

CULTIVATING FORGIVENESS: REDUCING HOSTILITY AND CONFLICT AFTER DIVORCE

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In recent years, scholars writing in the emerging “law and emotion” field have explored the role of emotions on criminal, administrative, securities, tort, employment, and constitutional law. Yet, surprisingly few scholars have examined their role in family law. Examining the role of emotion in family law is particularly important because the potential for harm resulting from “negative emotions,” such as persistent anger and the desire for vengeance, may be greater in the family law context. A divorced parent’s anger toward the other parent can lead to excessive conflict for years after the legal relationship has ended, harming both parents and their children. The law and emotion literature has focused on negative emotions, such as anger, disgust, and vengefulness. However, to the extent that society would benefit from both a reduction in negative emotions and an increase in positive emotions, such as love, hope, and forgiveness, it is worthwhile to explore the law’s ability to facilitate both. This Article explores the law’s ability to cultivate forgiveness between divorcing parents.

Although legal scholars have not examined forgiveness in any depth, scholars in other fields have conducted numerous studies demonstrating its benefits, including a reduction in anger. Drawing from various forgiveness models, this Article analyzes why and how the law should cultivate forgiveness between divorcing parents: first, by making marital misconduct irrelevant in divorce, property, alimony, and custody proceedings; and second, by requiring that high-conflict

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divorced parents participate in a forgiveness education program. This Article argues that these reforms, which are termed "Healing Divorce," may significantly reduce interparental hostility and conflict. Demonstrating that lawmakers have already attempted to facilitate forgiveness in the criminal law context, the Article argues that the law can and should cultivate forgiveness after divorce.

INTRODUCTION

Although the term "friendly divorce" may sound like an oxymoron, some couples are able to dissolve their marriage amicably. A few even remain close friends. Many divorces, however, are quite acrimonious, and the parties often feel angry, betrayed, and vengeful. These individuals might be well advised to terminate all contact and move on with their lives. This strategy, however, is not an option for couples with minor children who must maintain contact for the sake of the children.

Child development experts have established that interparental conflict and hostility are detrimental to children, increasing their risk of depression, anxiety, low self-esteem, and behavioral problems.¹ While this knowledge alone has done little to reduce interparental hostility, lawmakers have adopted various reforms, such as no-fault divorce, mediation, and parenting education, which they hoped would help former spouses co-parent their children. As shown below, each of these reforms, to some extent, sought to reduce the bitterness that characterizes many divorces by removing human emotions from the legal process. Ironically, the law's refusal to acknowledge divorcing parties' emotions and its failure to provide a venue for the expression of these emotions may have made the custodial aspects of separation more contentious than ever before. Efforts to reduce interparental hostility may require lawmakers to first acknowledge and validate the parties' emotions.

Lawmakers have long acknowledged the legitimacy of emotion in certain contexts. For example, the law has historically taken account of a killer's emotions both at the time of the act and in later expressions of remorse.² In the civil context, tort law has long

1. See Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 310, 315 (1982); see also *infra* Part I.B.

2. For example, hate crime laws and the heat of passion defense take into account the defendant's emotional state at the time the crime was committed. See Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1977 (2001) ("A person who kills while angry is usually guilty of a less serious crime than a person who kills in a calm, unemotional state, but not if the anger is caused by hatred rather than shame."); Austin Sarat, *Remorse, Responsibility, and*

compensated purely emotional harm, at least when intentionally inflicted,³ and it increasingly allows recovery for accidentally-caused emotional suffering.⁴ Certain evidentiary rules similarly take emotion into account.⁵ Yet, despite emotions' influence, legal actors have traditionally argued that emotions, believed to be irrational, devoid of thought, and "potentially dangerous,"⁶ should remain outside the legal sphere.⁷

Criminal Punishment: An Analysis of Popular Culture, in THE PASSIONS OF LAW 168, 168 (Susan A. Bandes ed., 1999) ("Traditionally, [the] law has encouraged remorse . . . [and] was as interested in the blameworthiness of the offender as in the harm his offense caused and, as a result, his emotional reaction to his own wrongdoing."); see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 335 (2007) ("[D]efense lawyers may cultivate their clients' remorse in an effort to win lower sentences."); cf. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559–61 (1998) (discussing a study finding that a jury is less likely to sentence a capital defendant to death if they believe that he feels remorseful). *But see* Sarat, *supra*, at 168–69 (noting that sentencing guidelines have made the role of remorse controversial and possibly, less relevant).

3. See, e.g., *Wishnatsky v. Huey*, 584 N.W.2d 859, 861 (N.D. Ct. App. 1998) (discussing battery); *Picard v. Barry Pontiac-Buick, Inc.*, 654 A.2d 690, 694 (R.I. 1995) (discussing the tort of assault in relation to emotional harm); *Womack v. Eldridge*, 210 S.E.2d 145, 147 (Va. 1974) (discussing intentional infliction of emotional distress).

4. See *Portee v. Jaffee*, 417 A.2d 521, 523, 528 (N.J. 1980) (allowing recovery for emotional harm resulting from witnessing son's accidental death).

5. For example, excited utterances and dying declarations are admissible because it is believed that emotions render such statements reliable. John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1246 (2006) ("[I]t is precisely 'the stress of excitement caused by the event or condition' that makes the utterance admissible."); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of An Emerging Field*, 30 LAW & HUM. BEHAV. 119, 130 (2006) (noting that the law "presumes that statements made by one experiencing extreme emotional arousal are likely to be truthful because in such situations 'raw' emotion trumps the cognitive function necessary for deception").

6. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 38–39 (1988); see also Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 438 (2005) ("Historically, emotions were thought to be states of the mind that caused one to deviate from purely rational calculation"); Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 24 (1996) (noting that emotions were believed to be completely devoid of "any kind of thought").

7. Maroney, *supra* note 5, at 120 ("A core presumption underlying modern legality is that . . . the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong."). For example, jurors have been instructed to disregard their emotions and those of the litigants and witnesses. See *California v. Brown*, 479 U.S. 538, 542–43 (1987) (upholding a jury instruction providing that jurors should not be swayed by mere sentiment, passion, prejudice, etc.). Judges have been similarly

This view is starting to change. We now know that emotions “are not merely instinctive and uncontrollable, but are also partially cognitive” and based on complex beliefs about the subject of the particular emotion.⁸ As Martha Nussbaum has illustrated, we are more likely to *feel* anger (the emotion) toward someone who has caused us harm if we *believe* (cognitive) that it was intentionally or recklessly caused.⁹ Similarly, we *feel* compassion toward someone who has suffered precisely because we do not *believe* that he deserved the harm.¹⁰

Researchers have also discovered that emotions help people make decisions.¹¹ As a result of these findings, an increasing number of legal scholars have begun to explore the role of emotions in the law.¹² While most of this work has focused on the criminal

expected to feel no emotions about the parties or the issues before them or to suppress them rather than risk distorting the required “objective legal reasoning.” Maroney, *supra* note 5, at 132. Indeed, legal commentators have criticized judges who have argued that emotion and law could and should coexist. See Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC, May 2, 1994, at 13, 18 (critiquing Justice Blackmun’s jurisprudence as inappropriately emotional).

8. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 370 (1996); see also JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 5 (1988) (“[P]assions are at least in part cognitive states, states of *belief* and not just feeling . . .”) (emphasis in original); RONALD DE SOUSA, THE RATIONALITY OF EMOTION, at xvi (1987); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 3 (2001); Jones & Goldsmith, *supra* note 6, at 438 (“We now know that . . . emotions are by no means divorced from rational deliberation.”); Nussbaum, *Emotion in the Language of Judging*, *supra* note 6, at 25 (noting that emotions are based on complex beliefs); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 657 (1989) (describing emotion as representing “a sensory experience arising out of a cognitive assessment of an event, person or situation”).

9. Nussbaum, *Emotion in the Language of Judging*, *supra* note 6, at 25; see also Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1521 (2000) (“To change one’s emotions[,] . . . one has to change one’s mind. Emotions are cognitive at least in part, otherwise they would not be amenable to conscious change. . . .”); Pillsbury, *supra* note 8, at 675–76 (illustrating the cognitive element of emotions).

10. Nussbaum, *Emotion in the Language of Judging*, *supra* note 6, at 25.

11. See ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 53–54 (1994) (finding that patients with certain brain injuries which interfered with ability-to-feel emotions experienced difficulty making certain decisions, despite retention of cognitive capacity); Bandes, *supra* note 8, at 366 (“[R]easoning has an emotive aspect.”).

12. These scholars have concluded that legal reasoning cannot and should not be devoid of emotion. See Bandes, *supra* note 8, at 369 (“Legal reasoning, although often portrayed as rational, does not—indeed, cannot—transcend passion or emotion.”); Susan A. Bandes, *Introduction to THE PASSIONS OF LAW*,

law area,¹³ some scholars writing in this emerging “law and emotions”¹⁴ field have explored the role of certain emotions on alternative dispute resolution and on administrative, securities, tort, employment, and constitutional law.¹⁵ Yet, few scholars have

supra note 2, at 7, 11 (“[E]motion in concert with cognition leads to . . . better (more accurate, more moral, more just) decisions.”); William J. Brennan, Jr., *Reason, Passion, and “the Progress of the Law,”* 10 CARDOZO L. REV. 3, 9 (1988) (“[T]he judiciary had deprived itself of the nourishment essential to a healthy and vital rationality . . . [by ignoring] the range of emotional and intuitive responses to a given set of facts or arguments”); *id.* at 10 (“Sensitivity to one’s intuitive and passionate responses . . . is . . . not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.”); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987) (critiquing the law’s avoidance of emotion as “an impoverished view of reason”). This recognition is not new. Seventy-five years ago, legal realists noted that we cannot “get rid of emotions in the field of justice.” JEROME FRANK, *LAW AND THE MODERN MIND* 143 (1930).

13. See, e.g., JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); Bandes, *supra* note 8; Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U. PA. J. CONST. L. 520 (2003); Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Pillsbury, *supra* note 8, at 655 (discussing emotions and criminal sentencing); Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *THE PASSIONS OF LAW*, *supra* note 2, at 123 (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1947)).

14. Maroney, *supra* note 5, at 119–20 (“Law and emotion’ . . . might now be added to a family of interdisciplinary approaches that includes . . . law and economics and feminist jurisprudence.”).

15. See, e.g., ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005); Neal R. Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, 27 FORDHAM URB. L.J. 1633 (2000); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73 (2001); Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. S237 (2002); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000); Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059 (2003); Owen D. Jones, *Law, Emotions, and Behavioral Biology*, 39 JURIMETRICS 283 (1999); Posner, *supra* note 2; Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2095–2100 (1998); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002); *Symposium on Law, Psychology, and the Emotions*, 74 CHI.-KENT

examined the role of emotions in family law,¹⁶ perhaps because their role in divorce, child custody, and support cases, for example, is “so obvious”¹⁷ that describing their influence would merely add to legal actors’ frustration with their presence.

Nevertheless, examining in depth the role of emotion in family law is important for two reasons. First, the potential for harm resulting from emotions such as persistent anger and vengefulness may be greater in the family context. Unlike tort law or criminal law, for example, where the parties often did not share a preexisting relationship and are unlikely to share one after their legal dispute is resolved, parties in family law cases must frequently continue to interact. Second, most of the law and emotion literature has primarily focused on negative emotions, such as anger, disgust, and vengefulness,¹⁸ and much less so on positive emotions such as love, hope, and forgiveness.¹⁹ To the extent that society would benefit from both a reduction in negative emotions among its citizens and an increase in positive emotions, it is worthwhile to explore the law’s ability to facilitate both.²⁰ Few law and emotion scholars have

L. REV. 1423 (2000) (discussing the role of outrage); R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003).

16. Cf. Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 993–94 (2001) (critiquing THE PASSIONS OF LAW for “the relative absence of one area of doctrine often used to control and to indulge emotion: family law”); Maroney, *supra* note 5, at 134 (noting that “little of the self-identified law and emotion literature has entered the arena of family law, nor has the family-law literature sought specifically to extract useful insights from the emotion-and-law field”). *But see* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. (forthcoming 2008); Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in THE PASSIONS OF LAW, *supra* note 2, at 218 (arguing that the same sex marriage debate is heavily influenced by the “cultural construction of a particular emotion: romantic love”); Lynn D. Wardle, *All You Need Is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUD. 51 (2004) (examining love’s impact on family law); Janet Weinstein & Ricardo Weinstein, *“I Know Better Than That”: The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & FAM. STUD. 351 (2005).

17. Maroney, *supra* note 5, at 120 (noting that the assertion that emotion deeply influences family law cases is “so obvious as to make its articulation seem almost banal”).

18. Although these emotions are not inherently negative and may be desirable in some cases, as discussed *infra* Part I.A, they have the potential to cause significant harm when held onto for too long.

19. *But see* Kathryn R. Abrams & Hila Keren, *Law in the Cultivation of Hope* (bepress Legal Series, Working Paper No. 1205, 2006), available at <http://law.bepress.com/expresso/eps/1205>.

20. Cf. MURPHY & HAMPTON, *supra* note 8, at 8 (“[O]ne legitimate concern of politics and social life is a concern with what *kind of people* will grow up and flourish. Will their personalities be rich and full and integrated . . . ?”); Little, *supra* note 16, at 994 (arguing that “emotion theory could help fashion doctrine

assumed this task, however. This Article attempts to begin to fill this void in the literature by exploring the law's ability to cultivate forgiveness—"the resolute overcoming of the anger and hatred that are naturally directed toward a person who has done one an unjustified and non-excused moral injury"²¹—after separation and divorce.

One might wonder why the law should cultivate forgiveness (as opposed to other emotions) and why it should focus on divorce in particular. There are a number of reasons. First, although legal scholars have not explored forgiveness in any depth, in the last two decades, scholars in other fields have produced an impressive body of literature and empirical studies demonstrating the benefits of forgiveness, including a reduction in anger. Second, forgiveness may be particularly beneficial to divorcing couples and their children. Many divorced or separated parents are angry and want to punish the spouse who hurt and betrayed them. These emotions affect parents' interactions during the divorce process and in some cases cause excessive hostility and conflict for years after the legal relationship has ended.²²

Although lawmakers have attempted to reduce the acrimony present in many divorces, they have not fully succeeded. This Article argues that until divorced parents learn to forgive each other, their anger and hostility will continue to harm them and their

that harnesses the most constructive emotions . . . and encourages negative emotions to transform into those that improve family relationships"). There is an emerging literature which focuses on positive emotions' effect on decision making. See, e.g., Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, *supra* note 15; Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, *supra* note 15; Barbara L. Fredrickson, *What Good Are Positive Emotions?*, 2 REV. GEN. PSYCHOL. 300, 307 (1998) (arguing that positive emotions such as joy, love, and contentment broaden an individual's attentional focus and scope of cognition); Alice M. Isen, *An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues with Practical Implications*, 11 J. CONSUMER PSYCHOL. 75, 78–80 (2001); Alice M. Isen, *Positive Affect and Decision Making*, in HANDBOOK OF EMOTIONS 417 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989).

21. MURPHY & HAMPTON, *supra* note 8, at 15.

22. See ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE 36 (2004) (arguing that grief and anger "are most intense around time of separation but they may persist and recur over time"); ROBERT D. ENRIGHT & RICHARD P. FITZGIBBONS, HELPING CLIENTS FORGIVE: AN EMPIRICAL GUIDE FOR RESOLVING ANGER AND RESTORING HOPE 212 (2000) ("[M]any individuals experience the periodic emergence of extremely strong anger and rage meant for their ex-spouses years or even decades after the relationship has ended.").

children. Thus, lawmakers must explore ways to help parents forgive their former spouse. In other words, family law must cultivate forgiveness.

This Article proceeds in three parts. Part I briefly summarizes the empirical evidence demonstrating that interparental hostility and conflict are detrimental to both parents and children. Part II summarizes the law's efforts to reduce interparental anger and conflict and explains why such efforts have had limited success. Drawing from various forgiveness models developed by scholars in other disciplines, Part III explores the meaning and benefits of forgiveness. It then analyzes why and how the law should cultivate forgiveness: first, by making marital misconduct irrelevant in divorce, property, alimony, and custody and visitation proceedings; and second, by requiring high-conflict parents to participate in a forgiveness education program. These reforms, which this Article calls "Healing Divorce," may significantly reduce interparental hostility and conflict. Finally, Part III addresses some potential objections to this proposal and briefly examines the restorative justice movement, including South Africa's Truth and Reconciliation Commission, which demonstrates that policymakers have attempted to facilitate forgiveness in other contexts. Those efforts suggest that the law can cultivate forgiveness in the divorce context.

I. INTERPARENTAL HOSTILITY AND CONFLICT

Psychologists agree that even when the decision to divorce is mutual (which it rarely is),²³ "divorce is incredibly hard."²⁴ While most couples manage to divide their assets and agree on their children's living arrangements without litigation, these negotiations are often influenced by the parties' emotions.²⁵ The spouse who is ending the relationship may experience guilt while also resenting

23. See EMERY, *supra* note 22, at 37 (noting that in the author's twenty-five years of experience as a therapist, he has seen few cases where the decision to end the marriage is mutual); FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 21-22 (1991) (noting that in eighty percent of cases, one person decided to end the marriage before the other person wanted it to end); Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1168 (1988) ("In most cases, the decision to divorce [i]s not mutual . . .").

24. EMERY, *supra* note 22, at 13.

25. Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From The Divorce Context*, 21 LAW & SOC'Y REV. 585, 595 (1987) ("The emotional intensity of divorce is particularly evident when the decision to end the marriage is not mutual.").

the other spouse for his inability to move on.²⁶ The abandoned or “Left”²⁷ spouse—who, remarkably, often had no inkling that the marriage was in trouble²⁸—often feels angry, betrayed, rejected, hopeless, and vengeful.²⁹ These emotions are quite normal but, when left unacknowledged, destroy any hope for a “good divorce”³⁰ or cooperative parenting relationship.

A. *Effect on Parents*

Angry spouses often hurt the other spouse any way they can. Some contest the divorce, thereby delaying the inevitable, but causing the other spouse (and themselves) significant stress in the process.³¹ Others destroy valuable property, including homes and pets,³² and many publicly disparage the other spouse.³³ Casebooks

26. EMERY, *supra* note 22, at 37.

27. Robert E. Emery refers to the “Leaver” spouse and the “Left” spouse. *Id.*

28. *Id.* at 19, 37 (noting that the Left spouse is often shocked to learn that the other spouse wants a divorce).

29. *See id.* at 32 (noting that when individuals are hurt, they respond with anger and the desire to inflict pain); ENRIGHT & FITZGIBBONS, *supra* note 22, at 212 (noting that “[t]he divorce process is often associated with powerful feelings of sadness, anger, and mistrust” and that some people “frequently go through a mourning process that may be associated with strong feelings of betrayal rage,” while “[o]thers struggle with hatred and impulses to get revenge”); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1573 (1991) (observing that virtually everyone who experiences divorce is angry at some point); Melli et al., *supra* note 23, at 1152.

30. CONSTANCE AHRONS, *THE GOOD DIVORCE*, at x–xi (1994) (arguing that about half of all divorcing couples have a “good divorce,” one in which they part without destroying each other’s lives or that of their children in the process).

31. *See* Nancie L. Katz et al., *Sentenced Till Death! Warring Couple Wanted Split, but Jury Sez No*, N.Y. DAILY NEWS, Mar. 29, 2007, at 7 (discussing a bitter New York divorce involving a husband who refused to agree to a no-fault divorce and then challenged his wife’s petition for divorce on the ground of extreme cruelty); Dareh Gregorian, *New Affront in ‘War of Roses’ Divorce*, N.Y. POST, May 15, 2007, at 15 (discussing the same divorce dispute). The parties’ divorce had become so vicious that, when they both refused to vacate the marital home (even though they owned several other properties), the court ordered them to build a wall dividing their brownstone (which they did). *Taub v. Taub*, 822 N.Y.S.2d 154 (N.Y. App. Div. 2006). Surprisingly, after a ten-day trial, the jury denied the wife a divorce despite allegations of domestic violence. Katz et al., *supra*. She has since refiled for divorce based on subsequent acts of adultery and cruelty. Gregorian, *supra*.

