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REPAIRING FAMILY LAW

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ABSTRACT

Scholars in the burgeoning field of law and emotion have paid surprisingly little attention to family law. This gap is unfortunate because law and emotion has the potential to bring great insights to family law. This Article begins to fill this void—and inaugurate a larger debate about the central role of emotion in family law—by exploring the intriguing and significant consequences for the regulation of families that flow from a theory of intimacy first articulated by psychoanalytic theorist Melanie Klein. According to Klein, individuals love others, inevitably transgress against those they love out of hate and aggression, feel guilt about the transgression, and then seek to repair the damage. Individuals experience this cycle repeatedly throughout their lifetimes, with transgressions ranging from the minor, such as parents raising their voices to their children,

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to the more egregious, such as an individual conducting an illicit affair.

This Article argues that the legal process embodied in the substance, procedure, and practice of traditional family law is at odds with the human process of love, hate, guilt, and reparation. In contexts as far ranging as divorce, child welfare, and adoption, family law is predicated on a binary model of love and hate, with no accounting for guilt and the drive to reparation. This Love-Hate Model actively thwarts the cycle of intimacy, greatly diminishing the opportunity for repair in familial relationships. In short, reparation as a normative goal receives far too little attention in family law. Although several important reforms have begun to move family law away from the Love-Hate Model, these reforms are undertheorized and incomplete and sometimes actively challenged. An overarching theory is needed both to undergird current reforms and to encourage others, thus moving family law more fully in a reparative direction.

To replace the prevailing Love-Hate Model, this Article proposes a Reparative Model of family law that would recognize the full cycle of emotions and facilitate the reparative drive. A Reparative Model would modify the substance of family law to recognize the ongoing relationships that often persist even after legal relationships are altered. It would reform the process of family law by de-emphasizing adversarial decisionmaking. And it would change the practice of family law by reconceiving the role of the family law attorney. Ultimately, the Reparative Model yields new perspectives on a range of theoretical and practical problems in contemporary family law, providing a framework for the law to account for the full, and complex, emotional reality of familial relationships.

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INTRODUCTION

A widely shared aspect of human experience is the cyclical nature of familial relationships.[1] In this cycle, individuals are thought to experience love, inevitably transgress against those they love out of hate and aggression, conscious or unconscious, feel guilt about the transgression, and then seek to repair the damage.[2] Individuals can experience this cycle of love, hate, guilt, and reparation repeatedly throughout their lifetimes, with transgressions ranging from the minor, such as parents raising their voices to their children, to the more egregious, such as an individual engaging in an illicit affair. This cycle of emotions—whether innate or socially constructed, universal or simply widely shared[3]—is an important dynamic in human relations. It is well accepted in the psychological literature, is

1. This Article defines familial relationships broadly to include intimate partners and parents and children who have legal, biological, or psychological ties. The cycle of intimacy described in this Article resonates in other types of close relationships, such as friendships. These relationships, however, are not regulated by the state in the same manner as familial relationships, *see* Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 632–33 (2007) (describing the absence of legal regulation of friendship in general); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 202–06 (2007) (describing family law's view of friendship as "utterly distinct" from family and therefore not subject to regulations concerning families), and thus are not considered in this Article.

2. Psychoanalytic theorist Melanie Klein is most closely associated with articulating this cycle of intimacy. *See infra* Part II.A. But as detailed in Part II.B, this cycle and the reparative drive are widely recognized beyond psychoanalytic theory.

3. For an argument that the cycle of intimacy as described by Klien need not be universal to be relevant, see *infra* text accompanying notes 76–77.

reflected throughout Western culture,[4] and has been influential in a variety of disciplines, including sociology, anthropology, political science, philosophy, literary criticism, feminism, and social theory.[5]

The structure and practice of traditional family law,[6] however, stand strikingly at odds with this fundamental cycle, recognizing only rupture but not repair. Through its substance, process, and practice, family law reifies hate, in both the symbolic and real sense (as an emotion and also a symbol of rupture without the possibility of repair),[7] freezing relationships at the moment of breakdown. The substance of family law across a wide range of conflicts establishes binary rules for entry and exit that admit of only love and hate:[8] A couple is married or divorced. Parents enjoy constitutionally protected rights in the care and custody of their children or have those rights terminated, ending the legal relationship entirely. Birth parents either retain custody of their children or relinquish their children completely to other adults through adoption. Procedurally, the courts preside over these binary lines, using the adversarial process to assign membership to one category or the other, and the larger regulatory system channels conflicts into the same opposites. The practice of family law inevitably reflects this adversarial frame, focusing on conflict and rewarding breach.

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4. This Article focuses on Western culture because it is the foundation for the American legal system. *But see infra* note 82 (describing the potentially cross-cultural nature of the reparative drive).

5. *See infra* Part II.B.

6. This Article uses the term "traditional family law" to refer to the system of family law without the reforms described in *infra* Part III.C. As discussed in that Section, family law has begun to move away from its dichotomous orientation, but that movement is incomplete and undertheorized and sometimes meets active resistance.

