they retained sufficient capacity to express clear desires for divorce, to understand proceedings, to exercise judgment, or to testify about their wishes for divorce.²³³

4. *In re Marriage of Kutchins*

The husband in *In re Marriage of Kutchins*²³⁴ had been placed under a guardianship of his estate in early 1983; though a guardianship of his person had also been requested, the request was denied.²³⁵ Four months later, Mr. Kutchins filed an action for marital dissolution, which his wife challenged based on her husband's earlier adjudication as disabled and his subsequent lack of capacity to bring a legal action.²³⁶ Mrs. Kutchins's motion was granted and the case was dismissed.²³⁷

Mr. Kutchins appealed the dismissal.²³⁸ The appeals court noted that no Illinois case had held that having *only* a guardian of estate rendered a person incompetent to seek a divorce.²³⁹

²³⁰ *Id.* at 1157.

²³¹ *Id.* at 1159.

²³² *Id.* at 1157–58.

²³³ *Id.* at 1158 (citing *Higgason v. Higgason*, 516 P.2d 289, 294 (Cal. 1973), *overruled by* *Dawley v. Dawley*, 551 P.2d 323, 325 (Cal. 1976)); *id.* at 1158–59 (citing *Akin v. Akin*, 135 S.E. 402 (Ga. 1926)) (approving the holding where a “plaintiff, on furlough from a mental institution, had sufficient capacity to sue for a divorce”); *id.* at 1158 (citing *Spooner v. Spooner*, 97 S.E. 670 (Ga. 1918)) (approving the holding that the plaintiff had “sufficient capacity to maintain a divorce action”); *id.* at 1159 (citing *Stevens v. Stevens*, 254 N.W. 162, 163 (Mich. 1934), *superseded by statute*, GCR 1963, 201.5(1), *as recognized in* *Smith v. Smith*, 335 N.W.2d 657, 658 (Mich. 1983)) (approving the holding where substituting wife as plaintiff in divorce action originally brought by her guardian was proper because wife could “understand the nature of the divorce proceedings”); *id.* (citing *Turner v. Bell*, 279 S.W.2d 71, 80–81 (Tenn. 1955)) (approving the holding where a “plaintiff-wife previously adjudged incompetent . . . had the requisite volition to seek divorce, and the capacity to testify and maintain the action”).

²³⁴ 482 N.E.2d 1005 (Ill. App. Ct. 1985).

²³⁵ *Id.* at 1006.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.*

However, an earlier Illinois case held that what might constitute incompetence for purpose should not necessarily apply for a different legal matter; “[n]o definite rule can be laid down which will apply to all cases alike.”²⁴⁰ The standard for competence to manage one’s financial affairs and the standard of competence to file for a divorce were different.²⁴¹ Concerning the latter standard, the appeals court held that

[t]he test of the mental capacity required for filing a petition for dissolution of marriage is whether the petitioner has sufficient mental capacity to understand fully the meaning and effect of the petition and whether the petitioner is able to determine in his own interest that he desires a final separation.²⁴²

Reasoning that an individual who did not need a guardian of the person had the requisite mental capacity to file a divorce suit, the appeals court reversed and remanded the dismissal of the petition for divorce to the trial court.²⁴³

5. *Murray v. Murray*

Fletcher and Charlie Belle Murray had been married for eighteen years when, in early January 1990, Fletcher fell ill.²⁴⁴ After a two-week hospitalization, Fletcher went to the home of his son, Allan.²⁴⁵ There, Fletcher received around-the-clock care until October 1991, when he was placed in a nursing home.²⁴⁶ Allan had been appointed his father’s attorney-in-fact in December 1989 and was subsequently appointed his father’s conservator and guardian of estate in March 1990.²⁴⁷ Following Mrs. Murray’s successful action for separate support and maintenance in February 1990, Allan brought an action for divorce on behalf of his father in November 1991.²⁴⁸ Mrs. Murray moved to dismiss the action on grounds that her stepson could

²⁴⁰ *Snyder v. Snyder*, 31 N.E. 303, 306 (Ill. 1892).

²⁴¹ *See In re Marriage of Kutchins*, 482 N.E.2d at 1006–07.

²⁴² *Id.* at 1007.

²⁴³ *Id.* at 1007–08.

²⁴⁴ *Murray v. Murray*, 426 S.E.2d 781, 782 (S.C. 1993).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

not bring a divorce action suit on behalf of his father, but the trial court denied her motion and ultimately granted the divorce.²⁴⁹

Mrs. Murray appealed the trial court's denial of her motion to dismiss.²⁵⁰ The Supreme Court of South Carolina noted that whether a guardian may sue for divorce had never been addressed in the state.²⁵¹ The court also noted that South Carolina defined an "incapacitated person" as a "person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age . . . to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property," but questioned whether this determination was ever made in Fletcher's case.²⁵² The court adopted the "majority rule" that bars suits for divorce brought on behalf of a person who is mentally incompetent to manage his estate and person.²⁵³ The court, however, added,

we decline to impose an absolute rule denying the right to seek a divorce if the spouse, although mentally incompetent with respect to the management of his estate, is capable of exercising reasonable judgment as to his personal decisions, is able to understand the nature of the action and is able to express unequivocally a desire to dissolve the marriage.²⁵⁴

Noting that the trial court had made no finding concerning Fletcher's competence, the supreme court remanded the case for a determination of Fletcher's competence and to clarify whether he indeed desired to obtain a divorce.²⁵⁵

6. *Syno v. Syno*

Mr. Syno, who had previously been adjudged incompetent to manage his estate, filed for and obtained a divorce on his own

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *See id.* at 783.

²⁵² *Id.* (quoting S.C. Code Ann. § 62-5-101(1) (2009)).

²⁵³ *Id.* at 784 (citing *Shaw v. Shaw*, 182 S.E.2d 865 (S.C. 1971)).

²⁵⁴ *Id.* (citing *Higgason v. Higgason*, 516 P.2d 289 (Cal. 1973), *overruled by* *Dawley v. Dawley*, 551 P.2d 323, 325 (Cal. 1976)); *id.* (citing *In re Marriage of Kutchins*, 482 N.E. 1005 (Ill. App. Ct. 1985)); *id.* (citing *Boyd v. Edwards*, 446 N.E.2d 1151 (Ohio Ct. App. 1982)); *id.* (citing *Syno v. Syno*, 594 A.2d 307 (Pa. Super. Ct. 1991)).

²⁵⁵ *Id.*

behalf.²⁵⁶ Mrs. Syno appealed on grounds that her husband could not bring the action on his own behalf because of his status as incompetent.²⁵⁷

The Superior Court of Pennsylvania noted that the commonwealth's case law and statutes contained no authority for distinguishing between incompetents who cannot manage their finances and incompetents who cannot manage their personal lives. Rather, once a person has been found incompetent for either purpose, he or she is incompetent for all purposes.²⁵⁸ Accordingly, the superior court concluded that Mr. Syno could not maintain an action for divorce in his own name, and the judgment by the lower court granting the divorce was deemed void.²⁵⁹ However, following *Higgason*, the superior court held that

an incompetent spouse should be permitted to institute a divorce proceeding through a guardian or guardian *ad litem*, provided the incompetent is capable of exercising reasonable judgment as to personal decisions, understands the nature of the action and is able to express unequivocally a desire to dissolve the marriage.²⁶⁰

In addition, the superior court held that the incompetent must be "able to verify statements made in his or her complaint" and be "'competent' to testify."²⁶¹ The superior court remanded the case to the trial court for proceedings that would determine whether Mr. Syno could satisfy these requirements, exercise reasonable judgment, and express a clear desire for a divorce.²⁶²

²⁵⁶ *Syno*, 594 A.2d at 307.

²⁵⁷ *Id.* at 309.

²⁵⁸ *Id.* at 310.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 311 (citing *Higgason v. Higgason*, 516 P.2d 289, 294-95 (1973), *overruled by* *Dawley v. Dawley*, 551 P.2d 323, 325 (Cal. 1976)).

²⁶¹ *Id.* (citing *Commonwealth v. Trudell*, 538 A.2d 53 (Pa. Super. Ct. 1988)). Regarding the husband's competence to testify, the superior court noted that "an adjudicated incompetent may be 'competent' to testify." *Id.* at 313. The standard for this determination would be "whether the incompetent understands his or her duty to tell the truth and whether he or she is able to perceive, remember and communicate the pertinent facts." *Id.* (citing *Commonwealth v. Goldblum*, 447 A.2d 234 (Pa. 1982)).

²⁶² *Id.* at 313-14.

7. *Northrop v. Northrop*

This Delaware family court case concerns an elderly man who filed for divorce in 1994.²⁶³ Several months later, two of the couple's children filed a motion seeking to substitute themselves for their father based on their allegation, supported by a psychiatrist's affidavit, that their father was incompetent due to Alzheimer's disease. In her responses, Mrs. Northrop suggested that her husband lacked the capacity to prosecute the divorce action, though she lacked sufficient knowledge to admit or deny he had become "incompetent."²⁶⁴ To address this matter, the Delaware trial court sought additional medical evidence concerning Mr. Northrop's competence,²⁶⁵ citing, as its authority, *Hoffman v. Hoffman*, a 1992 Delaware Supreme Court holding that a family court "has statutory authority to determine the mental competence of a spouse" before entering a divorce decree.²⁶⁶

Hoffman had not established criteria for determining the competence of a litigant in a divorce proceeding, but the *Northrop* court noted that other jurisdictions had done so.²⁶⁷ The *Northrop* court also noted that one might be incompetent to manage one's estate but be capable of making reasonable choices about one's personal life.²⁶⁸ "Thus, we should not deny *per se* an adjudicated 'incompetent' the right to proceed with a divorce action," concluded the *Northrop* court.²⁶⁹ For a litigant to be found "incompetent to initiate divorce proceedings," he or she must be "[in]capable of exercising reasonable judgment as to personal decisions, . . . not understand the nature of the divorce action, and [be] unable to express unequivocally a desire to dissolve the

²⁶³ *Northrop v. Northrop*, File No. CN94-9882, Petition No. 1719-94, 1996 Del Fam. Ct. LEXIS 96, at *1 (July 26, 1996).

²⁶⁴ *Id.* at *1-2.

²⁶⁵ *Id.* at *2-3.

²⁶⁶ *Id.* at *3 (citing *Hoffman v. Hoffman*, 616 A.2d 294 (Del. 1992)).

²⁶⁷ *Id.* at *3-4 (explaining that in one jurisdiction, the test is whether petitioner can "understand fully the meaning and effect of the petition and whether" he can "determine in his own interest that he desires a final separation" (quoting *In re Marriage of Kutchins*, 482 N.E.2d 1005, 1007 (Ill. App. Ct. 1985))).

²⁶⁸ *Id.* at *4 ("[A]n individual who has been adjudicated 'incompetent' with respect to management of his/her estate may be permitted to institute a divorce proceeding through a guardian or guardian ad litem.").