32. *See* Anemona Hartocollis & Cara Buckley, *Divorce, Real Estate and Rubble: When Marriages Go Really Awry*, N.Y. TIMES, July 12, 2006, at B1. According to some divorce attorneys, “vindictiveness is not unusual,” and they have seen a divorcing spouse slash art and record collections or kill the other’s pets. *Id.* (quoting an attorney recalling an angry spouse who put a puppy in the

are filled with cases involving divorcing spouses' vengeful behavior,³⁴ and every matrimonial attorney and therapist has dozens of stories about the lengths to which divorcing clients have resorted to exact revenge on the other spouse, often using the children as pawns in their battles.³⁵

Interparental conflict is not only detrimental to children (as shown below), but to parents as well. One study found a strong correlation between interparental conflict and parents' emotional problems,³⁶ and other studies suggest that high-conflict parents are

microwave and a cat in a washing machine). In a recent case, a physician blew up his six million dollar home so that his ex-wife could never have it. Anthony Ramirez, *Doctor Dies From Wounds Suffered in East Side Blast*, N.Y. TIMES, July 17, 2006, at B5. Ironically, the doctor, who had vowed to turn his ex-wife from "gold digger" into an "ash and rubbish digger," died as a result of the burns and injuries he suffered in the explosion. *Id.*

33. For example, former New Jersey Governor James McGreevey has publicly called his estranged wife a "bitter, vengeful woman." Judith Lucas, *Frosty Day in Family Court*, STAR-LEDGER, Apr. 28, 2007, at 1 (quoting James McGreevey). Similarly, former presidential hopeful Rudolph Giuliani's divorce made headlines in 2001 when he allowed his attorney to characterize his estranged wife and mother of his children as "an uncaring mother." Helen Peterson, *Mansion's Their House or Ours?*, DAILY NEWS, May 17, 2001; see also Anne-Marie O'Neill et al., *Three's a Crowd*, PEOPLE, May 28, 2001, at 96; Michael Powell & Christine Haughney, *The Rudy and Judi Show, Act 3: Mayor Giuliani's 'Private' Life Gets Another Full Airing*, WASH. POST, May 22, 2001, at C1.

34. See, e.g., *Egle v. Egle*, 715 F.2d 999, 1003 (5th Cir. 1983); *Schutz v. Schutz*, 581 So. 2d 1290, 1291-92 (Fla. 1991); *Wolf v. Wolf*, 690 N.W.2d 887 (Iowa 2005); *Hendrickson v. Hendrickson*, 603 N.W.2d 896 (N.D. 2000).

35. Irwin Borof recounted the case of a man who was never able to let go of his anger after his wife won custody of their daughter. Irwin J. Borof, *Nuts & Bolts: Honey, I Want the Kids Part I—Temporary Custody Overview*, 25 FAM. L. NEWS 78, 79 (2003). Years passed and when the daughter reached adulthood and decided to get married, her father offered to pay for the wedding and give her an additional ten thousand dollars on the condition that she not invite her mother. The daughter agreed. *Id.*; see also AHRONS, *supra* note 30, at 82 ("[W]henever I [the divorced wife] know he [the ex-husband] wants something real bad, I don't give it to him. He really wanted to take the kids to his new in-laws over Christmas. I made sure they had other plans. It's the only way I can get back at him."). Warren Adler, the author of the novel *The War of the Roses*, has said that strangers frequently approach him by saying "you stole my divorce" and then proceed to tell him about their own nasty divorce. Hartocollis & Buckley, *supra* note 32, at B1 (quoting Warren Adler).

36. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 224 (1980) ("Continued friction between parents who had long been divorced was significantly linked to psychological instability, psychiatric illness, and, most particularly, to the loneliness of one or both adults.").

at increased risk for severe psychopathology and substance abuse.³⁷ Furthermore, anger toward the other parent, even in the absence of conflict, may be harmful to one's health.³⁸ Studies have found a correlation between long-term or unresolved anger and stress, high blood pressure, poor cardiovascular health, depression, anxiety, and low self-esteem.³⁹ Persistent anger may also interrupt sleep patterns and negatively affect academic or work performance.⁴⁰

Anger, resentment, and the desire for revenge are normal and healthy responses when one has been treated unjustly. A woman whose husband of fifteen years leaves her for his mistress *should* feel angry and vengeful. As philosopher Jeffrie Murphy has argued, anger is a sign of self-respect, and thus, the absence of anger in such a case would indicate a lack of respect for herself and for societal norms of marital behavior.⁴¹ The problem with emotions such as

37. Matthew Goodman et al., *Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce*, 42 FAM. CT. REV. 263, 266–67 (2004).

38. See GRAHAM B. SPANIER & LINDA THOMPSON, PARTING: THE AFTERMATH OF SEPARATION AND DIVORCE (1984); Karen Somary & Robert E. Emery, *Emotional Anger and Grief in Divorce Mediation*, 8 MEDIATION Q. 185, 185–86 (1991).

39. See ENRIGHT & FITZGIBBONS, *supra* note 22, at 114 (“Numerous studies have shown that anger and hostility are common among patients with depressive disorders.”); Radhi H. Al-Mabuk & Robert D. Enright, *Forgiveness Education with Parentally Love-Deprived Adolescents*, 24 J. MORAL EDUC. 427, 427 (1995) (stating that negative emotions have a negative effect on blood pressure); Richard Fitzgibbons, *Anger and the Healing Power of Forgiveness: A Psychiatrist's View*, in EXPLORING FORGIVENESS 63, 71 (Robert D. Enright & Joanna North eds., 1998); Fredrickson, *supra* note 20, at 301 (noting that negative emotions have a negative effect on cardiovascular health); Michael E. McCullough & Everett L. Worthington, Jr., *Promoting Forgiveness: A Comparison of Two Brief Psychoeducational Group Interventions with a Waiting-List Control*, 40 COUNSELING & VALUES 55, 55 (1995); Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice System?*, 27 FORDHAM URB. L.J. 1721, 1727 (2000) (describing the costs of chronic anger and bitterness).

40. Fitzgibbons, *supra* note 39, at 71.

41. See Jeffrie G. Murphy, Keynote Address, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 FORDHAM URB. L.J. 1353, 1359 (2000) (“[L]ack of resentment reveals a servile personality—a personality lacking in respect for himself and respect for his rights and status as a free and equal moral agent.”). Murphy also noted that resentment toward those who hurts us also shows our “allegiance to the moral order itself.” *Id.* Adultery and cruelty unquestionably violate the moral order, as evidenced by most states’ retention of traditional fault-based grounds for divorce. These grounds signal the type of behavior that clearly violates accepted marital norms. Further, nine out of ten Americans believe that extramarital affairs are “always wrong” or “almost always wrong.” Jackie Calmes, *Americans Retain Puritan Attitudes on*

“resentment, anger, hatred, and the desire for revenge”⁴² is that they have the potential to become all-consuming and take over one’s life.⁴³ Nowhere is this problem more evident than in the divorce context.

B. Effect on Children

Although divorcing parents experience a host of emotions, the most destructive emotion as far as children are concerned is anger.⁴⁴ Angry parents sometimes refuse to reach a parenting time agreement; denigrate the other parent to the children; deny, interfere with, or place unrealistic restrictions on visitation;⁴⁵ withhold child support; or, although not common, make false accusations of abuse.⁴⁶ An angry spouse may also launch a custody battle out of spite.⁴⁷ While some parents contest custody or

Matters of Sex—Ninety Percent Oppose Adultery; Divorce Criticized, WALL ST. J., Mar. 5, 1998, at A12 (reporting the results of a 1998 Wall Street Journal/NBC News poll of 2004 adults).

42. Murphy, *supra* note 41, at 1355.

43. MURPHY & HAMPTON, *supra* note 8, at 105.

44. EMERY, *supra* note 22, at 30.

45. See, e.g., *Egle v. Egle*, 715 F.2d 999, 1003 (5th Cir. 1983) (finding that the mother had tried to “impregnate the children’s minds against their father” (alteration in original)); *Schutz v. Schutz*, 581 So. 2d 1290, 1291–92 (Fla. 1991) (finding that the mother had “brainwashed” the children into “hat[ing], despis[ing] and fear[ing]” their father); *Smith v. Smith*, 434 N.E.2d 749 (Ohio Ct. App. 1980) (holding the mother in contempt for interfering with the father’s visitation rights); *Hendrickson v. Hendrickson*, 603 N.W.2d 896 (N.D. 2000) (finding that the mother had repeatedly interfered with visitation and alienated the children from their father); WALLERSTEIN & KELLY, *supra* note 36, at 125 (describing how parents have used “a thousand mischievous, mostly petty, devices designed to humiliate the visiting parent and to deprecate him in the eyes of his children”).

46. See Nat Stern & Karen Oehme, *Defending Neutrality in Supervised Visitation to Preserve a Crucial Family Court Service*, 35 SW. U. L. REV. 37, 53 (2005) (“[A]lthough a few highly publicized cases suggest otherwise, studies have shown that false abuse allegations are not common in disputed custody cases.”) (citing Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 CT. REV. 12, 12 (1998)); Nancy Thoennes & Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 153 (1990).

47. Although less than five percent of all custody disputes go to trial, there are approximately 100,000 custody battles in the United States each year. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 131 (2002); Ira Daniel Turkat, *On the Limitation of Child-Custody Evaluations*, 42 CT. REV. 8, 8 (2005). Furthermore, some parents start preparing for a custody dispute from the moment they realize they are getting a divorce. For example, some attorneys advise their clients to avoid speaking

parenting time schedules because they are genuinely concerned about their children's best interests, negative emotions are often "the deeper, underlying force driving these actions."⁴⁸

According to some estimates, as many as one-third of all divorces are accompanied by "intense hostility and/or bitter legal conflict,"⁴⁹ and in as many as twenty-five percent of divorced families, high levels of parental conflict continue long after the divorce is final,⁵⁰ even if only one parent is angry and the other parent wants peace.⁵¹ Some parents return to court repeatedly to resolve minor disputes such as "one-time changes in the timeshare schedule, telephone access, vacation planning, and decisions about the children's after-school activities, health care, child care, and child-rearing practices."⁵² Each trip to the courthouse reinforces

with their former spouse and "to search . . . their memories" for information that will portray the other spouse negatively. Kelly, *supra*, at 131.

48. EMERY, *supra* note 22, at 34; Karen Laing, *Doing the Right Thing: Cohabiting Parents, Separation and Child Contact*, 20 INT'L J.L. POL'Y & FAM. 169, 176 (2006) (citing study of divorcing parents finding that "[p]arents justified their conflict and court battles as being 'in the best interests of the child'").

49. Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 567 (2000).

50. "There is some ambiguity about the number of divorces that become 'high conflict.' The estimates generally range from 10–30%." Weinstein & Weinstein, *supra* note 16, at 352 n.4; see also Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 290 (2006) (noting that twenty-five percent of parents are high-conflict); Goodman et al., *supra* note 37, at 263 (stating that "10% to 25% of divorced families remain highly conflicted long after separation"). *But see* John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005) (noting that for ten to fifteen percent of families, "conflict continues at a high level for years following the formal divorce decree").

51. Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 41 (2006) (noting that "not all couples described as 'high-conflict' after divorce involve two uncooperative . . . parents" but considered cases where one parent "wishes to avoid continuing conflict litigation whereas the other parent remains invested in vengeance, control, angry behaviors, and repeated motions to the court").

52. Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 246–47 (2004); see also Kelly, *supra* note 47, at 142–43. The most common disputes bringing high-conflict parents to court repeatedly involve the following:

scheduling (e.g., does the Christmas transfer take place at noon or 2 p.m.), transition details and places, holiday and vacation planning (e.g., both parents want the same two-week vacation in July), children's activities that are scheduled on the other parents' time

parents' hostility toward each other.⁵³ Given that the majority of children whose parents divorced were six years of age or younger when their parents separated,⁵⁴ some children could be exposed to their parents' conflict for most of their childhood years.

1. *Psychological, Emotional, and Behavioral Problems*

Ideally, children should never be exposed to their parents' conflict.⁵⁵ Unfortunately, many children routinely overhear their parents arguing over child support and parenting time schedules. Furthermore, although parents should encourage their children to love and respect the other parent and should never ask them to "choose" one parent over the other, some parents expect children to take sides and make them feel guilty for defending the other parent. Parents also share their negative assessment of the other parent's character, behavior, and parenting skills with their children. Even when parents never actually say anything about the other parent, their silent disapproval of the child's relationship with that parent may be just as harmful to the child's emotional well-being.⁵⁶

Children "caught in the crossfire of parental acrimony"⁵⁷ are at higher risk for a myriad of emotional, behavioral, and psychological problems. Studies have repeatedly shown that interparental conflict and hostility are primary determinants of children's poor adjustment to divorce, placing them at higher risk for depression, anxiety, low self-esteem, and behavioral problems.⁵⁸ Not

without joint decision or consultation, child rearing (e.g., diet, bedtimes, homework, permissible movies), and make-up time when parents travel for business[,] . . . family rituals (e.g., whether the children can attend paternal grandmother's eightieth birthday party that occurs on mother's time), or school (e.g., the child's need for special tutoring, which father opposes).

Kelly, *supra* note 47, at 143.

53. Coates et al., *supra* note 52, at 246–47 (asserting that relitigating reinforces the parties' view of the other parent as the enemy).

54. Bruch, *supra* note 50, at 287. Seventy-five percent of these children are under the age of three. *Id.* at 287 n.27.

55. This does not mean that children would be oblivious to their parents' true feelings toward each other. Children, especially older children, might be quite attuned to their parents' emotions despite parents' efforts to shield them from the conflict and hostility.

56. See *Kemp v. Kemp*, 399 A.2d 923, 928 (Md. Ct. Spec. App. 1979), *rev'd on other grounds*, 411 A.2d 1028 (Md. 1980) (noting that the child sensed his mother's disapproval of his visitation with his father); *Eldridge v. Eldridge*, 42 S.W.3d 82, 90 (Tenn. 2001) (noting that a child, "like many children of divorce, [was] caught in the crossfire of parental acrimony" and sensed that her father disapproved of her overnight visits with her mother and lesbian partner).

57. *Eldridge*, 42 S.E.3d at 90.

58. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD*:

surprisingly, repeated exposure to their parents' disapproval and anger toward the other parent increases children's risk of emotional distress and loyalty conflicts.⁵⁹ Interparental hostility may also negatively affect children's cognitive and social development.⁶⁰

2. *Inadequate Parenting*

While most children of divorcing parents experience some difficulties adjusting to their parents' separation, children from high-conflict divorce families might not be able to rely on their parents to help them cope. Divorcing parents' own difficulties coping with the separation and their emotions often hinder their ability to parent.⁶¹ Recently divorced parents are less likely to discipline their children or to monitor their academic progress,

SOCIAL AND LEGAL DILEMMAS OF CUSTODY 248 (1992) (noting that teenagers caught in the middle of parental conflict "showed more symptoms of maladjustment (for example, depression and deviant behavior) than those who did not"); Cheryl Buehler et al., *Interparental Conflict and Youth Problem Behaviors: A Meta-Analysis*, 6 J. CHILD & FAM. STUD. 233, 233, 238 (1997) (conducting a meta-analysis of sixty-eight studies and finding that association between interparental conflict and child adjustment problems was almost twice as high as the effect of divorce on children); Kathleen A. Camara & Gary Resnick, *Interparental Conflict and Cooperation: Factors Moderating Children's Post-Divorce Adjustment*, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN 169, 191-92 (E. Mavis Hetherington & Josephine D. Arasteh eds., 1988) ("The degree of interparental cooperation in the postdivorce period, as well as the conflict resolution styles used by each spouse to regulate disagreements, appear to be important factors that determine the children's psychosocial adjustment 2 years following the divorce."); Coates et al., *supra* note 52, at 247-48; Janet R. Johnston et al., *The Psychological Functioning of Alienated Children in Custody Disputing Families: An Exploratory Study*, 23 AM. J. FORENSIC PSYCHOL. 39, 55 (2005) ("[T]he whole group of children of high-conflict custody disputes . . . on average, are two to five times more likely to have clinical levels of disturbance compared to the normal population."); Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANN. REV. SOC. 235, 253-54 (1994).

59. Goodman et al., *supra* note 37, at 265-66.

60. *Id.* at 265; Lawrence A. Kurdek, *An Integrative Perspective on Children's Divorce Adjustment*, 36 AM. PSYCHOLOGIST 856, 860 (1981) (reporting that parental conflict hinders social development and cognitive skills for years after the divorce is finalized).

61. See ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 217 (1994) ("Parental conflict throughout the divorce transition is a consistent predictor of maladjustment among children, as is the less adequate parenting that characterizes most divorces, at least temporarily."); Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Client's Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 142 (1998) ("During and after divorce, many children must endure, at least temporarily, an absence of effective parenting due to one or both parents' preoccupation with their own stress.").

activities, and whereabouts.⁶² This deterioration in parenting skills is even greater among parents who experience continuing conflict with the former spouse.⁶³ Positive parenting skills, such as responsiveness and understanding of children's needs, tend to decrease when interparental conflict is high, while bad parenting practices, such as yelling and harshness, tend to increase.⁶⁴ Parents may also displace their anger toward the other parent onto their children.⁶⁵ In short, high-conflict parents "may become more hostile, aggressive, or withdrawn from their children and more inconsistent in their discipline."⁶⁶

This decline in parenting skills might be explained by the higher incidence of mental health problems among parents involved in high-conflict divorces. As shown above, high-conflict parents tend to have a higher incidence of emotional problems and might be at higher risk for more severe mental health problems.⁶⁷ Not surprisingly, researchers have found a link between parental psychopathology and poor child adjustment.⁶⁸ A depressed or anxious parent is less likely than an emotionally stable parent to adequately monitor or discipline their children.⁶⁹ A child who

62. MICHAEL R. STEVENSON & KATHRYN N. BLACK, HOW DIVORCE AFFECTS OFFSPRING: A RESEARCH APPROACH 42 (1995) ("Sometimes temporarily and sometimes permanently, divorced parents are likely to have problems meeting all of the responsibilities of healthy parenting. Houses may not be kept clean; bedtime and mealtime routines may disappear; homework may not be checked. Children may in general not be supervised . . .").

63. Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 24 (2005) (describing attempts by separating parents to "ton win their children's loyalty by indulging them materially or by giving them inappropriate autonomy").

64. Goodman et al., *supra* note 37, at 266.

65. ENRIGHT & FITZGIBBONS, *supra* note 22, at 212-13 (noting that many parents experience "guilt when they realize that their anger often is displaced toward a significant other who does not deserve it, such as . . . a child who reminds them of the ex-spouse").

66. Grych, *supra* note 50, at 99; *see also* STEVENSON & BLACK, *supra* note 62, at 42 (noting that "parents may be more critical and less positive").

67. *See supra* Part I.A.

68. *Id.*; *see also* WALLERSTEIN & KELLY, *supra* note 36, at 224 ("A central cause of poor outcome for the children and the adolescents was the failure of the divorce to result in a reasonable adjustment to it by the parents.").