7. This Article uses the term hate on two levels. It uses hate symbolically to refer to the rupture of relationships that family law reifies. Thus, even in relationships in which there is no actual hate—for example, a low-conflict divorce in which the couple simply decides they made a mistake in marrying or an adoption following a voluntary relinquishment of parental rights—family law still insists on "hate" by permitting only rupture, without repair. This Article also uses hate in its more concrete emotional sense. This latter sense is charged and carries a great deal of cultural meaning, but this Article uses hate broadly to refer both to extreme manifestations, such as violence, and to more pedestrian manifestations, such as the negative feelings human beings all feel toward one another at various times. Ultimately, despite its ubiquity, hate is difficult—but important—to acknowledge. *See* MELANIE KLEIN & JOAN RIVIERE, LOVE, HATE AND REPARATION 6 (1964) ("[O]n the whole we do not much like the idea of [aggressive feelings], so unconsciously we minimize and underestimate their importance.").

8. *See infra* text accompanying notes 129–33.

In all of these ways, the prevailing system of family law—what this Article terms the Love-Hate Model—acknowledges the first two stages of intimacy by granting legal status to the creation and dissolution of relationships. But family law actively thwarts the cycle of intimacy by solidifying relationships in the moment of hate and then fueling that hate with the adversarial process.[9] Family law thus does violence to the cycle of intimacy by forestalling guilt and reparation. Although family law cannot solve all the problems in a relationship, it does hold great potential either to exacerbate or to alleviate emotional harm. In its substance, process, and practice, the Love-Hate Model of family law greatly exacerbates emotional harm within families.

The law's privileging of rupture rather than repair starkly ignores the reality that even as formal legal relationships among family members change—from spouses to former spouses, from parent to nonparent—connections between former family members typically remain. Nearly half of all divorces involve children,[10] and thus, even after the divorce is finalized, the former couple inevitably continues to be bound together as co-parents. Similarly, many children leaving the child welfare system are adopted by a relative and thus continue to see and relate to their original parents.[11] Finally, although the dominant image of adoption is of an infant placed in the home of a nonrelative, the majority of adoptions are by relatives and stepparents.[12] Of the infants who are adopted by nonrelatives, many

9. *See* Jay Lebow & Kathleen Newcomb Rekart, *Integrative Family Therapy for High-Conflict Divorce with Disputes over Child Custody and Visitation*, 46 FAM. PROCESS 79, 88 (2006) (describing how families use the legal system to continue fighting and resist the transition to postdivorce structures).

10. *See* Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269 (2000) (stating that approximately half of all divorces involve children).

11. In 2005, 51,323 children were adopted out of the child welfare system, and 25 percent of those were adopted by someone designated as an "other relative"—not a foster parent or stepparent. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006, at 4, 8 (2006) [hereinafter AFCARS REPORT].

12. *See* Joan H. Hollinger, *Introduction to Adoption Law and Practice*, *in* 1 ADOPTION LAW AND PRACTICE § 1.05[2] ("Approximately 60% or more of all adoptions of children are by relatives . . . ."). Only 20 to 30 percent of adoptions are of infants by unrelated individuals. *Id.* These percentages refer only to children born in the United States, *id.*, and thus do not include international adoptions.

seek to discover the identity of and perhaps reconnect with their birth parents at some point in their lives.[13]

The Love-Hate Model is poorly calibrated to the reality of these ongoing relationships. By focusing only on love and hate, family law short-circuits the cycle of intimacy and short changes family members. Indeed, the Love-Hate Model reinforces the acrimony between former family members, especially in the context of divorce and child welfare. Divorce and other family law actions simply cannot be viewed through the same lens as the kinds of impersonal breaches in areas such as contract and tort that involve parties with no reason for future dealings. If former family members often continue to relate to one another, and if this contact is to move beyond rupture, the individuals will need to heal the rifts that initially led to legal proceedings.

To encourage the completion of the full cycle of intimacy, this Article proposes a Reparative Model of family law. The central goal of this model is to repair (or attend to) emotional relationships while altering legal relationships. The goal is not to restore what may have been a harmful status quo, but rather to create the possibility of a better future. The best way to do this is to recognize fully the cycle of intimacy—the human process—in the legal process. Rather than operating in a binary world of love and hate, family law should acknowledge the complexity of familial relationships and the fact that people often seek to repair the damage they have inflicted.

A model of family law built around the cycle of intimacy would ameliorate the harmful aspects of the Love-Hate Model—the substance would not be binary, the procedure would not be adversarial, and the practice would facilitate healing and ongoing relationships. The law cannot and should not mandate forgiveness, nor should it be the primary vehicle for addressing emotional needs.[14]

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13. *See* Naomi R. Cahn & Joan H. Hollinger, *Adoption and Confidentiality*, *in* FAMILIES BY LAW: AN ADOPTION READER 123, 123 (Naomi R. Cahn & Joan H. Hollinger eds., 2004) ("Adult adoptees cite health-related, medical, and psychological reasons for wanting to know the identity of their birth parents. Many are searching to fill in what they claim are missing parts of their identity, for an explanation of why they were relinquished for adoption, or to reassure their birth parents that they are well. Adoptees who seek information about their birth parents are generally not estranged from their adoptive families; indeed, in recent years many adoptive parents have supported their children's search efforts.").