²⁶⁹ *Id.* (quoting *Syno v. Syno*, 594 A.2d 307, 311 (Pa. Super. Ct. 1991)).

marriage.”²⁷⁰ Based on both parties’ stipulation and the psychiatrist’s affidavit, the trial court found that Mr. Northrop was “incompetent to pursue his divorce action.”²⁷¹

D. Analysis and Comment

The cases discussed in Part IV.C lead to certain conclusions concerning the potential legitimacy of a specific “competence to divorce” and of statutes that might recognize and implement measures for courts to respond to litigants who appear to lack this competence.

First, *Shenk* and *Northrop* found a specific state statutory basis for allowing divorce courts to address and adjudicate the competence of litigants. Though the statutes providing this authority do not apply specifically to competence to divorce, these decisions allow trial courts to make judgments about petitioners’ competence without distorting or liberally interpreting statutory language.

Second, the decisions present diverse criteria concerning competence to divorce and when competence is required. As discussed above, the various criteria include:

- whether the divorce action reflects “the intelligent exercise of the will or volition of the plaintiff,” and whether “that will or volition is expressed by a sane and competent person”²⁷²;
- whether the petitioner can “exercis[e] a judgment, and express[] a wish, that the marriage be dissolved . . . and has done so”²⁷³;
- whether the petitioner can express clear desires for divorce, understand proceedings, exercise judgment, and is competent to testify his or her wish for divorce²⁷⁴;

²⁷⁰ *Id.* at *5.

²⁷¹ *Id.* A subsequent decision concluded that because Mr. Northrop had the cognitive capacity to understand his actions and their consequences when he initiated discussions about divorce proceedings (though perhaps not later on when he signed the petition), he should be granted a divorce. *See Northrop*, 1996 Del Fam. Ct. LEXIS 96, at *28–29.

²⁷² *Shenk v. Shenk*, 135 N.E.2d 436, 439 (Ohio Ct. App. 1954).

²⁷³ *Higgason v. Higgason*, 516 P.2d 289, 294 (Cal. 1973), *overruled by Dawley v. Dawley*, 551 P.2d 323, 325 (Cal. 1976).

²⁷⁴ *See Boyd v. Edwards*, 446 N.E.2d 1151, 1158–59 (Ohio Ct. App. 1982); *Murray v. Murray*, 426 S.E.2d 781, 784 (S.C. 1993).

- whether the petitioner can “understand fully the meaning and effect of the petition and . . . [can] determine in his own interest that he desires a final separation”²⁷⁵; and
- whether the petitioner can “exercis[e] reasonable judgment as to personal decisions, understand[] the nature of the action, . . . express unequivocally a desire to dissolve the marriage, . . . verify statements made in his or her complaint,” and testify competently.²⁷⁶

Third, courts do not present a unitary scheme for reaching conclusions about competence to divorce. In *Syno*, the superior court insisted that the trial court make a determination of the husband's competence from his own testimony, despite having a detailed report prepared by a doctor who had examined the husband in the case.²⁷⁷ By contrast, in *Northrop*—which cited *Syno*—a doctor's report was satisfactory support for a conclusion of incompetence.²⁷⁸

Fourth, the cases do not provide guidance about what process is adequate for determining competence to divorce. Must the putatively incompetent petitioner testify, or has he or she a right not to do so? Is expert testimony required, or may lay testimony suffice? If expert testimony is necessary, has the trial court any authority to order a putatively incompetent petitioner to undergo examination? Finally, what level of proof is required to bar a petitioner from proceeding?

Finally, none of the cases provide a detailed rationale either for concluding that petitioners must be competent, or for deciding what particular capacities constitute competence for divorce. Implicitly, some cases protect autonomy of petitioners by holding that their competence for divorce may be retained despite having a mental illness or a previous adjudication concerning competence to manage one's person or estate. However, the cases do not tell us why any minimum level of mental capacity should be necessary for pursuing a divorce. Moreover, nothing in these decisions would require other jurisdictions to see matters the

²⁷⁵ *In re Marriage of Kutchins*, 482 N.E.2d 1005, 1007 (Ill. App. Ct. 1985).

²⁷⁶ *Syno v. Syno*, 594 A.2d 307, 311 (Pa. Super. Ct. 1991); see also *Northrop*, 1996 Del Fam. Ct. LEXIS 96, at *4–5.

²⁷⁷ *Syno*, 594 A.2d at 312.

²⁷⁸ *Northrop*, 1996 Del Fam. Ct. LEXIS 96, at *4–5.

same way, nor would these decisions inform courts about why certain cognitive functions should or should not count in determining competence to divorce.

The next two Parts describe ways to plug these gaps in case law. We begin with the rationale for recognizing and requiring specific competence to divorce.

V. COMPETENCE FOR DIVORCE: A LEGAL RATIONALE

The merits of keeping individuals from making major, life-changing decisions on the basis of their delusional beliefs seems obvious, and this may be why some courts have imposed competence requirements on divorce petitioners. But this raises the question of *why* it might be desirable for courts to require some form or level of competence before permitting an individual to proceed with a divorce, especially when the very notion of competence for divorce has drawn so little attention. We contend that two other areas of law where legal requirements for competence are well established—competence to stand trial (“CST”) and competence to consent to medical treatment—suggest rationales for requiring individuals to satisfy some competence requirement if they wish to divorce.

A. *Competence To Stand Trial*

1. Historical Background

Within Anglo-American legal tradition, the expectation that a criminal defendant be competent to stand trial dates back to at least mid-seventeenth century England,²⁷⁹ an era and setting in which even persons who faced the severest penalties defended themselves without legal counsel. The competence requirement may have originated in response to defendants who stood “mute” rather than enter a plea regarding guilt.²⁸⁰ By the time

²⁷⁹ Bruce J. Winick & Terry L. DeMeo, *Competence To Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 32 n.2 (1980).

²⁸⁰ In such cases, juries decided whether the defendant was “obstinately mute, or whether he be dumb *ex visitatione Dei*.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 319 (Oxford, Clarendon Press 1769). A defendant found “obstinately mute” was subjected to *peine forte et dure*, a procedure that continued into the eighteenth century in which the defendant had increasingly heavy weights placed on his chest until he answered or died. See *id.* at 335; 8 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 887 (1974) (citing 2 NIGEL WALKER & SARAH

Blackstone wrote his *Commentaries*, though, a defendant's competence was deemed essential to the fairness of a criminal trial.²⁸¹ In *Frith's Case*, for example, after a jury found that a mentally ill prisoner charged with treason was "quite insane," the prisoner was remanded and his trial was postponed—perhaps indefinitely—until the prisoner might recover sufficiently to defend himself.²⁸² In charging the *Frith* jury, the court invoked, as justification for requiring trial competence,

the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.²⁸³

2. Standards

Though requiring defendants to be competent is a well-established feature of Anglo-American jurisprudence, courts and legislatures have historically provided varying definitions of CST. One of the judges in *Frith* instructed the jury to decide whether the prisoner was "of sound mind and understanding or not";²⁸⁴ if not, his trial would be delayed until "that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law."²⁸⁵ *Rex v. Pritchard* articulates an early

MCCABE, CRIME AND INSANITY IN ENGLAND (1968)). Those defendants who were mute "by visitation of G[-]d" were spared this ordeal. Though this category originally included just persons who could not speak or hear, it ultimately came to include persons with mental illness. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 126 (3d. ed. 2007).

²⁸¹ At common law, a "mad" defendant was "not to be arraigned . . . because he is not able to plead to [the charge] with that advice and caution that he ought," nor was he to be tried, "for how can he make his defense?" BLACKSTONE, *supra* note 280, at 24; *see also* 1 SIR MATHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34 (Philadelphia, 1847).

²⁸² *R v. Frith*, (1790) 22 Howell's St. Tr. 307. John Frith had attorneys who asked for the postponement of the trial over their client's objection. *Id.* at 309. Frith had already been locked up for three months and wished to proceed with his trial. His charge of treason had arisen from his throwing a stone at the carriage of King George III, after which authorities had immediately arrested him. *Id.* at 307–08.

²⁸³ *Id.* at 318. There is no evidence that Frith ever was brought to trial. *See* Richard Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 LAW & SOC'Y REV. 487, 510 n.21 (1985).

²⁸⁴ *Frith*, 22 Howell's St. Tr. at 311 (quoting Judge Heath).

²⁸⁵ *Id.* at 318.

and still frequently cited English formulation for judging CST, directing a jury to consider, “[f]irst, whether [a defendant] is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial.”²⁸⁶

Looking at *Pritchard* and at current tests for adjudicative fitness in Canada²⁸⁷ and Australia,²⁸⁸ one discerns a focus on cognitive, factual understanding. American jurisdictions often go a step further and consider the defendant’s rationality. For example, a New York state case from the mid-nineteenth century held that a defendant was “sane” or competent for purposes of a criminal trial if he “is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner.”²⁸⁹

In an early twentieth century opinion, a U.S. federal appeals court provided this test for CST: “Does the mental impairment of the prisoner’s mind, if such there be, whatever it is, disable him . . . from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition . . . ?”²⁹⁰ Another test asked trial

²⁸⁶ *R v. Pritchard*, (1836) 7 Carrington & Payne 303, 304, 173 Eng. Rep. 135 (Oxford Cir.) (italics omitted).

²⁸⁷ Canadian courts followed *Pritchard* until 1992, see WADE RAAFLAUB, PARLIAMENTARY INFORMATION & RESEARCH SERVICE OF THE LIBRARY OF PARLIAMENT, THE MENTAL DISORDER PROVISIONS OF THE *CRIMINAL CODE* 1 (2005), when the Canadian criminal code formally defined “‘unfit to stand trial’” as being unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel.

Criminal Code of Canada, R.S.C., ch. C-46, § 2 (2010).

²⁸⁸ Though Australia continues to use the fitness criteria of *Pritchard*, its law now further specifies that criminal defendants must have

the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge.

Kesavarajah v. R (1994) 181 C.L.R. 230, 243 (Austl.).

²⁸⁹ *Freeman v. People*, 4 Denio 9, 24–25 (N.Y. Sup. Ct. N.Y. County 1847).

²⁹⁰ *United States v. Chisolm*, 149 F. 284, 289 (C.C.S.D. Ala. 1906).

courts whether the defendant was “capable of properly appreciating his peril and of rationally assisting in his own defense.”²⁹¹ Since the 1960s, all U.S. jurisdictions have come to utilize CST standards that are consistent with *Dusky v. United States*,²⁹² in which the U.S. Supreme Court declared that a criminal defendant may stand trial only if “he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “has a rational as well as factual understanding of the proceedings against him.”²⁹³ Although many state statutes contain definitions of competence or incompetence to stand trial that do not mention rationality,²⁹⁴ statutes or case law in at least eight states do.²⁹⁵

3. Rationale

The requirement that defendants be competent to stand trial evolved in times and contexts in which defendants were precluded from retaining counsel in felony and treason cases.²⁹⁶ Having defendants be competent was a means of protecting accused individuals from unopposed action, like prosecution, by the state. Since *Gideon v. Wainwright*'s assurance of legal

²⁹¹ *United States v. Boylen*, 41 F. Supp. 724, 725 (D. Or. 1941).