69. *See* Gene H. Brody & Rex Forehand, *Multiple Determinants of Parenting: Research Findings and Implications for the Divorce Process*, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN, *supra* note 58, at 128; Bruch, *supra* note 50, at 287 (citing studies finding that "[s]tressed-out parents provided only 'seriously diminished parenting' during the upheaval, and the younger children suffered the most serious consequences"); M. S. Forgatch et al., *A Mediational Model for the Effect of Divorce on Antisocial Behavior in Boys*, in IMPACT OF DIVORCE, SINGLE

experiences inadequate parenting is at increased risk for emotional and behavioral problems—another example of how interparental conflict is detrimental to children.

3. *Paternal Disengagement*

Anger and interparental conflict also harm children by increasing the likelihood that nonresidential parents (usually fathers) will emotionally and financially abandon them. In recent years, social scientists and legal scholars have explored the reasons why as many as twenty-six percent of nonresidential fathers have little or no contact with their children two to three years after divorce.⁷⁰ Although the reasons are many and complex, the nonresidential father's relationship with his children's mother might be the strongest predictor of post-divorce paternal contact.⁷¹

Studies have found a strong correlation between interparental conflict and a decline in children's contact with their nonresidential fathers.⁷² One reason is that custodial mothers who are hostile toward their former spouses are more likely to interfere with the father's access to the children, by not making the children available for visitation, making the children feel guilty for seeing their father, or disparaging the father in their presence.⁷³ Second, even when mothers do not interfere with visitation, fathers in high-conflict relationships with their children's mothers sometimes curtail contact with their children because they find interacting with the mother difficult, or they believe (whether correctly or not) that she

PARENTING, AND STEPPARENTING ON CHILDREN, *supra* note 58, at 144.

70. See Kelly, *Children's Living Arrangements*, *supra* note 51, at 38; Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 946–47 (2005).

71. Maldonado, *supra* note 70, at 946–47 & nn.123–27, 979; see also TERRY ARENDELL, *FATHERS & DIVORCE* 145 (1995) (“[F]ormer spousal conflict was the primary explanation for fathers’ parental disengagement”); Geoffrey L. Greif, *When Divorced Fathers Want No Contact with Their Children: A Preliminary Analysis*, 23 J. DIVORCE & REMARRIAGE 75, 79 (1995) (noting that sixty-four percent of nonresidential fathers who had little contact with their children cited problems with their former spouses as the main reason for the lack of contact).

72. See E. Mavis Hetherington et al., *Marital Transitions, A Child's Perspective*, in READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES 45, 55 (Frederica K. Lombard ed., 1990) (finding that “high rates of continued aggression and conflict between the divorced parents is [sic] associated with the gradual loss of contact of the noncustodial parent”).

73. See WALLERSTEIN & KELLY, *supra* note 36, at 125 (describing how former wives have used “a thousand mischievous, mostly petty, devices designed to humiliate the visiting parent and to deprecate him in the eyes of his children”); Maldonado, *supra* note 70, at 980 (noting that “researchers estimate that one-third to one-half of residential mothers interfere with visitation”).

has “brainwashed” the children or will soon turn them against him.⁷⁴ Finally, noncustodial parents may distance themselves from their children because contact reminds them of what they have lost as a result of the divorce, thereby increasing their anger.

There is some evidence that paternal contact is beneficial to children. Some studies have found a correlation between regular paternal contact and children’s adjustment to the divorce, higher self-esteem, lower rates of depression, fewer behavioral problems, and higher levels of cognitive development. Researchers have also found a link between high rates of paternal contact and children’s lower rates of drug abuse, teenage pregnancy, truancy, academic underachievement, and antisocial and criminal behavior.⁷⁵ While other studies have found no correlation between frequent paternal contact and children’s educational and social outcomes,⁷⁶ even those researchers “remain convinced that when parents are able to cooperate in childrearing after a divorce and when fathers are able to maintain an active and supportive role, children will be better off in the long run.”⁷⁷

Despite the mixed evidence of the benefits of paternal contact, two things are certain. First, most children want to see their fathers and feel rejected and abandoned when contact is rare.⁷⁸ They “experience sadness and even severe depression” when they have little contact with their nonresidential fathers.⁷⁹ Second, children whose fathers pay child support tend to perform better academically and experience fewer behavioral and social problems than children whose fathers do not pay support.⁸⁰ Not surprisingly,

74. One father stated that the mother had “worked very hard for three years” to successfully alienate the children from him. Greif, *supra* note 71, at 80. Another father who had not seen his teenage children in three years wrote that their mother had “brainwashed” them to have no contact with him. *Id.*

75. Maldonado, *supra* note 70, at 949–61 (citing studies).

76. Frank F. Furstenberg, Jr. et al., *Paternal Participation and Children’s Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695, 697–99 (1987) (“[C]hildren in maritally disrupted families were not doing better if they saw their fathers more regularly than if they saw them occasionally or not at all.”).

77. FURSTENBERG, JR. & CHERLIN, *supra* note 23, at 73 (emphasis added). Further, at least one study has found that when parents cooperate, paternal visitation has a positive effect on children’s well-being. See Bruch, *supra* note 50, at 290.

78. See WALLERSTEIN & KELLY, *supra* note 36, at 218–19 (noting that children have lower self-esteem when the noncustodial parent has only limited contact with them).

79. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 907 (1984).

80. See Scott Altman, *A Theory of Child Support*, 17 Int’l J.L. Pol’y & Fam.

fathers who do not regularly see their children are significantly less likely to pay child support.⁸¹ Thus, for these two reasons alone (children's feelings of abandonment and the loss of child support), paternal disengagement is likely to be detrimental to children.

II. REDUCING ACRIMONY

Lawmakers have long sought to make the divorce process less acrimonious and to reduce interparental conflict and hostility. For example, no-fault divorce reform was driven, in part, by the hope that it would significantly reduce the blame and bitterness that accompanied fault-based divorce.⁸² Lawmakers' widespread support for mediation and parenting education is similarly motivated by the desire to reduce spousal hostility and conflict.⁸³ Yet, too many parents are still unable to let go of their anger toward the other parent even as it negatively affects their emotional and physical well-being and that of their children. In order to appreciate lawmakers' efforts to reduce interparental conflict and hostility, one must first understand how family law has historically legitimized and cultivated certain emotions. This Section briefly traces the history of divorce law in the U.S. and explores why it has not significantly reduced the bitterness and vengefulness that characterize some divorces.

A. *The Problem with Fault*

For most of American history, a spouse who wanted a divorce had to show that the other spouse had committed a marital fault as defined under state law—e.g., adultery, extreme cruelty, or abandonment.⁸⁴ The expression of anger and grief was often part of

173, 190 (2003); Douglas B. Downey, *The School Performance of Children from Single-Mother and Single-Father Families: Economic or Interpersonal Deprivation?*, 15 *J. Fam. Issues* 129, 132 (1994) (observing that "the father's financial support [is] related to lower problem behavior among children").

81. Fewer than twenty percent of fathers who have no contact with their children pay child support. In contrast, two-thirds of fathers who maintain frequent contact with their children pay child support. Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role After Separation*, 53 *J. Marriage & Fam.* 79, 87–89 (1991); see also Greif, *supra* note 71, at 79 (noting a correlation between consistent payment of child support and visitation).

82. *See infra* Part II.B.

83. *See infra* Part II.C.

84. Some states had additional grounds such as habitual drunkenness or addiction, impotence, deviant sexual acts without the petitioning spouse's consent, insanity, and incarceration or institutionalization for a statutory period. *See, e.g.*, N.J. STAT. ANN. §§ 2A:34-2, 34-6 (West 2000); N.Y. DOM. REL. LAW § 170 (McKinney 1999); S.C. CODE ANN. § 20-3-10 (1985).

the process of obtaining a fault-based divorce. For example, until 1967, adultery was the only ground for divorce in a number of states. Thus, a man who wanted to legally end his marriage had to show that his wife had engaged in a sexual act with another man. This might require that he hire a private investigator to follow and photograph her with her paramour in a compromising position or that their child testify as to what he saw or heard between his mother and her paramour when his father was not home.

Thus, by requiring evidence of fault, divorce law has historically cultivated negative emotions such as anger, humiliation, and vengefulness. The husband who sought a divorce faced the emotionally difficult task of collecting evidence of his wife's extramarital affair and possibly exposing his children to its painful details. Because direct evidence of adultery is rare, the husband might have had to describe for the court the circumstantial evidence of his wife's betrayal, possibly triggering feelings of anger, betrayal, humiliation, and disgust.

The availability of a tort action against a spouse's paramour further legitimized these emotions. Until 1948, when states began abolishing these causes of action, every state except Louisiana allowed a jilted spouse to sue his or her wife's paramour for alienation of affections.⁸⁵ A spouse who established that the defendant had engaged in "wrongful and malicious acts" which interfered with his marriage and caused him to lose his spouse's affection or consortium⁸⁶ could recover substantial damages. More importantly (as far as many plaintiffs were concerned), a spouse could get revenge. Courts were aware that anger and the desire for vengeance were often the driving forces behind these suits,⁸⁷

85. In *Rotwein v. Gersten*, 36 So. 2d 419, 420–21 (Fla. 1948) (en banc), Florida became the first state to abolish the claim. Other states soon followed. See *Bland v. Hill*, 735 So. 2d 414, 426–27 & nn.3–4 (Miss. 1999) (McRae, J., concurring in part and dissenting in part) (listing statutes and cases). Only Mississippi, Illinois, Hawaii, New Mexico, North Carolina, South Dakota, and Utah still recognize the tort of alienation of affections. *Helsel v. Noellsch*, 107 S.W.3d 231, 235 (Mo. 2003).

86. *Young v. Young*, 184 So. 187, 190 (Ala. 1938) (recognizing a husband's right to sue a man who engaged in a sexual relationship with his wife or who robbed him of her "conjugal affection, society, fellowship and comfort"); *Bland*, 735 So. 2d at 417; *McCutchen v. McCutchen*, 624 S.E.2d 620, 623 (N.C. 2006); *Pankratz v. Miller*, 401 N.W.2d 543, 549 (S.D. 1987) ("The acts which lead to the loss of affection must be wrongful and intentional, calculated to entice the affections of one spouse away from the other . . .").

87. See *Neal v. Neal*, 873 P.2d 871, 875 (Idaho 1994) (noting revenge may be a motive in these types of suits); *Bland*, 735 So. 2d at 426 (McRae, J., concurring in part and dissenting in part) ("[E]ven genuine actions of this type are brought more frequently than not with purely mercenary or vindictive

especially in cases where the adulterous spouse later married his or her paramour. In those cases, a suit against the paramour enabled an angry spouse to also punish the cheating spouse—at least financially.

Although other states recognized additional grounds for divorce, these grounds similarly cultivated the expression of negative emotions even if only for the court's benefit. For example, in states that recognized several grounds for divorce, cruelty was often the ground of choice. In a typical case, the petitioning wife had to allege specific acts of physical or mental cruelty, describing for the court how her husband had abused, belittled, and humiliated her. She also had to show that this course of conduct had caused her serious emotional harm. Even if the divorce was uncontested, some courts required the petitioning spouse to describe the alleged cruel acts, thereby facilitating and indeed requiring the expression of emotion in the courtroom. A spouse who maintained her composure while describing her husband's acts of cruelty risked a determination that the alleged acts were not sufficiently cruel or had not significantly impacted her mental health.⁸⁸ In contested divorces, the trial was always fraught with emotion as the parties submitted detailed evidence of each party's wrongdoings and shortcomings during the marriage.

Marital fault and the emotions that often accompanied attempts to establish fault were not only prerequisites to divorce, but were also relevant to determinations of child custody, alimony, and the division of the marital assets.⁸⁹ For example, a dependent spouse who committed a marital fault, in effect, forfeited any claim to alimony.⁹⁰ A court could also consider a supporting spouse's marital misconduct when awarding the innocent spouse alimony. Thus, divorcing spouses had strong economic incentives to portray themselves as saintly and the other spouse as evil. A wife might not have been satisfied to simply show that her spouse had committed

motives . . ."); *Helsel v. Noellsch*, 107 S.W.3d 231, 233 (Mo. 2003) (stating that "revenge . . . is the [sic] often the primary motive" behind actions for alienation of affections); *cf.* ENRIGHT & FITZGIBBONS, *supra* note 22, at 210 ("Marital infidelity results in some of the most powerful anger that one can encounter.").

88. *Hodge v. Hodge*, 837 So. 2d 786, 788–90 (Miss. Ct. App. 2003) (denying divorce on the ground of cruelty even though the wife's emotional distress was sufficiently severe to require medical treatment).

89. Herma Hill Kay, *No Fault Divorce and Child Custody: Chilling out the Gender Wars*, 36 FAM. L.Q. 27, 30 (2002). Although the tender years presumption provided that young children should reside with their mothers, mothers who committed adultery were unlikely to be awarded custody if the father contested it. *Id.*

90. *Id.*

adultery, but would have been wise to tearfully describe the egregious details of her husband's extramarital affair—how he publicly carried on with his mistress and humiliated her before their entire community, without regard for his children's emotional well-being.

A plaintiff filing for divorce on the ground of extreme cruelty had similar economic incentives to establish that the other spouse's acts were unusually cruel and hurtful. Although seventy-five percent of all divorces were uncontested and most couples negotiated their own custody, alimony, and marital property agreements, these were bargained for in the shadow of the law.⁹¹ Thus, fault and the emotions that accompanied divorce were often present, even if unacknowledged.

B. The Need for Reform: Eliminating Fault

Lawyers, judges, and many divorcing spouses were dissatisfied with the fault-based system for several reasons. Lawyers felt uneasy allowing (and sometimes advising) their clients to fabricate grounds for divorce, effectively perjuring themselves in order to end the marriage. Further, the difficulty of obtaining a divorce in their own state led many spouses to seek migratory divorces from sister states or other countries with laxer divorce laws.⁹² These divorces were not always recognized by their own state and created a host of problems for individuals who sought to remarry someone else.⁹³ Most importantly for purposes of this Article, critics of the fault-based system argued that fault "raised the level of intensity, bitterness, and acrimony of divorce proceedings."⁹⁴

91. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

92. See, e.g., *Clagett v. King*, 308 A.2d 245, 246 (D.C. 1973); *Fink v. Fink*, 346 N.E.2d 415, 417–18 (Ill. App. Ct. 1976).

93. For example, in *Williams v. North Carolina*, 325 U.S. 226 (1945), two North Carolina domiciliaries went to Nevada without their respective spouses. After they remained in Nevada for the requisite six weeks to establish domicile in the state, they divorced their respective spouses, married each other, and returned to North Carolina where they were arrested for bigamy. *Id.* at 226. Refusing to recognize the Nevada divorce, the North Carolina courts held that the newlyweds were still married to their original spouses. *Id.* The Supreme Court affirmed. *Id.*; see also *Fink*, 346 N.E.2d at 416 (refusing to recognize a Nevada divorce decree obtained by an Illinois domiciliary).

94. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2556 (1994); Marygold S. Melli, *Whatever Happened to Divorce?*, 2000 WIS. L. REV. 637, 637 ("The no-fault reformers were concerned about the hostility, acrimony, and bitterness that divorce generated and attributed it to a process that authorized divorce only on a judicial finding that one party was at fault for violating certain statutory

Critics sought to replace the adversarial fault-based divorce process with one that would “remove the weapons of blame and retaliation from embattled spouses.”⁹⁵ When California legislators passed the first no-fault statute in 1969, allowing spouses to end their marriage based on “irreconcilable differences,”⁹⁶ they envisioned a system that would “enable parties to end their marriage as amicably as possible.”⁹⁷ The drafters of the Uniform Marriage and Divorce Act had similar expectations.⁹⁸

This goal has not been achieved for several reasons. Although every state currently has some form of no-fault divorce, the majority of states, rather than eliminating fault grounds, merely added a no-fault ground to their fault-based system.⁹⁹ In addition, some states’ no-fault grounds require that spouses live separate and apart for a lengthy period (ranging from six months to three years), thereby making a no-fault divorce lengthier than one based on fault.¹⁰⁰

standards.”).

95. Kay, *supra* note 89, at 33; *see also* JUDITH AREEN, *FAMILY LAW* 373 (4th ed. 1999).

96. The statute expressly provided that “evidence of specific acts of misconduct shall be improper and inadmissible.” CAL. CIV. CODE. §§ 4506, 4509 (repealed 1994). Before 1969, a few states granted divorces on the no-fault ground of living separate and apart for a certain statutory period so long as both spouses agreed to end the marriage. *See* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 877 (1994); *see also* AREEN, *supra* note 95, at 371 n.1 (discussing Kentucky’s 1850 no-fault statute authorizing divorce for spouses who had been living apart for five years). However, California was the first state to eliminate fault grounds in favor of a no-fault system. *Id.*

97. Melli, *supra* note 94, at 637.

98. The Uniform Marriage and Divorce Act (“UMDA”) provides that a court shall grant a divorce if the marriage is “irretrievably broken,” as shown by evidence that the parties have lived “separate and apart for . . . more than 180 days” or “there is serious marital discord adversely affecting the attitude of one of both of the parties toward the marriage.” UNIF. MARRIAGE & DIVORCE ACT § 302 (amended 1973).

99. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 911 chart 4 (2000) (showing that thirty-two states simply added a no-fault ground to their fault grounds).

100. For example, New York’s no-fault ground is living separate and apart for twelve months after (1) the parties have obtained a judicial decree of separation (which can only be obtained on fault-based grounds) or (2) the parties have executed a separation agreement. N.Y. DOM. REL. LAW §§ 170(5)–(6) (McKinney 1999). Thus, to obtain a no-fault divorce, both parties have to consent or one party must have grounds for a separation. *Id.*; *see also* MO. ANN. STAT. § 452.320 (West 2003) (allowing no-fault divorce only where both parties agree); TEX. FAM. CODE ANN. § 6.006 (Vernon 2006) (stipulating that the no-fault ground requires a separation period of three years); UTAH

Further, even after one party files for a no-fault divorce, the other party can file on fault grounds and the court has discretion to award a fault-based divorce.¹⁰¹ These divorces are often no less bitter than those that precipitated the no-fault revolution. This is especially true in jurisdictions that require or authorize courts to consider fault when dividing marital assets and awarding alimony.¹⁰² In these jurisdictions, not surprisingly, the parties expend considerable energy attempting to demonstrate the other spouse's responsibility for the marital breakdown.¹⁰³

Moreover, "no-fault divorce did not end the bitterness of the divorce process," even in those jurisdictions that eliminated fault

CODE ANN. § 30-3-1(3)(j) (2007).

101. See *Robertson v. Robertson*, 211 S.E.2d 41, 43 (Va. 1975) (holding that "where a court has a choice between a cause of action for a 'no fault' divorce and a cause seeking to fix fault," the court can select the ground upon which to grant the divorce).

102. See, e.g., FLA. STAT. ANN. § 61.08(1) (West 2006) ("The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded."); GA. CODE ANN. § 19-6-1(b) (2004) ("A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion."); N.C. GEN. STAT. § 50-16.3A(b) (2000) ("If the court finds that the dependent spouse participated in an act of illicit sexual behavior . . . the court shall not award alimony."); S.C. CODE ANN. § 20-3-130(A) (1985); *Allen v. Allen*, 648 So. 2d 359, 361 (La. 1994) ("Although no-fault divorce is now available, freedom from fault is still necessary for permanent alimony."); *Kurz v. Kurz*, 443 N.W.2d 782, 787 (Mich. Ct. App. 1989) (finding that fault is a valid consideration in dividing marital assets and awarding alimony); *Hammonds v. Hammonds*, 597 So. 2d 653, 655 (Miss. 1992) (awarding a wife who committed adultery minimal alimony). Twenty-two states treat fault as relevant when deciding whether to award alimony and in what amount, and another eight consider it in extreme or egregious cases. See, e.g., *Mani v. Mani*, 869 A.2d 904, 917 (N.J. 2005) (considering fault only if egregious). Some courts consider the supporting spouse's adultery, ordering him to make higher alimony payments than would otherwise be merited. See N.C. GEN. STAT. § 50-16.3A (2000) ("If the court finds that the supporting spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse."); *Abercrombie v. Abercrombie*, 643 S.E.2d 697 (S.C. Ct. App. 2007) (considering a husband's adultery when awarding his wife alimony). Most states consider economic fault (i.e., waste or dissipation of assets during the marriage). See *Mani*, 869 A.2d at 915; *Woodhouse*, *supra* note 94, at 2534–35.