14. *See* Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 110–13 (2001) (describing the "tyranny" of the law requiring an emotional response, thus risking the authenticity of the emotion); *see also* John Braithwaite, *Narrative and "Compulsory Compassion,"* 31 LAW & SOC. INQUIRY 425, 437 (2006) ("Restorative justice is

But the law can create opportunities for those in relationships to move beyond hate or at the very least not thwart the drive to repair.

To be sure, the Reparative Model is not appropriate for every conflict in the family law system. Abusive relationships between parents and children as well as between intimate partners should not necessarily continue, even under the Reparative Model. In these cases the repair that needs to occur is *within* the individual, not between individuals, and complete rupture may well be the best course.[15] But the Love-Hate Model of family law privileges rupture in all cases. Most relationships that have deteriorated may well be at a point of acrimony but can be repaired in some fashion and will inevitably continue in some form.[16] It is this vision of relationships that should drive family law.

There have been important but scattered attempts to move beyond the Love-Hate Model. For example, custody over a child used to be granted to one parent, with the other parent retaining only a right to visit the child.[17] Beginning in the 1970s the practice shifted, and with the change states typically award both parents the responsibility to make important decisions for the child and frequently divide physical custody of the child between the two

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about creating spaces where it is more possible for compassion to flourish than in traditional criminal justice institutions like courts, prisons, and prosecutors' offices. It compels neither victims, nor offenders or other participants to show compassion. While the evidence is that compassion is more manifest in restorative justice conferences than in courtrooms, this is not because conferences make compulsory something that courts do not." (citation omitted)); *cf.* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 124 (acknowledging that the law cannot control love).

15. The Reparative Model is thus particularly relevant where there is an ongoing relationship, but it is also relevant even when a relationship will not continue because the model acknowledges the need for internal, as well as external, repair.

16. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137–38 (1992) (finding that in a survey of divorcing California parents in the late 1980s, approximately 20 percent required a neutral decisionmaker, whereas 50 percent involved no significant conflict between the parties); *see also infra* text accompanying note 241. As discussed in Part IV.C, arguably some relationships, particularly those marked by violence, should not continue in any form. But the majority of divorces do not involve histories of violence. One study found that divorcing couples fell into two distinct groups—high-distress marriages and low-distress marriages—each of roughly equal size. Couples in the low-distress group reported very little violence, whereas 43 percent of the couples in the high-distress group reported a high level of violence. *See* Paul R. Amato & Bryndl Hohman-Marriott, *A Comparison of High- and Low-Distress Marriages That End in Divorce*, 69 J. MARRIAGE & FAM. 621, 628–29 (2007).

17. *See* JUNE CARBONE, FROM PARENTS TO PARTNERS: THE SECOND REVOLUTION IN FAMILY LAW 182–85 (2000).

parents, albeit often unevenly.[18] In another development, collaborative law seeks to avoid court involvement for divorcing couples by requiring that attorneys withdraw if settlements are not reached.[19] And, of course, mediation has become widespread in the field of marital dissolutions.[20] In the field of child welfare,[21] some states and localities are experimenting with family group conferencing, a process that brings together parties with a stake in abuse and neglect cases to devise solutions collectively.[22] In the adoption context, some parties have crafted open adoption agreements in which the child and birth parent continue to see one another after the adoption is finalized.[23] Thus, a more accurate description of contemporary family law is that of a system moving away from the Love-Hate Model, particularly in the context of marital dissolutions.

Despite this movement, however, the reforms remain decidedly undertheorized and incomplete, and in some instances are actively challenged.[24] A clear theoretical framework is necessary to give underlying structure to these reforms and point toward comprehensive changes that would move family law as a whole more fully in a reparative direction. In this way, the Reparative Model acts

18. *See id.* at 182–86.

19. *See infra* text accompanying notes 186–90.

20. *See infra* text accompanying note 150.

21. Although child welfare laws require states to make "reasonable efforts" to "preserve and reunify" families, *see* 42 U.S.C. § 671(a)(15)(B) (2000), as I have discussed elsewhere, the efforts states make in this regard fall so far short of the mark that I do not consider the requirement an example of a move away from the Love-Hate Model. *See generally* Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485 (2007) [hereinafter Huntington, *Mutual Dependency*] (arguing that the cultural and legal environment created by the dominant understanding of family autonomy creates a post hoc child welfare system in which the state does far too little to prevent child abuse and neglect); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006) [hereinafter Huntington, *Rights Myopia*] (arguing that the debate over the proper balance between parents' rights and children's rights obscures the underlying needs of families in the child welfare system, particularly the need for meaningful assistance in addressing the problems underlying the abuse and neglect).

22. *See infra* text accompanying note 199.

23. *See infra* text accompanying note 206.

24. For a description of the ethical challenges to collaborative law as well as the unwillingness of courts to uphold some open adoption agreements, see *infra* text accompanying notes 207–08, 211.

as an interpretive theory for existing reforms and also encourages future innovation.[25]

Further, the Reparative Model provides a theoretical construct for scholars, legislators, judges, policymakers, and practitioners to reconceive many core aspects of family law. Once reparation as a normative goal is brought to the fore, the interests at stake in the family law system take on a decidedly different hue.