²⁹² See Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence To Stand Trial*, 53 GEO. WASH. L. REV. 375, 376 (1985) (“In considering the criteria for determining competence to stand trial, one must begin—and indeed, end—with the criteria set forth in *Dusky v. United States*.”).

²⁹³ *Dusky v. United States*, 362 U.S. 402, 402 (1960). In 1996, the Supreme Court indicated that *Dusky* is a universal standard in the U.S. when it described *Dusky* as providing the “well settled” standard for CST. See *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). The Supreme Court views *Dusky* as specifying a minimum CST standard: “States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, [though] the Due Process Clause does not impose these additional requirements.” *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

²⁹⁴ See, e.g., OHIO REV. CODE ANN. § 2945.37(G) (LexisNexis 2010) (stating that a defendant is incompetent if that individual cannot understand “the nature and objective of the proceedings against” him or herself or assist in his or her defense).

²⁹⁵ See, e.g., CAL. PENAL CODE § 1367(a) (West 2010); MICH. COMP. LAWS § 330.2020(1) (LexisNexis 2010); N.C. GEN. STAT. § 15A-1001(a) (2009); see also *People v. Foley*, 192 N.E.2d 850, 851 (Ill. 1963) (citing *Withers v. People*, 177 N.E.2d 203, 206 (Ill. 1961)) (stating that the test of CST is whether a defendant “can, in cooperation with his counsel, conduct his defense in a rational and reasonable manner”). For an intriguing and useful discussion of the role of rationality in U.S. interpretations of CST, see Grant H. Morris et al., *Assessing Competency Competently: Toward a Rational Standard for Competency-To-Stand-Trial Assessments*, 32 J. AM. ACAD. PSYCHIATRY & L. 231, 231–32, 241–42 (2004).

²⁹⁶ See *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

counsel even for indigent criminal defendants,²⁹⁷ being able to mount a defense on one's own no longer provides a justification for requiring defendants to be competent. Yet in the United States, where availability of counsel is constitutionally assured,²⁹⁸ the CST requirement has been seen as vital to the criminal law. Among the justifications:

- The CST requirement is a mechanism for preventing an innocent but mentally impaired defendant from being wrongly convicted when he or she knew of exculpatory facts but could not appreciate their significance and the need to share them with counsel.²⁹⁹
- Having defendants be competent is a safeguard against cruel treatment.³⁰⁰
- "It is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life" and would thus violate the U.S. Constitution.³⁰¹

A trial against an obviously psychotic or otherwise mentally helpless defendant might appear unfair and might undermine society's need to view its criminal justice system as reliable. Such considerations underlie the Supreme Court's more recent view that the CST requirement "is fundamental to an adversary system of justice"³⁰² and promotes fairness, accuracy, and dignity.³⁰³

Professor Richard Bonnie has emphasized that CST also has a dimension that "derives from legal rules that establish that the defendant must make or have the prerogative to make certain

²⁹⁷ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁹⁸ U.S. CONST. amend. VI.

²⁹⁹ See *United States v. Chisolm*, 149 F. 284, 287 (C.C.S.D. Ala. 1906); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 429–30 (1954).

³⁰⁰ See *Jordan v. State*, 135 S.W. 327, 328 (Tenn. 1911) ("It would be inhumane, and to a certain extent a denial of the right of trial upon the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or be tried for his life or liberty.").

³⁰¹ *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899).

³⁰² *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

³⁰³ See *Indiana v. Edwards*, 128 S. Ct. 2379, 2387 (2008) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 168 (1984)) (noting that a pro se criminal defense does not "affirm the dignity" of a defendant who lacks mental capacity to represent himself); *Cooper v. Oklahoma*, 517 U.S. 348, 366–67 (1996) (citing *Chisolm*, 149 F. at 288); *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (asserting that a pro se defense must not "abuse the dignity of the courtroom").

decisions regarding the defense or disposition of the case.³⁰⁴ This “decisional competence” stems from a “norm of client autonomy”³⁰⁵ or an implicit “principle of self-determination”³⁰⁶ that places the responsibilities for whether to plead guilty,³⁰⁷ whether to request a jury trial,³⁰⁸ and whether to testify³⁰⁹ squarely with the defendant. Further, when a defendant waives constitutional rights, the trial court must make sure that the defendant has done so knowingly, intelligently, and voluntarily³¹⁰—a further requirement that the defendant possess some minimum level of rational cognitive capacity.

Professor Bonnie adds that, particularly now that criminal defendants have guaranteed access to counsel, the CST requirement reflects societal interests that are independent of the implications for specific defendants.³¹¹ Bonnie summarizes these interests as society’s appropriate concern for the dignity of criminal prosecutions.³¹² For example, the right to a public trial, but the lack of a corresponding right to a private trial,³¹³ derives from society’s “independent interest in the pedagogical features of criminal trials, especially jury trials. . . . [P]ublic access to and participation in criminal proceedings helps to assure accountability of the judiciary and to effectuate democratic ideals of self-governance.”³¹⁴ Requiring a defendant’s competence at the time of trial or conviction ensures that punishment is imposed only on persons who have “a meaningful moral understanding of wrongdoing.”³¹⁵ Also independent of the defendant’s interests is society’s interest in accuracy and in avoiding erroneous convictions, which explains why a defendant does not have an

³⁰⁴ Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 553 (1993).

³⁰⁵ *Id.* (emphasis removed).

³⁰⁶ *Id.* at 554.

³⁰⁷ *See, e.g.*, *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966).

³⁰⁸ *See, e.g.*, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942).

³⁰⁹ *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 52–53 (1987) (quoting *Harris v. New York*, 401 U.S. 222, 230 (1971)).

³¹⁰ *See Godinez v. Moran*, 509 U.S. 389, 397 (1993); *Faretta v. California*, 422 U.S. 806, 835 (1975) (citing *Adams*, 317 U.S. at 279); *id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

³¹¹ *See Bonnie, supra* note 304, at 543.

³¹² *See id.*

³¹³ *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980).

³¹⁴ Bonnie, *supra* note 304, at 544.

³¹⁵ *Id.* at 543.

unqualified right to plead guilty.³¹⁶ Finally, to prosecute someone who “lacks a rudimentary understanding of the nature and purpose of the proceedings . . . offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object of the state’s effort to carry out its promises.”³¹⁷

B. Competence To Consent to (or Refuse) Medical Treatment

1. Historical Background

The requirement that physicians obtain consent from patients before treating them has an ancient heritage in tort law,³¹⁸ where an intentional touching in the absence of consent has long constituted a form of battery.³¹⁹ Modern U.S. law has greatly expanded physicians’ obligations through the doctrine of “informed consent.”³²⁰ Traditionally, a physician could avoid a

³¹⁶ See *id.*; see also *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970).

³¹⁷ *Bonnie*, *supra* note 304, at 551.

³¹⁸ See, e.g., *Slater v. Baker*, (1767) 2 Wils. K.B. 363, 95 Eng. Rep. 860, 862 (K.B.) (“[A] patient should be told what is about to be done to him, [so] that he may take courage and put himself in such a situation as to enable him to undergo the operation.”). A classic statement of this doctrine appears in U.S. law. *Schloendorff v. Soc’y of N.Y. Hospital*, 211 N.Y. 125, 129–30, 105 N.E. 92, 93 (1914) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent, commits an assault, for which he is liable in damages.”), *superseded by statute*, N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 2007).

³¹⁹ 1 DAN B. DOBBS, *THE LAW OF TORTS* § 28 (2001).

³²⁰ The phrase “informed consent” is widely believed to have first appeared in *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, where it occurs in the context of explaining the physician’s duties:

A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient’s consent. At the same time, the physician must . . . recognize that each patient presents a separate problem, . . . and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent.

317 P.2d 170, 181 (Cal. Ct. App. 1957). Professor Katz suggests that this doctrine appears to come “out of nowhere,” but was in truth lifted from an amicus brief filed by the American College of Physicians and Surgeons. Jay Katz, *Reflections on Informed Consent: 40 Years After Its Birth*, 186 J. AM. C. SURGEONS 466, 468 (1998) (citing American College of Surgeons, Brief as Amicus Curiae in Support of Defendant and Appellant Frank Gerbode (1956)). Concerning the distinction between legal requirements for informed consent and the related *philosophical*

successful action for battery if he had told his patient what the proposed treatment was and had obtained the patient's permission.³²¹ But under current informed consent requirements, physicians are expected to provide much more information about a proposed treatment, including a description of the treatment's risks, benefits, and the available alternatives, including no treatment.³²²

Of course, a physician's comprehensive and conscientious disclosure of information is useless unless the patient can understand, think about, and apply what the physician is explaining.³²³ Thus, the validity of informed consent is closely tied to a patient's competence to make medical decisions.³²⁴

doctrine that has developed, see Armand Arabian, *Informed Consent: From the Ambivalence of Arato to the Thunder of Thor*, 10 ISSUES L. & MED. 261, n.1 (1994).

³²¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 190 n.59 (5th ed. 1984 & Supp. 1988) (noting that since 1960, negligence has come to replace battery as the principle basis for liability in actions involving lack of informed consent).

³²² *Salgo* appears to be one of the first, if not the first, case to establish failure to obtain consent as a matter of negligence. See *Cobbs v. Grant*, 502 P.2d 1, 7-8 (Cal. 1972) (noting that courts were still "divided" and citing cases). The key cases concerning the nature of disclosure are *Natanson v. Kline*, 354 P.2d 670 (Kan. 1960) and *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972). *Natanson* established a medical custom standard, holding that the required disclosures by the physician must accord with "those which a reasonable medical practitioner would make under the same or similar circumstances." 354 P.2d at 673. In *Canterbury*, however, the court held that

the duty to disclose . . . arises from phenomena apart from medical custom and practice . . . [and must not be] dictated by the medical profession The scope of the physician's communications to the patient, then, must be measured by the patient's need, and . . . the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked.

464 F.2d at 786-87. California quickly adopted *Canterbury's* "materiality" standard. See *Cobbs*, 502 P.2d at 11. Subsequent California law has elaborated what "material" means: the necessary information includes "reasonable disclosure of the available choices with respect to proposed therapy [including nontreatment] and of the dangers inherently and potentially involved in each." *Thor v. Superior Court*, 855 P.2d 375, 383 (Cal. 1993) (quoting *Cobbs*, 502 P.2d at 10). At present, the physician disclosure standard is favored over the materiality standard by a slight majority of U.S. jurisdictions. BARRY R. FURROW ET AL., HEALTH LAW 313-14 (2000).