103. *Allen*, 648 So. 2d at 361 (discussing a husband who attempted to challenge his wife's alimony petition, claiming that she was not "free from fault" as required by Louisiana law because she had criticized his family and hometown, objected to his charitable contributions, and "argu[ed] 'back and forth'").

completely.¹⁰⁴ As some family law scholars have noted, no-fault divorce advocates were naive to expect that simply removing fault from the legal process would eliminate the animosity and emotion that had characterized divorce proceedings under the fault-based system.¹⁰⁵ Professor Melli's recollection of being asked to testify in support of a no-fault divorce bill perfectly describes many spouses' sentiments. When a Senator requested that she support a no-fault divorce bill, explaining that it would remove "all the hostility and bitterness we see in divorce now," she replied: "Senator, . . . if my husband of twenty years decides he prefers a new—probably younger—wife to me, I want you to know that I will be just as spiteful and bitter and uncooperative as I can. And I don't care what you call it."¹⁰⁶

She was right. In cases where only one party wants to exit the marriage, the legal irrelevance of fault has not made the process any less bitter. To the contrary, no-fault divorces are sometimes more acrimonious because they fail to provide a betrayed or abused spouse with a venue where he can express his anger, indignation, and desire for revenge. Since judges and mediators in a no-fault system often refuse to hear testimony regarding the spouses' behavior during the marriage, there is no acknowledgment that any behavior, however wrongful, violated marital norms. There is also no acknowledgment that an abused or betrayed spouse's anger is valid and reasonable.¹⁰⁷

Not surprisingly, angry spouses have found other ways to bring blame into the divorce process. Some parties fight over the marital property, and the greater the betrayal or marital misconduct, the greater the role of emotion in settlement negotiations or litigation.¹⁰⁸ Others bring tort actions based on their spouse's adultery, mental cruelty, or assault and battery if there was physical abuse.¹⁰⁹ Betrayed spouses, in the few jurisdictions that still recognize the tort of alienation of affections, have brought such claims against

104. Melli, *supra* note 94, at 638.

105. Kay, *supra* note 89, at 33, 36; Wardle, *supra* note 16, at 58–59.

106. Melli, *supra* note 94, at 638 (internal quotation marks omitted).

107. Wardle, *supra* note 16, at 58 (arguing that divorcing spouses often "want someone to say 'you were done wrong,'" but no-fault divorce "den[ies] them the opportunity to obtain legal recognition of their wounded feelings").

108. See Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Marital Misconduct on No-Fault Divorce Bargaining* (Social Science Research Network, Working Paper No. 906610, 2006), available at <http://ssrn.com/abstract=906610>.

109. See *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (suing the husband for intentional infliction of emotional distress); *Answer & Counterclaim, McGreevey v. McGreevey*, FM20-01166-7B (N.J. Super. Ct. Ch. Div. 2007).

their spouse's paramour,¹¹⁰ while spouses in states that no longer recognize such a claim have sued for intentional infliction of emotional distress.¹¹¹ While the likelihood of recovering significant damages in these cases is quite low,¹¹² this does not deter spouses who, as previously noted, are often motivated by the desire for revenge.¹¹³

Similarly, although the law significantly limits the relevance of marital misconduct to child custody and visitation decisions,¹¹⁴

110. See Julie Scelfo, *Heartbreak's Revenge*, NEWSWEEK, Dec. 4, 2006, at 57 (reporting that over 200 alienation of affections claims are filed in North Carolina each year).

111. See, e.g., *Van Meter v. Van Meter*, 328 N.W.2d 497 (Iowa 1983); *Quinn v. Walsh*, 732 N.E.2d 330 (Mass. App. Ct. 2000); *Strock v. Pressnell*, 527 N.E.2d 1235 (Ohio 1988); *Spiess v. Johnson*, 748 P.2d 1020 (Or. Ct. App. 1988); *McDermott v. Reynolds*, 530 S.E.2d 902 (Va. 2000).

112. *Quinn*, 732 N.E.2d at 340 (affirming the dismissal of a claim for intentional infliction of emotional distress against the wife's paramour); *McDermott*, 530 S.E.2d at 904 (affirming the dismissal of a claim for intentional infliction of emotional distress against the wife's paramour). The likelihood of success is greater where the defendant paramour was the spouses' marriage counselor or religious counselor. In those cases, courts have upheld awards on a theory of negligent counseling or breach of fiduciary duty based on the defendant's special relationship with the plaintiff spouse. *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75, 77 (Md. 1991) (holding that a psychologist hired by a couple to provide marriage counseling and who had an affair with the wife could be liable to the husband for intentional infliction of emotional distress). *But see Strock*, 527 N.E.2d at 1236, 1243 (holding that a statute abolishing heart balm torts precluded a breach of fiduciary duty claim against a minister who had a sexual relationship with the plaintiff's wife, to whom he was providing marriage counseling).

113. Some spouses have made their children plaintiffs in actions against a former spouse's paramour. For example, in *McDermott*, the husband brought an unsuccessful suit against his wife's paramour, alleging severe emotional harm to him and his children resulting from the affair. *McDermott*, 530 S.E.2d at 903-04; see also *Quinn*, 732 N.E.2d at 337-38 (dismissing husband's (and minor son's) suit against wife's paramour). Although the children undoubtedly suffered emotional harm when they saw their mother and her paramour "flaunt [the affair] outwardly," only an angry and vengeful parent would bring such an action given its potentially harmful effect on the children. *Id.* at 903. Such actions place children right in the middle of their parents' battles, sometimes requiring them to testify. See *Hoye v. Hoye*, 824 S.W.2d 422, 427 (Ky. 1992) (asserting that "such suits are likely to expose 'minor children of the marriage to one of [their] parent's extramarital activities, and may even require the children to testify to details of the family relationship in open court'" (alteration in original)). In addition, these suits take time and energy (both physical and emotional) away from parents who are already struggling to provide a stable environment for their children and whose parenting skills may have deteriorated. See *supra* Part I.B.2.

114. Most statutes authorize courts to consider marital fault in the child

parents sometimes use the children to hurt the other parent, shifting allegations of fault into the custody determination and parenting time schedules.¹¹⁵ As noted, custody disputes and repeated modification petitions are sometimes motivated by anger and the desire for revenge. Coincidentally, no-fault divorce may have made the custodial aspect of the divorce even more contentious because it is often the only “tool” a party can use to express his anger. Thus, rather than reducing or extinguishing spouses’ anger, no-fault divorce may have redirected this anger to the custody and visitation phase.

Spouses may not be aware that anger is driving their behavior and may genuinely believe that they are protecting their children from an inadequate or unfit parent. In other words, the desire to punish the other parent may be unconscious. In one recent study, participants were given fact patterns about divorcing couples and asked to rate each spouse’s proposed property settlement. Although instructed to ignore fault, many participants rated the wrongdoer’s (i.e., the adulterer spouse’s) settlement proposal lower than that of the nonwrongdoer without realizing that they had been influenced by the wrongdoer’s actions.¹¹⁶ Their feelings toward the adulterer unconsciously influenced their evaluation of his proposal. If study participants reading fact patterns are unconsciously influenced by their emotions toward an unfaithful spouse, it is highly likely that divorcing spouses’ emotions affect property and custody negotiations, even when these spouses intended to “ignore their interpersonal grievances.”¹¹⁷

The study’s findings also suggest that angry spouses might irrationally choose to litigate in order to punish the other spouse.¹¹⁸

custody determination only if the parent’s misconduct adversely affected the child. However, many parents claim that judges erroneously consider marital fault when awarding custody.

115. Kay, *supra* note 89, at 36 (“Since the advent of California’s ‘no fault’ divorce . . . there has been widespread supposition that the battleground has subtly shifted from personal accusations to custody and visitation fights . . .” (quoting James A. Cook)); Wardle, *supra* note 16, at 59; *see also* Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 289 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)) (“[T]he banishment of fault from the grounds and economics of divorce, [has] shift[ed] allegations of fault into the child custody determination.”).

116. Wilkinson-Ryan & Baron, *supra* note 108. That same settlement offer was rated more reasonable when proposed by the innocent spouse. *Id.*

117. *Id.*

118. *Id.*; *cf.* Jones & Goldsmith, *supra* note 6, at 441 (noting that people “often forgo a benefit to impose a cost on someone they consider to be unfair, or

As noted by the researchers, a wife whose husband is ending the marriage to marry his paramour may perceive his proposed settlement as outrageous even if it is objectively fair.¹¹⁹ She may also choose to litigate in order to make her husband's life difficult despite the financial and emotional costs to herself and the children.¹²⁰

To recap, no-fault divorce has not made unilateral divorces—where the decision to end the marriage is not mutual—less acrimonious.¹²¹

C. Mediation

Since no-fault divorce failed to significantly reduce divorcing spouses' anger and hostility, policymakers continued to explore ways to reduce the financial and emotional costs of bitter divorces. In light of evidence suggesting that litigation may exacerbate the parties' hostility and render parental cooperation unlikely,¹²²

will incur some costs to impose even larger costs on someone else"). For example, Medea killed her own children to punish her husband even though she knew that the loss of her children would destroy her. EURIPIDES, *MEDEA* 62–63 (Michael Collier & Georgia Machemer trans., 2006) (431 BC).

119. Wilkinson-Ryan & Baron, *supra* note 108. Study participants were also asked to predict how a judge would evaluate a particular proposal in a state where marital fault is irrelevant to the property division. *Id.* Their predictions were influenced by who had introduced the proposal—a spouse who was “at fault” or an “innocent” spouse. *Id.* This finding suggests that spouses who believe that they were wronged will assume that judges will consider marital misconduct and rule in their favor, even in fault-irrelevant jurisdictions. *Id.* Their emotions might hinder their ability to accept the legal irrelevance of their spouse's marital misconduct and decrease the likelihood of settlement in a custody dispute. *Id.*

120. *See id.*

121. Woodhouse, *supra* note 94, at 2548 (noting that “spousal hostility and blaming have a life of their own, regardless of whether the law looks to substantive standards of fault”); *cf.* Erlanger et al., *supra* note 25, at 595 (discussing a no-fault divorce study finding that while one party was extremely impatient to finalize the divorce, the other party wanted his “day in court” in order to “vilify the petitioning spouse”).

122. Gregory Firestone & Janet Weinstein, *In the Best Interest of Children*, 42 FAM. CT. REV. 203, 204 (2004) (noting that the adversary process makes enemies out of the parties and “exacerbates existing controversy” and tensions); Kelly, *supra* note 47, at 131 (stating that the adversarial process “escalate[s] conflict, diminish[es] the possibility of civility between parents, exacerbate[s] the win-lose atmosphere that encourages bitterness and parental irresponsibility, . . . pits parents against each other, encourages polarized and positional thinking about each other's deficiencies, and discourages parental communication, cooperation, and more mature thinking about children's needs”).

mediation¹²³ seemed like a better alternative—a “cure for the various ills of adversary divorce.”¹²⁴ As a result, a significant number of states now require that divorcing parents attempt to mediate custody and visitation disputes,¹²⁵ and many parents choose mediation voluntarily. In some parts of the country, mediation is the most widely used mechanism for resolving custody and visitation disputes.¹²⁶

Mediation has many advantages over traditional litigation. First, some studies suggest that mediation clients are more satisfied with their divorce outcomes than clients who used the adversary system.¹²⁷ Second, parties who negotiate custody and visitation arrangements are more likely to comply with them.¹²⁸ Third, nonresidential fathers who mediated custody and visitation have higher rates of paternal involvement than those who litigated.¹²⁹ Most importantly for purposes of this Article, there is some evidence that parents who mediate experience lower rates of interparental conflict after divorce than those who litigated.¹³⁰

123. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2* (1994) (defining mediation as “an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement”).

124. Grillo, *supra* note 29, at 1552 (noting that mediation has been “heralded as the cure for the various ills of adversary divorce” and that “[i]t was touted as a process in which the parties would voluntarily cooperate to find the best manner of continuing to parent their children”); see also Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POLY & L. 989, 1044 (2000) (“[M]ediation programs were created to solve a myriad of problems associated with the litigation process.”).

125. John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 280 (2004).

126. *Id.*

127. Beck & Sales, *supra* note 124, at 991; Emery et al., *supra* note 63, at 28; Grillo, *supra* note 29, at 1548–49 & n.8. *But see* Grillo, *supra* note 29, at 1549 & n.9 (critiquing the methodology of these studies).

128. Beck & Sales, *supra* note 124, at 991; Kelly, *supra* note 47, at 139.

129. Emery et al., *supra* note 63, at 30–31 (finding that twelve years after divorce, the 30% of noncustodial parents who mediated saw their children at least weekly as compared to the 9% of parents in the adversary group); *id.* (noting that 39% of noncustodial parents in the adversary group had seen their children once or not at all in the last year as compared to 15% of parents who mediated); Kelly, *supra* note 47, at 139 & n.50.

130. Kelly, *supra* note 47, at 139 (“[P]arents participating in mediation reported less conflict between them during and after the divorce, more cooperation and child-focused communications, and more frequent offers of support to each other after the divorce.”); see also Emery et al., *supra* note 63, at

Yet, despite these benefits, mediation has been the subject of significant criticism. Some critics have focused on the power imbalances that result when spouses lack legal representation either in the mediation sessions (often because it is not permitted)¹³¹ or have no counsel at all.¹³² Others have opposed mandatory mediation, criticizing the wide range in mediator qualifications and the assembly-line nature of the process.¹³³ Feminist scholars have attacked mediation's potential to revictimize survivors of domestic abuse.¹³⁴

This Article focuses on another criticism—mediation's limited ability to reduce interspousal anger and hostility. State laws expressly provide that one of the goals of mediation is "to reduce any acrimony that exists between the parties to a dispute involving custody or visitation."¹³⁵ However, although many mediating spouses reach an agreement, mediation does not always reduce the anger that can trigger interparental conflict.¹³⁶ Parents who reached

31 (stating that parents who mediated are more likely than parents who litigated to communicate regarding the children).

131. Some statutes provide that the mediator may exclude attorneys from the mediation session even if the parties want them present. *See* Grillo, *supra* note 29, at 1554 n.30. Although the Uniform Mediation Act, which has been adopted by a number of states, allows parties to have their attorney present in the mediation, some mediators are resistant.

132. *See* Beck & Sales, *supra* note 124, at 992–94 (citing a study finding that in almost sixty percent of divorce mediation cases, at least one party is pro se and is thus making decisions without knowing the law and what options might be available to him or her).

133. *See* Grillo, *supra* note 29, at 1600–07 (arguing against mandatory mediation). Typically, court-sponsored mediation "is expected to take place in an hour or less . . . [and] [s]ome take place in the hallways of the courthouse." *Id.* at 1583. The qualifications of mediators vary widely, and in some counties, "mediation takes place in the twenty minutes before court in a hallway." *Id.* at 1553 & n.26. Grillo further criticizes laws that allow local courts to require or allow mediators "to make a recommendation to the court regarding custody or visitation" and, "[i]f the parties do not reach an agreement, the mediator can recommend that an investigation be conducted or mutual restraining orders be issued." *Id.* at 1554–55.

134. *See id.* at 1584.

135. N.C. GEN. STAT. § 50-13.1 (2000); *see also* CAL. FAM. CODE § 3161 (Deering 2006); MONT. CODE ANN. 40-4-302(1) (1998) ("The purpose of a mediation proceeding is to reduce acrimony that may exist between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding.").

136. Marsha Kline Pruett & Janet R. Johnston, *Therapeutic Mediation with High-Conflict Parents: Effective Models and Strategies*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 92, 93 (Jay Folberg et al. eds., 2004) (noting that "[research] indicates that some children of divorced parents with ongoing conflict suffer as much after mediation as before").

an agreement through mediation did not always feel they had successfully resolved their dispute; some entered into an agreement because they could not bear to continue the negotiations.¹³⁷ Some parents continue to experience conflict and dissatisfaction with their agreement regardless of whether it was reached through mediation or litigation.¹³⁸

Although mediation has benefited many families, by itself it cannot promote parental cooperation in many cases. While some studies have found some reduction in interparental conflict and hostility among parents who mediated,¹³⁹ many divorced parents report that mediation did not help them communicate more effectively with the other parent.¹⁴⁰ Further, some studies

137. Beck & Sales, *supra* note 124, at 1027. One study of informally settled cases found that the “process is often contentious, adversarial, and beyond the perceived control of one or both parties.” Erlanger et al., *supra* note 25, at 585. The researchers found that in over half of the cases, “[n]egotiation between parties was bitter or nonexistent; terms were secured through threats and intimidation or pressure from attorneys or court personnel; and in each case at least one of the parties criticized the outcome.” *Id.* at 591. Only in twenty-eight percent of cases did “both parties report being satisfied with the result.” *Id.* at 592.

138. See Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, 23 CONCILIATION CTS. REV. 1, 13 (1985); Bruce D. Sales et al., *Is Self-Representation A Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553 (1993).

139. Emery et al., *supra* note 63, at 30. *But see* HOWARD H. IRVING & MICHAEL BENJAMIN, *FAMILY MEDIATION: CONTEMPORARY ISSUES* (1995) (forty percent of couples who mediated showed no improvement in conflict and hostility and fifteen percent got worse); Janet R. Johnston et al., *Impasses to the Resolution of Custody and Visitation Disputes*, 55 AM. J. ORTHOPSYCHIATRY 112 (1985).

140. See SUSAN L. KEILITZ ET AL., NAT’L CENTER FOR STATE CTS., *MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING* (1992); Beck & Sales, *supra* note 124, at 1024; Grillo, *supra* note 29, at 1549 n.8. One study found that by thirteen to fifteen months after divorce, thirty to forty percent of couples who had contested custody or visitation had also experienced multiple problems surrounding visitation regardless of whether they had mediated or litigated. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 9, 12, 23 (Kenneth Kressel et al. eds., 1989); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429 (Folberg & Milne eds., 1988). Interestingly, one study found that although one year had passed since divorce, parents who litigated reported more conflict than parents who participated in voluntary private mediation, the differences between litigation parents and mediation parents regarding conflict had vanished two years after divorce. Joan B. Kelly, *Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes* (1990) (final report, on file with the

suggesting that mediation may decrease parents' anger involved couples who *voluntarily* chose a private mediation program to resolve all of the divorce related issues and paid for the process themselves.¹⁴¹

However, parents who voluntarily chose private, fee-for-service mediation may not be representative of the majority of families who participate in court-sponsored mediation given that they voluntarily chose collaborative divorce and agreed to resolve their disputes outside the adversary process. Parents who voluntarily chose private mediation tended to be more cooperative¹⁴² and were more likely than the other couples to view their spouses as honest, fair, flexible, and able to cooperate regarding the children.¹⁴³ They were also less likely to report that their spouse had taken advantage of them during the marriage.¹⁴⁴ However, they also experienced higher rates of guilt and depression over the breakup, which might suggest that they believed that they shared responsibility for the marital breakdown.¹⁴⁵

In contrast, court-ordered mediation includes parents who feel

author); Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 387 (1991). *But see* Emery et al., *supra* note 63, at 31 (finding no difference in relationship quality between the voluntary court-based mediation group and the adversary settlement group one year after settlement, but finding that twelve years later, parents in the mediation group were more likely than parents in the adversary settlement group "to discuss problems" concerning the children).