This Article has one additional ambition: to demonstrate the relevance of the emerging field of law and emotion to family law.[26] Although family law is a ripe subject for law and emotion scholarship, the intersection between the two fields is largely unexplored.[27] This Article begins to fill this void. Law and emotion has considerable potential to shed light on long-standing problems in family law, and

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25. *See* RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986) (noting that interpretive theories both uncover the value underlying a practice and also find meaning in that practice so that the practice can later be restructured); JOHN RAWLS, A THEORY OF JUSTICE 19–20, 48–49 (rev. ed. 1999) (noting that interpretive theories are intended to explicate existing practices and further their development).

26. This interdisciplinary field explores the relationship between emotion and the law. *See* Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 119–33 (2006) (describing the emergence of the field of law and emotion and proposing a taxonomy for future scholarship).

27. *See id.* at 134 ("[L]ittle of the self-identified law and emotion literature has entered the arena of family law, nor has the family-law literature sought specifically to extract useful insights from the emotion-and-law field."); *see also* Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 980–81, 994 (2001) (reviewing THE PASSIONS OF LAW (Susan A. Bandes ed., 1999)) (noting the "[s]urprising" absence of family law from law and emotion scholarship). For a few counterexamples, see Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. (forthcoming 2008) (on file with the *Duke Law Journal*) (using a law and emotion perspective to argue for greater forgiveness in marital dissolution proceedings); 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, 369–71 (2005) (discussing studies finding that cognitive reasoning is affected by emotion and applying this insight to divorce proceedings). Further, some scholars have advanced normative calls for incorporating a therapeutic element into family law. *See, e.g.*, Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 798 (1997) (arguing that family law should incorporate therapeutic elements from social sciences because "[t]he notion of [state] intervention implies an ability to influence the underlying situation to make it more positive"); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 139–74 (1997) (rejecting the adversarial system as a means for determining the best interests of the child, and instead proposing an interdisciplinary, collaborative approach to resolving custody issues in divorce and child welfare). These calls, however, have not been accompanied by a theoretical framework to guide the discussion and adoption of substantive and procedural changes to family law.

this Article's exploration of the cycle of love, hate, guilt, and reparation is a first step.

A final clarifying note: this Article offers Klein's insights into human intimacy not as a scientific theory that can be empirically proven, but rather as a point of entry for thinking about the cyclical nature of emotions in familial relationships. Thus, this Article makes no claim to the firm truth of all aspects of Klein's theory, but rather uses Klein's perspective as a starting point for exploring family law and the relationships it regulates. As discussed more fully in Part II, the essence of Klein's theory is broadly reflected in modern psychology and disparate other disciplines. Thus, a reader skeptical of Klein in particular or psychoanalysis in general need not on those grounds reject the theoretical and pragmatic conclusions of this Article.

This Article proceeds in four parts. Part I explores the missing connection between family law and law and emotion. Part II turns to the cycle of intimacy as first articulated by psychoanalytic theorist Melanie Klein. It explores the deep roots of this cycle in Western culture and its acceptance in modern psychological thought and numerous other academic disciplines. Part III describes the Love-Hate Model of family law and argues that the contemporary legal process is antithetical to the emotional cycle of the relationships it regulates. Part III also describes nascent developments in family law that have begun to transcend this tension and argues that these reforms lack a theoretical construct that would facilitate their broader adoption. Part IV proposes a Reparative Model of family law and then demonstrates how this model would affect the substance, procedure, and practice of family law. The Reparative Model suggests several concrete changes to family law, but more fundamentally provides a new theoretical framework to guide family law to account for the full, and rich, emotional complexity of familial relationships.

I. THE MISSING INTERSECTION BETWEEN LAW AND EMOTION AND FAMILY LAW

The interplay between law and emotion is the subject of increasing scholarly attention. The field has progressed from tentative arguments that emotion has some value in legal reasoning to a promising and still-maturing exploration of the relationship between

emotion and law.[28] Law and emotion highlights the distinct relevance of emotion to the law, both in substantive terms and in terms of the emotional life of individuals (including practitioners) in the legal system.

The field began with arguments about the role of emotion in decisionmaking, with scholars challenging the well-entrenched dichotomy between reason and emotion. Scholars argued, for example, that the process of judging need not view emotion as threatening.[29] Much of this early scholarship focused on negative

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28. For a good summary of this literature across disciplines and subject matters, see generally Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045 (2006). Law and emotion differs from the field of law and psychology in that it draws upon the study of human emotion in a variety of contexts, including feminism, anthropology, and philosophy, to name but a few. *See* Maroney, *supra* note 26, at 121 ("Not only has law in recent decades become far more receptive to insights from other disciplines, but those disciplines have begun to engage far more deliberately with issues of defining and understanding human emotion."). The field of psychology, of course, also concerns emotions, but law and psychology arguably is more narrowly focused. *See* James R.P. Ogloff, *Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century*, *in* TAKING LAW AND PSYCHOLOGY INTO THE TWENTY-FIRST CENTURY 1, 13 (James R.P. Ogloff ed., 2006) (defining the law and psychology movement under the label "legal psychology" as "the scientific study of the effect of law on people; and the effect people have on the law" and noting that it "also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law").