³²³ See *Demers v. Gerety*, 515 P.2d 645, 649-50 (N.M. Ct. App. 1973) (stating that a decision by an incompetent person is not a valid authorization for medical treatment).

³²⁴ It also is important that the consent be given voluntarily, that is, without coercion, unfair persuasion, or inducement. See *Relf v. Weinberger*, 372 F. Supp. 1196, 1202 (D.C. 1974), *vacated*, 565 F.2d 722, 727 (D.C. Cir. 1977). Lacking

2. Legal Standards

Concerning the legal standards for competence to make medical decisions (“CMD”), two initial observations are appropriate. First, although the requirement of competence should be “neutral” as to whether a patient is agreeing with or refusing recommended treatment, a patient’s CMD is more likely to be questioned and evaluated when the patient is declining treatment that the physician recommends and believes is necessary to prevent death or serious deterioration.³²⁵ Thus, whatever contours the law has provided concerning CMD often speaks to contexts in which a patient is refusing rather than receiving treatment—the opposite of situations that led to case law establishing information requirements for consent.³²⁶

A second observation follows from the first: the requirement that patients be CMD often has the effect of preventing individuals from harming themselves by rejecting needed care because of their irrationality. Thus, in contrast to the law’s CST requirement—which in former times protected mentally compromised individuals from being prosecuted when they could not mount a defense—CMD often protects an individual from himself. The CMD requirement assures that only those persons who meet a certain standard can reject medical treatment that their physicians believe they need. Also, it assures that the decisions that determine treatment are the patient’s own, and not merely those of the doctor. Through the CMD requirement, the patient is a self-governing collaborator in care rather than a mere passive object of care.

voluntariness, a patient’s agreement to treatment is at best acquiescence rather than true consent. For an older but still useful formulation of the interrelationship between *competence*, voluntariness, and informed consent, see Alan Meisel et al., *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCHIATRY 285, 286–87 (1977).

³²⁵ See THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 395 (2d ed. 2003) (“[A] patient whose decision creates a higher level of risk regarding the patient’s health is likely to receive greater scrutiny.”); Loren H. Roth et al., *Tests of Competency To Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 281 (1977) (“[I]f patients do not decide the ‘wrong’ way, the issue of competency will probably not arise.”).

³²⁶ For example, the plaintiffs in *Canterbury* and *Natanson* had both accepted and undergone care that had suboptimal outcomes. See *Canterbury*, 464 F.2d at 776; *Natanson*, 350 P.2d at 1097.

Legal standards concerning CMD are often left ill-defined in case law, but, to the extent they have been articulated, those standards follow a four-part scheme promulgated by psychiatrist Paul Appelbaum and psychologist Thomas Grisso.³²⁷ Appelbaum and Grisso construe CMD as having four component abilities: (1) communicating a choice, (2) understanding relevant information, (3) appreciating one's situation and the relevant likely consequences, and (4) rational manipulation of information.³²⁸

Courts have often treated the ability to *communicate a choice* as a necessary and perhaps self-evident feature of CMD.³²⁹ Were this the only criterion for CMD, however, verbal patients could make self-damaging choices even if they lacked any ability to assimilate or rationally utilize information provided by caregivers. Thus, when ability to express a choice appears in case law, it usually does so accompanied by other elements of CMD.

³²⁷ See Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities To Consent to Treatment*, 319 NEW ENG. J. MED. 1635, 1636–38 (1988); Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence To Make Medical Decisions*, 48 RUTGERS L. REV. 345, 351 (1996). For a recent iteration of these ideas accompanied by practical examples of evaluation questions, see Paul S. Appelbaum, *Assessment of Patients' Competence to Consent to Treatment*, 357 NEW ENG. J. MED. 1834, 1835–36 (2007).

³²⁸ Appelbaum & Grisso, *supra* note 327, at 1635–36. This four-part scheme has served as a key clinical heuristic where other types of competence are concerned. See, e.g., NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 59–61 (2002) (applying the four-part scheme in CST context). Missing from this four-part scheme is a feature suggested by Roth and colleagues: whether the patient's decisionmaking reaches a "reasonable" outcome. Roth et al., *supra* note 325, at 280–81. The problem with this criterion relates to deciding what is "reasonable." See Berg et al., *supra* note 327, at 352 n.22. However, this criterion has received some support in older case law, see, e.g., *United States v. George*, 239 F. Supp. 752, 753 (D. Conn. 1965), and "is probably used more often than might be admitted by both physicians and courts." Roth et al., *supra* note 325, at 280–81. Moreover, "unreasonable" choices are probably what trigger many investigations of CMD, even though the matters may ultimately be judged on other grounds.

³²⁹ See, e.g., *In re Estate of Longeway*, 549 N.E.2d 292, 299 (Ill. 1989) ("Obviously, a patient who is irreversibly comatose . . . will be incompetent, unable to communicate his intent."); *Morgan v. Olds*, 417 N.W.2d 232, 235 (Iowa Ct. App. 1987) (noting that in some cases, patients are incompetent "as the result of being comatose" and are unable to make decisions).

An ability to *understand* information is the feature of CMD most commonly identified by courts³³⁰ and legislatures.³³¹ Berg and colleagues suggest that when used in this context, understanding should be regarded narrowly: simply as a capacity to assimilate or comprehend facts and statements about proposed care that are communicated by caregivers.³³²

Distinct from the capacity to understand information is the ability to *appreciate* what that information means in one's own situation. Appreciation involves recognition by a patient that information supplied by caregivers applies to him.³³³ Thus, a psychotic individual who understands and can repeat what his physician has told him about antipsychotic medication, but who refuses the drugs because he flatly denies³³⁴ that he is mentally ill, is incapable of appreciating—or properly evaluating—the information he has received and its relevance to his situation.³³⁵

³³⁰ See, e.g., *Rasmussen v. Fleming*, 741 P.2d 674, 683 (Ariz. 1987) (“[T]he patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis.”); *Estate of C.W.*, 640 A.2d 427, 431 (Pa. Super. Ct. 1994); *Miller v. Rhode Island Hosp.*, 625 A.2d 778, 786 (R.I. 1993); *Virgil D. v. Rock County*, 524 N.W.2d 894, 898 (Wis. 1994).

³³¹ See, e.g., IDAHO CODE ANN. § 39-4503 (2010) (declaring that “[a]ny person of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in [any proposed care] is competent to consent thereto”); see also WIS. STAT. § 51.61(1)(g)(4) (2009) (providing that “an individual is not competent to refuse medication or treatment if, [following an explanation of proposed treatment and alternatives] . . . [t]he individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives”). Implicit in this Wisconsin provision is that the individual's grasp of information can be evaluated only through some outward display of understanding.

³³² Berg et al., *supra* note 327, at 353–54.

³³³ Saks and Jeste suggest a slightly different articulation of this distinction: “[U]nderstanding refers to comprehension of the meaning of the information given one about the treatment . . . whereas appreciation refers to the beliefs one has formed about that information.” Elyn R. Saks & Dilip V. Jeste, *Capacity To Consent to or Refuse Treatment and/or Research: Theoretical Considerations*, 24 BEHAV. SCI. & L. 411, 414 (2006).

³³⁴ Here, we recognize that doctors can make mistakes and allow that reasonable disagreements can form the basis of a valid treatment refusal. Thus, a patient who says, “My doctor is sure that I need antidepressants, but I think I can manage my problems without them” has recognized and appreciated the applicability of the doctor's judgments. By contrast, a patient who says, “The doctor says I am mentally ill and need medication, but that's baloney; my problem is that I have an electronic monitoring device in my brain” cannot apply the doctor's assessment because of adherence to a delusional belief.

³³⁵ See, e.g., *Guardianship of Roe*, 583 N.E.2d 1282, 1286 (Mass. 1992) (affirming judgment of incompetence of a man with schizophrenia because he denied that he

On the other hand, a psychotic individual may hold several delusional beliefs, yet be recognized as competent to refuse medical care if the delusions do not prevent him from grasping the significance of the information he has received and its implications for his condition.³³⁶

Rational manipulation of information is the fourth feature of CMD under Appelbaum and Grisso's formulation. This criterion looks to whether a patient can engage in and demonstrate logical thought processes when comparing risks and benefits of treatment options. Berg and colleagues note that of the four CMD-related capacities, rational manipulation "is the ability least often included in legal competence standards,"³³⁷ in part because it is "the hardest to operationalize,"³³⁸ and in part because courts may be reluctant to make judgments about what is and is not rational.³³⁹

was mentally ill and thus could not "appreciate the need to control this illness with antipsychotic medication" or "the risks associated with refusing it").

³³⁶ See, e.g., *In re Milton*, 505 N.E.2d 255, 256 & n.2, 260 (Ohio 1987) (upholding delusional psychiatric patient's right to refuse radiation therapy for uterine cancer because such treatment would conflict with her belief in faith healing and her "belief in spiritual healing stands on its own, without regard to any delusion"), *overruled in part* by *Steele v. Hamilton County Cmty. Mental Health Bd.*, 736 N.E.2d 10 (Ohio 2000).

³³⁷ Berg et al., *supra* note 327, at 357. For example, Illinois's health care surrogate law requires "decisional capacity," defined as "the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision." 755 ILL. COMP. STAT. 40/10 (LexisNexis 2010). Interestingly, though, its mental health treatment preference statute requires rationality: There, someone lacks decisional capacity if, "in the opinion of 2 physicians or the court, [that] person's ability to receive and evaluate information effectively or communicate decisions" is sufficiently impaired. *Id.* 43/5(5).

³³⁸ Berg et al., *supra* note 327, at 357. Berg and colleagues apparently use "operationalize" as the term is used in the social sciences, where to "operationalize" a concept, one must define it so as to make it measurable through observations of specific, objective variables.

³³⁹ The facts in *In re Milton* provide an example: In holding that Ms. Milton's belief in faith healing, even if unwise or foolish, could be overridden only if the belief threatened paramount interests, the Ohio Supreme Court failed to recognize or examine ways that her delusion of being married to a faith healer might be affecting her decision to refuse radiation therapy. 505 N.E.2d at 258-59; see also *In re Yetter*, 62 Pa. D. & C.2d 619, 621-24 (Ct. Com. Pl. 1973) (finding a delusional sixty-year-old woman competent to decline mastectomy to treat breast cancer, though her refusal was based on concern about how the surgery would affect her non-existent Hollywood career). Courts do not always respect patients' viewpoints, however. See, e.g., *In re Harvey U.*, 116 A.D.2d 351, 353, 501 N.Y.S.2d 920, 921-22 (3d Dep't 1986) (holding that "irrational trust" in the natural healing of a patient's illness and the belief that hospitalization was for experimental purposes supported finding that

Nonetheless, rational manipulation or use of rational thought processes is a feature of many statutory definitions of CMD. In Alaska, for example, rational manipulation appears in the state's mental health statute, under which a "competent" psychiatric patient:

- (A) has the capacity to assimilate relevant facts and to appreciate and understand [his or her] situation with regard to those facts . . . ;
- (B) appreciates that [he or she] has a mental disorder or impairment, if the evidence so indicates . . . ;
- (C) has the capacity to participate in treatment decisions by means of a rational thought process; and
- (D) is able to articulate reasonable objections to using the offered medication.³⁴⁰

3. Rationale

These four criteria do not look directly at the *outcome* of a decision. Rather, communication, understanding, appreciation, and rational manipulation of information focus on a patient's thinking and decisionmaking processes and his or her articulation thereof. A patient who can understand and appreciate information, think logically about his or her situation, and communicate his or her decision is competent and should have his or her decision respected even if the decision seems wrong to nearly everyone. Thus, the four criteria give life to Justice Brandeis's oft-quoted sentiment: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."³⁴¹

patient was not competent), *rev'd*, *Veteran's Admin. Med. Ctr. v. Harvey U.*, 68 N.Y.2d 624, 496 N.E.2d 229, 505 N.Y.S.2d 70 (1986).

