Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce

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ABSTRACT

In recent years, scholars writing in the emerging “law and emotion” field have explored the role of emotions on criminal, administrative, securities, torts, 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 towards 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, Professor Maldonado 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 divorced parents participate in a forgiveness education program. She argues that these reforms, which she has named “Healing Divorce,” may significantly reduce inter-parental hostility and conflict. Demonstrating that lawmakers have already attempted to facilitate forgiveness in the criminal law context, she argues that the law can and should cultivate forgiveness after divorce.

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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. In the civil context, tort law has long compensated purely emotional harm, at least when intentionally inflicted, and it increasingly allows recovery for accidentally-caused emotional suffering. Certain evidentiary rules similarly take emotion into account. Yet, despite emotions’ influence, legal actors have traditionally argued

1 Professor, Seton Hall University School of Law. I am grateful to the participants in the International Society of Family Law North America Regional Conference in Vancouver, B.C. and the Seton Hall Law School Faculty Colloquium for their helpful comments. This article was inspired by the Law and the Emotions Conference at the University of California, Berkeley (Feb. 7-8, 2007) and benefited from the generous support of the Seton Hall Law School Summer Research Stipend. Thanks to Krista Gundersen, Jeffrey Gruen, Deanna Duncan, Anneris Hernandez and the Seton Hall Law School librarians for excellent research assistance.

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 Posner, Law and Emotions, 89 Geo. L.J. 1977 (2001) (noting that “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 Criminal Punishment, in The Passions of Law 168, 168 (Susan Bandes ed. 1999) (“Traditionally, 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.”); C.f. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1559-61 (1998) ((discussing study finding that jury is less likely to sentence a capital defendant to death if they believe that he feels remorseful)); see also Stephanos Bibas, Forgiveness in Criminal Procedure, 4 Ohio St. L.J. 329, 336 (2007) (suggesting that “defense lawyers may cultivate their clients’ remorse in an effort to win lower sentences.”). But see Sarat, supra, at 168-69 (noting that sentencing guidelines have made the role of remorse controversial and possibly, less relevant).


4 See Portee v. Jaffe, 84 N.J. 88 (1980) (allowing recovery for emotional harm resulting from witnessing son’s 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) (“it is precisely ‘the stress of excitement caused by the event or condition’ that makes the utterance admissible.”); Terry Maroney, Law and Emotion: A Proposed Taxonomy of An Emerging Field, 30 Law & Hum. Beh. 119, 130 (2006) (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.”).
that emotions, believed to be irrational, devoid of thought, and “potentially
dangerous,”6 should remain outside the legal sphere.7

This is starting to change. We now know that emotions “are not merely
instinctive and uncontrollable, but are also partially cognitive,” and are 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) towards
someone who has caused us harm if we believe (cognitive) that it was
intentionally or recklessly caused.9 Similarly, we feel compassion towards
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

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6 Martha Minow & Elizabeth Spelman, Passion for Justice, 10 Cardozo L. Rev. 37, 38-39 (1988); see also Martha C. Nussbaum, Rededication Symposia: The Language of Judging: 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”); see also Owen Jones & Timothy 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”).
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 were instructed to disregard their emotions and that of the litigants and witnesses, see California v. Brown, 479 U.S. 538, 543 (1987) (upholding jury instruction providing that jurors should not be swayed by mere sentiment, passion, prejudice, etc.), and judges were similarly expected to feel no emotions about the parties or the issues before them or suppress them rather than risk distorting the required “objective legal reasoning.” Maroney, supra, at 132. Indeed, judges who argued that emotion and law could co-exist were criticized. See Jeffrey Rosen, Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun, THE NEW REPUBLIC, May 2, 1994, at 13 (critiquing Justice Blackmun’s jurisprudence as inappropriately emotional as exemplified by his dissent in DeShaney v. Winnebago chastising the majority’s refusal to find the state liable for an abused child’s permanent injuries suffered after the state returned him to his abusive father’s custody, and argued “that compassion need not be exiled from the province of judging.” 489 US 189, 213 (1989) (Blackmun, J., dissenting)).
8 Susan Bandes, Empathy, Narrative and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 393 & n.37 (1996); Nussbaum, supra note 6, at 24 (emotions are based on complex beliefs); JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 5 (1988) (“Passions are at least part cognitive states, states of belief and not just feeling”) (emphasis in original); Jones & Goldsmith, supra note 6, at 438 (“We now know that . . . emotions are by no means divorced from rational deliberation.”); see also Samuel Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655, 657 (1989) (describing emotion as “a sensory experience arising out of a cognitive assessment of an event, person or situation”); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987).
9 Nussbaum, supra note 6, at 24; Linda Ross Meyer, Forgiveness and Public Trust, 27 Fordham Urb. L.J. 1515 (2000) (arguing that “to change one’s emotions . . . one has to change one’s mind” and this shows that “emotions are cognitive at least in part” or “they would not be amenable to change.”); see also Pillsbury, supra note 8, at 675 (illustrating emotions’ cognitive element).
10 Nussbaum, supra note 6, at 24.
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
have begun to explore the role of emotions in the law.\textsuperscript{12} While most of this work has focused on the criminal law area,\textsuperscript{13} some scholars writing in this emerging “law and emotion”\textsuperscript{14} field have explored the role of certain emotions on ADR, administrative, securities, torts, employment, and constitutional law.\textsuperscript{15} Yet, few scholars have examined the role of emotions in family law,\textsuperscript{16} possibly, because emotions experienced difficulty making certain decisions, despite retention of cognitive capacity; Bandes,\textit{ supra} note 8, at 366 (“reasoning has an emotive aspect.”).\textsuperscript{12} These scholars have concluded that legal reasoning cannot and should not be devoid of emotion.\textsuperscript{13} See Bandes,\textit{ supra} note 8, at 368 (“legal reasoning, although often portrayed as rational, does not--indeed, can not--transcend passion or emotion.”); Susan A. Bandes,\textit{ Introduction, in The Passions of Law, supra} note 2, at 7, 11 (“emotion in concert with cognition leads to . . . better (more accurate, more moral, more just) decisions.”); William J. Brennan, Jr.,\textit{ Reason, Passion and the “Progress of the Law},” 10 Cardozo L. Rev. 3, 9 (1988) (arguing that by ignoring “the range of emotional and intuitive responses to a given set of facts or arguments . . . the judiciary had deprived itself of the nourishment essential to a healthy and vital rationality.”); \textit{Id.} at 10 (“Sensitivity to one’s intuitive and passionate responses . . . is not only an inevitable but desirable part of the judicial process, an aspect more to be nurtured than feared.”); Lynne Henderson,\textit{ 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, the legal realists noted that we cannot “get rid of emotions in the field of justice.” Jerome Frank,\textit{ Law and the Modern Mind} (1930).\textsuperscript{13} See, e.g., Pillsbury,\textit{ supra} note 8, at 655 (emotions and criminal sentencing); Dan M. Kahn,\textit{ The Anatomy of Disgust in Criminal Law}, 96 Mich. L. Rev. 1621 (1998); Martha Nussbaum & Dan Kahn,\textit{ Two Conceptions of Emotion in Criminal Law}, 96 Colum. L. Rev. 269 (1996), Susan Bandes,\textit{ Empathy, Narrative and Victim Impact Statements}, 63 U. Chi. L. Rev. 361 (1996); Susan Bandes,\textit{ Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett}, 5 U. Pa. J. Const. L. 520 (2003); Susan Bandes,\textit{ The Fear Factor: The Role of Media in Covering and Shaping the Death Penalty}, 1 Ohio St. J. Crim. L. 585 (2004); John Braithwaite,\textit{ Crime, Shame, and Reintegration} (1989); Robert C. Solomon,\textit{ Justice v. Vengeance: On Law and the Satisfaction of Emotion, in The Passions of Law, supra} note 2, at 123; Theodore Eisenberg et al.,\textit{ But Was He Sorry? The Role of Remorse in Capital Sentencing}, 83 Cornell L. Rev. 1599, 1632-37 (1998).\textsuperscript{14} Maroney,\textit{ supra} note 5, at 119 (“law and emotion . . . might now be added to a family of interdisciplinary approaches that includes law and economics and feminist jurisprudence.”).\textsuperscript{14} See e.g.,\textit{ Symposium on Law, Psychology, and the Emotions}, 74 Chi-Kent L. Rev. 1423 (2000); Eric Posner,\textit{ Law and Emotions}, 89 Geo. L.J. 1977 (2001); Owen D. Jones,\textit{ Law, Emotions, and Behavioral Biology}, 39 Jurimetrics J. 283 (1999); Cass Sunstein,\textit{ Probability Neglect: Emotions, Worst Cases, and the Law}, 112 Yale L.J. 61 (2002); Neal Feigenson,\textit{ Forgiveness and Tort Law}, 27 Fordham Urb. L.J. (2000); Neal Feigenson,\textit{ Sympathy and Legal Judgment}, 65 Tenn. L. Rev. 1 (1997); Cass Sunstein et al.,\textit{ Assessing Punitive Damages}, 107 Yale L.J. 2071, 2095-2100 (1998) (role of outrage); Roger Fisher & Daniel Shapiro,\textit{ Beyond Reason: Using Emotions As You Negotiate} (2005); Erin Ryan,\textit{ The Discourse Beneath: Emotional Epistemology In Legal Deliberation and Negotiation}, 10 Harv. Negot. L. Rev. 231 (2005); Peter Huang,\textit{ Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining}, 79 Or. L. Rev. 435 (2000); Peter Huang,\textit{ Trust, Guilt, and Securities Regulation}, 151 U. Pa. L. Rev. 1059 (2003); Peter Huang,\textit{ International Environmental Law and Emotional Rational Choice}, 31 J. Legal Stud. 237 (2002); Catherine L. Fisk,\textit{ Humiliation at Work, William & Mary J. Women & L.} 8 (2001); George Wright,\textit{ An Emotion-Based Approach to Freedom of Speech}, 34 Loy. U. Chi. L. J. 429 (2003).\textsuperscript{15} Maroney,\textit{ supra} note 5, at 134 (“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 exact useful insights from the law and emotion field.”); Laura E. Little,\textit{ Negotiating the Tangle of Law and Emotion}, 86 Cornell L. Rev. 974, 993-94 (2001) (critiquing\textit{ The Passions of Law} for “the relative absence of one area of doctrine often used to control and to indulge emotion: family law . . .
their role in divorce, child custody, and support cases, for example, is so obvious\textsuperscript{17} that describing their influence would merely add to lawmakers’ frustration with their presence. However, examining the role of emotion in family law in depth is important for two reasons. First, the potential for harm resulting from “negative emotions,”\textsuperscript{18} such as persistent anger and the desire for vengeance may be greater in the family context. Unlike tort law or criminal law, for example, where the parties often did not share a pre-existing relationship and most likely will not 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 focused primarily on negative emotions such as anger, disgust, and vengefulness and much less so on positive emotions such as love, hope, and forgiveness.\textsuperscript{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.\textsuperscript{20} Few law and emotion scholars have 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”\textsuperscript{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

\textsuperscript{17} Maroney, supra note 5, at 120 (noting that the assertion that emotion deeply influences family law cases is so obvious that “its articulation seems almost banal.”)

\textsuperscript{18} Emotions such as anger are not inherently positive or negative. See infra Part I.A.

\textsuperscript{19} But see Kathryn Abrams & Hila Keren, Law in the Cultivation of Hope, available from Bepress Legal Series at http://law.bepress.com/expresso/eps/1205 (March 29, 2006).

\textsuperscript{20} Cf. Little, supra note 16, at 993-94 (arguing that “emotion theory could help fashion doctrine that harnesses the most constructive emotions . . . and encourages negative emotions to transform into those that improve family relationships.”); MURPHY & HAMPTON, supra note 8, at 8 (“One 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?”).


\textsuperscript{21} MURPHY & HAMPTON, supra note 8, at 15.
any depth, in the last two decades, scholars in other fields have produced an impressive literature and empirical studies demonstrating the benefits of forgiveness, including a reduction in anger. Second, forgiveness is particularly beneficial to divorcing couples and their children. Many divorced or separated parents are hurt, angry, and want nothing more than to punish their former spouse for the pain he or she has caused them. These emotions affect their interactions not only during the divorce process, but can also endure and cause excessive conflict for years after the legal relationship has ended. Persistent anger and the desire for revenge are harmful not only to the divorcing parents, but also to their children, significantly increasing their risk of depression, anxiety, low self-esteem, and behavioral problems.