The study of emotions is influencing a number of other legal disciplines. For example, law and economics has begun to integrate a more complex understanding of human psychodynamics into traditional understandings of rational economic actors. *See* June Carbone & Naomi Cahn, *Behavioral Biology, The Rational Actor Model, and the New Feminist Agenda*, RES. L. & ECON. (forthcoming 2008) (manuscript at 2, on file with the *Duke Law Journal*) ("In addressing these issues, more complex models of human motivation are critical. Economics itself, led by the insights that have come from game theory, is increasingly focused on examination of trust, altruism, reciprocity and empathy."); Christine Jolls, *Behavioral Law and Economics*, *in* ECONOMIC INSTITUTIONS AND BEHAVIORAL ECONOMICS 115, 116 (Peter Diamond & Hannu Vartianen, eds., 2007); Roger G. Noll & James F. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, *in* BEHAVIORAL LAW AND ECONOMICS 325, 325 (Cass Sunstein ed., 2000) ("The purpose of this paper is to consider some implications of the cognitive theory for regulatory policies designed to control risks to life, health, and the environment."); *see also* ANTONIO DAMASIO, DESCARTES' ERROR 53 (1994) (arguing that the "biological machinery of reason" includes emotion). For a critique of the use of evolutionary psychology and human behavioral biology in legal scholarship, see Brian Leiter & Michael Weisberg, Why Evolutionary Biology Is (So Far) Irrelevant to Law 5 (Oct. 17, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=892881 ("[E]volutionary biology offers nothing to law—more precisely, it offers nothing to help with questions about legal regulation of behavior . . . .").

29. *See* Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 38 (1988) ("[W]hen he takes on the historically highly charged distinction between reason and emotion, and seems to defend passion against rationality in judicial action, Justice Brennan risks rejection by all those who invest those terms with longstanding meanings.");

emotions, particularly in the context of criminal law, such as Dan Kahan and Martha Nussbaum's excellent work on disgust and anger.[30] This early scholarship focused primarily on questions of how the law expresses emotions.[31]

More recently, scholars have looked beyond the expressive aspect of law and emotion. Scholars have explored how the law can cultivate emotions, such as hope,[32] or seek to impose emotions, such as shame.[33] Other scholars have used emotion as a basis for understanding what the legal system protects.[34] Law and emotion scholarship also has begun to explore positive emotions[35] as part of a larger movement doing so.[36] This Article is firmly in this second generation of law and emotion scholarship, both in its focus on the law's capacity to nurture emotions actively and in its focus on positive emotions.

Although not yet fully developed, some methodological commitments of the field are beginning to coalesce. For example, it is important for scholars to examine emotions from a variety of perspectives, exploring how emotion is understood by neuroscientists,

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Judith Resnik, *On the Bias: Feminist Reconsideration of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1922–23 (1988) ("A modification of the official dogma of judging would be required to add the traits of compassion, care, concern, nurturance, identification, and sympathetic attention to the list of aspirations for our judges."). Early scholarship thus addressed questions about which emotions and which legal actors should be studied and should influence the law. *See* Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1608 (2002) (reviewing THE PASSIONS OF LAW, *supra* note 27, and describing the book of collected essays as addressing these kinds of questions).

30. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 270–74 (1996).

31. *See* Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319, 319–20 (2007) (noting that much of the scholarship addresses how criminal law manifests society's emotional response to violations).

32. *See id.* at 320–21.

33. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–34 (1996). *But see* Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2086–90 (2006) (revising his earlier argument in favor of shaming sanctions by contending that for an alternative sanction to appeal to citizens, it must be as pluralistic as possible so as not to denigrate the values of some citizens while affirming those of others).

34. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 5–6 (2004) (arguing that emotions indicate what is important to people and thus what the legal system should protect).

35. *See* Abrams & Keren, *supra* note 31, at 321.

36. *See* Shelly L. Gable & Jonathan Haidt, *What (and Why) is Positive Psychology?*, 9 REV. GEN. PSYCHOL. 103, 103 (2005).

psychologists, economists, sociologists, philosophers, political scientists, and anthropologists.[37]

Family law is a fertile, but oddly uncultivated, field for the insights of law and emotion scholarship. The absence of law and emotion scholarship in family law is surprising given the remarkable insights that the tools of law and emotion offer for a set of challenges common to the entire body of family law. One observer of law and emotion scholarship has noted the tremendous potential. "Think of the rich possibilities awaiting further scholarship [in family law]: emotion theory could help fashion doctrine that harnesses the most constructive emotions, identifies beneficial cognitive components of feeling/belief/desire interactions, and encourages negative emotions to transform into those that improve family relationships."[38]

Family law inherently addresses significant emotional conflict within families: Intimate relationships can be highly discordant and sometimes include violence and psychological abuse. Parent-child relationships can be abusive and neglectful. And adoption can evoke a complex set of emotions for birth parents, adoptive parents, and adopted children, both at the time of adoption and later. Family law must craft regulatory systems to govern these difficult relationships. These challenges include child support rules that ensure children receive the financial support they need, child custody rules that protect the well-being of children and their relationships with both parents after divorce, intervention rules that determine when the state should remove a child from an abusive home and when and if to return the child to that home, and rules about how long a birth parent has to relinquish a child for adoption. Scholars have yet to explore these and many other critical questions through a law and emotion lens.