³⁴⁰ ALASKA STAT. § 47.30.837(d)(1) (2010). The statute also notes, in connection with the ability to appreciate one's illness, that "denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions." *Id.*

³⁴¹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 352–53 (1967). This notion has frequently arisen in connection with refusal of treatment on religious grounds. *See, e.g., In re Estate of Brooks*, 205 N.E.2d 435, 436, 442–43 (Ill. 1965) (holding that a Jehovah's Witness had a First Amendment right to refuse blood

The legal and ethical doctrine of informed consent in medical decisionmaking reflects a paramount respect for self-determination, that is, the individual's right to define personal goals and make decisions to achieve goals.³⁴² Case law and statutes concerning informed consent encourage physicians and other caregivers to make disclosures to patients and to refrain from providing care until patients give consent.³⁴³ Rulings and statutes also have an "educative role": They reinforce respect for self-determination,³⁴⁴ in a context where ever-increasing knowledge and expertise of caregivers might encourage a "doctor knows best" approach to healthcare decisions.³⁴⁵

At the same time, the exceptions to informed consent—including the exception for individuals who lack CMD—implicitly acknowledge that other ends, including the promotion of well-being and protection of life, exert a countervailing influence within doctor-patient relationships.³⁴⁶ The idea that patients are better off when they participate in making choices about their medical care is based partly in moral principle—respect for autonomy—and partly in empirical reality.³⁴⁷ Some patients clearly cannot benefit morally or practically from self-determination.³⁴⁸ To allow persons suffering from debilitating mental illnesses to refuse needed medical treatment could harm or kill them and might thereby frustrate their long-term rational values and aims.³⁴⁹ By making competence a requirement for medical decision making, society, through the law, enhances everyone's well-being.³⁵⁰ The competence requirement protects all of us from harms we might suffer were we to become disabled by defects in our decisionmaking capacities. In a sense, then, requiring CMD is a general advance directive, executed not by

transfusions); *In re Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (holding that the state may not override pregnant mother's religion-based refusal of transfusion).

³⁴² PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 17 (1982) [hereinafter *ETHICAL PROBLEMS*].

³⁴³ *See id.* at 30.

³⁴⁴ *Id.*

³⁴⁵ For a bold statement of this position, see Franz J. Ingelfinger, *Arrogance*, 303 *NEW ENG. J. MED.* 1507 (1980).

³⁴⁶ *See ETHICAL PROBLEMS*, *supra* note 342.

³⁴⁷ *See id.* at 56.

³⁴⁸ *See id.*

³⁴⁹ *See id.* at 56–57.

³⁵⁰ *See id.*

individuals but by civil society on behalf of all its members. Requiring CMD ultimately serves as an autonomy- and freedom-enhancing feature of the law and is justifiable on Rawlsian grounds: It is appropriate to ignore or override the medical choices of incompetent persons because all rational people, knowing in advance that they could suffer a loss of their decisionmaking capacity, would desire a mechanism for such protection.³⁵¹

D. Implications: Rationales for Competence To Divorce

The legal standards, traditional bases, and rationales for requiring competence of criminal defendants and individuals who decline health-restoring or live-saving treatment provide clear hints about the rationales that would support a legal requirement of competence for divorcing individuals and legal criteria that would give effect to that requirement. In the next Part, we propose a legal standard for competence to divorce along with inquiries that might help courts, aided by input from mental health professionals, adjudicate the matter. We conclude this Part with a set of rationales that support legal provisions that would bar from participating in divorce proceedings individuals whose judgment is severely impaired by active symptoms of mental illness.

1. Protection of the Mentally Ill Litigant

As discussed above, one of early justifications of requiring competence for criminal defendants was their potential need to defend themselves without the assistance of counsel. Though attorneys are now made available to criminal defendants who cannot afford counsel, the U.S. Supreme Court has recently affirmed the legal system's ongoing concern for and obligation to protect defendants who might wish to proceed pro se.³⁵² In divorce proceedings, litigants have no constitutional guarantee of

³⁵¹ See JOHN RAWLS, *A THEORY OF JUSTICE* 218–19 (Belknap Press rev. ed. 1999) (1971) (contending that a belief in liberty is consistent with paternalistic protections for the “mentally disturbed”).

³⁵² See *Indiana v. Edwards*, 128 S. Ct. 2379, 2386–87 (2008) (discussing the impact of severe psychopathology, and concluding that allowing pro se defense by someone “unable to carry out the basic tasks needed to present his own defense without the help of counsel . . . is at least as likely to prove humiliating as ennobling” and would preclude a fair trial).

counsel.³⁵³ This leaves open the possibility that a vulnerable mentally ill individual seeking divorce for delusional reasons might not only initiate a potentially harmful divorce action but might make additional self-harming judgments in the course of litigation.

Even if the mentally impaired litigant has retained counsel, divorce proceedings may still require the separating parties to make complex decisions, for example, when substantial assets are involved or decisions with major consequences for a litigant's own future situation or the situation of loved ones.³⁵⁴ Depending on the content and force of their delusions, individuals with psychotic disorders may find themselves motivated by irrational, but nonetheless intense, fears or desires. Yet they may not heed the advice of counsel because their illness impairs their ability to recognize that their fears are false or to appreciate that their decisions are foolish.³⁵⁵

2. Deleterious Consequences of Divorce

Even when the parties do not suffer from capacity-compromising psychiatric illnesses, divorce litigants are statistically likely to suffer adverse consequences. Women and their children are likely to be financially worse off after a divorce, and although the results are more mixed for men, many of them

³⁵³ The internet has scores or perhaps hundreds of websites aimed at helping individuals initiate divorce actions on their own and inexpensively. *See, e.g.*, 3StepDivorce, <http://www.3stepdivorce.com/index.html> (last visited Apr. 15, 2010); CompleteCase, <http://www.completecase.com/index.html> (last visited Apr. 15, 2010); LegalZoom, <http://www.legalzoom.com/legal-divorce/divorce-overview.html> (last visited Apr. 15, 2010). Many jurisdictions provide government-sanctioned help with initiating divorce. For example, the State of New York maintains a website that "offers free instruction booklets and forms for people starting a divorce." New York State Unified Court System, Matrimonial Matters, <http://www.nycourts.gov/ip/matrimonial-matters/forms.shtml> (last visited Apr. 15, 2010).

³⁵⁴ Such considerations underlie the majority rule that a guardian may not bring a suit for divorce on behalf of an incompetent individual. *See supra* Part IV.B.

³⁵⁵ *See* H. Richard Lamb & Linda E. Weinberger, *Mental Health Courts as a Way To Provide Treatment to Violent Persons with Severe Mental Illness*, 300 JAMA 722, 722 (2008) ("[S]ome individuals with mental illness have anosognosia, a biologically based inability to recognize that one has a mental illness."); *see also* Lorenzo Pia & Marco Tamietto, *Unawareness in Schizophrenia: Neuropsychological and Neuroanatomical Findings*, 60 PSYCHIATRY & CLINICAL NEUROSCIENCES 531, 532-34 (2006) (describing defects in frontal lobe functioning and other possible neuroanatomical bases for lack of insight into one's own mental illness).

wind up as financial “losers” too.³⁵⁶ Divorced women experience an increased risk for cardiovascular disease that persists well into middle age.³⁵⁷ Marriage is unambiguously beneficial to men’s health: Never-married men have mortality rates 250% higher than married men.³⁵⁸ Studies across various cultures and times have shown that married persons live longer than persons who are divorced, widowed, or single.³⁵⁹ Finally, cross-section and longitudinal studies show that married individuals experience lower rates of depression, anxiety, and other psychiatric disorders than do persons who are single, widowed, or divorced.³⁶⁰

Though these findings may in part reflect better emotional and physical health of persons who get and stay married, a variety of factors suggest that divorce may cause health problems. Divorce is a highly stressful event, and it often is accompanied or followed by other stressors: lowered living standards, residence changes, disrupted social networks and

³⁵⁶ Patricia A. McManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 AM. SOCIOLOGICAL REV. 246, 265–66 (2001) (noting that “women and children . . . overwhelmingly suffer serious declines in their material well-being in the aftermath of separation and divorce” and that “men’s economic outcomes following separation and divorce are heterogeneous, with a majority of losers but a sizable core of winners”). This is an international phenomenon. See, e.g., Caroline Dewilde & Wilfred Uunk, *Remarriage as a Way To Overcome the Financial Consequences of Divorce—A Test of the Economic Need Hypothesis for European Women*, 24 EUR. SOCIOLOGICAL REV. 393, 393 (2008) (citing studies that find that, for women, divorce “results in a substantial decline of household income and an increased likelihood of falling into poverty”).

³⁵⁷ See Zhenmei Zhang & Mark D. Hayward, *Gender, the Marital Life Course, and Cardiovascular Disease in Late Midlife*, 68 J. MARRIAGE & FAM. 639, 653–54 (2006) (noting that following divorce, women have a higher risk of cardiovascular disease in late midlife compared to continuously married women, which can be explained by higher emotional distress and a fall in socioeconomic status).

³⁵⁸ See Catherine E. Ross et al., *The Impact of the Family on Health: The Decade in Review*, 52 J. MARRIAGE & FAM. 1059, 1061 (1990).

³⁵⁹ See, e.g., Yuanreng Hu & Noreen Goldman, *Mortality Differentials by Marital Status: An International Comparison*, 27 DEMOGRAPHY 233, 246 (1990); Lee A. Lillard & Linda J. Waite, *Til Death Do Us Part: Marital Disruption and Mortality*, 100 AM. J. SOCIOLOGY 1131, 1152–55 (1995).