Lawmakers have attempted to reduce the acrimony that has traditionally characterized many divorces, but 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 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 inter-parental hostility and conflict are detrimental to both parents and children. Part II summarizes the law’s efforts to reduce 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 proceedings; and second, by requiring high-conflict divorced parents to participate in a forgiveness education program. These reforms, which I am naming “Healing Divorce,” may significantly reduce inter-parental hostility and conflict. Finally, this Part addresses some potential objections to my proposal and briefly looks at restorative justice and South Africa’s Truth and Reconciliation Commission in order to demonstrate that policymakers have attempted to facilitate forgiveness in other contexts. Those cases, while not analogous to divorce, may suggest that the law can cultivate forgiveness in the divorce context.

I. INTER-PARENTAL HOSTILITY AND CONFLICT

22 See Robert E. Emery, The Truth About Children and Divorce 36 (2004) (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) (“many 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.”).

23 See infra Part I.B.
Psychologists agree that even when the decision to divorce is mutual (which it rarely is),24 “divorce is incredibly hard.”25 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.26 The party who wants to end the relationship may feel guilty about her decision, but also resent the other spouse for his inability to move on.27 The abandoned or “left”28 spouse (who, remarkably, often had no inkling that the marriage was in trouble)29 may feel angry, betrayed, rejected, hopeless, and vengeful.30 Further, the left spouse may experience conflicting and intense emotions such as love, anger, sadness, and vengefulness all in the span of one hour, swinging from one emotion to the other.31 This roller coaster of emotions is quite normal, but, left unacknowledged, it destroys any hope for a “good”32 divorce and cooperative parenting relationship.

A. EFFECT ON PARENTS

In the 1989 film, War of the Roses, Michael Douglas and Kathleen Turner portrayed a divorcing couple who would rather fight to death (literally) than compromise or let the other spouse “win.”33 While few divorces are quite this

24 EMERY, supra note 22, at 37 (noting that in his 25 years of experience as a therapist, he has seen few cases where the decision to end the marriage is mutual); Marygold Melli et al., The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce, 40 Rutgers L. Rev. 1133 (1988) (“In most cases, the decision to divorce is not mutual. One party wants out, often to pursue another relationship.”); FRANK FURSTENBERG, JR. & ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 21-22 (1991) (in 80% of cases, one person decided to end the marriage before the other person wanted it to end).
25 EMERY, supra note 22, at 13.
26 Howard S. Erlanger et al., Participation and Flexibility in Informal Processes: Cautions From The Divorce Context, 21 Law & Soc’y Rev. 585, 593 (1987) (“the emotional intensity of divorce is particularly evident when the decision to end the marriage is not mutual.”).
27 EMERY, supra note 22, at 37.
28 Robert Emery refers to the “Leaver” spouse and the “Left” spouse. EMERY, supra note 22, at 37.
29 EMERY, supra note 22, at 19, 37 (noting that the left spouse is often shocked to learn that the other spouse wants a divorce).
30 Melli et al., The Process of Negotiation, supra note 24, at 1134; EMERY, supra note 22, 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 (“The divorce process if often associated with powerful feelings of sadness, anger, and mistrust” and some people “frequently go through a mourning process that may be associated with strong feelings of betrayal rage. Others 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).
31 EMERY, supra note 22, at 27-30 (describing divorcing woman experiencing alternating moments of grief, sadness, and anger).
32 CONSTANCE AHRONS, THE GOOD DIVORCE 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).
33 WAR OF THE ROSES (20th Century Fox 1989). The phrase “war of the Roses” is commonly used to describe the most vicious divorces. See, e.g., Dareh Gregorian, New Affront in “War of Roses”
vicious, media stories describing destructive divorces abound. In one tragic New York case, a physician blew up his $6 million home so that his ex-wife could never have it and died as a result of the burns and injuries he suffered in the explosion. While this is an extreme case, destruction of property and loved ones, including pets, is one of the unfortunate ways in which angry divorcing spouses intentionally hurt each other.

Angry spouses hurt each other any way they can. Some contest the divorce, thereby delaying the inevitable, but causing the other spouse significant stress in the process, while others disparage their estranged spouse to their friends or anyone who will listen. For example, former New Jersey Governor James McGreevey has called his estranged wife a “bitter, vengeful woman” and, as part of their custody fight, the couple is now in the process of publicly attacking each other’s character and parenting skills. Similarly, former New York Mayor and presidential hopeful Rudolph Giuliani’s divorce made headlines.


35 According to some divorce attorneys, “vindictiveness is not unusual” and they have seen divorcing spouses slash art and record collections or kill the other’s pets. Hartocollis & Buckley, _supra_ note 34 (quoting attorney recalling an angry spouse who put a puppy in the microwave and a cat in a washing machine).

36 _See_ Taub v. Taub (discussed in _Sentenced Till Death! Warring Couple Wanted Split, But Jury Sez No_, N.Y. DAILY NEWS, at 7 (Mar. 29, 2007) (refusing to consent to no-fault divorce and challenging wife’s divorce petition on the ground of extreme cruelty). The parties’ divorce had become so contentious that, when they each 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). Surprisingly, after a 10 day trial, the jury denied the wife a divorce despite allegations of domestic violence. _Id_. She has since refiled for divorce based on acts of adultery and cruelty Simon allegedly committed since 2005 when she first filed for divorce. Dareh Gregorian, _New Affront in “War of Roses” Divorce_, NEW YORK POST, May 15, 2007.


38 _Id_. For example, James McGreevey has said that, although he is not alleging that Dina “is an unfit mother,” he has some concerns. _See_ McGreevey v. McGreevey, FM20-01166-7B, Certification of James E. McGreevey in Support of Order to Show Cause with Temporary Restraints (Apr. 5, 2007), Superior Court of NJ, Union County-Chancery Division—Family Part. In turn, Dina has alleged that James never made time for his daughter while governor and did not bother going to the emergency room when she fell and cut her chin. _McGreevey Exposed Young Daughter to Erotic Art, Wife Says_, STAR-LEDGER, Apr. 20, 2007.
in 2001 when he allowed his attorney to characterize his estranged wife and mother of his children, as “an uncaring mother.”

Politicians and the uber-wealthy are not the only divorcing spouses who intentionally cause each other harm. Casebooks are filled with cases describing angry spouses who engage in vengeful behavior. Further, every matrimonial attorney or 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. Although custody and visitation disputes often harm the children, they inevitably harm the parents as well. One study found a strong correlation between inter-parental conflict and parents’ emotional problems. Other studies suggest that high-conflict parents are at increased risk for severe psychopathology and substance abuse problems.

Furthermore, while conflict with the other spouse is a source of emotional distress, anger towards the other parent (independent of conflict) may be just as harmful to one’s health. Anger, resentment, and the desire for revenge are normal and healthy responses when one has been injured unjustly. A woman whose husband of fifteen years abandons her and their children for his mistress has every right to be angry and to want to hurt him. Anger is a sign of self-respect and thus, the absence of anger in such a case would indicate a lack of

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39 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); Helen Peterson, Mansion’s Their House or Ours?, DAILY NEWS (May 17, 2001); see also The Mayor, The Wife, The Mistress, PEOPLE MAGAZINE (May 2001).
40 See, e.g., Schutz v. Schutz, 581 So.2d 1290, 1291-92 (Fla. 1991); Egle v. Egle, 715 F.2d 999, 1003 (5th Cir. 1983).
41 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. Years passed and when the daughter reached adulthood and decided to get married, he offered to pay for the wedding and give her an additional $10,000 on the condition that she not invite her mother. The daughter agreed. Irwin J. Borof, Honey, I Want the Kids: Part I—Temporary Custody Overview, 25 Fam. L. News. 78, 79 (2003) (cited in 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, 351 (2005); AHRONS, supra note 32, at 82 (quoting divorced wife who five years after the divorce said that “whenever I 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 “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 34 (quoting Warren Adler).
42 JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 125, 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.”).
respect for herself and for societal norms of marital behavior. The problem with such emotions—“resentment, anger, hatred, and the desire for revenge”-- is that they have the potential to become all-consuming and take over one’s life. 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. Excessive anger may also interrupt sleep patterns and negatively affect academic or work performance. In short, persistent anger is detrimental to one’s health.

B. EFFECT ON CHILDREN

Although many divorcing parents experience a host of emotions, the most destructive emotion as far as children are concerned is anger. Anger towards the other parent causes individuals to say and do things they never thought they would do and that are clearly harmful to their children’s best interests. It may lead parents to refuse to reach a parenting time agreement, denigrate the other parent to the children, deny, interfere with, or place unrealistic restrictions on visitation, withhold child support, and, although not common, make false

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45 See Murphy, supra note 8, at 1359 (“lack 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.”); id. at 1359 (noting that resentment towards those who hurts us also shows our “allegiance to the moral order itself”). 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 10 Americans believe that extra-marital affairs are “always wrong” or “almost always wrong.” Jackie Calmes, Ninety Percent Oppose Adultery; Divorce Criticized, WALL ST. J., Mar. 5, 1998, at 12 (reporting results of 1998 Wall Street Journal/NBC News poll of 2003 adults). We do not need a poll to tell us that virtually all Americans believe that cruelty towards a spouse is wrong.

46 Murphy, supra note 8, at 1355.

47 Murphy, supra note 8, at 1360-61.


49 Fitzgibbons, supra note 48, at 71.

50 EMERY, supra note 22, at 30.

51 See, e.g., 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); WALLERSTEIN & KELLY, supra note 42, at 218 (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”); Egle v. Egle, 715 F.2d 999, 1003 (5th Cir. 1983) (finding that mother had tried to “impregnate[e] the children's minds against their father.”).
accusations of abuse.\textsuperscript{52} An angry parent may force a child to chose him over the other parent or punish the child emotionally (by making her feel guilty or disloyal) if she defends the other parent. An angry spouse may also launch a custody battle out of spite.\textsuperscript{53} While some parents contest custody or 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.”\textsuperscript{54}

According to some estimates, as many as one-third of all divorces are accompanied by intense hostility and/or bitter legal conflict\textsuperscript{55} and in as many as 25\% of families, high levels of parental conflict continue long after the divorce is final.\textsuperscript{56} Some of these parents go back 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.”\textsuperscript{57} Each trip to the courthouse expends court resources and causes the parties to incur financial costs (e.g.,

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\textsuperscript{53} Less than five percent of custody disputes go to trial. Joan B. Kelly, \textit{Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes}, 10 Va. J. Soc. Pol’y & L. 129, 131 (2002). However, 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 not to speak to the other parent, and to search their memories for information that will portray the other parent negatively. \textit{Id.}

\textsuperscript{54} EMERY, \textit{supra} note 22, at 34.


\textsuperscript{57} Christine A. Coates et al., \textit{Parenting Coordination for High-Conflict Families}, 42 Fam. Ct. Rev. 246 (2004); Kelly, \textit{Psychological and Legal Interventions}, \textit{supra} note 53, at 143 (noting that that the most common disputes bringing high conflict parents to court repeatedly “involve 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 and that on the other parents’ time 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”).

\end{quote}
attorneys’ fees, filing fees, time off from work). Most important, they reinforce parents’ hostility towards each other which negatively impacts their children. Given that the majority of children whose parents divorced were six years of age or younger when their parents separated, some children could be exposed to their parents’ conflict for most of their childhood years.

1. Psychological, Emotional, and Behavioral Problems

In a perfect world, children would never be exposed to their parents’ conflict. Parents would encourage their children to love and respect both parents and never force them to “choose” between them. Unfortunately, many parents are unable or unwilling to keep their feelings towards their former spouse to themselves. They share their biased assessment of the other parent’s character, behavior, and parenting skills with anyone who will listen, including the children. Imagine the effect on a child whose father tells him that the reason he no longer lives at home is that his mother had an affair, or was not willing to work on the marriage for the sake of the family. Imagine the effect on that same child when his mother tells him that his father is a liar and cannot be trusted, or that if his father really cared about him, he would pay more child support. This child cannot win. If he defends his mother, he risks angering his father and being accused of disloyalty. If he defends his father’s integrity, he risks alienating his mother.