This Article draws on two particular law and emotion frames. First, the Article explores the relevance of a particular theory of emotion, what Terry Maroney has called the "emotion-theory approach" to the study of law and emotion.[39] This approach begins

37. *Cf.* Huang & Anderson, *supra* note 28, at 1046–49 (noting that all these perspectives and others can be used to understand the role of an emotion).

38. Little, *supra* note 27, at 994. Despite this potential, the intersection is greatly underexplored. *See id.* (noting that only one scholar in the anthology reviewed had made even a passing reference to the intersection between emotion theory and family law).

39. *See* Maroney, *supra* note 26, at 128. As Professor Maroney has said, this type of scholarship is rare but, when done well, is careful to distinguish competing theories and clarify why the chosen theory is better suited for adoption by the legal system. *Id.* at 128–29.

with a particular discipline, such as psychoanalysis or cognitive neuroscience, and then focuses on a particular theory within that discipline.[40] This Article investigates one theory of emotion, articulated by Melanie Klein and other psychoanalytic theorists, addressing the love, hate, guilt, and reparation cycle of intimacy. As discussed in greater detail in Part IV, Klein's recognition of the cyclical nature of human emotions and the reparative drive offers powerful insights across the breadth of family law.[41]

Second, law and emotion provides a theoretical construct to examine how emotion influences legal actors.[42] This construct is particularly useful in understanding individuals regulated by family law. Although family law regulation is ubiquitous in American legal culture,[43] some individuals have much more direct contact with the system because they are dissolving their marital union, are involved in the child welfare system, or are a party to an adoption. A legal actor approach also brings to the fore family law attorneys, who heavily influence the experience of their clients and adversaries.[44]

Law and emotion scholarship has its limits, as does all interdisciplinary work.[45] A particular challenge faced by law and emotion literature is instability within the study of emotions.[46] Emotion scholarship has yet to settle on a definition of emotion, as

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40. *See id.* at 128.

41. *See infra* Part IV.A–B.

42. Professor Maroney has labeled this the "legal-actor approach" to law and emotion. *See* Maroney, *supra* note 26, at 131.

43. Even individuals who choose not to marry or are unable to marry, who do not divorce, who are not involved in the child welfare system, or who have never adopted a child or been adopted are still regulated by family law. Simply by virtue of being born, a child is subject to background legal rules allocating authority among parents, children, and the state. The one exception to this universal experience of regulation may be an immigrant who comes to the United States as an adult, creates no family ties while in the United States, and makes no attempt to bring in any family from another country.

44. *See infra* text accompanying notes 265–66.

45. Critics argue—fairly or unfairly—that interdisciplinary scholarship often manifests itself as nonexperts selectively choosing theories without a complete understanding of the field as a whole. *See, e.g.*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) (criticizing the use of historical arguments by legal scholars who do not rely on primary and secondary sources).

46. *See* Little, *supra* note 27, at 980–81.

opposed to feelings,[47] nor has it reached a consensus on the role of cognition in emotion.[48]

Antonio Damasio, a leading neuroscientist, has outlined a useful approach to these questions. Damasio contends that an emotion is a "patterned collection of chemical and neural responses that is produced by the brain when it detects the presence of an emotionally competent stimulus—an object or situation, for example. The processing of the stimulus may be conscious but it need not be, as the responses are engendered automatically."[49] Damasio further argues that "[m]ost emotional responses are directly observable either with the naked eye or with scientific probes . . . . Thus, emotions are not subjective, private, elusive or undefinable."[50] By contrast, "[f]eelings are the mental representation of the physiological changes that characterize emotions. Unlike emotions . . . feelings are indeed private, although no more subjective than any other aspect of the mind."[51]

Although there is no single definition of emotion, this indeterminacy need not undermine the study of emotions in the family law context. Even without a perfectly circumscribed definition of emotions—such as those involved in the cycle of intimacy, on which this Article focuses—it is still possible to explore the law's failure to account for the cycle of intimacy and suggest ways in which the law could facilitate it. In sum, with appropriate acknowledgment of these concerns, the field of law and emotion can provide a set of

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47. *See id.* at 983–84 (describing the debate among emotion theorists on how to construct a taxonomy of emotions and how to distinguish emotions from moods and desires).

48. *See id.* at 987–92 (describing a similar debate about the definition of cognition and how to distinguish it from emotion). Richard Posner has described the difference:

> Empathy is one of the best examples of the cognitive character of emotion. The cognitive element of empathy is imagining the situation of another person; the affective element, which marks it as an emotion and not merely a dimension of rationality, is *feeling* the emotional state engendered in that person by his situation.

Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW, *supra* note 27, at 309, 329 n.21.

49. Antonio Damasio, *Fundamental Feelings*, 413 NATURE 781, 781 (2001).

50. *Id.*

51. *Id.* Damasio notes that the failure to distinguish feelings from emotions has led neuroscientists to avoid the study of emotions out of the (incorrect) belief that emotions are not measurable or the proper subject of hypothesizing. *See id.* For further discussion of the differences between feelings and emotions, see ANTONIO DAMASIO, LOOKING FOR SPINOZA 27–28 (2003) [hereinafter DAMASIO, LOOKING FOR SPINOZA]; ANTONIO DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 35–38 (1999).

tools to incorporate the reality of familial relationships in a rigorous way.

II. THE DYNAMIC CYCLE OF INTIMACY

A widely recognized aspect of familial relationships is that they are dynamic, cycling through emotions of love, hate, guilt, and the drive to repair.[52] There are numerous and active debates about how and why humans care for one another, but the fact that people are wont to repair harm in relationships is well established. This Part first explores the cycle of emotions and the reparative drive, beginning with its recognition in psychoanalytic theory, particularly the work of the early Freudian theorist Melanie Klein. This Part then discusses the widespread acceptance of these dynamics in Western culture and their importance in disparate scholarly fields.

A. Love, Hate, Guilt, and Reparation in Psychoanalytic Theory

Melanie Klein, an early follower of Sigmund Freud and a pioneer in the field of child psychoanalysis,[53] articulated an understanding of

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52. This Article uses the term drive in the sense that Melanie Klein used it—to refer to a productive human tendency, *see* 1 MELANIE KLEIN, *Mourning and Its Relation to Manic-Depressive States*, *in* THE WRITINGS OF MELANIE KLEIN: LOVE, GUILT AND REPARATION AND OTHER WORKS, 1921-1945, at 344 (1975) [hereinafter 1 KLEIN, THE WRITINGS OF MELANIE KLEIN], and not as a term of art as in behavioral neuroscience, *see* Kent C. Berridge, *Motivation Concepts in Behavioral Neuroscience*, 81 PHYSIOLOGY & BEHAV. 179, 184–85 (2004). Klein used drive differently from other psychoanalytic theorists. *See* Ruth Stein, *A New Look at the Theory of Melanie Klein*, 71 J. PSYCHOANALYSIS 499, 507 (1990) (arguing that Klein differed from Freud in that Kleinian drives are "inherently and inseparably directed towards objects").

53. *See* Patricia Daniel, *Child Analysis and the Concept of Unconscious Phantasy*, *in* CLINICAL LECTURES ON KLEIN AND BION 14 (Robin Anderson ed., 1992). Klein was a Freudian in the sense that she built upon his basic insights about the unconscious. *See* R.D. HINSHELWOOD, CLINICAL KLEIN: FROM THEORY TO PRACTICE 10 (1994) (describing basic Freudian theory that the unconscious influences conscious thoughts, emotions, relationships, attitudes, and behavior in ways that are unknown to the individual; that the purpose of psychoanalysis is to give expression to, not to control, the unconscious; and that the content of the unconscious derives from childhood traumas and frightening phantasies). Klein's mother-centric theories, focusing on the foundational relationship between infants and their mothers, offered a strong counterpoint to Freud's father-centric account of human behavior. *See* JULIA SEGAL, MELANIE KLEIN 4, 28 (2d ed. 2004).

Klein was the first psychoanalyst to apply Freud's insights to very young children. *Id.* at 1, 137–38. Whereas Freud argued that humans do not internalize the outer world in phantasies until age three or four, Klein contended that this process begins in infancy. *See* JANET SAYERS, KLEINIANS: PSYCHOANALYSIS INSIDE OUT 3 (2000). Klein argued that infants internalize the external world through their relationships with the mother, which begins at birth. *See* Juliet Mitchell, *Introduction* to MELANIE KLIEN, THE SELECTED MELANIE KLEIN 9, 19 (Juliet

the cycle of intimacy in which the reparative drive is critical. Klein first propounded this theory in a series of public lectures delivered in London in 1936.[54] Klein argued that hate is a fundamental aspect of human nature, as powerful as—and in constant interaction with—love and the "drive to reparations."[55] Klein theorized that infants first experience love and hate in relation to their mothers. Infants love their mothers when their mothers are satisfying their needs. But when their needs are not gratified, infants feel hatred and aggression toward their mothers and want to destroy them.[56] When infants experience these destructive "phantasies,"[57] they mistakenly believe that they have destroyed their mothers.[58]

To Klein, the infants' belief that they have destroyed their mothers has extremely important consequences for the development of their minds. To ward off this terrifying specter of destruction, Klein argued, infants have an equally if not more powerful phantasy of putting their mothers back together again—repairing them.[59] As Klein explained, "the unconscious feelings of guilt which arise in connection

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Mitchell ed., 1986). Indeed, to Klein, the infant, just like a newborn animal that instinctively seeks the mother, has an "innate unconscious awareness of the existence of the mother. . . . [T]his instinctual knowledge is the basis for the infant's primal relation to his mother." 3 MELANIE KLEIN, *Our Adult World and Its Roots in Infancy*, *in* THE WRITINGS OF MELANIE KLEIN: ENVY AND GRATITUDE AND OTHER WORKS 247, 248 (1975) [hereinafter 3 KLEIN, THE WRITINGS OF MELANIE KLEIN]. Klein made many other contributions to the field of psychoanalysis, including pioneering the technique of play therapy. *See* SEGAL, *supra*, at 61–62.