³⁶⁰ See Anne E. Barrett, *Marital Trajectories and Mental Health*, 41 J. HEALTH & SOC. BEHAV. 451, 460 (2000) (finding that marriage benefits one’s mental health and leads to a lower risk of anxiety and substance abuse); Sheila R. Cotten, *Marital Status and Mental Health Revisited: Examining the Importance of Risk Factors and Resources*, 48 FAM. RELATIONS 225, 225, 231–32 (1999) (observing that married individuals experience a lower risk of depression and greater psychological resources such as self-esteem and mastery).

social support, and single parenting.³⁶¹ A variety of studies suggest that declines in health may result from stress-related changes in the release of pituitary hormones, adrenal hormones, and proinflammatory cytokines, which are associated with cardiovascular disease.³⁶² Stress can also increase the likelihood of unhealthy behavior patterns, such as smoking and overeating.³⁶³ Given what we know about the adverse mental and physical impact of divorce, it makes sense for society to bar this option when individuals are acting for reasons that are clearly symptoms of a severe mental illness.

3. Dignity and Integrity of Legal Processes

As noted above, courts cite society's interest in the dignity of criminal proceedings as a justification for requiring defendants to be competent to stand trial. Divorce hearings and trials usually do not receive much publicity, and, unlike criminal proceedings,³⁶⁴ they do not function as public expressions of society's attitudes or moral response to certain types of behavior.³⁶⁵ Yet society has a far-from-trivial interest in protecting the dignity and seriousness of all legal processes, including those processes that lead to termination of marriages.³⁶⁶

Dignity of legal processes was one of the rationales behind the development of no-fault divorce laws. Previously, lawyers often advised clients who wished to divorce about how to create

³⁶¹ See Zhang & Hayward, *supra* note 353, at 641.

³⁶² See *id.*

³⁶³ See *id.*

³⁶⁴ "Determining the truth about guilt and innocence, however, is not the sole purpose of a trial. The trial is also a public performance, an opportunity for the community to witness and absorb a morality tale about crime and punishment and thereby to learn the values of the society." Sherry F. Colb, *What Is a Trial?: President Bush Asks Congress To Authorize Military Commissions*, FINDLAW, Sept. 20, 2006, <http://writ.news.findlaw.com/colb/20060920.html>. For a discussion of Kantian morality as the only sensible basis for prosecuting war crimes, see Aaron Fichtelberg, *Crimes Beyond Justice? Retributivism and War Crimes*, 24 CRIM. JUST. ETHICS 31, 32 (2005).

³⁶⁵ The classic articulation of this notion is in Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95, 97–100 (1970).

³⁶⁶ In acknowledgment of the seriousness of divorce, South Carolina requires its courts of domestic relations to "make an earnest effort to bring about a reconciliation," and no divorce may be granted by a judge unless he states "in the [divorce] decree that he has attempted to reconcile the parties to such action and that such efforts were unavailing." S.C. CODE ANN. § 20-3-90 (2009).

evidence that courts would accept.³⁶⁷ In many states, the most popular allegation for divorce was “cruelty.” Wives would regularly testify that their husbands treated them miserably. As a California Supreme Court justice characterized the situation:

Every day, in every superior court in the state, the same melancholy charade was played: the “innocent” spouse, generally the wife, would take the stand and, to the accompanying cacophony of sobbing and nose-blowing, testify under the deft guidance of an attorney to the spousal conduct that she deemed “cruel.”³⁶⁸

No-fault divorce was seen as a solution to a situation in which widely acknowledged lying and collusion threatened the dignity and integrity of legal proceedings.³⁶⁹ Although it is not perjury when a litigant files documents or testifies about matters that he sincerely but delusionally believes are true, the dignity and honesty of legal proceeding is implicated when the court knows that the initiating party to divorce is acting for completely false reasons. Moreover, the dignity of legal proceedings can be abused by mentally ill persons who use legal mechanisms to pursue delusional ideas.

4. Therapeutic Jurisprudence

In recent years, “therapeutic jurisprudence” has recognized that the law is a social force that shapes behavior by imposing consequences and can potentially serve as a therapeutic or anti-therapeutic agent.³⁷⁰ While proponents of therapeutic jurisprudence insist that their scholarly approach is not an effort

³⁶⁷ Our personal favorite, termed “collusive adultery,” required both sides to agree that the wife would “surprise” her husband at home and discover him committing adultery with a “mistress” hired for this purpose. The wife would swear falsely to the “facts” and the husband would admit them, which was tantamount to both sides committing perjury. The husband’s “conviction” for adultery provided the judge with grounds for divorce. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 436 (2002).

³⁶⁸ *McKim v. McKim*, 493 P.2d 868, 875 (Cal. 1972) (Mosk, J., dissenting).

³⁶⁹ See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 *BYU L. REV.* 79, 93; see also Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 *CAL. L. REV.* 291, 297–98 (1987) (noting statistics that suggest that most divorces for which the putative cause was “extreme cruelty” actually reflected parties’ mutual consent).

³⁷⁰ See DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN THE THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (1996).

to subvert other important legal values,³⁷¹ they urge that therapeutic impact be one factor that courts, attorneys, and other legal actors consider as they create and carry out legal policy. Clearly, absent some overriding reason to the contrary, the law should not implicitly sanction, foster, or promote a mentally ill person's acting on his delusions when such action has potentially serious consequences for him or others he affects.

5. Self-Determination

Self-determination, or vindication of autonomy, has, as demonstrated above, served as a justification for no-fault divorce and as the basis for allowing individuals to refuse recommended medical treatment. In the latter case, requiring competence is a complement to self-determination: it functions as an implicit, general advance directive that expresses one's freedom, and it serves as a mechanism for preserving one's safety and opportunity for future self-expression when mental disability might otherwise leave one imperiled. If the availability of no-fault divorce can be seen as an advance³⁷² in self-determination, requiring competence of divorcing parties has a similar role in complementing autonomy. In requiring competence at the time of divorce, the law would provide a safeguard that rational individuals would desire as a means of protecting themselves and their loved ones from being harmed by choices impaired by and arising from their mental illnesses.³⁷³

³⁷¹ They note, for example, that therapeutic considerations do not, by themselves, justify coercion. *Id.*

³⁷² Whether this and similar developments in family law represent an "advance" in the melioristic sense has been the subject of scholarly, as well as public, debate. See, e.g., MARY ANN GLENDON, ABORTION AND DIVORCE 105-08 (1989) (emphasizing that individuality ignores the reality of interdependence, especially dependence of children on caretakers); Carl E. Schneider, *Moral Discourse and the Transformation of Family Law*, 83 MICH. L. REV. 1803, 1809-16 (1985) (contending that legal changes, including no-fault divorce, reflect diminished moral discourse).

³⁷³ In a similar vein, Saks and Jeste state:

An incompetently made choice is, in an important sense, not an autonomous choice. The choice may well not reflect the chooser's goals or values. If those goals or values represent the core of the person, then a choice that fails to serve them is, in a sense, not the chooser's choice, and is therefore not reflective of the core of the person. It is not his or her choice.

Saks & Jeste, *supra* note 333, at 412.

6. Lack of Countervailing Value

Finally, we recognize that persons might raise objections or counterarguments to several of the preceding rationales for requiring competence of divorcing parties. As a final point, then, we note that there is little countervailing value to allowing someone to divorce when his reason is one he would not hold were he not suffering from a serious mental illness.

VI. A MODEL STATUTE

Because the aim of divorce proceedings is to produce an agreement dissolving the marriage, one might regard those competence standards pertaining to formation and enforcement of contracts as the best source for guidance concerning competence to maintain a divorce action. Traditionally, the law has recognized immaturity,³⁷⁴ mental disorders—including substance-related conditions—and mental retardation as bases for invalidating contracts. The test for competence has referred to the person's "ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract;"³⁷⁵ incompetence to contract occurs if "the powers of a person's mind have been so affected as to destroy the ability to understand the nature of the act in which he is engaged, its scope and effect or its nature and consequences."³⁷⁶

These tests focus primarily on the individual's cognitive grasp of the transaction.³⁷⁷ While there may be valid policy reasons for constructing the laws of contract along these lines,³⁷⁸ the strictly cognitive emphasis would fail to recognize and avert the devastating impairments discussed in Part III, which induce delusional motivations in individuals, while preserving their

³⁷⁴ Formerly defined as an age less than twenty-one years old, now it is an age below eighteen years. See 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS 443–45 (3d ed. 2004) [hereinafter FARNSWORTH].

³⁷⁵ Gaddy v. Douglas, 597 S.E.2d 12, 20 (S.C. Ct. App. 2004).

³⁷⁶ Davis v. Marshall, No. 94APE02-158, 1994 WL 425169, at *3 (Ohio Ct. App. 1994).

³⁷⁷ *But see* RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (1981) (proposing that a contract is invalid "if by reason of mental illness or defect [the individual] is unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of his condition").

³⁷⁸ Farnsworth suggests that a "case-by-case analysis of incompetency may be too costly and too productive of uncertainty," and that "[a]rbitrary rules may be suited" to society's needs for reliable business transactions. FARNSWORTH, *supra* note 374, at 443.

capacity to act on those delusions. Also, contract law requires certain efficiencies that are unnecessary and even unwise in divorce cases. Contracts between individuals usually are created without the supervision or approval of an independent legal authority, and the demands of commercial transactions require clear-cut rules that can be implemented reliably, quickly, and automatically. In divorce cases, a court must approve the final settlement, and the existence of special courts of domestic relations attests to the law's recognition of how divorce may affect family ties that society wishes to foster. The duration of and individual judicial attention offered during many divorce proceedings provide opportunities and a framework for requiring competence to pursue a divorce and for undertaking assessments when competence is questioned.³⁷⁹

A. *Text of a Model Statute*

Accordingly, we propose the following model statute ("Model Statute") on competence to maintain a divorce action, which utilizes elements of existing statutes concerning competence to stand trial and to make treatment decisions.³⁸⁰

Model Statute

1. Presumption and Definitions

1.1 For purposes of this section, "competent" means "competent to initiate, maintain, and participate in divorce proceedings," and "competence" refers to being competent to initiate, maintain, and participate in divorce proceedings.

1.2 Parties to a divorce action are presumed to be competent.³⁸¹

³⁷⁹ See Beck & Frost I, *supra* note 6, at 25 (offering a similar argument concerning competence to mediate a divorce settlement).

³⁸⁰ We have modeled our proposal on existing laws in Ohio and Alaska: Ohio's statutory provisions concerning competence to stand trial, OHIO REV. CODE ANN. §§ 2945.37–38 (LexisNexis 2010); and Alaska's statutes concerning informed consent for and capacity to make treatment decisions concerning psychotropic medications, ALASKA STAT. §§ 47.30.836–837 (2010). This adaptation of adopting laws that have proven workable for courts should provide some assurance of our proposal's appropriateness and practicability in the contexts we address in this Article.

³⁸¹ This presumption is consistent with other areas of law governing competence. See, e.g., FED. R. EVID. 601 ("Every person is competent to be a witness . . ."); GA. CODE ANN. § 53-4-10(a) (2010) ("Every individual 14 years of age or older may make a will, unless laboring under some legal disability . . ."); OHIO REV. CODE ANN.