Now imagine a child whose parents never say anything (positive or negative) about each other, but whose mother prohibits him from mentioning his father’s name in her presence or gives him the cold shoulder whenever he returns from his father’s new home. Finally, imagine a child who overhears his parents arguing about his residential schedule over the telephone or who sees them fighting every time he is picked up or dropped off at the other’s home. These are some typical examples of children stuck in the middle of their parents’ conflict. Not surprisingly, a child in any of these situations is at higher risk for a myriad of emotional, behavioral, and psychological problems. Studies have repeatedly found that inter-parental 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. Studies have also found a

58 Goodman et al., supra note 43, at 263 (high-conflict divorced families use a disproportionate amount of court resources).
59 Coates et al., supra note 57, at 248 (relitigating reinforces the parties’ view of the other parent as the enemy).
60 Bruch, supra note 56, at 287. Seventy-five percent of these children are under the age of three. Id. at 287 n.27.
61 This does not mean that children would be oblivious to their parents’ true feelings towards each other. Children, especially older children might be quite attuned to their parents’ emotions despite parents’ efforts to shield them from their conflict and hostility.
62 Janet R. Johnston et al., The Psychological Functioning of Alienated Children in Custody Disputing Families, 23 AM. J. FORENSIC PSYCHOLOGY 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,
correlation between inter-parental hostility and children’s lower cognitive and social development. Repeated exposure to their parents’ anger and disparagement of each other exacerbates children’s emotional distress and loyalty conflicts.

2. Inadequate Parenting

Unfortunately, children from high-conflict divorce families may not be able to rely on their parents to help them deal with their feelings and adjustment difficulties. During, and sometimes for years after, the divorce, many parents struggle with their own stress and difficulty adjusting to the divorce, which hinders their ability to be effective parents. Recently divorced parents are less likely to discipline their children or monitor their academic progress, activities, and whereabouts. The deterioration in parenting skills is even greater among parents who experience continuing conflict with the former spouse. Good parenting skills, such as responsiveness and understanding of their children’s needs, tend to decrease when inter-parental conflict is high while bad parenting practices, such as yelling and harshness, tend to increase. Parents may also

Consequences of Marital Dissolution for Children, 20 ANN. REV. SOC. 235, 253-54 (1994); Kathleen A. Camara & Gary Resnick, Interparental Conflict and Cooperation: Factors Moderating Children's Post-Divorce Adjustment, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPARENTING ON CHILDREN 191-92 (E. Mavis Hetherington and 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 two years following the divorce.”); Buehler et al., Interparental Conflict and Youth Problem Behaviors: A Meta-Analysis, 6 J. Child & Fam. Stud. 233 (1997) (conducting meta-analysis of sixty-eight studies and finding that association between inter-parental conflict and child adjustment problems was almost twice as high as the effect of divorce on children); Coates et al., supra note 57, at 247-48; ELEANOR E. MACCoby & ROBERT H. MNOOKIN, DIVIDING THE CHILD 248 (1992) (teenagers caught in the middle of parental conflict “showed more symptoms of maladjustment (for example, depression, deviant behavior) than those who did not.”).

63 Goodman et al., supra note 43, at 265; Lawrence A. Kurdek, An Integrative Perspective on Children's Divorce Adjustment, 36 AM. PSYCHOL. 856 (1981) (reporting that parental conflict hinders social development and cognitive skills for years after the divorce is finalized).

64 Goodman et al., supra note 43, at 265.

65 ROBERT E. EMERY, RENegotiating FAMILY RELATIONSHIPS 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 Maxwell, Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Client’s Divorces on Their Children, 67 Rev. Jur. U.P.R. 137 (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.”).

66 MICHAEL R. STEVENSON & KATHRYN N. BLACK, HOW DIVORCE AFFECTS OFFSPRING 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 . . . ”).

67 Goodman et al., supra note 43, at 265.
displace their anger towards the other parent onto their children.68 In short, high conflict parents “may become more hostile, aggressive, or withdrawn from their children and more inconsistent in their discipline.”69

The 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.70 Not surprisingly, researchers have found a link between parental psychopathology and poor child adjustment.71 A depressed or anxious custodial parent is less likely than an emotionally stable parent to adequately monitor or discipline the children.72 A child who experiences inadequate parenting is at increased risk for emotional and behavioral problems. Thus, this is one more way in which interparental conflict may lead to poor outcomes for children.

3. Paternal Disengagement

Anger and inter-parental conflict also harm children by increasing the likelihood that the nonresidential parent (usually the father) will abandon them emotionally and financially. In recent years, social scientists and legal scholars have explored the reasons why as many as 30% of nonresidential fathers have little or no contact with their children after divorce. Although the reasons are many and complex, studies have found that the nonresidential father’s relationship with his children’s mother may be the strongest predictor of post-divorce paternal contact.73 Specifically, these studies have found a strong

68 ENRIGHT & FITZGIBBONS, supra note 22, at 212-13 (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.”).
69 Grych, supra note 56, at 99; STEVENSON & BLACK, supra note 66, at 42 (“parents may be more critical and less positive”).
70 See supra Part I.A.
71 Id.; see also WALLERSTEIN & KELLY, supra note 42, 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.”).
72 Bruch, supra note 56, at 287 (citing studies finding that “[s]ressed-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 PARENTING, AND STEPPARENTING ON CHILDREN, supra note 62 at 144; Gene H. Brody & Rex Forehand, Multiple Determinants of Parenting: Research Findings, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN, supra, at 129.
73 See Solangel Maldonado, Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent, 153 U. Pa. L. Rev. 946-47 & n. 123-127, 979 (2005); 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) (64% 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).
correlation between inter-parental conflict and a decline in children’s contact with their nonresidential fathers.74

One reason is that custodial mothers who are hostile towards their former spouse are more likely to interfere with his access to the children, either by not making them available for visitation, making them feel guilty for seeing their father, or disparaging the father in front of them.75 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 it is just too difficult to interact with the mother or they believe (whether correctly or not) that the mother has “brainwashed” or will soon turn the children against them.76 Finally, angry 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 rage.

There is some evidence that paternal disengagement is harmful to children. Some studies have found a correlation between regular paternal contact and children’s better adjustment to their parents’ 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 anti-social and criminal behavior.77 While other studies have found no correlation between frequent paternal contact and children’s educational and social outcomes,78 even those researchers “remain convinced that when parents are able to cooperate in child rearing after a divorce and when fathers are able to maintain an active and supportive role, children will be better off in the long run.”79

74 See Eileen Mavis Hetherington et al., Divorced Fathers, in READINGS IN FAMILY LAW 55 (Frederica K. Lombard ed., 1990) (“high rates of continued aggression and conflict between the divorced parents are associated with the gradual loss of contact of the noncustodial parent”).
75 Maldonado, supra note 73, at 980 (“researchers estimate that one-third to one-half of residential mothers interfere with visitation”); WALLERSTEIN & KELLY, supra note 42, 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”).
76 One father stated that the mother had "worked very hard for three years" to successfully alienate the children from him. Greif, supra note 73, 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.
77 Maldonado, supra note 73, at 949-61 (citing studies).
78 Frank F. Furstenberg, Jr. et al., Paternal Participation and Children's Well-Being After Marital Dissolution, 52 Am. Soc. Rev. 695, 698-99 (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.").
79 FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 73 (1991) (emphasis added); Further, at least one study has found that when parents get along, paternal visitation has a positive effect on children's well-being. See Bruch, supra note 56, at 290.
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.\textsuperscript{80} They “experience sadness and even severe depression” when they have little contact with their nonresidential fathers.\textsuperscript{81} 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.\textsuperscript{82} Not surprisingly, fathers who do not regularly see their children are significantly less likely to pay child support.\textsuperscript{83} 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 divorce less acrimonious. 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.\textsuperscript{84} Lawmakers’ widespread support for mediation and parenting education is similarly motivated by the desire to reduce spousal hostility and conflict.\textsuperscript{85} Yet, despite some evidence of success, too many parents are still unable to let go of their anger even as it adversely affects their emotional and physical well-being and that of their children. In order to appreciate lawmakers’ efforts to reduce inter-parental conflict and hostility, one must first understand how family law has historically legitimized and cultivated certain emotions. In this section, I briefly trace the history of divorce law in the U.S. and show why it has failed to significantly reduce the bitterness and vengefulness that characterizes some divorces.

A. THE PROBLEM WITH FAULT

For most of American history, a spouse who wanted to legally end her marriage had to show that the other spouse had committed a marital fault as

\textsuperscript{80}See Wallerstein & Kelly, supra note 42, at 218-19 (noting that children have lower self-esteem when the noncustodial parent has only limited contact with them).
\textsuperscript{81} 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).
\textsuperscript{83} Fewer than 20% 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(1991); Greif, supra note 73, at 225 (noting correlation between consistent payment of child support and visitation).
\textsuperscript{84} See infra Part II.B.
\textsuperscript{85} See infra Part II.C.
defined under state law—e.g., adultery, extreme cruelty, or abandonment. The expression of anger and grief was often part of 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 a divorce 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.

I use this hypothetical to illustrate how 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 for Louisiana, allowed a jilted spouse to sue his or her wife’s paramour for alienation of affections. The plaintiff who showed that the defendant had engaged in “wrongful and malicious acts” which interfered with plaintiff’s marriage and caused him to lose his spouse’s affection or consortium could recover substantial damages, but more importantly (as far as many plaintiffs were concerned), obtained revenge. Courts were aware that anger and the desire for vengeance were often the driving forces behind these suits, especially in cases where the adulterous spouse later married his or her paramour.


87 See Rotwein v. Gersten, 36 So.2d 419 (1948) (en banc) (abolishing claim). Other states soon followed. See Bland, 735 So.2d at 426 nn.3 & 4 (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.

88 McCutchen v. McCutchen, 624 S.E.2d 620, 623 (N.C. 2006); Bland, 735 So.2d at 417; 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.”); 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”).

89 Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994) (noting revenge may be a motive in these types of suits); Helsel v. Noellsch, 107 S.W.3d 231 (Mo. 2003) (“Revenge . . . is the often the primary motive” behind actions for alienation of affections); Bland, 735 So.2d at 426 (McRae, J., concurring in part and dissenting in part) (“even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives”). Cf. ENRIGHT & FITZGIBBONS, supra note 22, at 210 (“Marital infidelity results in some of the most powerful anger that one can encounter.”).
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 belittled and humiliated her. She would also attempt 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 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 finding that the alleged acts were not sufficiently cruel or significantly impacted her mental health. In contested divorces, the trial was always fraught with emotion as the parties blamed each other for virtually everything.

Marital fault and the emotions that often accompanied attempts to establish fault were not only prerequisites for divorce, but were also relevant to determinations of child custody, alimony, and division of the marital assets. For example, a dependent spouse who committed a marital fault, in effect, forfeited any claim to alimony. 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 completely innocent and to portray the other spouse in the worst possible light. A wife might not have been satisfied to simply show that her spouse had committed 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 feelings.

Plaintiffs 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 75% of all divorces were uncontested and most couples negotiated their own alimony and marital property agreements, these were

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90 Hodge v. Hodge, 837 So.2d 786 (Miss. App. 2003) (denying divorce on the ground of cruelty even though the wife’s emotional distress was sufficiently severe to require seek medical treatment).
91 Herma Hill Kay, *No Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 30 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.*
92 *Id.*
bargained for in the shadow of the law. 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 were uncomfortable 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 people to obtain migratory divorces from sister states or other countries with laxer divorce laws. These divorces were not always recognized by their own state and created a host of problems for individuals who sought to remarry someone else. 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.”

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

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95 For example, in Williams v. North Carolina II, 325 U.S. 226 (1945), two North Carolina domiciliaries went to Nevada without their respective spouses. After remaining 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. Refusing to recognize the Nevada divorce, the North Carolina courts held that the newlyweds were still married to their original spouses. The Supreme Court affirmed. See also Fink, 346 N.E.2d at 416 (refusing to recognize Nevada divorce decree obtained by Illinois domiciliary).
96 Barbara Bennett Woodhouse, Sex, Lies, And Dissipation: The Discourse Of Fault In A No-Fault Era, 82 Geo. L.J. 2525, 2556; Marygold Melli, Whatever Happened to Divorce, 2000 Wis. L. Rev. 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 standards.”).
97 Kay, supra note 91, at 33; see also Judith Areen, Family Law 373 (4th ed. 1999).
98 The statute expressly provided that “evidence of specific acts of misconduct shall be improper and inadmissible.” Cal. Civ. Code. §§ 4506, 4509. 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 Areen, supra note 97, 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.
99 Melli, supra note 96, at 638.
simultaneously drafted Uniform Marriage and Divorce Act had similar expectations.\textsuperscript{100}

This goal has not been achieved for several reasons. First, it is true that every state currently has some form of no-fault divorce; but, rather than eliminating all fault grounds, the majority of states merely added a no-fault ground to their fault-based system.\textsuperscript{101} 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.\textsuperscript{102} 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.\textsuperscript{103} 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.\textsuperscript{104} In these jurisdictions, not surprisingly, the parties expend considerable energy blaming each other for the marital breakdown.\textsuperscript{105}

\textsuperscript{100} The Uniform Marriage and Divorce Act provides that a court shall grant a divorce if the marriage is “irretrievably broken” as shown by evidence that the parties have lived separate 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.” UMDA § 302.