141. *See* IRVING & BENJAMIN, *supra* note 139; Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 MEDIATION Q. 33, 37 (1989); Joan B. Kelly, *Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes* (Dec. 1990) (unpublished final report, on file with the Fund for Research in Dispute Resolution); Joan Kelly et al., *Mediated and Adversarial Divorce: Initial Findings From a Longitudinal Study*, in DIVORCE MEDIATION: THEORY AND PRACTICE 453 (Jay Folberg & Ann Milne eds., 1988); Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 506 (1984); *cf.* Emery et al., *supra* note 63, at 22 (finding that low-income parents who voluntarily participated in court-based custody mediation "informed by therapeutic considerations" had a better relationship twelve years later than parents who litigated, even if they settled before the court hearing).

142. Beck & Sales, *supra* note 124, at 1035 ("[C]omprehensive programs provided by private, voluntary, fee-for-service programs attract clients who tend to be young (30s), middle class, well-educated, professionals, and who are mostly cooperative and fair-minded. Clients in court-mandated programs tend to be working class and poorly educated and are either underemployed or unemployed." (citations omitted)).

143. Pruett & Johnston, *supra* note 136, at 93.

144. Kelly et al., *supra* note 141, at 459-60.

145. *See* Beck & Sales, *supra* note 124, at 1016.

that the other spouse is solely to blame for the breakup,¹⁴⁶ and thus, these parents are more likely to feel angry and vengeful. In all fairness, although mediation is probably more effective at reducing anger than litigation, these studies finding that voluntary, private mediation may reduce interparental anger and hostility might not be applicable to the vast majority of mediating parents who participate in mandatory or court-sponsored mediation only to resolve custody and visitation disputes.¹⁴⁷

In short, some spouses who successfully mediate (in the sense that they reach an agreement) remain angry and experience little or no reduction in conflict. One reason why mediation has not reduced anger and hostility in many cases is that the process is settlement-driven. Mediation is deemed successful if the parties reached an agreement and unsuccessful if they did not.¹⁴⁸ Thus, the emphasis is on reaching a resolution, not on helping the parties deal with their anger toward the other person.¹⁴⁹ This focus on settlement can make parties feel pressured or coerced to reach an agreement and “may well increase the conflict between parents.”¹⁵⁰

Furthermore, while the majority of divorcing spouses express the need to air their grievances,¹⁵¹ the standard one- or two-session

146. *Id.* at 1016–17.

147. Court-sponsored mediation generally resolves only issues of custody and visitation, not property and alimony disputes. *See, e.g.*, N.C. GEN. STAT. § 7A-494 (2005) (requiring mediation in child custody, but not for alimony, child support, or property disputes). Thus, parties must rely on litigation for these issues. However, this situation is changing, as some states are now mandating mediation of all issues. *See, e.g.*, ALA. CODE § 6-6-20 (1975) (requiring mediation of all issues upon agreement by both parties, motion by either party, or by court order).

148. *But see* Emery et al., *supra* note 63, at 27 (2005) (arguing that settlements are not “the only, or the most important, index of the success of mediation”).

149. *See* Beck & Sales, *supra* note 124, at 1018 (“[E]ven when using mental health professionals as mediators, many mediation clients reported the sessions to be ‘tension-filled and unpleasant,’ and that they felt angry and defensive during much of the session. They felt pressured by the ex-spouse and the mediator to reach an agreement, and never felt comfortable expressing feelings.”).

150. *Id.* at 1029 (noting that mediators who pressure “parties to reach agreement quickly, who threaten the parties with submission of negative recommendations to the court if one or both do not agree, or who strongly support one party to the displeasure of the other may well increase the conflict between the parents”); Emery et al., *supra* note 63, at 27 (expressing concern that “an overemphasis on settlement can make mediation less family-friendly as mediators feel pressured to become more coercive and less facilitative in order to maximize the likelihood of settlement”).

151. Beck & Sales, *supra* note 124, at 996 (“[I]n one study 70% to 80% of the

rushed, assembly-line court-ordered mediations do not provide such opportunities.¹⁵² Similarly, some private mediators focus on settlement and discourage parties from discussing the past or expressing anger.¹⁵³ Although a therapeutic model of mediation, one which allows parties to express their feelings and incorporates counseling into the process, has been shown to reduce anger and parental conflict,¹⁵⁴ most mediators in court-sponsored programs do not use this model.¹⁵⁵ Further, even the few who have included

respondents agreed that the opportunity to air grievances was extremely important to them.”).

152. *Id.* at 996 (noting that “[s]ome parents feel that the mediation process is rushed, and that they were given assembly-line treatment”). “[I]n some counties, [court-sponsored] mediation is limited to only one session.” *Id.* In contrast, voluntary comprehensive mediations (involving all disputed issues, not just child custody) averaged ten sessions. Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents’ Perceptions of Their Processes and Outcomes*, 24 *MEDIATION Q.* 71, 71, 74 (1989).

153. Grillo, *supra* note 29, at 1563–64 (mediators believe there is “little value in talking about the past”); *id.* at 1574 (describing mediators’ views that “the expression of feelings [i]s antithetical to problem-solving” and that divorcing spouses must be shown that “elaboration of their feelings during conflicts with each other is ‘irrelevant and counterproductive’”); Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 *CARDOZO J. CONFLICT RESOL.* 97, 97–98 (2004) (critiquing mediation’s “focus on the future”).

154. *See* IRVING & BENJAMIN, *supra* note 139 (using a therapeutic model of mediation); Beck & Sales, *supra* note 124, at 1026 (arguing that the only mediation programs likely to reduce conflict are those that use a therapeutic model and allow as many sessions as needed for the parties to work through their conflicts and change ingrained behavior patterns); Pruett & Johnston, *supra* note 136, at 95–101 (describing therapeutic mediation and outcomes, but noting that despite reaching agreements, fifteen percent of parental relationships deteriorate over the follow-up period).

155. Most mediators in court-sponsored programs do not practice therapeutic mediation, in part because it is time-intensive and costly. *See* Pruett & Johnston, *supra* note 136, at 96–97 (describing a twelve week therapeutic mediation program and its sliding scale); *id.* at 102 (noting that “severely conflicted families may require 3–5 hours per week for 2 months or so, accompanied by frequent phone calls and crisis points” and “1–2 hours per week for the next 2–6 months”). However, some mediators have incorporated elements of therapeutic mediation into court-sponsored programs. *See* Emery et al., *supra* note 63, at 23 (conducting a court-based custody mediation program which “contained elements of both problem solving and therapeutic mediation”). Some scholars have critiqued mediators’ settlement-oriented approach and proposed a transformative approach that would foster (1) “empowerment,” or “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems,” and (2) “recognition,” or “the evocation in individuals of acknowledgement and empathy for the situation and problems of others.” BUSH & FOLGER, *supra* note 123, at 2,

elements of therapeutic mediation in court-sponsored, albeit voluntary, programs, state that their “goal was not to be therapeutic,” but to get their “clients to begin to understand the emotions lying behind their anger, get help and support elsewhere, and find a way to control their feelings as best as possible to be able to work out a parenting plan.”¹⁵⁶ Thus, mediators’ interest in helping parents reach an agreement may limit their ability to help parents reduce their anger, which may first require that spouses express it, not control it.

D. Parenting Education

In an effort to reduce interparental conflict, many states have created parenting education programs (also known as divorce education)¹⁵⁷ that teach parents how their negative attitudes and behaviors toward each other affect their children.¹⁵⁸ These programs are increasingly mandatory, but they are generally only two to four hours long.¹⁵⁹ While the vast majority of parents participating in

4; see also Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 263 (1996) (proposing that mediators encourage parties to discuss past events and express their emotions). However, this is not the approach of most mediators in court-sponsored programs where the primary goal is to reach a settlement as quickly as possible.

156. Emery et al., *supra* note 63, at 33.

157. As of 2001, nearly half of all counties in the U.S. offered parenting education programs. Robyn J. Geelhoed et al., *Status of Court-Connected Programs for Children Whose Parents are Separating or Divorcing*, 39 *FAM. CT. REV.* 393, 393 (2001).

158. Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 *FAM. & CONCILIATION CTS. REV.* 36, 36 (1999); Goodman et al., *supra* note 37, at 269; Grych, *supra* note 50, at 102; Kelly, *supra* note 47, at 134. Good programs typically do the following:

(1) inform parents how children typically respond to separation and adjust after divorce; (2) alert parents to the negative impact of continued high conflict and other harmful behaviors on their children’s adjustment; (3) discuss benefits of and skills for developing a civilized parenting relationship; (4) focus parents on children’s need for a continuing relationship with both parents, as separate from their own feelings and attitudes toward each other; (5) describe positive parenting behaviors and discipline practices; (6) discuss adult adjustment to divorce and skills for coping with change; (7) focus on responsibilities of residential and contact parents; and (8) describe court processes, such as mediation.

Id.

159. Goodman et al., *supra* note 37, at 268 (explaining that court-provided programs are generally two hours long and community-provided programs are four hours long); Grych, *supra* note 50, at 102; Kelly, *supra* note 47, at 134–35 (noting that mandated court-connected programs are typically two to four hours

these programs, whether voluntarily or not, thought they were helpful and reported that the program increased their willingness to cooperate with the other parent,¹⁶⁰ there is little evidence that these parents actually experience less hostility and conflict than nonparticipating parents.¹⁶¹ For example, although one study found that relitigation rates were much lower among program participants, other studies found no difference.¹⁶² Further, as scholars have noted, one or two session programs are unlikely to be sufficient for high-conflict couples.¹⁶³

E. Parent Coordinator Programs

Although the majority of divorced parents reduce or resolve their conflicts within two to three years after divorce, approximately ten to twenty-five percent remain in high-conflict.¹⁶⁴ These parents argue frequently, undermine the other parent, interfere with the other parent's access to the child, and return to court repeatedly to resolve the most mundane issues.¹⁶⁵ Courts' frustration with these families led to the creation of Special Masters, or Parent Coordinator programs, which authorize experienced mental health professionals and attorneys to immediately settle certain parenting disputes in a nonadversarial setting.¹⁶⁶ While Special Masters or Parent Coordinators first attempt to mediate disputes, they have the authority to make binding decisions if the parents cannot reach an agreement.¹⁶⁷

long, but some community-based programs often offer three to six sessions of two hours each).

160. Kelly, *supra* note 47, at 135 (citing a study finding that 93% of participating parents thought the program was worthwhile and 90% agreed to increase their efforts to get along with their former spouse).

161. See Goodman et al., *supra* note 37, at 274–75 (summarizing studies and noting that “the effect that longer parenting programs have on interparental conflict remains unclear” and “[f]uture research, therefore, is needed to determine if these programs indeed reduce interparental conflict”); Grych, *supra* note 50, at 104 (concluding that “[t]here is little hard evidence that parental behavior actually changes when parents attend a brief divorce education program” and that parents may be exaggerating a reduction in conflict because of the expectation that they reduce or resolve conflict); Kelly, *supra* note 47, at 135 (“These initial studies have yet to assess whether the behavior of parents who participate actually changes or whether it differs from control groups of parents not taking divorce education programs.”).

162. Kelly, *supra* note 47, at 135 & nn.21–22.

163. Grych, *supra* note 50, at 105.

164. See *supra* Part I.B.

165. See *supra* Part I.B.

166. Coates et al., *supra* note 52, at 247; Kelly, *supra* note 47, at 143.

167. Kelly, *supra* note 47, at 144.

Although there is very little research on these programs, the majority of participating parents reported satisfaction with the program and “decreased conflict with the other parent.”¹⁶⁸ There is, however, no evidence that these programs have actually reduced parents’ anger toward the other parent or equipped them to resolve conflicts on their own. Indeed, because the Parent Coordinator is ultimately responsible for resolving any disputes, these programs may relieve parents of the need to interact or cooperate, but may do little to reduce the anger they feel toward the other parent.

Mediation, especially therapeutic mediation, and parenting education are steps in the right direction and lawmakers must continue to improve and use these tools to reduce interparental anger and conflict. However, for the reasons discussed above, these approaches alone might be insufficient to reduce divorcing parents’ negative emotions and conflict. While the results of Parenting Coordinator programs might be encouraging, many parents cannot afford the financial costs, which are borne by the parties.¹⁶⁹ Further, because judges cannot delegate decision-making authority for custody and visitation issues to non-judges, these programs require parental consent, which not all parents are willing to provide.¹⁷⁰ Finally, these interventions may not be appropriate in cases involving domestic violence or other cases where a parent’s anger and hostility toward the other parent (even if justified) renders contact, however limited, unwise.

In contrast, parents and children could benefit from a reduction in anger even in cases of abuse. Forgiveness has been shown to reduce anger.¹⁷¹ While no studies have shown that forgiveness reduces interparental conflict per se, anger and the desire for revenge are main causes of interparental conflict in many cases. For example, many nonresident fathers withhold child support (even

168. *Id.* at 146–47.

169. *See* Coates et al., *supra* note 52, at 259–60. Parent Coordinators are usually attorneys and they charge their usual hourly rates.

170. Some jurisdictions allow judges to appoint Parent Coordinators “over the objection of one parent.” Kelly, *supra* note 47, at 144. This is problematic given the court’s exclusive statutory authority to make binding custody and visitation decisions, which is the reason that parents’ decisions regarding custody and visitation as reflected in a prenuptial or separation agreement are not binding on the court. *Id.* at 144–45. Some programs have attempted to circumvent judges’ lack of authority to delegate their responsibility for custody and visitation decisions by authorizing Parenting Coordinators to make recommendations “to the court rather than making the actual decision.” *Id.* at 145. In the end, the result is the same because judges are likely to follow such recommendations despite the parties’ right to a trial and the opportunity to persuade the court not to follow the Parent Coordinator’s recommendation.

171. *See infra* Part III.A.

if they can afford to pay) because they are angry at the custodial mother. Conversely, anger toward the child's father leads some custodial mothers to interfere with visitation. Thus, a reduction in anger may result in fewer child support and visitation disputes. In addition, as shown in Part I, excessive anger is detrimental to both parents and children. As such, it is worthwhile to explore forgiveness's ability to reduce anger. Part III below describes how researchers have helped people forgive those who have hurt them and explores the law's role in cultivating forgiveness.

III. CULTIVATING FORGIVENESS

The academic literature on forgiveness has grown exponentially in the last twenty years as researchers in different disciplines have explored the meaning, value, and "how-to" of forgiveness. In addition to the many recent books and articles on forgiveness,¹⁷² there is also an International Forgiveness Institute, a thrice yearly publication, *The World of Forgiveness*, an independent learning course on "*The Psychology and Education of Forgiveness*" offered by the University of Wisconsin-Madison, the Stanford Forgiveness Project, and conferences and exhibits devoted to the subject.¹⁷³ While a number of researchers have attempted to help individuals in many different contexts to forgive, legal scholars have not explored the value and application of forgiveness in the context of divorce and post-divorce parenting. This Section defines forgiveness and the reasons why it is desirable. It also describes several forgiveness models and shows why and how the law should cultivate

172. See, e.g., DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES (Everett L. Worthington, Jr. ed., 1998); ROBERT D. ENRIGHT, FORGIVENESS IS A CHOICE: A STEP-BY-STEP PROCESS FOR RESOLVING ANGER AND RESTORING HOPE (2001); FORGIVENESS: THEORY, RESEARCH, AND PRACTICE (Michael E. McCullough et al. eds., 2000); HANDBOOK OF FORGIVENESS (Everett Worthington, Jr. ed., 2005); MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 151-90 (2006) (discussing the meaning of forgiveness); Robert D. Enright et al., *The Adolescent as Forgiver*, 12 J. ADOLESCENCE 95 (1989); Michael E. McCullough et al., *Interpersonal Forgiving in Close Relationships*, 73 J. PERSONALITY & SOC. PSYCH. 321 (1997). There are also many "how-to books" on forgiveness written for the general public. E.g., FRED LUSKIN, FORGIVE FOR GOOD (2002); LEWIS SMEDES, FORGIVE AND FORGET: HEALING THE HURTS WE DON'T DESERVE (1984); TO FORGIVE IS HUMAN: HOW TO PUT YOUR PAST IN THE PAST (Michael E. McCullough et al. eds., 1997).

173. E.g., Bibas, *supra* note 2, at 329; Symposium, *Ninth Annual Stein Center Symposium: The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347 (2000); The Role of Forgiveness in the Law Conference, Fordham University School of Law (Jan. 28, 2000); National Conference on Forgiveness, University of Wisconsin-Madison (Mar. 30-Apr. 1, 1995).

forgiveness after separation and divorce, a process this Article names “Healing Divorce.”

A. *Why Forgive?*

Scholars have defined forgiveness in different ways. According to psychology Professor Robert Enright and the Human Development Study Group at the University of Wisconsin-Madison, forgiveness is the “willingness to abandon one’s right to resentment, negative judgment, and indifferent behavior toward one who unjustly injured us, while fostering the undeserved qualities of compassion, generosity, and even love toward him or her.”¹⁷⁴ The philosopher Joanna North has stated that “[f]orgiveness is a matter of a *willed* change of heart, the successful result of an active endeavor to replace bad thoughts with good, bitterness and anger with compassion and affection.”¹⁷⁵ Fred Luskin, the cofounder of the Stanford University Forgiveness Project, defines forgiveness as the “peace and understanding that occurs when an injured party’s suffering is reduced as they transform their grievance against an offending party.”¹⁷⁶ He adds that “this transformation takes place through learning to take less personal offense, attribute less blame to the offender and, by greater understanding, see the personal and interpersonal harm that occurs as the natural consequence of unresolved anger and hurt.”¹⁷⁷ All of these definitions share one element in common—the reduction of anger.

Forgiveness is voluntary—the offended party willingly chooses to forgive the person who unjustly caused him pain.¹⁷⁸ Further, while forgiveness may lead the injured person to replace his anger and vengefulness toward his injurer with empathy, compassion, and

174. Robert D. Enright, Suzanne Freedman & Julio Rique, *The Psychology of Interpersonal Forgiveness*, in EXPLORING FORGIVENESS 46, 46–47 (Robert D. Enright & Joanna North eds., 1998) (citing Joanna North, *Wrongdoing and Forgiveness*, 62 PHIL. 499, 506 (1987)); see also MURPHY & HAMPTON, *supra* note 8, at 15 (“Forgiveness . . . is the foreswearing of resentment—the resolute overcoming of the anger and hatred that are naturally directed toward a person who has done one an unjustified and non-excused moral injury.”) (quoting Bishop Joseph Butler).

175. Joanna North, *The “Ideal” of Forgiveness: A Philosopher’s Exploration*, in EXPLORING FORGIVENESS 15, 20 (Robert D. Enright & Joanna North eds., 1998).

176. ENRIGHT & FITZGIBBONS, *supra* note 22.

177. *Id.* at 292 (quoting Fred Luskin); see also Frank D. Fincham et al., *Forgiveness in Marriage: Current Status and Future Directions*, 55 FAM. REL. 415, 416 (2006) (“[C]ommon to most definitions of forgiveness is the idea of a change whereby one becomes less motivated to think, feel, and behave negatively (e.g., retaliate, withdraw) in regard to the offender.”).

178. Enright, Freedman & Rique, *supra* note 174, at 46–47.

love,¹⁷⁹ it is not the same as condoning or excusing the offender's behavior or forgetting the hurt that was inflicted.¹⁸⁰ Indeed, in order to forgive, the injured person must first acknowledge that another person has hurt him unjustly.¹⁸¹

Forgiveness is separate and distinct from reconciliation and need not lead to reconciliation.¹⁸² For example, in order to forgive her batterer, a battered woman must let go of her anger, hatred, and desire for revenge. However, she need not, and probably should not, have contact with her batterer again. One can forgive and also end the relationship.¹⁸³ She also need not give up her desire for justice—the desire for punishment such as incarceration where appropriate. However, after forgiving, the desire for punishment would not be driven by vengeful motives but by an understanding that people must accept the consequences of their criminal acts.