1.3 A party is competent if that party:³⁸²

1.3.1 can express a clear, consistent preference as to whether to divorce;

1.3.2 can assimilate and understand relevant facts concerning the divorce proceedings and the consequences of the proceedings;

1.3.3 can appreciate the party's situation with regard to those facts;

1.3.4 can participate in the divorce proceedings using rational thought processes;

1.3.5 can provide and does articulate reality-based reasons for seeking or pursuing a divorce and for wishing to participate in divorce proceedings.

1.4 Attitudes, Beliefs, and Competence³⁸³

1.4.1 The following are not, by themselves, evidence of lacking competence:

1.4.1.1 plausible but inaccurate perceptions of the spouse;

1.4.1.2 callousness or bitterness toward the spouse;

1.4.1.3 seeking a divorce for seemingly petty, trivial, or ill-considered reasons;

1.4.1.4 seeking a divorce despite the party's best interests or the interests of loved ones;

1.4.1.5 having a mental disorder or mental illness.

1.4.2 Any party's holding of patently false beliefs directly related to seeking or as reasons for seeking a divorce constitutes rebuttable evidence that the party is not competent.

1.5 "Evaluatee" means a party that the court has ordered to undergo an examination concerning competence, as described in Section 3, below.

1.6 In enacting this Section, the legislature specifically recognizes that individuals seek to divorce for reasons that are callous, mean-spirited, ill-considered, stupid, self-centered, trivial, or contrary to their own best interests and/or the interests of their loved ones. The legislature does

§ 2945.37(G) (LexisNexis 2010) (stating the presumption of competence to stand trial).

³⁸² This subsection parallels the Alaska statute's implementation of the four-part Appelbaum-Grisso standard discussed *supra* notes 327–339 and accompanying text.

³⁸³ We discuss the rationale for this section *infra* text accompanying notes 390–397.

not intend to bar an individual from obtaining a divorce simply because it was initiated under such circumstances.

2. Hearings³⁸⁴

2.1 In a divorce action in the court of domestic relations, the court or either party may raise the issue of a party's competence. If the court finds probable cause to believe that a party is not competent, the court shall hold a hearing on the issue as provided in this section.

2.2 Either party may submit evidence relevant to the party's questioned competence. A written report of a medical or psychological evaluation of the party may be admitted into evidence at the hearing by stipulation, but if either party objects to its admission, the report may be admitted under sections [applicable statute or rule on expert evidence].

2.3 The court shall not find a party incompetent solely because the party has a mental disorder or mental illness. The court shall not find a party incompetent solely because the party is receiving or has received psychotropic medication or other forms of psychiatric or psychological treatment, even if the party might become incompetent without such treatment.

2.4 If, after a hearing, the court finds by a preponderance of the evidence that, because of the party's present mental condition, the party is not competent as defined in Section 1.3, the court shall do one of the following:

2.4.1 dismiss the divorce petition;

³⁸⁴ Sections 2 and 3 create mechanisms for a court of domestic relations to inquire into a party's competence to divorce; the sections also give the court authority and powers to require (or compel) a possibly incompetent party to undergo evaluation to aid the court in determining whether the party is competent. This authority parallels the authority available to criminal courts when the question of trial competence arises. This latter authority arises both from statutes, *see, e.g.*, 18 U.S.C. § 4241 (2006); OHIO REV. CODE ANN. § 2945.38, and from case law, *see, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 354–55, 368 (1996); *Jackson v. Indiana*, 406 U.S. 715, 720, 730–31 (1972); *Dusky v. United States*, 362 U.S. 402, 402–03 (1960), that have established competence at the time of trial as a Constitutional protection. The existence of cases cited in Part IV.B. suggests that domestic relations courts have assumed they may have similar powers; at the very least, domestic relations courts have established powers to bar divorce for some individuals, perhaps on the same grounds that have allowed these courts to bar divorces of individuals previously adjudicated incompetent. *See* cases cited *supra* notes 198–202. To our knowledge, however, neither statute nor case law has clearly established any authority to request mental examinations of parties suspected of incompetence to divorce, to incentivize parties—through legal compulsion or staying proceedings—to submit to examinations, or to act upon the results of such examinations by dismissing or staying proceedings.

2.4.2 issue an order staying any divorce proceedings for up to one year pending the outcome of a course of treatment aimed at restoring the party's competence.

2.5 If the court has ordered treatment as provided in Section 2.4.2, the court shall hold hearings at intervals not to exceed six months, and in all cases at the end of one year following issuance of the treatment order. At these hearings, the court shall receive evidence relevant to whether the party has regained competence. At the conclusion of such a hearing:

2.5.1 if the court finds that the party has regained competence, the court shall issue an order lifting the stay;

2.5.2 if the court finds that the party has not regained competence, but one year has not elapsed since the order issued pursuant to Section 2.4.2, the court shall continue the hearing;

2.5.3 if the court finds that the party has not regained competence, and one year has elapsed since the order pursuant to Section 2.4.2, the court shall dismiss the divorce petition.

2.6 No person whose divorce petition has been dismissed pursuant to Sections 2.4.1 or 2.5.3 may submit a new divorce petition unless one year has elapsed since the dismissal.

3. Examination by Court Order

3.1 If the issue of a party's competence is raised, the court may order one or more evaluations of the party's present mental condition. An examiner shall conduct the evaluation. "Examiner" means either of the following:

3.1.1 a psychiatrist who is licensed to practice medicine in this state and who is eligible to take the American Board's certification examination in psychiatry; or

3.1.2 a clinical psychologist licensed to practice in this state under [applicable section].

3.2 If the court orders an evaluation under division 3.1 of this section, the evaluatee shall be available at reasonable times and places established by the examiner who will conduct the evaluation. If an evaluatee refuses to submit to a complete evaluation, the court shall do one of the following:

3.2.1 stay divorce proceedings until the evaluatee undergoes evaluation; or

3.2.2 dismiss the divorce petition; or

3.2.3 order the sheriff to take the evaluatee into custody and deliver the evaluatee to a suitable location for evaluation; or

3.2.4 hold the evaluatee in contempt of court and order the evaluatee detained for evaluation in a jail, psychiatric facility, or other suitable facility for a period not to exceed ten days. In such case, the examiner will evaluate the evaluatee at the place of detention.

3.3 The examiner shall file a written report with the court within thirty days after completion of the evaluation, and the court shall provide copies of the report to both parties. The report shall include:

3.3.1 the examiner's findings;

3.3.2 the facts in reasonable detail that provide the basis for the examiner's findings;

3.3.3 the examiner's opinion about whether the evaluatee:

3.3.3.1 can express a clear preference as to whether the evaluatee desires to divorce;

3.3.3.2 can assimilate and understand relevant facts concerning the proceedings and their consequences;

3.3.3.3 can appreciate the evaluatee's situation with regard to those facts;

3.3.3.4 can participate in the proceedings using rational thought processes;

3.3.3.5 can provide and does articulate reality-based objections to remaining married as the evaluatee's reasons for seeking or pursuing a divorce and for participating in divorce proceedings;

3.3.3.6 holds any patently false beliefs directly related to the evaluatee's seeking a divorce or as reasons for seeking a divorce; and

3.3.3.7 has a mental disorder or impairment and the nature of that disorder or impairment, if the evidence so indicates;

3.3.4 the examiner's opinion concerning whether the evaluatee is competent;

3.3.5 if the examiner's conclusion is that the evaluatee is not competent, the examiner's opinion as to:

3.3.5.1 the cause of or reason for the incompetence;

3.3.5.2 the relationship between the incompetence and any mental disorder or impairment that the examiner has diagnosed;

3.3.5.3 the likelihood of the evaluatee's becoming competent within one year if the evaluatee receives appropriate treatment;

3.3.5.4 what treatment is appropriate, both for the evaluatee's mental condition and for restoring competence, if restoration appears possible;

3.3.5.5 the least restrictive alternative setting for such treatment.

3.4 Neither the appointment of an examiner under this section nor the testimony of an examiner precludes either party from calling other witnesses or presenting other evidence relevant to competence.

3.5 No statement that an evaluatee makes in an examination or hearing concerning competence shall be used against the evaluatee during any proceeding or concerning any issue not related to the evaluatee's competence. The examiner may not be called as a witness during any proceeding unrelated to competence unless both parties agree.³⁸⁵

As was noted earlier, the Model Statute is based on Alaska and Ohio statutes concerning CMD and CST, and uses the four-part formulation of competence promulgated by Appelbaum and Grisso. Though the Model Statute's description of competence to divorce goes beyond the holdings reviewed earlier, it is in accord with several elements of those decisions. Those decisions refer to the ability to express wishes that one's marriage be dissolved,³⁸⁶ understand proceedings,³⁸⁷ and make reasonable judgments about personal matters.³⁸⁸ The notion that the petitioner should be competent to testify, though present in some rulings,³⁸⁹ is not

³⁸⁵ This section provides protections analogous to those found in many state statutes that forbid using information disclosed in an evaluation of competence to stand trial to prove guilt. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 46.B.007 (Vernon 2009). Inclusion of such statements vindicates a criminal defendant's constitutional protection against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454, 462 (1981). Here, the protection is included so that evaluatees would not be dissuaded from undergoing evaluation out of concern that information would be used to make later judgments during any subsequent disposition of their divorce petition.

³⁸⁶ *See Higgason v. Higgason*, 516 P.2d 289, 294 (Cal. 1973), *overruled by Dawley v. Dawley*, 551 P.2d 323, 325 (Cal. 1976).

³⁸⁷ *See Boyd v. Edwards*, 446 N.E.2d 1151, 1158-59 (Ohio Ct. App. 1982); *Murray v. Murray*, 426 S.E.2d 781, 784 (S.C. 1993).

³⁸⁸ *See Northrop v. Northrop*, File No. CN94-9882, Petition No. 1719-94, 1996 Del Fam. Ct. LEXIS 96, at *5 (July 26, 1996); *Syno v. Syno*, 594 A.2d 307, 311 (Pa. Super. Ct. 1991).

³⁸⁹ *See, e.g., Boyd*, 446 N.E.2d at 1159.

included in the Model Statute because it is not universally required in all cases and because other means—such as services of an attorney or a guardian ad litem—might fulfill or satisfactorily effectuate a petitioner's needs. The Model Statute does provide that a petitioner must be able to “reasonably participate” in proceedings, however, which we believe incorporates testifying relevantly, if a particular case will require testimony.

The Model Statute's sections 1.4.2 and 3.3.3.6 provide that a “patently false belief” (“PFB”) is evidence of incompetence to initiate or participate in divorce proceedings, while sections 4.1 and 2.3 state that simply having a mental disorder or simply having bad reasons for desiring a divorce should not be barriers to proceeding. These provisions have aims that parallel the *desiderata* for assessments of competence to consent to research endorsed by Saks. We explain these values shortly, but we first explain Saks's notion of a PFB.