\textsuperscript{102} For example, New York’s the no fault ground is living separate and apart for 12 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. Thus, to obtain a no fault divorce, both parties have to consent or one party must have grounds for a separation McKinny’s Consol. L. N.Y. Ann. § 170 (2003); see also Vernon’s Ann. Mo. Stat. § 452.320 (2003) (allowing no-fault divorce only where both parties agree); Vernon’s Tex. Stat. & Codes Ann. § 6.006 (1997) (no fault ground requires separation period of three years); West’s Utah Code Ann. § 30-3-1 (1987) (same).

\textsuperscript{103} See Robertson v. Robertson, 211 S.E.2d 41, 43 (1975) (“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).

\textsuperscript{104} See, e.g., Fla. Stat. Ann. § 61.08 (West 1997) (“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. § 9-6-1(b) (West 1999) (“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 (1999) (“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) (West 1998) (same); Allen v. Allen, 648 So.2d. 359 (La. 1994) (“Although no-fault divorce is now available, freedom from fault is still necessary for permanent alimony”); Hammonds v. Hammonds, 597 So.2d 653 (Miss.1992) (awarding wife who committed adultery minimal alimony); Kurz v. Kurz, 443 N.W.2d 782 (Mich. App. 1989) (fault is a valid consideration in dividing marital assets and awarding 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. Mani v. Mani, 183 N.J. 70, 89 (2005). Some courts consider the supporting spouse’s adultery or cruelty, ordering him to make higher alimony payments than would otherwise be merited. See N.C. Gen. Stat. § 50-16.3A (1999) (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
However, “no-fault divorce did not end the bitterness of the divorce process” even in those jurisdictions that eliminated fault completely.\(^{106}\) As some family law scholars have noted, no-fault divorce advocates were naive to expect that removing fault would eliminate the blame, animosity, and emotion that had characterized divorce proceedings under the fault-based system.\(^{107}\) 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.”\(^{108}\)

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. Indeed, no-fault divorce may actually leave the rejected spouse feeling even angrier because she has no mechanism for obtaining vindication and recognition of her moral character and respect for the marriage.\(^{109}\) No judge or mediator in a no-fault system will tell a woman whose husband left her for his mistress that she was wronged. Rather, she will learn that under the law, fault does not matter and that, when a marriage ends, both parties are at fault. This is the last thing a rejected or abused spouse wants to hear.

Not surprisingly, angry spouses have found other ways to bring blame into the divorce process. Some fight over the marital property; the greater the betrayal or marital misconduct, the greater the role of emotion in settlement negotiations or litigation.\(^{110}\) Some spouses bring tort actions based on their spouses’ adultery or mental cruelty, or assault and battery if there was physical abuse.\(^{111}\) Some betrayed spouses in the few jurisdictions that still recognize the tort of alienation

\(^{105}\) Allen v. Allen, 648 So.2d 359 (La. 1994) (husband attempted to challenge wife’s alimony petition, claiming that she was not “free of fault” as required by Louisiana law because she had criticized his family and home town, objected to his charitable contributions, and “argued back and forth”).
\(^{106}\) Melli, supra note 96, at 637.
\(^{107}\) Kay, at supra note 91, at 33, 36; Wardle, supra note 16, at 58.
\(^{108}\) Melli, supra note 96, at 637-38.
\(^{109}\) Wardle, supra note 16, at 59 (arguing that divorcing spouses often want someone to say "you were done wrong" but no-fault divorce denies them the opportunity to obtain legal recognition of their wounded feelings because they are legally irrelevant, and thus, courts refuse to hear such testimony).
\(^{111}\) See McGreevey Answer & Counterclaim (suing husband for intentional infliction of emotional distress and fraud); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993) (same).
of affections have brought such claims against their spouse’s paramour\textsuperscript{112} and those in states that no longer recognize such a claim have sued their spouse’s paramour for intentional infliction of emotional distress.\textsuperscript{113} While the likelihood of recovering significant damages is quite low,\textsuperscript{114} that does not deter spouses who, as noted, are often driven by the desire for revenge.

Similarly, although the law significantly limits the relevance of marital misconduct to child custody and visitation decisions,\textsuperscript{115} parents sometimes use the children to hurt the other parent,\textsuperscript{116} shifting allegations of fault into the custody determination and parenting time schedules.\textsuperscript{117} As noted, custody disputes and frequent modification petitions are sometimes motivated by anger and the desire to hurt the other parent. No-fault divorce has not significantly reduced custody disputes and frequent modification petitions.

\textsuperscript{112} See Julie Scelfo, \textit{Heartbreak’s Revenge: Some States Allow Suits for Alienation of Affections}, Newsweek (Dec. 4, 2006) (reporting that more than 200 alienation of affections claims are filed in North Carolina each year).


\textsuperscript{114} McDermott, 530 S.E.2d 902 (dismissing claim for intentional infliction of emotional distress against wife’s paramour); Quinn, 732 N.E.2d 330 (same). 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. Spiess, 748 P.2d 1020 (allowing husband’s claim against wife’s paramour, her psychiatrist); Figueiredo-Torres v. Nickel, 584 A.2d 69 (Md. 1991) (psychologist hired by 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 1235 (statute abolishing heart balm torts precluded breach of fiduciary duty claim against minister who had a sexual relationship with plaintiff’s wife whom he was providing marriage counseling).

\textsuperscript{115} Most statutes authorize courts to consider marital fault in the child 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.

\textsuperscript{116} Some spouses have made their children plaintiffs in actions against a parent’s paramour. For example, in McDermott v. Reynolds, 530 S.E.2d 902 (Va. 2000), the husband brought an unsuccessful suit against his wife’s paramour, alleging severe emotional harm to him and his children resulting from the affair. \textit{Id.}; see also Quinn, 732 N.E.2d 330 (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,” \textit{id.}, at 903, only an angry and vengeful parent would bring such an action given its potentially harmful effect on the children. 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.’”). 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.

\textsuperscript{117} Barbara Bennett Woodhouse, \textit{Towards A Revitalization of Family Law}, 69 Tex. L. Rev 245, 289 (1990) (“the banishment of fault from the grounds and economics of divorce [has] shift[ed] allegations of fault into the child custody determination); Kay, supra note 91, 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”); Wardle, supra note 16, at 59.
and visitation disputes or the negative behaviors that often follow. Ironically, no-fault divorce may have made these aspects of the divorce even more contentious because they are often the only means for a party to express his anger and desire for revenge. Thus, no-fault divorce did not extinguish these emotions, but may have redirected them 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, college students were given fact patterns about divorcing couples and asked to rate each spouse’s proposed property settlement. Although instructed to ignore fault, many students rated the wrongdoer’s (i.e., the adulterer spouse’s) settlement proposal lower than that of the non-wrongdoer without realizing that they had been influenced by the wrongdoer’s actions.\(^{118}\) Their feelings towards the adulterer unconsciously influenced their evaluation of his or her proposal. If college students reading fact patterns are unconsciously influenced by their emotions towards an unfaithful spouse, it is highly likely that divorcing spouses’ emotions affect their settlement negotiations even when they intended to “ignore their interpersonal grievances.”\(^{119}\)

The study’s findings also suggest that angry spouses might irrationally choose to litigate in order to punish the other spouse, regardless of the cost to themselves and their children.\(^{120}\) As noted by the researchers, a wife whose husband is ending the marriage to marry his paramour will likely find his proposal to sell the marital home and split the proceeds equally outrageous. Even if she is aware that, in her particular state, marital misconduct is legally irrelevant, she may believe that her proposal--that she remain in the house and her husband continue to pay the mortgage--is reasonable.\(^{121}\) She may prefer to litigate even if it means spending thousands of dollars on attorneys’ fees to make her husband’s life difficult despite the financial and emotional cost to her and her children.\(^{122}\)

\(^{118}\) Wilkinson-Ryan & Baron, supra note 110, at 8. That same settlement offer was rated more reasonably when proposed by the innocent spouse. Id.

\(^{119}\) Id.

\(^{120}\) 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 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. See EURIPIDES, MEDEA.

\(^{121}\) Wilkinson-Ryan & Baron, supra note 110, at 9. 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. Their predictions were influenced by who had introduced the proposal—a spouse who had committed adultery 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. 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.

\(^{122}\) Id.
To recap, no-fault divorce has not made unilateral divorces—where the decision to end the marriage is not mutual—less acrimonious.123 Below, I examine more recent efforts to reduce inter-parental hostility and conflict.

C. MEDIATION

Since no-fault divorce did little to reduce judges’ and lawyers’ frustration with divorcing spouses’ unwillingness or inability to control their anger and hostility, they, along with mental health experts, continued to explore other ways to reduce the financial and emotional costs of bitter divorces. Many legal and mental health professionals believe that litigation exacerbates the parties’ anger and renders parental cooperation after battling in court unlikely.124 Mediation125 seemed like a better alternative.126 As a result, a significant number of states now require that divorcing parents attempt to mediate custody and visitation disputes,127 and many parents voluntarily opt for mediation when unable to resolve custody and other matters on their own. In some areas, mediation is the most widely used mechanism for resolving custody and visitation disputes.128

Mediation has some advantages over traditional litigation. First, some studies suggest that mediation clients are more satisfied with their divorce outcomes than parents who used the adversary system.129 Second, parties who

123 Woodhouse, supra note 96 at 2548 (“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 26, at 593 (discussing 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).
124 Gregory Firestone & Janet Weinstein, In the Best Interest of Children, 42 Fam Ct. Rev. 203, 204 (2004) (adversary process makes enemies out of the parties and exacerbates existing controversy and tensions); Kelly, Psychological and Legal Interventions, supra note 53, at 131 (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”).
125 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.”).
126 See Connie J. A. Beck & Bruce D. Sales, A Critical Reappraisal of Divorce Mediation Research and Policy, 6 Psychol. Pub. Pol'y & L. 989, 1044 (2000) (noting that “mediation programs were created to solve a myriad of problems associated with the litigation process.”); Grillo, supra note 30, at 1552 (noting that mediation has been “heralded as the cure for the various ills of adversary divorce” and “it was touted as a process in which the parties would voluntarily cooperate to find the best manner of continuing to parent their children.”)
128 Lande & Herman, supra note 127, at 280.
129 Beck & Sales, supra note 126, at 991; Grillo, supra note 30, at 1546 & n.8. But see id. at 1546 n.9 (critiquing methodology of these studies).
negotiate custody and visitation arrangements are more likely to comply with them.\textsuperscript{130} Third, nonresidential fathers who mediated custody and visitation tend to have higher rates of paternal involvement than those who litigated.\textsuperscript{131} Most importantly, for purposes of this Article, there is some evidence that parents who mediate experience lower rates of inter-parental conflict after divorce.\textsuperscript{132} Yet, despite these apparent benefits, mediation has been significantly criticized. Some critics have focused on the power imbalances that result when parties lack legal representation either in the mediation sessions themselves (often because it is not permitted)\textsuperscript{133} or at all.\textsuperscript{134} Others have opposed mandatory mediation and criticized the quality of the process and mediator qualifications.\textsuperscript{135} Many feminist scholars have attacked mediation’s potential to re-victimize survivors of domestic abuse.\textsuperscript{136}

I focus on another aspect—mediation’s limited ability to reduce anger and hostility towards the other parent. 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.”\textsuperscript{137} However, although many mediating spouses reach an agreement, mediation may not significantly reduce the anger that can result in years of inter-parental hostility and conflict.\textsuperscript{138} Studies have found that reaching an agreement does not mean that parents feel they successfully

\textsuperscript{130} Kelly, \textit{Psychological and Legal Interventions}, supra note 53, at 139; Beck & Sales, \textit{supra} note 126, at 991.

\textsuperscript{131} Kelly, \textit{Psychological and Legal Interventions}, \textit{supra} note 53, at 139 & n.50.

\textsuperscript{132} Kelly, \textit{Psychological and Legal Interventions}, \textit{supra} note 53, at 139 (”parents 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.”).

\textsuperscript{133} Some statutes provide that the mediator may exclude attorneys from the mediation session even if the parties want them present. \textit{See} Grillo, \textit{supra} note 30, at 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. \textit{See} Beck & Sales, \textit{supra} note 126, at 992-94 (citing study finding that in almost 60\% of divorce mediation cases, at least one party is \textit{pro se} and is thus, making decisions without knowing the law and what options might be available to him or her).