Further, because forgiveness is separate from reconciliation, the offended party may choose to forgive regardless of the other person's current attitude and behaviors toward him or her.¹⁸⁴ To illustrate, a woman whose ex-husband was unfaithful and verbally abusive and continues to disparage her in front of the children can choose to forgive him despite his failure to apologize, show remorse, or change his behavior. However, she may choose to have little or no contact with him, even after she has forgiven him.

One might wonder why anyone should seek to forgive a person who has treated him badly and is unlikely to change his or her hurtful behavior. The answer is simple—forgiveness may help individuals heal psychologically and enable them to better parent

179. *Id.*; Worthington, Jr., *supra* note 39, at 1721 (“Forgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love . . . on top of ‘hot’ anger at the transgression . . .”).

180. MURPHY & HAMPTON, *supra* note 8, at 15 (citing Bishop Joseph Butler); Enright, Freedman & Rique, *supra* note 174, at 47–48; North, *supra* note 175, at 16 (explaining that “[f]orgiveness does not . . . wipe out the fact of wrong having been done” and does not “excuse the wrongdoer”).

181. Enright, Freedman & Rique, *supra* note 174, at 46–47.

182. *Id.* at 49; see also Paul W. Coleman, *The Process of Forgiveness in Marriage and the Family*, in *EXPLORING FORGIVENESS* 75, 78 (Robert D. Enright & Joanna North eds., 1998) (“It is possible to forgive without reconciling . . .”); Worthington, Jr., *supra* note 39, at 1725 (“[F]orgiveness is something within a person while reconciliation is something between people.”).

183. ENRIGHT & FITZGIBBONS, *supra* note 22, at 214 (forgiveness does not mean one should trust the injurer, and the injured person may need to distance himself from the injurer); Coleman, *supra* note 182, at 79; Murphy, *supra* note 41, at 1357 (“[T]he fact that one has forgiven does not mean that one must also trust or live again with a person.”).

184. Enright, Freedman & Rique, *supra* note 174, at 49.

their children.¹⁸⁵ It might also reduce interparental conflict.

As noted in Part I.A, anger is a healthy response when one has been unjustly injured. Persistent anger toward a former spouse, however, is detrimental to both parents and children and may negatively affect mental health (e.g., self-esteem, anxiety, depression), cardiovascular health, and sleep patterns.¹⁸⁶ Forgiveness has the opposite effect. It quells “that kind of anger that debilitates the injured individual” and enables him to move on with his life.¹⁸⁷ Studies have found that forgiveness improves the forgiver’s self-esteem and decreases anxiety, depression, anger, and hostility.¹⁸⁸

185. ENRIGHT & FITZGIBBONS, *supra* note 22, at 212 (“Forgiveness of a former spouse is linked to better mental health for single mothers, less punitive parenting behaviors, and more positive family relationships.”); see Frank D. Fincham et al., *Forgiveness and Conflict Resolution in Marriage*, 18 J. FAM. PSYCHOL. 72, 78–80 (2004) (finding a positive correlation between forgiveness and more effective conflict resolution).

186. See *supra* Part I.

187. ENRIGHT & FITZGIBBONS, *supra* note 22, at 4; see also MURPHY & HAMPTON, *supra* note 8, at 17 (noting that forgiveness helps us heal); *id.* at 36–38 (“Victims need to be able to forgive in order to attain closure.”); Bibas, *supra* note 2, at 337 (“Forgiveness . . . involves catharsis, a cleansing of anger and hate.”); Coleman, *supra* note 182, at 78 (“[F]orgiveness is the process that enables the forgiver to get on with his life unencumbered with the pain of betrayal.”); Martha Minow, *Forgiveness and the Law*, 27 FORDHAM URB. L.J. 1394, 1400 (2000) (writing that by forgiving, the injured person avoids bitterness and “free[s] herself from the kind of preoccupation with a felt wrong that can distort her own life and sensibilities”); North, *supra* note 175, at 18 (“Through forgiveness the pain and hurt caused by the original wrong are released . . .”).

188. Fitzgibbons, *supra* note 39, at 71; see also ENRIGHT & FITZGIBBONS, *supra* note 22, at 4 (“[F]orgiveness has been shown to be effective in reducing clients’ anger, anxiety, and depression while increasing their sense of hope and self-esteem.”); *id.* at 212 (reporting that persons who “forgive an unfaithful spouse have greater psychological well-being than those who do not forgive”); McCullough & Worthington, Jr., *supra* note 39, at 55–56 (summarizing studies finding that forgiveness benefits the forgiver’s physical, emotional, and psychological health); North, *supra* note 175, at 19 (explaining that forgiving allows the injured person to assert her value and self-respect because she is saying that she will not allow the wrong that another did to her to cause her any more pain). Forgiveness may also reduce high blood pressure and improve cardiovascular health, sleep patterns, and academic and work performance. See Al-Mabuk & Enright, *supra* note 39, at 427 (citing a study finding a reduction in blood pressure amongst people who forgave); Fitzgibbons, *supra* note 39, at 71; McCullough & Worthington, Jr., *supra* note 39, at 55–56; see also Fredrickson, *supra* note 20, at 314 (noting that negative emotions have a negative effect on cardiovascular health); Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 AM. PSYCHOLOGIST 218, 221 (2001) (arguing that positive

Anger and the desire to hurt the other parent may lead parents to unwittingly harm their children.¹⁸⁹ Anger drives parents to engage in custody and visitation disputes, withhold child support, interfere with the other parent's access to the child, and belittle the other parent in front of the children.¹⁹⁰ It may also lead to inadequate parenting.¹⁹¹ Forgiveness may reduce or eliminate these "negative parental emotional and behavioral patterns."¹⁹²

There is yet another reason to attempt to forgive: forgiveness enables reconciliation in those cases where it is desirable or necessary.¹⁹³ While divorcing spouses may prefer not to interact with their former spouse, as long as they share minor children, most divorced parents will have to communicate and interact to some extent. As such, children would benefit if their parents tried to forgive each other and established a cooperative parenting relationship. However, unlike forgiveness, which is unilateral, "[r]econciliation involves two people" and requires that the injurer be aware of the pain and damage he or she has caused and genuinely intend not to hurt the other person in the future.¹⁹⁴ Thus, reconciliation (as parents) may not always be possible,¹⁹⁵ even though forgiveness may be.

B. *The Law's Role: Healing Divorce*

Divorced parents are repeatedly told not to let their emotions interfere with the child's relationship with the other parent.¹⁹⁶ One

emotions may fuel psychological resilience and undo lingering negative emotions and their harmful effects on physical and psychological health). *But see* Carl E. Thoresen et al., *Forgiveness and Health: An Unanswered Question*, in FORGIVENESS: THEORY, RESEARCH, AND PRACTICE, *supra* note 172, at 254 ("While some data suggest that a secular approach to increasing forgiveness improves some mental health measures, such as depression and anger, no controlled studies have yet reported improved physical health in persons with major diseases." (citation omitted)). Researchers have also found some clinical improvement in persons with psychiatric disorders such as bipolar, impulse-control, panic, and adjustment disorders when they forgave someone who hurt them. Fitzgibbons, *supra* note 39, at 71.

189. Murphy, *supra* note 41, at 1361; *see supra* Part I.B.

190. *See supra* Part I.B.

191. *See supra* Part I.B.2.

192. Fitzgibbons, *supra* note 39, at 71.

193. McCullough & Worthington, Jr., *supra* note 39, at 55 (noting that forgiveness has beneficial effects on the relationship with the offender); Murphy, *supra* note 41, at 1361 ("[F]orgiveness can . . . open the door to the restoration of those relationships in our lives that are worthy of restoration.").

194. Enright, Freedman & Rique, *supra* note 174, at 49; *see also* Worthington, Jr., *supra* note 39, at 1725.

195. In cases of domestic abuse, it may be best if the parties never reconcile.

196. For example, Robert Emery advises individuals to "refuse to fight with

commentator tells parents: “No matter how you feel about your ex-spouse, you must separate those feelings from your role as a parent.”¹⁹⁷ Parents also hear this advice in divorce education classes, mediation, and from their attorneys. This is good advice, but how exactly is a parent supposed to achieve this when most people find it difficult to hide their true feelings even for a short while? Forgiveness might be the key. Rather than hiding his or her true feelings, by starting the process of forgiving, a parent may experience a reduction in anger and desire for vengeance. Ultimately, even partial forgiveness might enable him or her to replace the anger with empathy and compassion.¹⁹⁸ A parent who has attempted to forgive might be less likely to argue with the other parent, disparage the former spouse, or withhold child support.

As forgiveness scholars have noted, divorcing parents are good candidates for forgiveness intervention.¹⁹⁹ The law should attempt to cultivate forgiveness among divorcing parents by (1) completely eliminating fault from divorce, property, alimony, and custody proceedings; and (2) requiring high-conflict divorced parents to participate in a forgiveness education program, a program this Article calls “Healing Divorce.”

1. *Eliminating Fault Redux*

No-fault divorce laws did not completely eliminate fault from divorce.²⁰⁰ Most states maintain fault-based grounds and many

your ex” when “around the kids, say nothing [about the other parent] if you can’t say something positive.” EMERY, *supra* note 22, at 48. Constance Ahrons similarly advises divorcing couples to forgive themselves and their ex and to cooperate with the other parent if only for the sake of the children. AHRONS, *supra* note 30, at 252, 254.

197. Maxwell, *supra* note 61, at 161.

198. According to Fincham, there are different types and levels of forgiveness. Fincham et al., *supra* note 177, at 422. “Ambivalent forgiveness exists when the forgiver” has both negative and positive feelings towards the person who has hurt him. *Id.* Detached forgiveness exists when the forgiver has low levels of negative and positive feelings. *Id.* Although divorced spouses should strive for complete forgiveness, which is characterized by “low levels of negative” feelings and “high levels of positive” feelings, *id.*, detached or ambivalent forgiveness might be a more realistic goal for divorced couples.

199. Kristina Coop Gordon et al., *Forgiveness in Couples: Divorce, Infidelity, and Couples Therapy*, in HANDBOOK OF FORGIVENESS, *supra* note 172, at 407, 418 (arguing that “a particularly promising line of research is the study of forgiveness to decrease the bitterness and conflict that occurs between parents after divorce”); Everett L. Worthington, Jr. et al., *Group Interventions to Promote Forgiveness: What Researchers and Clinicians Ought to Know*, in FORGIVENESS: THEORY, RESEARCH, AND PRACTICE, *supra* note 172, at 238, 239 tbl.11.2.

200. *See supra* Part II.B.

consider marital misconduct when dividing marital property and awarding alimony.²⁰¹ Further, by shifting allegations of marital misconduct into the custody and visitation aspects, divorcing spouses have found ways to bring blame into the divorce process even in pure no-fault states.²⁰² While the complete removal of fault from the divorce process might not be possible, lawmakers can signal that marital misconduct has absolutely no legal relevance, thereby helping to change societal expectations that divorces are often bitter and adversarial. Divorcing couples often expect the divorce process to be acrimonious, and attorneys sometimes reinforce this perception through their statements and actions. Furthermore, even when their attorneys tell them that fault is not legally relevant, divorcing spouses often do not hear this information because it seems counterintuitive to them for the law to ignore their injury.²⁰³ In other words, a betrayed spouse does not understand how the law can completely ignore the fact that she was wronged and deserves (at least in her perception) vindication.

The elimination of fault, by itself, will not make the divorce process and post-separation interactions less bitter. States' attempts to silence and extinguish anger from legal proceedings failed, in part, because they left divorcing spouses without a formal and legitimate mechanism to express their emotions and start healing. However, coupled with a court-sponsored program where parents can express their anger and contemplate forgiveness, it might.

The availability of forgiveness education through Healing Divorce programs might help parents channel their anger to that forum rather than the courtroom or mediation, and specifically, the custody and visitation component of the divorce. Parents are unlikely to channel their anger to an appropriate forum, however, if judges can still consider allegations of marital misconduct either as grounds for divorce or in the financial phase of the process. Thus, in order to channel parents' emotions to the forgiveness education programs, the law must ensure that there is no legal mechanism enabling parents to express their anger in the litigation or mediation.

This proposal to eliminate fault from all aspects of divorce is supported by the American Law Institute's *Principles of the Law of Family Dissolution*.²⁰⁴ Further, although many states still consider

201. See *supra* notes 99, 102 and accompanying text.

202. See *supra* note 115 and accompanying text.

203. See *supra* note 117 and accompanying text.

204. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 737 (2000).

marital misconduct when distributing the marital assets and considering alimony, courts are increasingly holding that fault is irrelevant. As the New Jersey Supreme Court held recently, marital misconduct should be irrelevant to the alimony and property determination because it would “relieve[] matrimonial litigants and their counsel from the need to act upon the nearly universal and practically irresistible urge for retribution that follows on the heels of a broken marriage.”²⁰⁵

States should also abolish actions against paramours for the same reason. By recognizing these claims, lawmakers legitimize angry spouses’ desire for revenge and thwart the goal of cultivating forgiveness among divorced parents. However, a divorcing spouses’ rights to seek damages for abuse should not be diminished by virtue of their intimate relationship with the abuser. Thus, a spouse could still bring a claim for assault and battery, while participating in Healing Divorce. Forgiveness and justice are not mutually exclusive.

The practitioners’ and judges’ role in the elimination of fault and success of Healing Divorce programs cannot be overemphasized. Even if every state eliminates fault, judges will continue to play a significant role in the parties’ abilities to leave their emotions out of the courtroom. Some judges believe that fault should be legally relevant and their beliefs might influence parties looking for vindication anywhere they can get it. Divorcing spouses rely on their attorneys for guidance and may model their behavior and emotions on those exhibited by counsel. To illustrate, an angry parent who finds an attorney that expressly favors bringing fault and the emotions that accompany it into the courtroom or mediation is unlikely to accept that fault is not legally relevant. She is also unlikely to focus her rage and express it only at the Healing Divorce sessions. In contrast, an attorney who reassures her client that her anger is valid and that she should express it at the right time and place, such as the Healing Divorce sessions, may more successfully direct her client’s emotions to the appropriate forum, thereby enabling her to focus on making decisions during mediation or settlement negotiation that will benefit the children.

2. *Teaching Forgiveness*

Many people can understand the emotional, physical, and interrelational benefits of forgiveness, but may not know how to forgive. Interestingly, when deeply hurt by another, most individuals do not consciously consider forgiving.²⁰⁶ One reason for

205. *Mani v. Mani*, 869 A.2d 904, 918 (N.J. 2005).

206. Enright, Freedman & Rique, *supra* note 174, at 52; *see also* Al-Mabuk

this result is that forgiveness is seen as a sign of weakness practiced only by timid individuals who lack the power to punish others for their transgressions.²⁰⁷ While forgiveness is voluntary and, arguably, a sign of strength,²⁰⁸ researchers believe that most people need to be taught to forgive before they can contemplate forgiving.²⁰⁹ Commentators might agree that divorced parents and children may benefit when parents forgive each other, but fail to see the law's role in cultivating or teaching forgiveness. After all, isn't that more appropriately the role of mental health professionals or spiritual leaders, not lawmakers?

However, the law already cultivates and channels our emotions. In addition, the majority of divorcing parents do not seek therapy or any type of counseling to help them forgive. Many cannot afford counseling, and others do not think it is necessary. In contrast, all divorcing parents have some contact with the legal system, some much more than others. As a result, the law has the unique opportunity to expose parents to the benefits of forgiveness, thereby enabling them to forgive if they so choose. The next Section discusses several models of forgiveness, not to endorse any one in particular, but to show how the law might start exploring forgiveness and experimental interventions in the context of divorce.²¹⁰

& Enright, *supra* note 39, at 427 (finding that most study participants did not even consider forgiveness as a viable option until after participating in a forgiveness education program); Suzanne R. Freedman & Robert D. Enright, *Forgiveness as an Intervention Goal with Incest Survivors*, 64 J. CONSULTING & CLINICAL PSYCHOL. 983, 988 (1996) (same).

207. ENRIGHT & FITZGIBBONS, *supra* note 22, at 268 (noting that this was Nietzsche's interpretation of forgiveness).

208. *See infra* Part III.C.

209. Enright, Freedman & Rique, *supra* note 174, at 52.

210. A discussion of forgiveness that does not address individuals' spiritual reasons for forgiving or theological contributions to the forgiveness literature is necessarily incomplete. *See, e.g.*, FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY & CONFLICT TRANSFORMATION (Raymond G. Helmick & Rodney L. Petersen eds., 2001); L. GREGORY JONES, EMBODYING FORGIVENESS: A THEOLOGICAL ANALYSIS (1995); Elliot N. Dorff, *The Elements of Forgiveness: A Jewish Approach*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES, *supra* note 172, at 29; Martin E. Marty, *The Ethos of Christian Forgiveness*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES, *supra* note 172, at 9; Mark S. Rye et al., *Religious Perspectives on Forgiveness*, in FORGIVENESS: THEORY, RESEARCH, AND PRACTICE, *supra* note 172, at 17. Nonetheless, although some law and state doctrine does not preclude lawmakers' consideration of theological arguments, other scholars vehemently disagree. Given this debate, this Article focuses on the law's secular reasons for cultivating forgiveness.

a. *The Process Model.* Robert Enright and the Human Development Study Group at the University of Wisconsin-Madison have developed the first tested model of forgiveness, the *Process Model*, which has four phases.²¹¹ In the first phase, the Uncovering Phase, the injured person acknowledges that another person has deeply offended him and reacts with anger and maybe even hatred.²¹² In addition to anger, some people may also experience humiliation, shame, or guilt.²¹³

In the Decision Phase, the injured person recognizes that her obsession with the injurer and the hurtful event is not helping to ease her pain.²¹⁴ At that point, she may entertain forgiveness and commit to forgiving, thereby giving up on the idea of revenge.²¹⁵ The decision to forgive is not the same as actually forgiving. Emotional forgiveness comes later (sometimes much later) and requires work.

In the Work and Outcome/Deepening phases, the injured person attempts to understand the offending party's background and pressures he or she must encounter in an effort to understand the injuring party's motivation and behavior.²¹⁶ For example, a battered wife may learn that her husband was also abused as a child. While that does not excuse his behavior, it may help her understand why he abused her.²¹⁷ This process, known as *reframing*, often leads to empathy and compassion for the offender. At this point, the injured party may actually *feel* like forgiving²¹⁸ and experience a reduction in anger. She may also begin to wish the injurer well even if some

211. The model has twenty steps, but not everyone goes through each step or phase. Enright, Freedman & Rique, *supra* note 174, at 52.

212. *Id.* at 52.

213. *Id.* For example, a man whose wife betrayed him may not only feel angry, but also humiliated, as plaintiffs who sue their spouse's paramour have claimed. In this phase, the offended person becomes aware of the emotional energy he has expended on the hurtful event and how he has obsessively replayed the event in his mind over and over again.

214. *Id.* at 53.

215. *Id.* at 53–54.

216. *Id.* at 54; *see also* Robert Enright & Gayle Reed, *Process Model*, International Forgiveness Institute, http://www.forgiveness-institute.org/html/process_model.htm (last visited Apr. 5, 2008).

217. John H. Hebl & Robert D. Enright, *Forgiveness as a Psychotherapeutic Goal with Elderly Females*, 30 *PSYCHOTHERAPY* 658, 660 (1993). Similarly, a man whose wife was unfaithful may learn that she was always fighting for her parents' attention as a child and only found it in the arms of an intimate partner. He may understand that his wife felt rejected and lonely when he worked long hours or traveled on business. While that does not justify or excuse her adultery, the husband may find it easier to understand her behavior and possibly forgive her.