Saks suggests that respect for autonomy requires that a standard for evaluating persons' beliefs about proposed treatment or research should not require those persons to simply “believe what most people would believe [W]e should try . . . to characterize the standard in a way that does not refer essentially to majorities.”³⁹⁰ However, basing decisions on “beliefs that obviously distort reality[, or] are based on little evidence[, or] are indisputably false[, or] are patently delusional” is a clear indication of incompetence in decisionmaking.³⁹¹ Saks defines PFBs as “grossly improbable” beliefs, and notes that these come in three varieties.³⁹² (1) A belief may be bizarre, that is, physically impossible or requiring a violation of “the laws of nature as we know them,”³⁹³ such as a man's insisting he can fly by flapping his arms. (2) A belief may, without violating the laws of nature, declare a fact that is physically impossible or “so improbable that the reasons for the person's holding the belief

³⁹⁰ Elyn R. Saks, *Competency To Decide on Treatment and Research*, in 2 RESEARCH INVOLVING PERSONS WITH MENTAL DISORDERS THAT MAY AFFECT DECISIONMAKING CAPACITY 59, 71 (1999), available at <http://bioethics.georgetown.edu/nbac/capacity/volumeii.pdf>.

³⁹¹ *Id.*

³⁹² Elyn R. Saks et al., *The California Scale of Appreciation: A New Instrument To Measure the Appreciation Component of Capacity To Consent to Research*, 10 AM. J. GERIATRIC PSYCHIATRY 166, 168 (2002).

³⁹³ *Id.*

are irrelevant,³⁹⁴ such as a man untrained in medicine who insists he is the world's greatest diagnostician. (3) A belief may represent a "gross distortion of obvious facts," that is, a false belief about physical events concerning which almost all people would agree, for example, whether a spacecraft has landed on the White House lawn.³⁹⁵ This category includes beliefs that, though not obviously impossible or bizarre, are just obviously false.³⁹⁶

In the Model Statute, the PFB criterion and the instruction not to deem someone incompetent simply because of mental illness serves to protect three interests held by individuals who might seek a divorce.³⁹⁷ (1) The PFB criterion protects individuals who would, because of mental illness, be vulnerable to errors and the consequences of decisions adverse to their real interests. (2) The PFB and mental illness criteria allow individuals with unconventional or ill-considered beliefs that are not obviously erroneous to act according to how they perceive the world—that is, these criteria protect these individuals' autonomy. (3) The mental illness criterion provides a protection against discrimination simply because of a diagnosis; a person with a severe mental disorder is deemed incompetent only because his illness produces a major distortion in beliefs. Beliefs that represent the sorts of distortion to which many of us are vulnerable, and that lead many of us to bad decisions, are not a basis for finding a party incompetent.

Finally, section 2.4 of the Model Statute provides two courses for trial courts when the petitioner is incompetent to divorce: staying or dismissing the proceedings. The option of appointing a guardian ad litem is not included to conform to the notion, underlying the majority rule,³⁹⁸ that initiation of divorce proceedings must involve the personal judgment of a petitioner that a marriage should end.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *See id.* For useful background information, see generally ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL 180–94 (2002) (elaborating on PFBs and their role in competence to refuse treatment).

³⁹⁷ *See Saks et al., supra* note 392.

³⁹⁸ *See* discussion *supra* Part IV.B.

B. *Sample Questions for Courts*

Model Statute section 3.3.4 calls for an examiner's express opinion about an evaluatee's competence to divorce. Respected commentators maintain that mental health experts should not express opinions on ultimate issues,³⁹⁹ and evidence rules or cases occasionally enforce such a restriction.⁴⁰⁰ We believe, however, that having mental health professionals offer views on the ultimate issue—if such opinions are coupled with the professional's rationale—can be helpful to courts. Knowing the examining expert's view on the ultimate issue may help the court⁴⁰¹ see how the expert synthesizes a large body of clinical data, and this provides the court with a context for understanding those data and their relevance. Examining professionals cannot possibly report all the data they sense; their reports to courts always represent a subset of data that the examiner selectively reports because of apparent relevance. Provided that courts feel free to disagree with the expert's conclusion, an ultimate opinion helps the court grasp the significance—from the expert's viewpoint—of reported data. This puts the court in the best position to interpret those data in a context and to recognize potential deficiencies in the data or the expert's reasoning.

Courts are the ultimate arbiters of competence, however, and should reach independent conclusions about a litigant's fitness to proceed with a divorce. We think courts can best do this by eliciting their own information from participants. Despite their knowledge and legal skills, judges sometimes may feel uncomfortable or unprepared to interview litigants who may suffer from severe mental disorders. We also note that judges

³⁹⁹ See, e.g., Grant H. Morris et al., *Assessing Competency Competently: Toward a Rational Standard for Competency-To-Stand-Trial Assessments*, 32 J. AM. ACAD. PSYCHIATRY & L. 231, 243 (2004); Stephen Morse, *Reforming Expert Testimony: An Open Response from the Tower (and the Trenches)*, 6 L. & HUM. BEHAV. 45–46 (1982).

⁴⁰⁰ See FED. R. EVID. 704(b). For interpretations of Rule 704(b), see *United States v. Hillsberg*, 812 F.2d 328, 331 (7th Cir. 1987) (finding that an expert may not testify about whether the defendant had the capacity to conform his conduct to the law); *United States v. Buchbinder*, 796 F.2d 910, 917–18 (7th Cir. 1986) (finding that an expert should not testify as to whether defendant had the requisite mental state to defraud, though testimony about extent of defendant's depression was allowed).

⁴⁰¹ This paragraph discusses benefits to courts, but attorneys for the litigants may also benefit from the examiner's views on the ultimate issue in ways we describe here.

often ask litigants questions answerable as “yes” or “no.”⁴⁰² Though this interview strategy may satisfy legal requirements, it usually will not get at the kinds of data about comprehension, reasoning, and appreciation that are crucial to evaluating soundness of judgment.

In what follows, we offer a series of questions⁴⁰³ that courts⁴⁰⁴ may use to gather data relevant to reaching conclusions about competence to divorce.⁴⁰⁵ In footnotes, we note how responses to these questions may help courts address criteria for competence under the Model Statute.⁴⁰⁶

1. Can you tell me what your goal is in coming to our court?
2. Would you summarize for me how you concluded you should come to our court on this matter?
3. How did you decide whether to follow your lawyer’s recommendation concerning your case?
4. Is anything making it hard for you to follow your lawyer’s advice?⁴⁰⁷
5. Please tell me in your own words what you understand about:
 - what getting a divorce means,
 - possible benefits and risks for you of getting a divorce,
 - alternatives you have (or other courses of actions you could take or other things you could do) besides getting divorced, and
 - the risks and benefits of choosing those alternatives.⁴⁰⁸

⁴⁰² See *Godinez v. Moran*, 509 U.S. 389, 411 (1993) (Blackmun, J., dissenting) (holding that the trial judge failed to ascertain the full extent of defendant’s mental impairment and accepted his “guilty pleas after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers”); FED. JUDICIAL CTR., BENCHMARK FOR U.S. DISTRICT COURT JUDGES 6–7 (5th ed. 2007) (recommending judge’s questions when defendant wishes to proceed pro se, all be answerable with “yes” or “no”).

⁴⁰³ We have adapted these questions from Appelbaum, *supra* note 327, at 1836 tbl.1.

⁴⁰⁴ These questions, with appropriate changes in wording, should also prove helpful to examining experts conducting evaluations of competence to divorce.

⁴⁰⁵ We intend these as examples only. They should not be deemed requirements, and judges should feel free to modify and expand upon them to fit the circumstances of a specific case.

⁴⁰⁶ See Model Statute § 1.3, *supra* Part VI.B.

⁴⁰⁷ Questions 1 through 4 are most relevant to section 1.3.1. See *supra* Part VI.A. That the word “divorce” does not appear in the questions is intentional; by omitting such “hints,” the court also can ascertain whether the litigant grasps what he or she is doing. Questions 3 and 4 are appropriate only for litigants who have, or at some point have had, attorney representation.

⁴⁰⁸ Question 5 is most relevant to the “understand[ing]” and “consequences” portions of section 1.3.2. See *supra* Part VI.A.

6. What do you believe is wrong with your marriage now?
7. How did you decide that you needed a divorce?
8. What leads you to believe that getting divorced is better than remaining married?⁴⁰⁹
9. How do you think a divorce will affect you?
10. What else might happen?
11. What makes you believe a divorce will have those results?
12. What do you think will happen to you if you do not get divorced?
13. Why do you think your spouse has opposed a divorce?⁴¹⁰

VII. CONCLUSIONS

This Article suggests that legal recognition of a specific form of incompetence—incapacity to initiate or maintain a divorce action—would remedy an important gap in domestic relations law as it exists in most jurisdictions. Legal recognition of a specific incapacity to maintain a divorce action would let trial courts respond to possibly “crazy” petitioners like Mr. Doe with appropriate respect and concern. Barring individuals who lack insight into their mental illnesses from pursuing divorces for delusional reasons is consistent with several principles that courts affirm in other legal arenas where it is common to deal with psychiatrically impaired individuals. Requiring competence to divorce:

- Protects a vulnerable mentally ill individual from maintaining a legal action in the course of which that individual might make other self-harming judgments.
- Protects a mentally ill person from suffering financial insecurity, poorer mental health, and poorer physical health that are known risks of getting divorced.

⁴⁰⁹ Questions 6 through 8 address sections 1.3.4–.5, that is, the party's reasoning and whether the basis for seeking to divorce is realistic, as opposed to delusional). *See supra* Part VI.A. In asking these questions, one tries to ascertain how well the party can compare getting divorced to remaining married. In looking at the party's reasons for seeking a divorce, the focus of inquiry is the process the party uses to reach the decision, not whether getting divorced is a *good* idea. As section 1.4 entails, a party may make an ill-advised or unreasonable choice to seek divorce so long as the motivation is not a patently false belief. *See supra* Part VI.A.

⁴¹⁰ Questions 9 through 13 address sections 1.3.3 and 1.3.5, that is, whether the party's appreciation is flawed by delusions or pathological distortions of reality. *See supra* Part VI.A.

- Preserves the dignity and integrity of legal processes, which was an important rationale for the alterations in divorce law that took place in the 1960s and 1970s.
- Provides a means for courts to avoid implicitly sanctioning, fostering, or promoting a mentally ill person's acting on his delusions when such action has potentially serious consequences for himself and others.
- Respects and enhances the freedom of a delusional petitioner by preserving his safety and opportunity for future self-expression when mental disability might cause him to act improvidently.

In the absence of countervailing reasons, giving trial courts the legal authority to dismiss or stay delusionally motivated, potentially harmful divorce actions is a just and compassionate response to the needs of loved ones of litigants who have serious mental illnesses and—especially and most importantly—to the needs of those litigants themselves.

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