\textsuperscript{134} Grillo, \textit{supra} note 30, at 1600-07 (arguing against mandatory mediation); \textit{id.} at 1583 (noting that frequently an entire court-sponsored mediation is expected to take place in an hour or less and some take place in the hallways of the courthouse); \textit{id.} at 1553 & n.26 (noting that qualifications of mediators vary widely and in some counties, mediation takes place in the 20 minutes before court in the hallway; \textit{id.} at 1554-55 (criticizing laws that allow local courts to require or allow mediators to make a recommendation to the court regarding custody or visitation and if the parties do not reach an agreement, the mediator can recommend that an investigation be conducted or mutual restraining orders be issued).

\textsuperscript{135} \textit{See} \textit{id.} at 1584.

\textsuperscript{136} N.C. Gen. Stat. Ann. § 50-13.1 (1999); \textit{see also} Mont. Code Ann. 40-4-302 (1998) (“the purpose of a mediation proceeding is to reduce acrimony that may exists between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding.”); Cal. Civ. Code 4606(a) (same)

\textsuperscript{137} Marsha Kline Pruett & Janet R. Johnston, \textit{Therapeutic Mediation with High Conflict Parents}, \textit{in Divorce and Family Mediation: Models, Techniques and Applications} 92, 93 (Jay Folberg et al. eds., 2004) (research “indicates that some children of divorced parents with ongoing conflict suffer as much after mediation as before”).
resolved their dispute; some entered into an agreement because they could not bear to continue the negotiations.139 Not surprisingly, some parents continue to experience conflict and dissatisfaction with their agreement regardless of whether it was reached through mediation or litigation.140

Some studies suggest that mediation has a limited ability to promote parental cooperation and many divorced parents have reported that mediation did not help them communicate more effectively with the other parent.141 While some studies have found some reduction in inter-parental conflict and hostility among parents who mediated, in one study, 40% of couples showed no improvement and 15% got worse.142 Further, the studies suggesting that mediation may decrease parents’ anger involved parents who voluntarily chose a private mediation program to resolve all of the divorce related issues and paid for the process themselves.143 Parents who voluntarily chose private, fee-for-service mediation tend to be more cooperative, better educated, and of higher socioeconomic status than those participating in court-ordered mediation.144

139 Beck & Sales, supra note 126, 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 26, at 593. The researchers found that in over half of the cases “negotiation 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. Only in 28% of cases did both parties report being satisfied with the result. Id.

140 Jessica Pearson & Nancy Thoennes, A Preliminary Portrait of Client Relations to Three Court Mediation Programs, 23 Conciliation Courts Review 1 (1985); Bruce Sales et al., Is Self-Representation A Reasonable Alternative to Attorney Representation in Divorce Cases, 37 St. Louis U. L.J. 553 (1993).

141 Beck & Sales, supra note 126, at 1024; Robert Emery & Melissa Wyer, Divorce Mediation, 42 American Psychologist 472 (1987); Keilitz et al., Multi-State Assessment of Divorce Mediation and Traditional Court Processing, National Center for State Courts (1992); Grillo, supra note 30, at n.8. One study found that, 12-15 months after divorce, 30% to 40% of couples who had contested custody or visitation 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 (Kressel et al., eds. 1989); Jessica Pearson & Nancy Thoennes, Divorce Mediation Research Results in DIVORCE MEDIATION: THEORY AND PRACTICE 429 (Folberg & Milne eds., 1988).


144 Beck & Sales, supra note 126, at 1035 (noting that “comprehensive programs provided by private, voluntary, fee for service programs attract clients who tend to be young (30s), middle-class, well-educated professional, and who are mostly cooperative and fair-minded. Clients in
In addition, in one study, parents who chose private, voluntary mediation tended to view their spouses as more honest, flexible, fair, and better able to cooperate regarding the children than litigating couples. They were also less likely to report that their spouses took advantage of them during the marriage. In addition, the mediating couples had higher rates of guilt and depression over the breakup than did litigating couples, which might suggest that they believed they shared joint responsibility for the divorce. In contrast, court-ordered mediation includes parents who believe that the other spouse is solely to blame for the breakup, and, thus, are more likely to feel angry and vengeful. Consequently, studies finding that voluntary, private mediation may reduce inter-parental anger and hostility might not be applicable to the vast majority of mediating parents who participate in mandatory court-sponsored mediation to resolve custody and visitation disputes only. It may be that spouses who voluntarily mediate are already less angry and hostile than those who litigate or participate in court-ordered mediation which might explain their lower rates of hostility and conflict post-mediation.

In short, some spouses participate in mediation and even reach an agreement, but remain angry and experience little or no reduction in conflict. One reason why mediation has not successfully reduced anger and hostility is that the process is focused on settlement; as a result, it can sometimes be rigid and even coercive. As scholars have noted, when mediators pressure “parties to reach an agreement quickly or threaten to submit negative recommendations to the court” if they are unable to reach an agreement, it can “contribute to and increase interparental conflict.”

Court-sponsored mediation generally resolves only issues of custody and visitation, not property and alimony disputes. Thus, parties must rely on litigation for these issues. However, this is changing as some states are now mandating mediation of all issues. Interestingly, although one year after 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 Kelly, Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes (1990); Joan Kelly, Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes, 9 Behavioral Sciences & L. 387 (1991).

Further, while the majority of divorcing spouses have court-mandated programs tend to be working class and poorly educated and are either unemployed or underemployed.”).

145 Pruett & Johnston, supra note 138, at 93.
147 See Beck & Sales, supra note 126, at 1016.
148 Beck & Sales, supra note 126, at 1016.
149 Court-sponsored mediation generally resolves only issues of custody and visitation, not property and alimony disputes. Thus, parties must rely on litigation for these issues. However, this is changing as some states are now mandating mediation of all issues.
150 Interestingly, although one year after 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 Kelly, Mediated and Adversarial Divorce Resolution Processes: An Analysis of Post-Divorce Outcomes (1990); Joan Kelly, Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes, 9 Behavioral Sciences & L. 387 (1991).
151 See Beck & Sales, supra note 126 at 1018 (“Even 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.”).
152 Id. at 1029.
expressed the need to air their grievances, the rushed one- or two-session, assembly-line court-ordered mediations do not provide such opportunities. Similarly, many private mediators focus on settlement and discourage parties from discussing the past or expressing anger. 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, mediators in court-sponsored programs do not use this model.

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153 Beck & Sales, supra note 126, at 996 (“70% to 80% of respondents agreed that the opportunity to air grievances was extremely important to them.”).

154 Beck & Sales, supra note 126, at 996 (noting that “some parents feel that the mediation process is rushed, and that they were given assembly line treatment.”). In 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 10 sessions. Joan Kelly, Mediated and Adversarial Divorce: Respondent’s Perceptions of Their Processes and Outcomes, Mediation Q. 71, 74 (1989).

155 Grillo, supra note 30, 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 [is] antithetical to problem-solving” and that divorcing spouses must be 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, 98 (2004) (critiquing mediation’s “focus on the future”).

In the last decade, some scholars have advocated for a different type of mediation. In their groundbreaking book, The Promise of Mediation, Bush and Folger critiqued mediators’ settlement-oriented approach and proposed a transformative approach that would foster (1) “empowerment,” “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,” “the evocation in individuals of knowledge and empathy for the situation and problems of others. BUSH & FOLGER, supra note 125, at 2, 4. Although transformative mediation encourages parties to discuss past events and express their emotions, see Joseph P. Folger & Robert A. Baruch Bush, Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Practice, 13 Mediation Q. 263 (1996), this is not the approach of most mediators in court-sponsored programs where the primary goal is reaching a settlement as quickly as possible, a goal that Bush and Folger expressly eschew.

156 See Pruitt & Johnston, supra note 138, at 95-101 (describing therapeutic mediation and outcomes, but noting that despite reaching agreements, 15% of parents deteriorate over the follow-up period); IRVING & BENJAMIN, supra note 142 (using a therapeutic model of mediation). Beck & Sales, supra note 126, 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); Beth M. Erickson, Therapeutic Mediation: A Saner Way of Disputing, 14 J. Am. Acad. Matrim. L. 233, 241-42 (1997) (describing how she practices therapeutic mediation; she attempts to “identif[y] and resolv[e] the communication impasse that complicated the marriage so that those same patterns do not create impasse cases of divorce,” “coaches both parties to learn to relate to each other differently post-divorce,” “identifies the major systemic dynamics that either could compromise or facilitate a party’s ability to reach agreements,” “helps parties empower themselves by taking responsibility for themselves and the resolution of their problems,” “teaches a sufficient degree of mutual understanding that the couple can collaborate on resolving their concerns.”).

157 Therapeutic mediation is time intensive and costly as compared to court-sponsored mediation. See Pruitt & Johnston, supra note 138, at 96-97 (describing 12 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.”).
D. PARENTING EDUCATION

In an effort to reduce inter-parental conflict, many states have created parenting education programs (also known as divorce education)\textsuperscript{158} that teach parents how their negative attitudes and behaviors towards each other affect their children.\textsuperscript{159} While these programs are increasingly mandatory, they are generally only two to four hours long.\textsuperscript{160} Although the vast majority of parents participating in these programs, whether voluntarily or not, thought they were helpful and reported they were more willing to cooperate with the other parent,\textsuperscript{161} there is little evidence that these parents actually experience less hostility and conflict than non-participating parents.\textsuperscript{162} For example, although one study found that relitigation rates were much lower among program participants, other studies found no difference.\textsuperscript{163} Further, as scholars have noted, one to two session programs are unlikely to be sufficient for high-conflict couples.\textsuperscript{164}

E. PARENT COORDINATOR PROGRAMS

\textsuperscript{158} As of 2001, nearly half of all counties in the U.S. offered parenting education programs. See Geelhoed et al., \textit{Status Of Court-Connected Programs For Children Whose Parents Are Separating or Divorcing}, 39 Fam. Ct. Rev. 393 (2001).

\textsuperscript{159} Grych, supra note 56, at 102; Goodman et al., supra note 43, at 269; Geasler & Blaisure, \textit{The 1998 Nationwide Survey Of Court-Connected Divorce Education Programs}, 37 Fam. & Conciliation Courts Rev. 36 (1999); Kelly, \textit{Psychological and Legal Interventions}, supra note 53, at 134 (noting that good programs typically: “(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.”).

\textsuperscript{160} Grych, supra note 56, at 102; Goodman et al., supra note 43, at 268 (court-provided programs are generally two hours long and community-provided programs are four hours long.); Kelly, \textit{Psychological and Legal Interventions}, supra note 53, at 133-35 (mandated court-connected programs are typically two to four hours long, but some community-based programs often offer three to six sessions of two hours each).

\textsuperscript{161} Geasler & Blaisure, supra note 159, at 50; Kelly, \textit{Psychological and Legal Interventions}, supra note 53, at 135 (citing study finding that 93% of participating parents thought the program was worthwhile and 90% agreed to increase their efforts to get along with the other parent).

\textsuperscript{162} See Grych, supra note 56, at 104 (concluding that “there 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, \textit{Psychological and Legal Interventions}, supra note 53, 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.”); Goodman et al., supra note 43, at 274-75 (summarizing studies and noting that “the effect that longer parenting programs have on interparental conflict is unclear” and “future research, therefore is needed to determine if these programs indeed reduce interparental conflict.”).


\textsuperscript{164} Grych, supra note 56, at 105.
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. These parents argue frequently, undermine the other parent, interfere with the other parent’s access to the child, and return to court repeatedly because they are unable to resolve the most mundane issues. 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. While Special Masters or Parent Coordinators first attempt to mediate disputes, they are more like arbitrators with the authority to make binding decisions regardless of the parents’ wishes if the parents cannot resolve the dispute themselves. 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.

As shown, lawmakers cannot rely on mediation and parenting education alone to reduce divorcing parents’ negative emotions and conflict. While the results of Parenting Coordinator programs are encouraging, many parents cannot afford the financial costs, which must be borne by the parties. In addition, these programs require both parents’ consent or raise serious questions about courts’ ability to delegate decision-making authority for custody and visitation issues to non-judges. Further, these interventions may not be appropriate in cases involving domestic violence or other cases where the parents simply hate each other and contact quickly deteriorates.