218. Enright, Freedman & Rique, *supra* note 174, at 54; Fitzgibbons, *supra* note 39, at 66.

negative feelings remain.²¹⁹ As a result, she may start to notice the benefits to herself as a result of forgiving and realize that she too has hurt others in the past and needed their forgiveness.²²⁰

b. *The Stanford Forgiveness Project.* Fred Luskin, a psychologist and cofounder of the Stanford University Forgiveness Project, has also developed a four-stage forgiveness process. In the first stage, a person who experienced a loss feels angry and hurt and blames the injurer for her feelings.²²¹ In the second stage, she realizes that the pain and anger are negatively affecting her emotional health, happiness, and well-being.²²² In the third stage, she remembers the last time she forgave someone and the peace she experienced.²²³ She decides to forgive because she is aware of its benefits. In the fourth stage, she becomes a more forgiving person.²²⁴

Dr. Luskin has developed several forgiveness techniques, described by the acronyms PERT (Positive Emotion Refocusing Technique) and HEAL (Hope, Educate, Affirm, Long-Term Commitment), which he teaches at seminars and describes at length in his book, *Forgive for Good*.²²⁵ These techniques, which involve breathing and visualization exercises, encourage the injured party to take responsibility for his or her emotions.

c. *The Pyramid Model and REACH.* Psychologist Everett Worthington and his colleagues²²⁶ have developed the *Pyramid Model of Forgiveness*, which theorizes that forgiveness requires empathy, humility, and a commitment to forgiving.²²⁷ Based on this *Pyramid Model*, Dr. Worthington has developed a five-step

219. Enright, Freedman & Rique, *supra* note 174, at 54.

220. *Id.* at 54.

221. LUSKIN, *supra* note 172, at 180–81.

222. *Id.* at 181.

223. *Id.* at 182.

224. *Id.*

225. *Id.*

226. Everett Worthington is the Chair of Psychology at Virginia Commonwealth University and serves as Executive Director of A Campaign for Forgiveness Research. HANDBOOK OF FORGIVENESS, *supra* note 172, at xi.

227. See Everett L. Worthington, Jr., *An Empathy-Humility-Commitment Model of Forgiveness Applied Within Family Dyads*, 20 J. FAM. THERAPY 93 (1998); Everett L. Worthington, Jr. & Dewitt T. Drinkard, *Promoting Reconciliation Through Psychoeducational and Therapeutic Interventions*, 26 J. MARITAL & FAM. THERAPY 93 (2000); Everett L. Worthington, Jr., *The Pyramid Model of Forgiveness: Some Interdisciplinary Speculations About Unforgiveness and the Promotion of Forgiveness*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES, *supra* note 172, at 107 [hereinafter Worthington, Jr., *Pyramid Model of Forgiveness*].

forgiveness intervention, which has been applied in marriage counseling and is described by the acronym REACH (Recall, Empathy, Altruistic, Commit, and Hold). It requires that the injured party *recall* the hurt, describe the hurtful event from the injurer's perspective, and recall instances where she (the injured party in this case) has needed forgiveness from others. The goal is to foster *empathy* and humility, which will enable the offended party to give the *altruistic* gift of forgiveness.²²⁸ The fourth and fifth steps require that the offended spouse verbally *commit* to forgiving and find ways to *hold* on to forgiveness when the hurtful event is inevitably recalled. The REACH process distinguishes between remembering the hurt and anger, which is impossible to prevent completely even after one has forgiven, and "continuing to reexperience bitterness and hatred."²²⁹

d. *Forgiveness Interventions.* Several published studies have used these models to help participants forgive someone who has hurt them deeply.²³⁰ The forgiveness interventions discussed above have helped individuals from Northern Ireland who lost an immediate family member in the country's bloody civil war to forgive.²³¹ They have also helped individuals forgive incest,²³² marital infidelity,²³³ parental-love deprivation,²³⁴ and unjust treatment at work.²³⁵ This Section briefly describes a few of these interventions to illustrate different ways lawmakers can structure Healing Divorce programs.

The first forgiveness intervention attempted to help elderly women who had been hurt by a spouse or adult child, among others, to forgive.²³⁶ After eight weekly sixty-minute group sessions, the participants had higher self-esteem and fewer negative feelings toward the person who caused them emotional pain than the control group. They were also more willing to forgive.²³⁷

Another study focused on college students who felt they had been deprived of parental love, nurturing, and attention.²³⁸ One

228. Worthington, Jr., *Pyramid Model of Forgiveness*, *supra* note 227, at 97.

229. Gordon et al., *supra* note 199, at 414.

230. See Thomas W. Baskin & Robert D. Enright, *Intervention Studies on Forgiveness: A Meta-Analysis*, 82 J. COUNSELING & DEV. 79 (2004) (analyzing nine published studies on the efficacy of forgiveness interventions).

231. LUSKIN, *supra* note 172, at 94.

232. Freedman & Enright, *supra* note 206.

233. McCullough & Worthington, Jr., *supra* note 39.

234. Al-Mabuk & Enright, *supra* note 39.

235. See HANDBOOK OF FORGIVENESS, *supra* note 172, at ch. 29.

236. Hebl & Enright, *supra* note 217, at 660.

237. *Id.* at 664–66.

238. Al-Mabuk & Enright, *supra* note 39, at 427.

group of students participated in a four-day workshop²³⁹ that emphasized the commitment to forgive, basically the first two phases of the Process Model. The other group participated in a six-day workshop²⁴⁰ that included all four phases. As compared to the control group, both the four-day and six-day forgiveness groups experienced an increase in hope and willingness to forgive. However, the six-day group experienced a significantly higher increase in forgiveness, hope, self-esteem, and positive attitudes toward their parents.²⁴¹

A third forgiveness intervention helped angry men who described themselves as having been hurt by a partner's decision to have an abortion.²⁴² The forgiveness intervener met with each participant individually for ninety minutes once a week for twelve weeks. Compared to the control group, the experimental group demonstrated significant increases in willingness to forgive and reductions in anger, anxiety, and grief.²⁴³

One unpublished study, titled *Forgiveness and Divorce: Can Group Interventions Facilitate Forgiveness of a Former Spouse?*,²⁴⁴ is of particular relevance to this Article. Researchers randomly assigned 149 divorced individuals to a secular forgiveness group, a religiously integrated forgiveness group,²⁴⁵ or a wait-list control group. Using a variation of the REACH model, the group sessions discussed feelings of betrayal, coping with anger toward the former spouse, forgiveness education, preventing relapse (holding on to forgiveness), and closure.²⁴⁶ Although there were no differences between the secular and religiously integrated forgiveness groups, participants in these groups self-reported similarly higher levels of

239. The workshop met twice a week for two weeks. The sessions were led by a graduate student trained in forgiveness and included thirty minutes of "didactic instruction," ten minutes of self-reflection, and twenty minutes of group discussion. *Id.*

240. The workshop met weekly for six weeks. *Id.*

241. *Id.* Twenty-three of the twenty-four participants in the second group chose to sign a commitment to forgive contract as compared to less than half of the control group members. *Id.*

242. Catherine T. Coyle & Robert D. Enright, *Forgiveness Intervention with Postabortion Men*, 65 *J. CONSULTING & CLINICAL PSYCH.* 1042, 1042 (1997).

243. The control group members were allowed to participate in the intervention after the experimental group completed the program and their results were compared to those of the control group's. *Id.*

244. Gordon et al., *supra* note 199, at 416 (describing the unpublished study).

245. This group was the same as the secular group, but participants were encouraged to rely on their religious or spiritual beliefs as they worked to forgive. *Id.*

246. *Id.*

forgiveness and lower depression than the wait-list control group.²⁴⁷ This study suggests that “individuals’ levels of forgiveness towards their ex-spouses can be increased by a relatively brief intervention.”²⁴⁸ This study did not find that the group forgiveness interventions (whether secular or religiously integrated) had any significant effect on parents’ communications regarding parenting issues. However, researchers predict that more targeted forgiveness interventions focusing on how lack of forgiveness affects parenting or placing both parents in the same group sessions “might yield more powerful results.”²⁴⁹

These studies suggest that forgiveness can be successfully taught in six to twelve individual or group sessions.²⁵⁰ Researchers report that most group sessions are generally nine hours or less,²⁵¹ but one study suggests that it may be possible to encourage forgiveness in as little as one session. This study, which included college students who had been unable to forgive infidelity or termination of a romantic relationship or marriage, found that even one sixty-minute group session of seven to fourteen people could promote forgiveness in some people.²⁵² Although the results were modest, the fact that one session helped reduce feelings of revenge and promoted conciliatory thoughts and behaviors is notable.²⁵³

247. *Id.*

248. *Id.*

249. *Id.* at 418.

250. *Cf.* Baskin & Enright, *supra* note 230, at 86–87 (conducting meta-analysis interventions applying Enright’s Process Model and finding that the average participant did as well or better than 95% and 92% of the control group on forgiveness and emotional health measures, respectively). Another study focused on incest survivors. After meeting with a forgiveness counselor individually for sixty hour-long sessions over fourteen months, each of the study participants forgave her perpetrator even though before entering the study, each had said that she would never forgive. Freedman & Enright, *supra* note 206, at 988. For example, after the intervention, one woman sent her father, who had molested her as a child, a birthday card for the first time and helped with his care before he died. *Id.* at 991. After forgiving, the study participants reported higher self-esteem and hope and decreases in (or alleviation of) depression and anxiety. *Id.* at 983.

251. Worthington, Jr. et al., *supra* note 199, at 232 tbl.11.1, 236.

252. McCullough & Worthington, Jr., *supra* note 39, at 58, 60, 65.

253. *Id.* at 65. *But see* Worthington, Jr. et al., *supra* note 199, at 234–35 (evaluating this study and concluding that one and two hour interventions are “virtually inert” and recommending that group interventions aimed at promoting forgiveness be at a minimum six hours long and that sessions be spaced apart rather than amassed into a single weekend).

3. *Creating a Healing Divorce Program*

This Article does not purport to prescribe how a Healing Divorce program should be structured. Rather than adopting a particular forgiveness model or intervention approach, lawmakers must experiment with different approaches and variations. Nevertheless, there are a number of considerations worth exploring at the outset.

As forgiveness scholars have argued, many individuals do not know how to forgive. Consequently, any Healing Divorce program must educate participants as to what forgiveness is, what it is not, why they should forgive, and how to start the process. This may be taught in six to eight weekly, small group sessions²⁵⁴ led by mental health professionals, including graduate students, familiar with the forgiveness literature and interventions. It is unlikely that all divorcing parents will want to participate in forgiveness education, especially since they are unlikely to be familiar with the benefits of forgiveness or what the process entails.

Given that many divorcing parents are angry and could potentially benefit from even partial forgiveness or just contemplating forgiving their former spouse, participation in forgiveness education should conceivably be mandatory for all divorcing parents in the same way that parenting education is mandatory in many states. However, due to limited resources and the logistics of training thousands of mental health professionals willing to conduct forgiveness sessions, states might want to mandate participation for high-conflict parents only, at least initially. While parents might resent a compulsory program, they might feel differently after completing it, as did most parents who resisted parenting education initially, but later reported that it was beneficial.

Although no published studies have attempted forgiveness interventions with the injurer and injured in the same group, therapists specializing in marriage and family counseling have successfully utilized forgiveness models with couples.²⁵⁵ Further, Richard Fitzgibbons, an experienced psychiatrist and author of a seminal article on the use of forgiveness in the treatment of anger,²⁵⁶ has found that “when possible the willingness of the offenders to participate in the work phase [of the Process Model] can be very

254. Although forgiveness can also be taught in individual sessions, in an effort to maximize resources, it is prudent to focus on group sessions.

255. See Coleman, *supra* note 182, at 75–87 (applying the Process Model); Worthington, Jr., *Pyramid Model of Forgiveness*, *supra* note 227, at 107 (applying the Pyramid Model).

256. See Richard P. Fitzgibbons, *The Cognitive and Emotive Uses of Forgiveness in the Treatment of Anger*, 23 PSYCHOTHERAPY 629 (1986).

helpful in the resolution of the [injured person's] resentment."²⁵⁷ One reason is that the injurer's efforts to apologize and explain his behavior may facilitate forgiveness.²⁵⁸ Thus, it might be beneficial for divorcing parents to participate in group forgiveness interventions jointly. As forgiveness scholars have noted, when the injurer and the injured are both present, once forgiveness takes place, the injurer can immediately attempt to repair the relationship and the parties can begin the reconciliation process if they wish.²⁵⁹ Further, they can benefit from watching how other divorcing parents forgive.²⁶⁰

On the other hand, the potential benefits of joint participation in group sessions are also potential risks. When couples participate in group sessions together, it can lead to conflicts and arguments, thereby "subvert[ing] the group's focus on forgiveness."²⁶¹ Furthermore, even if one spouse forgives the other, it does not mean that he will, or should, let the other spouse back in his life. The spouse who has been forgiven may not understand the forgiving spouse's rejection of his attempts at reconciliation and may become angry. This might also occur in cases where both spouses are injured and injurers—they have hurt each other—but only one spouse is willing to forgive. As a result of these risks, some scholars have concluded that placing the injurer and the injured in the same group session is riskier and potentially more disruptive than groups focused on forgiving an absent party.²⁶² Lawmakers could experiment with group sessions in which both parents are present despite the risks discussed above or avoid the risks (and potential benefits) by placing them in separate groups.

Realistically, few parents will forgive their former spouses at the end of a Healing Divorce program. Forgiveness is a process that takes time. Some people may not want to forgive while others may simply be unable to achieve full forgiveness. Thus, the goals and successes of Healing Divorce programs cannot be measured by the number of participants who forgive their former spouse at the end of the program, but rather by their understanding of the benefits of

257. Fitzgibbons, *supra* note 39, at 70 (finding that it was "extremely helpful in the healing process" for children who were angry at their nonresidential fathers to have their fathers participate in the Work Phase).

258. *Id.*

259. Worthington, Jr. et al., *supra* note 199, at 237.

260. *Id.*

261. *Id.*

262. *E.g., id.* In some cases (i.e., where domestic violence was involved), facing the abusive spouse might be traumatic for the battered spouse and even downright dangerous. Thus, placing the spouses in the same group session would not be advisable.

forgiveness, their reduction in anger, and their willingness to consider forgiveness. Furthermore, even if only a small percentage of high-conflict parents forgive or commit to working toward forgiveness, it would save them and their children (and taxpayers) the significant financial and emotional costs associated with interparental hostility and conflict, including repeated court filings to resolve minor disputes.

Although Parent Coordinators have successfully resolved many of these disputes, not all parents are willing to consent to their appointment, and Parent Coordinators' fees place their services beyond many parents' reach.²⁶³ These costs are also unfair to a parent who is not uncooperative or litigious himself, but who shares a child with a person who "remains interested in vengeance, control, angry behaviors, and repeated motions to the court."²⁶⁴ Until the angry and vengeful parent commits to letting go of the anger, which Parent Coordinators do not teach individuals to do, the entire family suffers.

In contrast, even if a parent does not forgive her former spouse by the end of the Healing Divorce program, she is likely to have reaped some benefits, such as a reduction in anger and improved self-esteem.²⁶⁵ The commitment to letting go of the anger and giving up on the idea of revenge may reduce interparental conflict even if emotional forgiveness is never achieved. In addition, the knowledge that forgiving may improve their own psychological health strikes at people's self-interest and provides an incentive for individuals to work on forgiving even if they do not feel like doing so.²⁶⁶

263. Furthermore, Parent Coordinators do not always teach parents to resolve their own disputes, but rather make decisions for them, thereby doing little to prevent parents from returning to the courthouse when the next issue arises.

264. Kelly, *Children's Living Arrangements*, *supra* note 51, at 41.

265. For example, one intervention led the participants through the first half of Enright's Process Model, up to and including the Decision Phase, but did not focus on the Work or Outcome Phases. McCullough & Worthington, Jr., *supra* note 39, at 57–58. Although there was very little increase in forgiveness, the majority of participants experienced a reduction in anger and an increase in self-esteem. *Id.* at 65–66. They had all learned that their anger and desire for revenge was detrimental to their own psychological and emotional health. *Id.* at 65.

266. For example, one intervention focused on the benefits of forgiveness to the forgiver while the other intervention focused on the interrelational benefits of forgiveness. Levels of forgiveness were much higher among the first group that focused on the benefits to the forgiver as opposed to the interrelational benefits of forgiveness. McCullough, et al., *supra* note 172, at 1586–1603.

C. Potential Objections

Some readers might question whether the law can and should attempt to cultivate certain emotions. However, it is clear that, regardless of whether they should, lawmakers have historically cultivated and institutionalized certain emotions, such as anger.²⁶⁷ As Professor Grillo has argued, “there is much room for the expression of anger in the adversarial context.”²⁶⁸ The Supreme Court has acknowledged that one reason for granting the public access to criminal trials is to provide “an outlet for community concern, hostility, and emotion.”²⁶⁹ By allowing a capital murder victim’s relatives to submit victim impact statements describing the crime’s devastating effect on their lives, the law encourages and legitimizes society’s desire for revenge and discourages mercy and forgiveness.²⁷⁰ Inversely, by authorizing lower sentences for defendants who show remorse, the law cultivates expressions of remorse.²⁷¹

In the family law context, the law has long cultivated certain emotions. As shown in Part II, by requiring that a petitioner spouse not only allege marital misconduct but also show how the misconduct affected her emotionally, fault-based divorce creates incentives for petitioners to feel and express feelings of betrayal, anger, rage, and humiliation in divorce proceedings.²⁷² Currently,

267. MURPHY & HAMPTON, *supra* note 8, at 2 (“[T]he criminal law . . . institutionalizes certain feelings of anger, resentment, and even hatred that we typically (and *perhaps* properly) direct towards wrongdoers . . .”); Posner, *supra* note 2, at 1983–84 (arguing that the law affects individuals’ incentives to cultivate and act on their emotions); Solomon, *supra* note 13, at 127 (arguing that “the law is a vehicle for the expression and satisfaction of emotions, especially revenge”).

268. Grillo, *supra* note 29, at 1573; *see also* D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”: Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 436–37 (1997) (describing some legal scholars’ beliefs that “the true primary value [of a trial] is to give both the parties and the public a stage on which a fair (though not necessarily rational), dramatic, emotionally satisfying, and decisive mock combat can be played out to a conclusion which will lay the underlying controversy to rest by acceptable catharsis”).

269. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

270. *See* MURPHY & HAMPTON, *supra* note 8, at 8 (describing punishment as the institutionalization of emotions such as resentment and indignation); Minow, *Forgiveness and the Law*, *supra* note 187, at 1400 (asserting that victim impact statements are used “to provide vivid statements of pain and harm caused by horrific acts, not to permit forgiveness”).

271. *See* Sarat, *supra* note 2, at 168.

272. *See supra* Part II.A. As Professor Grillo has argued, sometimes the anger that was expressed was not the litigants’ actual anger, but that which they were expected to feel. Grillo, *supra* note 29, at 1573. For example, a wife

some states require that a domestic violence victim seeking an order of protection show emotion—that she *fears* the batterer; it is not sufficient that she can prove that her partner has battered her before. Similarly, as Professor Carol Sanger has noted, states that require women who have decided to have an abortion to watch an ultrasound are trying to invoke certain emotions such as guilt and shame.²⁷³ Family law has attempted to cultivate not only negative emotions, but also positive emotions such as love, albeit in a narrow and discriminatory context.²⁷⁴ Without a doubt, the law is in the business of cultivating our emotions.