In contrast, parents and children could benefit from a reduction in anger even in cases of abuse. Forgiveness has been shown to reduce anger. Although forgiveness has not been proven to reduce inter-parental conflict per se, as shown, anger and the desire for revenge are main causes of inter-parental conflict in many

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165 See supra Part I.B.
166 See supra Part I.B.
167 Coates et al., supra note 57, at 246; Kelly, Psychological and Legal Interventions, supra note 53, at 143.
168 Kelly, Psychological and Legal Interventions, supra note 53, at 144.
169 Id. at 146-47.
170 Parent Coordinators are usually attorneys and they charge their usual hourly rates.
171 Some jurisdictions allow judges to appoint Parent Coordinators over the objection of one parent. Kelly, Psychological and Legal Interventions, supra note 53, at 144. This is problematic given 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. 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 144-45. In the end, the result might be the same since judges are likely to follow such recommendations. However, the parties have the opportunity to try their case and persuade the court not to follow the Parent Coordinator’s recommendation.
172 See infra Part III.A.
cases. For example, many nonresident fathers who can afford to pay the amount of child support awarded do not pay because they are angry at the custodial mother. Conversely, some custodial mothers interfere with visitation because they are angry with the father. Thus, a reduction in anger should result in fewer child support and visitation disputes. Further, a reduction in anger is a valid end in and of itself. As shown in Part I, excessive anger is detrimental to both parents and children. Thus, it is worthwhile to explore forgiveness’ ability to reduce anger. Below, I describe how researchers have helped people forgive and explore 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, 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. While a number of researchers have attempted to help parties 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. In this Part, I define forgiveness and the reasons why it is desirable. I also describe several forgiveness models and show why and how the law should cultivate forgiveness after separation and divorce, a process I refer to as “Healing Divorce.”

A. WHY FORGIVE

There are several definitions of forgiveness. According to psychology Professor Robert Enright and the Human Development Study Group at the

173 See, e.g., ROBERT D. ENRIGHT, FORGIVENESS IS A CHOICE (2001); FORGIVENESS (Michael E. McCullough, et al., eds. 2000); DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEORETICAL PERSPECTIVES (Everett Worthington, Jr. ed.1998); 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 Enright et al., The Adolescent as Forgiver, 12 J. Adolescence 95 (1989); Michael McCullough et al., Interpersonal Forgiving in Close Relationships, J. Personality & Soc. Psych. 321 (1997). There are also many “how to books” on forgiveness written for the general public. 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 (McCullough et al., eds. 1997); FRED LUSKIN, FORGIVE FOR GOOD (2002).

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.”175 The philosopher Joanna North has stated that “forgiveness is a matter of a willed change of heart, the successful result of an active endeavor to change bad thoughts with good, bitterness and anger, with compassion and affection.”176 Fred Luskin, the co-founder 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.” 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 to the replacement of anger and vengefulness with empathy, compassion, and love,179 it is not the same as condoning or excusing the offender’s behavior or forgetting the hurt that was inflicted.180 Indeed, forgiveness requires that the offended party acknowledge that he suffered an unjust hurt from another.181 Forgiveness is also not the same as 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 ever have contact with her batterer again. One can forgive and still decide to end

175 Robert D. Enright, et al., The Psychology of Interpersonal Forgiveness, in EXPLORING FORGIVENESS, supra note 48, at 46, 47 (citing Joanna North, Wrongdoing and Forgiveness, 62 Philosophy 499 (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”) (citing Bishop Butler).


177 ENRIGHT & FITZGIBBONS, supra note 22, at 292 (quoting Fred Luskin).

178 Enright, et al., supra note 175, at 47.

179 Id.; Everett Worthington, Jr., Is There A Place for Forgiveness, 27 Fordham Urb. L.J. 1721, 1727 (2000) (forgiveness involves super-imposing emotions of empathy, compassion and other-oriented altruistic love on top of “hot” anger at the transgression).

180 Enright, et al., supra note 175, at 47-48; MURPHY & HAMPTON, supra note 8, at 15 (citing Bishop Butler); Joanna North, The “Ideal” of Forgiveness: A Philosopher’s Exploration, in EXPLORING FORGIVENESS, supra note 48, at 15, 16 (forgiveness does not “wipe out the fact of wrong having been done” and does not excuse the wrongdoer).

181 Enright, et al., supra note 175, at 47.

182 Enright, et al., supra note 175, at 47; Paul W. Coleman, The Process of Forgiveness in Marriage and the Family, in EXPLORING FORGIVENESS, supra note 48, at 75, 78 (“It is possible to forgive without reconciling.”); Worthington, supra note 179, at 1724 (“Forgiveness is something within a person while reconciliation is something between people”).
the relationship. Further, because forgiveness is separate from reconciliation, the offended party may forgive unconditionally regardless of the other person’s current attitude and behaviors towards the offended party. To illustrate, a woman whose ex-husband was unfaithful, 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.

The question is why should she forgive someone who has treated her badly and is unlikely to change his hurtful behavior? Because it will help her heal psychologically and enable her to better parent her children. It might also reduce inter-parental conflict.

As noted in Part I.A, anger is a healthy response when one has been unjustly injured. Persistent anger, however, is detrimental to both parents and children, and may negatively affect self-esteem, cardiovascular health, and sleep patterns. It is also correlated with higher rates of anxiety, depression, and hopelessness. Forgiveness has the opposite effect. It quells “that kind of anger that debilitates the injured individual.” Forgiveness releases the pain, anger, and hate and enables individuals to move on with their lives. Studies have found that forgiveness improves the forgiver’s self-esteem and decreases anxiety, depression, anger, and hostility. It may also reduce high blood pressure and improve cardiovascular health, sleep patterns, and academic and work

183 Jeffrie Murphy, Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview, 27 Fordham Urban L.J. 1353, 1355 (2000); Coleman, supra note 182, at 79; Murphy, supra, at 1357 (the fact that one has forgiven does not mean that one must also trust or live again with a person.”); 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).
184 Enright, et al., supra note 175, at 47.
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.”).
186 See supra Part I.
187 Id.
188 ENRIGHT & FITZGIBBONS, supra note 22, at 4.
189 North, supra note 176 at 18 (“Through forgiveness the pain and hurt caused by the original wrong are released”); Bibas supra note 2, at 337 (forgiveness “involves catharsis, a cleansing of anger and hate”); Coleman, supra note 182, at 78 (“Forgiveness is the process that enables the forgiver to get on with his life unencumbered with the pain of betrayal.”); MURPHY & HAMPTON, supra note 8, at 17 (forgiveness helps us heal); id. at 36-38 (“Victims need to be able to forgive in order to attain closure.”); Martha Minow, Forgiveness and the Law, 27 Fordham Urb. L.J. 1394, 1400 (2000) (by forgiving, the injured person avoids bitterness and frees “herself from the kind of preoccupation with a felt wrong that can distort her own life and sensibilities.”).
190 Fitzgibbons, supra note 48, at 71; McCullough & Worthington, Promoting Forgiveness, supra note 48, at 55 (summarizing studies finding that forgiveness benefits the forgiver’s physical, emotional and psychological health.); North, supra note 176, at 19 (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); ENRIGHT & FITZGIBBONS, supra note 22, at 4 (“forgiveness 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 (persons who “forgive an unfaithful spouse have greater psychological well-being that those who do not forgive”).
performance. 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.

Anger and the desire to punish the other parent may lead parents to unwittingly harm their children. As shown, anger drives parents to engage in custody and visitation disputes, withhold child support, interfere with the other parents’ access to the child, and belittle the other parent in front of the children, despite the harm to their children. It may also lead to inadequate parenting. Forgiveness may reduce or eliminate these “negative parental emotional and behavioral patterns.”

There is yet another reason to forgive. It enables reconciliation in those cases where it is desirable or necessary. While divorcing spouses may prefer not to interact with their former spouse, the majority of divorcing parents do not have that luxury. As long as they have minor children, most divorced parents will have to communicate and interact to some extent. Thus, it would benefit them and their children to forgive each other and try to reestablish a cooperative relationship. Unlike forgiveness, which is unilateral, “reconciliation involves two people coming together again” and restores trust in a relationship. It requires that the injurer be aware of the damage done and genuinely intend not to hurt the other person again. Reconciliation might be possible for many divorced parents so long as they first forgive each other and try not to hurt each other again. This does not mean that they will reunite as a couple, but that they will establish a relationship as co-parents.

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191 Fitzgibbons, supra note 48, at 71; McCullough & Worthington, Promoting Forgiveness, supra note 48, at 55; Al-Mabuk et al., supra note 48, at 427 (citing study finding reduction in blood pressure amongst people who forgave). Cf. Fredrickson, What Good Are Positive Emotions?, supra note 20 (noting that negative emotions have a negative effect on cardiovascular health); Barbara Fredrickson, The Role of Positive Emotions in Positive Psychology, 56 Am. Psychologist 218 (2001) (arguing that positive emotions may “fuel psychological resilience” and “undo lingering negative emotions” and their harmful effects on physical and psychological health). But see Carl E. Thorenson et al., Forgiveness and Health: An Unanswered Question, in FORGIVENESS, supra note 173, at 254, 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 improve physical health in persons with major diseases.”).

192 Fitzgibbons, supra note 48, at 71.

193 See supra Part I.B; Murphy, supra note 183, at 1361.

194 See supra Part I.B.

195 See supra Part I.B.2.

196 Fitzgibbons, supra note 48, at 71.

197 McCullough & Worthington, Promoting Forgiveness, supra note 48, at 55 (forgiveness has beneficial effect on the relationship with the offender); Murphy, supra note 183, at 1361 (2000) (forgiveness can “open the door to the restoration of those relationships in our lives that are worthy of restoration.”).

198 Enright, et al., supra note 175, at 49; Worthington, supra note 179, at 1725.

199 Worthington, supra note 179, at 1729-30; Enright, et al., supra note 175, at 49.

200 However, when there was abuse, it may be best if the parties do not reconcile.
B. THE LAW’S ROLE: HEALING DIVORCE

Divorced parents are repeatedly advised not to let their emotions interfere with the child’s relationship with the other parent.\textsuperscript{201} One commentator tells parents: “No matter how you feel about your ex-spouse, you must separate those feelings from your role as a parent.”\textsuperscript{202} Parents also hear this advice in divorce education classes, mediation, and from their attorneys. This is great advice, but how exactly is a parent supposed to achieve this? Most people find it difficult to hide their true feelings even for a short while. It is almost impossible to do all day long while sharing a home with one’s children. Forgiveness might be the key.

By forgiving the other parent, a parent would no longer have to walk around pretending or hiding his feelings while the anger boils inside. A parent who has replaced his anger towards the other parent with empathy and compassion may be significantly less likely to fight with him or her, disparage him or her, withhold child support, or interfere with visitation. As forgiveness scholars have noted, divorcing parents are good candidates for forgiveness intervention.\textsuperscript{203}

The law can 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 I am calling “Healing Divorce.”

1. \textit{Eliminating Fault Redux}

As shown, the no-fault divorce revolution did not completely eliminate fault from divorce.\textsuperscript{204} Most states maintain fault-based grounds and consider marital misconduct when dividing marital property and awarding alimony.\textsuperscript{205} Further, divorcing spouses have found ways to bring blame into the divorce process even in pure no-fault states, by shifting allegations of marital misconduct into the custody and visitation aspects of the process.\textsuperscript{206} Although it may not be possible to eliminating fault completely, signaling that marital misconduct

\textsuperscript{201} For example, Robert Emery advises individuals to “refuse to fight with your ex,” when “around the kids, say nothing [about the other parent] if you can’t say something positive.” \textit{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. \textit{Ahrons}, supra note 32, at 252, 254.
\textsuperscript{202} \textit{Maxwell}, supra note 65, at 161.
\textsuperscript{203} Everett Worthington, Jr., et al., \textit{Group Interventions to Promote Forgiveness: What Researchers and Clinicians Ought to Know}, in \textit{Forgiveness}, supra note 173, at 238, 239 Table 11.2; Kristina Coop Gordon et al., \textit{Forgiveness in Couples: Divorce, Infidelity, and Couples Therapy}, in \textit{Handbook of Forgiveness}, supra note 173, 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.”).
\textsuperscript{204} \textit{See supra} note Part II.B.
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
has absolutely no legal relevance may help change social norms of bitter divorce. Many people expect the divorce process to be acrimonious and attorneys sometimes reinforce this perception. Even when told that fault is not legally relevant, divorcing spouses do not hear this message because it seems counterintuitive when they are feeling so much pain and anger. In other words, they do not understand how the law can completely ignore their pain. Consequently, pure no-fault 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 move on with their lives.

The elimination of fault, by itself, will not make the divorce process and future inter-parental interaction less bitter. However, together with a court-sponsored program where parents can express their anger and learn to forgive, it might. The availability of forgiveness education may help parents channel their anger to that forum rather than the courtroom or mediation, and specifically, the custody and visitation component of the divorce. However, parents might be less likely to channel their anger to an appropriate forum if judges in the majority of states 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 Healing Divorce program, the law must ensure that there is no legal mechanism enabling parents to express their anger elsewhere.

My proposal to eliminate fault from all aspects of divorce is supported by the American Law Institute’s Principles of the Law of Family Dissolution. Further, although many states still consider marital misconduct when distributing the marital assets and considering alimony, some courts are finding 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.”

States should also abolish actions against paramours for the same reason. By recognizing these claims, lawmakers legitimize angry spouses’ desire for revenge and may thwart the goal of cultivating forgiveness among divorced parents.

2. Teaching Forgiveness

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207 Id.
209 Mani, 183 N.J. at 89.
Many people can understand the benefits of forgiveness, but may not know how to forgive. Interestingly, when deeply hurt by another, most do not consciously consider forgiving. One reason is that forgiveness is seen as a sign of weakness practiced only by timid people who have no other choice. Although forgiveness is a choice and, arguably, a sign of strength, many researchers believe that most people need to be taught to forgive before they can start forgiving. One might agree that divorced parents and children will benefit from forgiveness, but nevertheless believe that the law has no role in helping parents forgive. One might also argue that cultivating or teaching forgiveness is the role of mental health professionals or spiritual leaders, not lawmakers. As shown below, 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 it 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 teach parents how to forgive. Below I discuss 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 divorce context.

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 consists of twenty steps and four phases. Not everyone goes through each step or phase. In the first phase, known as the Uncovering Phase, the injured person acknowledges that another person has

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210 Enright, et al., supra note 175, at 52; Al-Mabuk et al., supra note 48, 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 Enright, Forgiveness as an Intervention Goal With Incest Survivors, 64 J. Consulting & Clinical Psych. 983 (1996) (same).
211 ENRIGHT & FITZGIBBONS, supra note 22, at 268 (citing Nietzsche’s argument).
212 See infra Part III.C.
213 Enright, et al., supra note 175, at 52.
214 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); Mark Rye et al., Religious Perspectives on Forgiveness, in FORGIVENESS, supra note 173, at 17; Martin E. Marty, The Ethos of Christian Forgiveness, in DIMENSIONS OF FORGIVENESS, supra note 173, at 9; Elliot N. Dorff, The Elements of Forgiveness: A Jewish Approach, in DIMENSIONS OF FORGIVENESS, supra note 173, at 29. Nonetheless, although some law and religion scholars argue that the First Amendment’s separation of church and state doctrine, see U.S. CONST. AMEND. I, 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.
215 Enright, et al., supra note 175, at 52.
deeply offended him and reacts with anger and maybe even hatred.\textsuperscript{216} In addition to anger, some people may also experience humiliation, shame, or guilt.\textsuperscript{217}

In the Decision Phase, the injured person recognizes that her obsession with the injurer and the hurtful event is unhealthy and is not helping ease her pain.\textsuperscript{218} At that point, she may entertain forgiveness and commit to forgiving thereby giving up on the idea of revenge.\textsuperscript{219} 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 Deepening phases, the injured person attempts to understand the offending party’s background and pressures in order to understand his motivation and behavior.\textsuperscript{220} 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 him and why he abused her.\textsuperscript{221} This process, known as reframing, often leads to empathy and compassion for the offender and the injured party may actually feel like forgiving.\textsuperscript{222} He may experience a reduction in anger and begin to wish the injurer well even if some negative feelings remain.\textsuperscript{223} He may also notice the benefits to himself as a result of forgiving and realize that he too has hurt others in the past and needed their forgiveness.\textsuperscript{224}

\textbf{b. The Stanford Forgiveness Project}

Frederic Luskin, a psychologist and co-founder 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.\textsuperscript{225} In the second stage, she realizes that the pain and anger are negative affecting her emotional health, happiness, and well-being.\textsuperscript{226} In the third stage, she remembers the last time she forgave and the peace she

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\item \textsuperscript{216} \textit{Id.} at 52.
\item \textsuperscript{217} \textit{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.
\item \textsuperscript{218} \textit{Id.} at 53.
\item \textsuperscript{219} \textit{Id.} at 53-54.
\item \textsuperscript{220} \textit{Id.} at 54.
\item \textsuperscript{221} John Hebl & Robert Enright, \textit{Forgiveness as a Therapeutic Goal With Elderly Females,} 4 Psychotherapy 658 (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 work long hours or traveling 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.
\item \textsuperscript{222} Enright et al., \textit{supra} note 175, at 54; Fitzgibbons, \textit{supra} note 48, at 66.
\item \textsuperscript{223} \textit{Id.} at 54.
\item \textsuperscript{224} \textit{Id.} at 54.
\item \textsuperscript{225} LUSKIN, \textit{supra} note 173, at 180-81.
\item \textsuperscript{226} \textit{Id.} at 181.
\end{itemize}
\end{footnotesize}
experienced. She decides to forgive because she is aware of its benefits. In the fourth stage, she becomes a more forgiving person.

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*. These techniques, which involve breathing and visualization exercises, encourage the injured party to take responsibility for his own emotions.

c. The Pyramid Model and REACH

Psychologists Everett Worthington and colleagues have developed the Pyramid Model of Forgiveness which theorizes that forgiveness requires empathy, humility, and a commitment to forgiving. Based on this Pyramid Model, Worthington has developed a five step forgiveness intervention, which has been applied in marriage counseling and is described by the acronym REACH. 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. 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 and “continuing to reexperience bitterness and hatred.”

d. Forgiveness Interventions

Several published studies have used these models to help participants forgive someone who has hurt them. The forgiveness interventions discussed

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227 *Id.* at 182.
228 Everett Worthington is Chair of Psychology at Virginia Commonwealth University and serves as Executive Director of A Campaign for Forgiveness Research. *HANDBOOK OF FORGIVENESS* xi (Everett Worthington, ed. 2005).
230 Worthington, Jr., *An Empathy-Humility-Commitment Model, supra* note 229, at 60.
231 Gordon et al., *supra* note 203, at 414.
above have helped individuals from Northern Ireland who lost an immediate family member in the country’s bloody civil war to forgive. They have also helped individuals forgive incest, marital infidelity, parental-love deprivation, and unjust treatment at work. Below, I briefly describe 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. After eight weekly 60-minute group sessions, the participants had higher self-esteem and fewer negative feelings towards the person who caused them emotional pain than the control group. They were also more willing to forgive.

Another study focused on college students who felt they had been deprived of parental love, nurturing, and attention. One group of students participated in four day workshop which emphasized the commitment to forgive, basically the first two phases of the Process Model. The other group participated in a six day workshop which included all four phases. As compared to the control group, both the four- and six-day forgiveness groups experienced an increase in hope and willingness to forgive. However, the six-day group was significantly higher in forgiveness, hope, self-esteem, and positive attitudes towards their parents.

A third forgiveness intervention helped angry men who described themselves as having been hurt by a partner’s decision to have an abortion. The forgiveness intervenor met with each participant individually for 90 minutes once a week for twelve weeks. As compared to the control group, the experimental group demonstrated significant increases in forgiveness and reduction in anger, anxiety, and grief.

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233 LUSKIN, supra note 173, at 94.
235 Hebl & Enright, supra note 221, at 660
236 Hebl & Enright, supra note 221, at 664-66
237 Al-Mabuk et al., supra note 48, at 427.
238 The workshop met twice a week for two weeks. The sessions were led by a graduate student trained in forgiveness and included 30 minutes of “didactic instruction,” 10 minutes of self-reflection, and 20 minutes of group discussion. Id.
239 The workshop met weekly for six weeks.
240 Al-Mabuk et al., supra note 48, at 427. Twenty-three of the 24 participants in the second group chose to sign a commitment to forgive contract as compared to less than half of the control group members.
242 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.
One unpublished study, titled “Forgiveness and Divorce: Can Group Interventions Facilitate Forgiveness of a Former Spouse?,” is of particular relevance to this Article. Researchers randomly assigned 149 divorced individuals to a secular forgiveness group, a religiously integrated forgiveness group, or a wait-list control group. Using a variation of the REACH model, the group sessions discussed feelings of betrayal, coping with anger towards the former spouse, forgiveness education, preventing relapse (holding on to forgiveness) and closure. Although there were no differences between the secular and religiously integrated forgiveness groups, participants in these groups self-reported similarly higher levels of forgiveness and lower depression than the wait-list control group. This study suggests that “individuals’ levels of forgiveness towards their ex-spouses can be increased by a relatively brief intervention.” 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.”

These studies suggest that forgiveness can be successfully taught in six to twelve individual or group sessions. Researchers report that most group sessions are generally nine hours or less, 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 60 minute group session of 7-14 people could promote forgiveness in some people.

243 Gordon et al., supra note 203, at 416 (describing unpublished study)
244 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. Gordon et al., supra note 203, at 416.
245 Gordon et al., supra note 203, at 416.
246 Gordon et al., supra note 203, at 416.
247 Gordon et al., supra note 203, at 416.
248 Gordon et al., supra note 203, at 418.
249 Cf. Baskin & Enright, supra note 232, at 87 (conducting meta-analysis interventions applying Enright’s Process Model and finding that average participant did as well or better than 95% and 92% of control group on forgiveness and emotional health measures, respectively). Another study focused on incest survivors. After meeting with a forgiveness counselor individually for 60 hour long sessions over 14 months, all of the study participants forgave their perpetrators even though before entering the study, each had said that she would never forgive. Suzanne R. Freedman & Robert Enright, Forgiveness as an Intervention Goal With Incest Survivors, 64 J. Consulting & Clinical Psych. 983 (1996). For example, one woman sent her father, who had molested her as a child, a birthday card for the first time, another visited her father’s grave for the first time, and another helped with her ill father’s care before he died. After forgiving, the study participants reported higher self-esteem and hope, and decreases in (or no) depression and anxiety.
250 Worthington, Jr., et al., Group Interventions, supra note 203, at 232 Table 11.1, 236.
251 McCullough & Worthington, Jr., Promoting Forgiveness, supra note 48, at 55.
the results were modest, the fact that one session helped reduce feelings of revenge and promoted conciliatory thoughts and behaviors is notable.  

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. This may be taught in six to eight weekly, small group sessions253 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 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.254 Further, Richard Fitzgibbons, an experienced psychiatrist and author of a seminal article on the use of forgiveness in the treatment of anger,255 has found that “when possible the willingness of the offenders to participate in the

252 McCullough & Worthington, Promoting Forgiveness, supra note 48, at 55. But see Worthington, Jr., et al., Group Interventions, supra note 203 228, 234-35 (evaluating this study and concluding that 1 and 2 hour interventions are “virtually inert” and recommending that group interventions aimed at promoting forgiveness be at minimum six hours long and sessions be spaced apart rather than massed into a weekend).
253 Although forgiveness can also be taught in individual sessions, in an effort to maximize resources, it is prudent to focus on group sessions.
254 See Coleman, supra note 182, at 75-87 (applying Process Model); Worthington, Jr. & Drinkard, supra note 229, at 95 (applying the Pyramid Model).
Work Phase [of the Process Model] can be very helpful in the resolution of the [injured person’s] resentment.” 256 One reason is that the injurer’s efforts to apologize and/or explain his behavior may facilitate forgiveness. 257 Thus, it would seem 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. 258 Further, they can benefit from watching how other divorcing parents forgive. 259

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.” 260 Further, even if the injured party forgives, it does not mean that she will be willing to let the injurer back in her life. The injuring spouse who has been forgiven may not understand the forgiver spouse’s rejection of his attempts at reconciliation and become angry. As a result, 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 offender. 261 Lawmakers could experiment with group sessions where both parents are present despite the risks discussed above or avoid the risks (and potential benefits) by placing them in separate groups.

Not all parents will forgive their former spouses at the end of a Healing Divorce program. However, if one-third or even one-fourth of high-conflict parents are able to forgive, it would save them (and taxpayers) the significant financial and emotional costs associated with repeated trips to the courthouse 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 their fees place their services beyond many parents’ reach. Furthermore, Parent Coordinators do not always help parents learn 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. Most importantly, Parent Coordinators do not teach parents how to let go of their anger. 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

256 Fitzgibbons, supra note 48, 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).
257 Fitzgibbons, supra note 48, at 70.
258 Worthington, Jr., et al., Group Interventions, supra note 203, at 228, 237.
259 Worthington, Jr., et al., Group Interventions, supra note 203, at 237.
260 Id. at 237.
261 Id. at 237-38. 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.
reduction in anger and improved self-esteem. Forgiveness is a process and committing to letting go of the anger and giving up on the idea of revenge may lessen inter-parental 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.