Some readers might also be skeptical as to the law's ability to facilitate forgiveness between divorced parents. However, this proposal is not unprecedented. Lawmakers have already attempted to facilitate forgiveness in other contexts, such as criminal law. The Restorative Justice Project at the University of Wisconsin Law School and other similar programs have explored the law's influence on forgiveness.²⁷⁵ Restorative justice, which treats criminal behavior as an offense against an individual, not the state, focuses on healing the harm done to the individual victim and her community.²⁷⁶ During a victim-offender mediation ("VOM") or conference, the most widely used form of restorative justice, the victim tells the offender, in the presence of a mediator, how his crime has negatively impacted her life.²⁷⁷ She can talk for as long as she wishes, ask the

who discovered that her husband was having an extramarital affair was expected to feel a certain way and to act in a certain manner. Thus, even if a wife was not angry, humiliated, or distraught, she should act as if she was because society and the court expected her to experience those feelings.

273. Carol Sanger, Remarks at the University of California Berkeley School of Law, Law and the Emotions: New Direction in Scholarship Conference (Feb. 9, 2007); see also Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 108, 111–12 (2001) (discussing the requirement that a pregnant teen express the appropriate emotion in a judicial bypass hearing or that a battered spouse fit the emotional profile of a battered woman).

274. See Calhoun, *supra* note 16, at 218 (arguing that the law has cultivated the feeling that romantic love is real only in the context of heterosexual relationships).

275. See Robert D. Enright & Bruce A. Kittle, *Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice*, 27 FORDHAM URB. L.J. 1621, 1628–29 (2000) (discussing a meeting between an offender convicted of robbing a church and the pastor of that church).

276. MARK UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 2–5 (1994).

277. As of 2001, there were more than 1300 VOM programs worldwide. Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 29 (2001). While VOM is most frequently used in property and minor crimes, many victims of serious crimes, such as rape or the murder of a family member, have chosen to meet with their

offender questions, and only when she feels she has been heard does the offender have the opportunity to express his feelings and reasons for the criminal act.²⁷⁸ The offender can apologize if he wishes and the victim can choose to forgive. Although restitution is often part of VOM, it is not the focus of the meeting and many studies have found that victims value the dialogue much more than the restitution.²⁷⁹ Crime victims who participated in VOM are much more satisfied than victims who were involved in the normal court process, in large part, because of the opportunity “to share their stories and their pain.”²⁸⁰

Some of the factors that have made VOM successful and enabled victims to start healing may apply in the context of divorce. For example, just like crime victims, divorcing spouses often feel that an injustice has been done to them; they feel victimized. They want their spouse to know just how deeply he or she has hurt them. They also want answers. A “Left” spouse often had no idea that the “Leaver” was unhappy and wants to know why he or she had an extramarital affair or abandoned the marriage. This dialogue is cathartic and may allow an injured spouse to start the healing process. In the criminal context, the VOM dialogue enables the victim to personally assess the offender in order to forgive him.²⁸¹ Similarly, by listening to the injurer spouse express his feelings and reasons for his behavior, the injured spouse may be able to feel compassion and empathy, prerequisites to emotional forgiveness.

Crime victims and persons injured by a negligent tortfeasor often want an apology.²⁸² An apology helps restore the injured

offenders.

278. David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard to Find?*, 27 *FORDHAM URB. L.J.* 1663, 1664–65 (2000); Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross-National Comparison*, 61 *FED. PROBATION* 33, 33 (1997).

279. Umbreit & Bradshaw, *supra* note 278, at 34 (explaining that the agreement or settlement “is secondary to the importance of the initial dialogue between the parties that addresses the victims’ emotional and informational needs that are central to their healing and to the offenders’ development of victim empathy”); *id.* at 33–34 (“While many other types of mediation are largely ‘settlement driven,’ victim-offender mediation is primarily ‘dialogue driven,’ with the emphasis upon victim healing, [wrongdoer] accountability, and restoration of losses.”).

280. Umbreit et al., *supra* note 277, at 30–31. Eighty to ninety percent of participants report satisfaction with the process. *Id.* (noting that victims reported that “what they appreciated most about the program was the opportunity to talk with the offender”).

281. Lerman, *supra* note 278, at 1663.

282. Bibas, *supra* note 2, at 336. For example, injured patients want doctors

person's self-esteem and "[makes] it easier to heal and forgive."²⁸³ The majority of offenders participating in VOM apologize to their victims, and victims participating in VOM are more likely to forgive than those involved in the traditional criminal system.²⁸⁴ Similarly, a divorcing parent is more likely to forgive if the other spouse acknowledges hurting him and expresses remorse for doing so. Although expressions of remorse are not a prerequisite to nor a guarantee of forgiveness, an injured person is more likely to feel empathy and to forgive if the injurer expresses genuine remorse for hurting him.²⁸⁵

Some divorcing parents will feel no remorse for the emotional harm they have caused their spouse, especially if the spouse has hurt them as well, or if they do not believe their behavior was wrongful—for example, where they just fell out of love or were unhappy in the marriage.²⁸⁶ Nevertheless, Healing Divorce facilitators could encourage forgiveness by informing divorcing parents that acknowledging that their actions (e.g., extramarital affair, decision to end the marriage, verbal abuse, etc.) have hurt the other spouse might cultivate forgiveness and enable the renegotiated²⁸⁷ family to start the healing that will benefit their children.²⁸⁸ Carrie Menkel-Meadow has noted the importance to a

and hospitals to admit that they made a mistake and to apologize. An apology "can be a way of avoiding compounding insult upon the injury." Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L.J.* 1447, 1459 (2000).

283. Bibas, *supra* note 2, at 336. "[E]ven insincere or semi-sincere remorse and apologies have some value, as they vindicate victims and the violated norm and may lead to true remorse." *Id.* at 344; *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 142–47 (2004).

284. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 *UTAH L. REV.* 167, 189 (noting that 74% of offenders participating in VOM apologize as compared to only 29% of offenders in the normal criminal court process); *id.* ("[V]ictims in restorative justice were 2.6 times more likely to forgive the offender than were victims in court.").

285. Robert D. Enright et al., *The Adolescent as Forgiver*, 12 *J. ADOLESCENCE* 95 (1989) (explaining that receiving an apology from one's offender encourages forgiving); McCullough et al., *supra* note 172, at 323, 327–28 (1997) (arguing that an apology facilitates increased empathy for the offender).

286. *See* Menkel-Meadow, *supra* note 153, at 112 (noting that people often do not want to take responsibility for harms they unintentionally inflicted on others).

287. The term "renegotiated family" is from Emery, *Renegotiating Family Relationships*, *supra* note 61.

288. *See* Worthington, Jr. & Drinkard, *supra* note 227, at 93, 95 (describing how couples should apologize: first, they should each think of actions they have

rejected spouse of hearing her husband say: "I admit I did wrong, I had an affair, but I love another person."²⁸⁹ Although such an admission is painful to hear, it "acknowledges wrongdoing"²⁹⁰ and validates the rejected spouse's emotions.

Some commentators might question how one can advocate for no-fault divorce while simultaneously encouraging spouses to acknowledge that their actions have hurt their loved ones, and express remorse if genuine. The injurer's acknowledgement that his actions have deeply hurt his spouse (and probably his children) is not inconsistent with no-fault divorce and the removal of fault from all aspects of the legal divorce process. A spouse may express remorse and guilt for having hurt his family, but not for ending the marriage. Although the expression of remorse may facilitate the injured spouse's ability to feel empathy for the injurer, an injured spouse should not be pressured to forgive simply because the other person has apologized.²⁹¹ Forgiveness cannot be coerced, only taught and encouraged.

One might argue that the lessons of VOM are not applicable in the divorce context because, unlike criminal law, in divorce there is no clear victim or wrongdoer. Actually, most states have traditionally classified certain divorcing spouses as wrongdoers and their partners as victims. By treating certain behaviors as sufficiently egregious such that a spouse should not have to tolerate them—for example, adultery or extreme cruelty—the law has signaled that certain acts violate social norms of appropriate marital behavior and has treated the actor as a wrongdoer. This legal classification of spouses as victims and wrongdoers (at least in fault-based divorces) would change if this proposal to completely

done that have hurt the other person; second, they should each apologize for having hurt the other person without attempting to excuse or justify their behavior; and third, they should express their sincere intention to try not to hurt the other person again); cf. Menkel-Meadow, *supra* note 153, at 112 n.52 (stating that people do not want to acknowledge the pain they have caused another, arguing that "I didn't intend to hurt you and I am sorry you feel hurt," but that a skillful mediator can often help the injurer see his "responsibility" or the mutual responsibility for pain incurred).

289. Menkel-Meadow, *supra* note 153, at 107.

290. *Id.*

291. As Professor Coker has argued, the pressure to forgive could be particularly traumatic for a battered spouse who is made to feel that there is something wrong with her because she is not ready to forgive even though her batterer has apologized. In addition, batterers are quite used to apologizing, so there is less reason to believe that an abusive spouse is remorseful and, even if he is, that he will change his behavior. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1, 86 (1999).

eliminate fault were adopted.

However, VOM's lessons might be useful even when neither party is to blame for the breakup (for example, if they simply fell out of love or grew apart) or both are equally blameworthy. When spouses have hurt each other, each is likely to be angry and resentful. To illustrate, even when the decision to divorce is mutual, the wife may blame the husband for not trying harder to make the marriage work, while he may resent her for not being more attentive to his needs.²⁹² These parties need to forgive just as much as the husband whose wife engaged in an extramarital affair. A process that encourages divorcing parents to tell each other how much pain they have caused each other and to listen without interruption might cultivate mutual forgiveness regardless of who hurt whom the most.²⁹³

Granted, there are differences between VOM and cultivation of forgiveness among divorcing parents. First, VOM often includes restitution, but in the pure no-fault system this Article endorses, marital misconduct such as adultery would not impact the divorce, property, or child custody and access determinations. Second, in VOM, the victim confronts the offender and tells him exactly how his crime has negatively impacted her life. This is one of the most satisfying aspects of VOM from the victim's perspective. In contrast, in none of the forgiveness interventions discussed above did the injured party confront the person who hurt him. Yet, many individuals forgave anyway. Thus, the ability and willingness of either the injurer or the injured spouse to meet face-to-face is not a prerequisite to forgiveness.

Indeed, the law has attempted to start the healing process even in the offender's absence. South Africa's Truth and Reconciliation Commission ("TRC"), which Archbishop Desmond Tutu has characterized as the "institutional enabling of forgiveness,"²⁹⁴ attempted to help victims of Apartheid heal and forgive.²⁹⁵ Anyone

292. ENRIGHT & FITZGIBBONS, *supra* note 22, at 212 ("Many [divorcing spouses] are bitter and resentful because they believe that their spouses did not try to put forth sufficient effort to make the marriage work.").

293. Rather than using the term "victim" and "wrongdoer," we can substitute the terms "injured" and "injurer," knowing that each party has played both roles.

294. Minow, *Forgiveness and the Law*, *supra* note 187, at 1402; *see also id.* at 1395 (arguing that mediation, restorative justice, and truth and reconciliation commissions have the potential to "promote forgiveness").

295. ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND 62-63, 65 (2007) (noting that TRCs allow victims to explore their feelings and experiences, offer individual catharsis, and may provide psychological healing); MARTHA MINOW, BETWEEN VENGEANCE AND

who had been a victim of a crime could testify before the TRC even if the perpetrator was not present.²⁹⁶ This opportunity to describe the abuses they experienced at the hands of their offenders enabled some victims to let go of the anger and move on with their lives. Some were even able to forgive.²⁹⁷

This Article does not suggest that the experiences of divorced parents are analogous to those of victims of violence, although there might be similarities in cases involving domestic violence. Nor does this Article suggest that the VOM or TRC models would be appropriate or effective in the context of divorce and post-separation parenting. Rather, this Article merely uses VOM and the TRC to illustrate that lawmakers have attempted to facilitate forgiveness and psychological healing in other contexts.²⁹⁸ Once we acknowledge

FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91 (1998) (noting that the TRC encourages “[r]epentance and forgiveness”). The TRC was established in 1995 to help South Africa move forward after the human rights atrocities committed during Apartheid. It established a Committee on Human Rights Violations charged with pursuing independent investigations and hearing testimony from survivors. MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra*, at 53. It also established a Committee on Amnesty with discretion to exempt from criminal prosecution and civil liability applicants who fully disclosed their abusive acts, and demonstrated that their crimes were politically motivated. *Id.* at 53, 55–56. It also established a Committee on Reparation and Rehabilitation devoted to “proposing economic and symbolic acts of reparation for survivors and for devastated communities,” such as monetary payments, health and social services, and memorials or other types of commemorations. *Id.* at 53, 91.

296. Victims often did not have the opportunity to confront their perpetrators because they did not know their identity, whereabouts, or whether they were still alive. See MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 295, at 77–78. However, a perpetrator who had applied for amnesty was required to meet with his victims if the victims wished. *Id.* at 130 (“The commission affords victims the chance to examine amnesty applicants . . .”). Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in THE PASSIONS OF LAW, *supra* note 2, 265, 269–70. Although this amnesty provision has been the subject of significant criticism, see *id.* at 56, some scholars have argued that this “face-to-face confrontation and engagement encouraged some applicants to seek forgiveness and enabled some survivors to forgive.” Minow, *Forgiveness and the Law*, *supra* note 187, at 1403. Of course, victims are not required to forgive and perpetrators are not required to apologize, MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 295, at 78, but both were encouraged. *Id.* at 91 (noting that the TRC encourages “[r]epentance and forgiveness”).

297. DALY & SARKIN, *supra* note 295, at 154 (noting that at the end of witnesses’ testimony, the TRC commissioners would ask if they could forgive their perpetrators and although many witnesses remained silent, a few said that they could forgive).

298. Cf. Minow, *Institutions and Emotions*, *supra* note 296, at 271 (“Legal responses to mass atrocity may seem sui generis, and yet they resemble other

that cultivating forgiveness between divorced parents could benefit them and their children and that lawmakers have assumed this role in other contexts, the question is no longer whether the law can or should cultivate forgiveness, but how it should do so.²⁹⁹

Some readers might be concerned about the gender implications of this proposal. In other words, is one gender more likely to forgive, and does this create or reinforce power imbalances in many families? It is true that women are more likely than men to participate in voluntary forgiveness interventions.³⁰⁰ However, researchers have found that changing the terminology from forgiveness to “grudge management” resulted in more men volunteering for forgiveness education.³⁰¹ It seems that many men believe forgiveness is a “feminine” thing to do.³⁰² Men might be more open to forgiveness if the term itself is avoided.

More importantly, the concern that one spouse (usually the woman) might be more likely to forgive is only a problem if we believe that forgiving places the injured party at a disadvantage relative to the injurer, or that by forgiving, a spouse gives up power. She does not. As shown, long-term anger and resentment are detrimental to the injured person’s health (not the injurer), so she may be hurting herself by not forgiving. Furthermore, forgiveness is not the same as reconciliation or condonation, nor does it require that the forgiver trust the offending spouse again. Thus, a woman who forgives her abusive or unfaithful ex-husband is not giving him any power over her merely by letting go of the anger and wishing him well. To the contrary, she empowers herself by refusing to let the injury continue to control her life. To the extent that women may be more likely to forgive than men, it appears that men are the ones at a disadvantage because they may spend years consumed by anger, resentment, and bitterness.

Readers might also question whether forgiveness is harmful to

efforts to use dispute institutions to affect people’s emotions.”). “[T]he use of truth commissions reflects a wager that emotions can be affected by the design of institutional responses.” *Id.*

299. Other scholars have argued that the law should cultivate forgiveness. See DALY & SARKIN, *supra* note 295, at 154 (arguing that the government could “encourage forgiveness by promoting a culture of reconciliation” and that “institutional support’ may help victims realize that forgiveness is an option and may suggest avenues for achieving forgiveness”).

300. Women comprise seventy-five percent or more of the study participants in several forgiveness interventions. See, e.g., McCullough et al., *supra* note 172, at 321; McCullough & Worthington, Jr., *supra* note 39, at 56.

301. Joan O’C. Hamilton, *Peace Work*, STAN. MAG., May–June 2001, at 77 (quoting Fred Luskin).

302. *Id.*

women. Women have been taught not to express anger. Indeed, one critique of mediation is that it attempts to quell anger and silence the expression of emotions. This concern is valid because research shows a positive correlation between repressed anger and depression. When women are not able to express anger, they feel powerless. Further, anger is sometimes desirable and beneficial. As noted in Part I.A, anger is a sign of self-respect and is necessary to establish boundaries. For individuals who have never experienced the freedom to feel and express anger, its discovery and expression can be quite liberating and empowering, especially for those in abusive relationships.

Healing Divorce, however, does not seek to silence anger. Indeed, the first step in each of the forgiveness models discussed is the acknowledgment or recollection of the hurt and the anger. Forgiveness education does not affect individuals' ability to become angry. Instead, it tries to help them deal with their anger so they can move on to the next step rather than allowing it to consume them.³⁰³

CONCLUSION

Healing Divorce is not a substitute for mediation or any other type of resolution-focused process such as litigation or collaborative divorce.³⁰⁴ Mediators often communicate with parents early in the divorce process and thus have the first opportunity to help them acknowledge their anger and resentment. Mediators need not focus exclusively on settlement, but could and should address the parties' emotions as some already do.³⁰⁵ In cases where the mediators determine that the parents would benefit from participating in a Healing Divorce program, they could discuss forgiveness and its benefits before recommending their participation to the parents and

303. See Minow, *Between Vengeance and Forgiveness*, *supra* note 295, at 19 ("Victims have much to gain from being able to let of hatred" and "should release the anger for their own sake.").

304. Although some therapeutic mediators try to help couples forgive, see Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIMONIAL LAWS. 233, 246 (1997), forgiveness is difficult, if not impossible, to cultivate in mediation when the parties have many other issues to work out and one or both parties may deny responsibility for the breakup. Furthermore, therapeutic mediation requires that both parties be present in the session. However, for the reasons discussed above, there are potential risks involved with having both spouses in the same session.

305. Emery et al., *supra* note 63, at 33 (stating that as mediators, the authors' goals include helping their "clients to begin to understand the emotions lying behind their anger").

the court. Thus, mediation, even if court-sponsored, could be broad enough to encompass not only settlement goals, but also help the parties start to heal.

Healing Divorce is also not a substitute for Parent Coordinators, although forgiveness education may reduce the need for them. It is also not a substitute for divorce education or individual therapy. Rather, Healing Divorce seeks to supplement these programs and increase their effectiveness by teaching parents that forgiveness is an option and providing them with the tools to do so if they choose.

Healing Divorce is also aspirational. It is unrealistic to expect parents who have been fighting for years to miraculously let go of the anger after six to eight hours of forgiveness interventions. It might take a parent six months, one year, or an eternity before she can fully forgive. However, by enabling parents to contemplate forgiveness, Healing Divorce may plant a seed. It may also help parents separate their anger toward the other parent as a former spouse and their feelings toward him or her as a parent. In other words, the recognition that the other parent may have hurt them as a partner, but is still a good parent, may encourage parents to try to forgive.³⁰⁶

This Article has focused on the negative effects of long-term anger toward a former spouse and its contribution to interparental conflict. There are, however, many children of divorce who are angry toward one or both parents, especially the nonresidential father, as a result of the divorce. Numerous studies have documented the negative effects of anger in children, including a higher risk of juvenile delinquency, behavioral difficulties, academic underachievement, and depression. Forgiveness scholars are currently researching whether forgiveness interventions can be successfully applied to young children to help them forgive. The Healing Divorce programs, if successful, may help not only parents forgive each other, but they also may help children to forgive their parents. This possibility is yet another reason why policymakers must explore the law's ability to cultivate forgiveness in the family law context.

306. I owe this observation to Robert E. Emery.