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. As Professor Grillo has argued, “there is much room for the expression of anger in the adversarial context.” 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.” 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. Inversely, by authorizing lower sentences for defendants who show remorse, the law cultivates expressions of remorse.

262 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. Although there was very little increase in forgiveness, the majority of participants experienced a reduction in anger and an increase in self-esteem. They had all learned that their anger and desire for revenge was detrimental to their own psychological and emotional health. McCullough & Worthington, Promoting Forgiveness, supra note 48, at 55.

263 For example, one intervention focused on the benefits of forgiveness to the forgiver while the other intervention focused on the inter-relational benefits of forgiveness. Levels of forgiveness were much higher among the first group which focused on the benefits to the forgiver as opposed to the inter-relational benefits of forgiveness. McCullough et al., supra note 173, at 1586.

264 For example, one intervention focused on the benefits of forgiveness to the forgiver while the other intervention focused on the inter-relational benefits of forgiveness. Levels of forgiveness were much higher among the first group which focused on the benefits to the forgiver as opposed to the inter-relational benefits of forgiveness. McCullough et al., supra note 173, at 1586.

265 Grillo, supra note 30, at 1573; 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, 437-37 (1998) (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.”).

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

267 MURPHY & HAMPTON, supra note 8, at 8 (punishment is the institutionalization of emotions such as resentment and indignation); Minow, supra note 189, at 1400 (2000) (asserting that victim impact statements are used “to provide vivid statements of pain and harm caused by horrific acts, not to permit forgiveness”).

268 See Sarat, supra note 2, at 168.
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 show how the misconduct affected her emotionally, fault-based divorce created incentives for petitioners to feel and express feelings of betrayal, anger, humiliation, and hatred in divorce proceedings. Currently, 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 prove that her partner has battered her before. Similarly, as Professor Carol Sanger has pointed out, 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. Family law has attempted to cultivate not only negative emotions, but also positive emotions such as love, albeit in a narrow and discriminatory context. Without a doubt, the law is in the business of our cultivating emotions.

Some readers might also be skeptical as to the law’s ability to cultivate forgiveness between divorced parents. However, my proposal is not unprecedented. Lawmakers have already attempted to facilitate forgiveness in other, albeit very different, 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. 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. During a victim-offender mediation (“VOM”) or conference, the most widely used form of restorative justice, the victim meets the offender in the presence of a mediator and has the opportunity to tell the offender how his crime has negatively affected her life. She can talk for as long as she wishes, ask the offender questions, and only when she feels she has been heard will the offender

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269 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 30, at 1573. For example, a wife who discovered that her husband was having an extramarital affair was expected to feel and 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.

270 Presentation at Law and Emotions Conference (Berkeley, CA Feb. 9, 2007); see also Carol Sanger, The Role and Reality of Emotions in Law, 8 William and Mary J. Women & L. 107, 111 (2001) (discussing requirement that pregnant teen express the appropriate emotion in a judicial bypass hearing or that a battered spouse fit the emotional profile of a battered woman).

271 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).


274 As of 2001, there were more than 1,300 victim-offender mediation 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 offenders.
have the opportunity to express his feelings and reasons for the criminal act. He can also 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—the opportunity to tell to offender how his crime has affected their lives--much more than the restitution. Crime victims who participated in VOM were much more satisfied than those who went through the normal court process, in large part, because of the opportunity “to share their stories and their pain.”

Some of the factors that have made VOM successful as far as enabling victims to start healing and forgive 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. “Left” spouses often had no idea that the “Leaver” was unhappy and want to know why he or she did not try harder to make the marriage work, had an extramarital affair, or was unhappy. 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. 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, necessary elements of emotional forgiveness.

Crime victims and persons injured by a negligent tortfeasor often want an apology. An apology helps to restore the injured person’s self-esteem and makes “it easier to heal and forgive.” The majority of offenders participating in VOM apologize to their victims and victims participating in VOM are more likely


276 Umbreit & Bradshaw, supra note 275, at 35 (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. (“While many other types of mediation are largely ‘settlement driven’, victim-offender mediation is primarily dialogue driven with the emphasis on victim healing, [wrongdoer] accountability, and restoration of losses.”).

277 Umbreit & Bradshaw, supra note 275, at 37. Eighty to ninety percent of participants report satisfaction with the process. Umbreit et al., supra note 274, at 30; id. at 31 (victims reported that “what they appreciated most about the programs was the opportunity to talk with the offender.”).

278 Lerman, supra note 275, at 1663.

279 Bibas, supra note 2, at 336. For example, injured patients want doctors 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).

280 Bibas, supra note 2, at 336. “Even 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; Stephanos Bibas & Richard Biersbach, Integrating Remorse and Apology Into Criminal Procedure, 114 Yale L.J. 85, 142-46 (2004).
to forgive.\textsuperscript{281} Similarly, divorcing parents are more likely to forgive if the other spouse acknowledges his pain and expresses remorse for hurting him. Although remorse is not a prerequisite to nor guarantee of forgiveness, an injured person is more likely to feel empathy and forgive if the injurer expresses genuine remorse for hurting him.\textsuperscript{282} Some divorcing parents will feel no remorse for the emotional harm they have caused their spouse, especially if that person has also caused them pain, or they do not believe they did anything wrong—for example, they just fell out of love or were unhappy staying in the marriage.\textsuperscript{283} Nevertheless, state-sponsored forgiveness educators could encourage forgiveness by informing divorcing parents that acknowledging the pain that their actions (an extramarital affair, decision to end the marriage, verbal abuse) caused the other spouse might cultivate forgiveness which will benefit their children.\textsuperscript{284} Carrie Menkel-Meadow has noted the value to a rejected spouse of hearing her husband say: “I admit I did wrong, I had an affair, but I love another person.”\textsuperscript{285} Although hearing this is painful, it is “sadly honest and acknowledges wrongdoing.”\textsuperscript{286} It might also help the “leaver” spouse develop empathy for what the “left” spouse is experiencing. The Leaver should recognize that his feelings and actions are causing the Left spouse unbearable anguish. For that, the Leaver should be sorry even if he is relieved to be moving on. That being said, an injured spouse should not be pressured to forgive simply because the other parent apologized.\textsuperscript{287} 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

\textsuperscript{281} Barton Poulson, \textit{A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice}, 2003 Utah L. Rev. 167, 189 (74% of offenders participating in VOM apologize as compared to only 29% of offenders in the normal criminal court process); \textit{id}. (“victims in restorative justice were 2.6 times more likely to forgive the offender than were victims in court.”).

\textsuperscript{282} Robert Enright et al., \textit{The Adolescent as Forgiver}, 12 J. Adolescence 95 (1989) (receiving an apology from one’s offender encourages forgiving); McCullough et al., \textit{supra} note 173, at 323, 327-28 (1997) (arguing that an apology facilitates increased empathy for the offender).

\textsuperscript{283} \textit{See} Menkel-Meadow, \textit{supra} note 156, at 112 (noting that people often do not want to take responsibility for harms they unintentionally “inflicted” on others).

\textsuperscript{284} \textit{See} Worthington, Jr. & Drinkard, \textit{supra} note 229, at 95 (describing how couples should apologize; first, they should think of actions they have done that have hurt the other person; second, they should each apologize for having hurt the other person without attempting to excuse or justify his or her behavior; third, they should express their sincere intention to try and not hurt the other person again). \textit{Cf}. Menkel-Meadow, \textit{supra} note 156, at 106 (arguing 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).

\textsuperscript{285} Menkel-Meadow, \textit{supra} note 156, at 106.

\textsuperscript{286} Menkel-Meadow, \textit{supra} note 156, at 106.

\textsuperscript{287} 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, \textit{Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking}, 47 UCLA L. Rev. 1, 86 (1999).
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 treated the actor as a wrongdoer and the other spouse as a victim. This legal classification of spouses as victims and wrongdoers (at least in fault-based divorces) would change if my proposal to completely eliminate fault were adopted. However, VOM’s lessons might be useful even when neither party is to blame for the breakup (for example, 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. 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 he or she has caused him or her and to listen without interruption might cultivate mutual forgiveness regardless of who hurt who the most.

Granted, there are differences between VOM and cultivation of forgiveness among divorcing parents. Most notably, 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 cultivate forgiveness 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,” attempted to help victims of Apartheid heal and forgive. Anybody who had been a victim of a crime could testify before the

288 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.”).
289 Rather than using the term “victim” and “wrongdoer,” we can substitute the terms “injured” and “injurer,” knowing that each party has played both roles.
290 Minow, supra note 189, at 1402; see also id. at 1395 (arguing that mediation, restorative justice, truth and reconciliation commissions have the potential “to promote forgiveness.”).
291 MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91 (1998) (noting that the TRC encourages “repentance and forgiveness”); ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES 62-63, 65 (2007) (noting that TRCs allow victims to explore their feelings and experiences, offers individual catharsis, and may provide psychological healing). 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
TRC even if the perpetrator was not present. This opportunity to tell the world what had been done to them enabled many victims to let go of the anger and move on with their lives. Some were even able to forgive.

I am not suggesting that the experiences of divorced parents are analogous to those of victims of violence. Nor am I suggesting that the VOM or TRC models would be appropriate or effective in the context of divorce and post-separation parenting. Rather, I am merely using VOM and the TRC to illustrate that lawmakers have attempted to facilitate forgiveness and psychological healing in other contexts. Once we acknowledge 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.

Some readers might be concerned about the gender implications of my 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. However, researchers have found that changing the terminology from forgiveness to investigations and hearing testimony from survivors. Minow, 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 55. 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 91-92.

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, supra note 291, at 77-78. However, a perpetrator who had applied for amnesty was required to meet with his victims if the victims wished. Id. at 55; Martha Minow, Institutions and Emotions: Redressing Mass Violence, in the PASSIONS OF LAW, supra note 2, at 265, 269-70. Although this amnesty provision has been the subject of significant criticism, see Minow, supra, 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, supra note 189, at 1403. Of course, victims are not required to forgive and perpetrators are not required to apologize, Minow, supra, at 78, but both were encouraged. Id. at 91 (noting that the TRC encourages “repentance and forgiveness”).

Daly & Sarkin, supra note 291, 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).

Cf. Minow, Institutions, supra note 292, at 271 (“Legal responses to mass atrocity may seem sui generis, and yet they resemble other efforts to use dispute institutions to affect people’s emotions.”); id. (“the use of truth commissions reflects a wager that emotions can be affected by the design of institutional responses.”).

Other scholars have argued that the law should cultivate forgiveness. See Daly & Sarkin, supra note 291, 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.”).

Women comprise 75% or more of the study participants in several forgiveness interventions. See, e.g., McCullough et al, supra note 173, at 321; McCullough & Worthington, Promoting Forgiveness, supra note 48, at 56.
“grudge management” resulted in more men volunteering for forgiveness education.\textsuperscript{297} It seems that men believe forgiveness is a “feminine” thing to do.\textsuperscript{298} Thus, avoiding the term “forgiveness” might make more men seek it. More importantly, the concern that one spouse (usually the woman) may 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 if she cannot forgive. Furthermore, forgiveness is not the same as reconciliation or condonation, nor does it require that the forgiver ever 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 will not reap the benefits of forgiveness and may spend years consumed by anger, resentment, and bitterness.

Readers might also question whether forgiveness is harmful to women. Women have been taught not to express anger and one of the critiques of mediation is that it attempts to quell anger and silence the expression of emotions. This is a valid concern 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 not inherently bad. 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 anger. Forgiveness education does not affect individuals’ ability to become angry. What it does is try to help them deal with their anger so they can move on rather than letting it consume them.\textsuperscript{299}

CONCLUSION

Healing Divorce is not a substitute for mediation or any other type of resolution focused process such as litigation or collaborative divorce.\textsuperscript{300} It is also


\textsuperscript{298} Id.

\textsuperscript{299} Cf. Minow, supra note 291, at 19 (“Victims have much to gain from being able to let off hatred” and “should release the anger for their own sake.”).

\textsuperscript{300} Although some therapeutic mediators try to help couples forgive, see Erickson, supra note 156, at 246, 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.
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 to forgive.

This Article has focused on the negative effects of long-term anger towards a former spouse and its contribution to inter-parental conflict. There are, however, many children of divorce who are angry towards one or both parents, especially the non-residential father, as a result of the divorce. Numerous studies have documented the negative effects of anger in children and forgiveness scholars are 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, but also their children, to forgive. This is yet another reason why policymakers must explore the law’s ability to cultivate forgiveness in the family law context.

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.