54. This and related lectures were later published in KLEIN & RIVIERE, *supra* note 7.

55. *See id.* at 57. As Klein argued, "only when consideration has been given to the part that destructive impulses play in the interaction of hate and love, is it possible to show the ways in which feelings of love and tendencies to reparation develop in connection with aggressive impulses and in spite of them." *Id.*

56. *See id.* at 60–61. Klein argued that the struggle between love and hate gives rise to the mental activity of imaginative thinking. Infants who desire to be fed imagine the mother's breast and also imagine the satisfaction they will get from the breast. *Id.* at 60. Similarly, infants imagine destroying the mother's breast in an act of aggression and hatred because it is the breast that both satisfies and, at times, deprives infants of their desires. *Id.* at 60–61. As subsequent readers and interpreters of Klein's work have noted, Klein sometimes appears to use the breast metaphorically and sometimes literally. But it is in its metaphoric sense that her theory has the most resonance—as the expression of "the global character of the original emotional experience." C. FRED ALFORD, MELANIE KLEIN AND CRITICAL SOCIAL THEORY 7–8 (1989).

57. Klein, like other psychoanalysts, uses the term phantasy to refer to unconscious fantasies. *See* SEGAL, *supra* note 53, at 29. Fantasy is reserved for conscious fantasies. *See id.*

58. *See* KLEIN & RIVIERE, *supra* note 7, at 61.

59. *See id.* This phantasy of reparation does not quite quell the fears of destructiveness, however, because destroying the source of love, satisfaction, and security is such a powerful fear. *See id.*

with the phantasied destruction of a loved person play a fundamental part in the [love, hate, and reparation] processes."[60] The drive to make reparation abates the feelings of guilt.[61]

This cycle—with feelings of hatred and aggression giving birth to guilt and the reparative drive[62]—is repeated throughout a lifetime, each time widening the scope of a person's ability to love and make reparations.[63] Klein argued that wherever there is a feeling of love, the conflict between hate and love is aroused, which leads to feelings of guilt and then wishes to make good.[64] Thus, according to Klein, making reparation is "a fundamental element in love and in all human relationships."[65] Klein concluded that "these basic conflicts profoundly influence the course and the force of the emotional lives of grown-up individuals."[66]

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60. *Id.* at 117; *accord id.* ("We have seen that the baby's feelings of guilt and sorrow, arising from his phantasies of destroying his mother in his greed and hate, set going the drive to heal these imaginary injuries, and make reparation to her.").

61. *See id.*

62. *See id.* at 62. When an individual is not able to master these aggressive impulses, that individual fears hurting the loved one. *See id.* at 62–63. This unconscious fear of being incapable of love, or of hurting a loved one, then informs a person's own feelings of self-worth. *See id.* There is a variant to this cycle. The hate for the other leads to guilt, which then triggers an external transgression to give an object to the hate. *See* 1 KLEIN, *Criminal Tendencies in Normal Children*, *reprinted in* THE WRITINGS OF MELANIE KLEIN, *supra* note 52, at 170, 170–85. In this way, the guilt precedes the transgression, rather than the transgression preceding the guilt. But the original transgression was the hatred toward the other, which led to the guilt and the external transgression, so even in this variant, the cycle remains love, hate, guilt, and reparation.

These early experiences inform infants' relationships with their mothers and, later, their relationships with other adults. As Klein contended:

> The baby . . . soon begins to respond to these gratifications and to [the mother's] care by developing feelings of love toward [the mother] as a person. But this first love is already disturbed at its roots by destructive impulses. Love and hate are struggling together in the baby's mind; and this struggle to a certain extent persists throughout life and is liable to become a source of danger in human relationships.

KLEIN & RIVIERE, *supra* note 7, at 59–60.

63. *See id.* at 63, 117; *see also id.* at 10 ("The hate and aggression, envy, jealousy and greed felt and expressed by grown-up people are all derivatives, and usually extremely complicated derivatives, both of this primary experience and of the necessity to master it if we are to survive and secure any pleasure at all in life.").

64. *See id.* at 64–65.

65. *Id.* at 68. Art is another external manifestation of the drive to reparation. *See id.* at 106; *see also* JANET SAYERS, MOTHERS OF PSYCHOANALYSIS 226–31 (1991) (discussing Klein's theories on the reparative aspects of creativity).

66. *See* KLEIN & RIVIERE, *supra* note 7, at 62. Klein drew her conclusions about the workings of an infant's mind from her psychoanalysis of young children. Her psychoanalysis of adults confirmed that the effects of this early phantasy life are profound and long lasting, influencing the unconscious mind of adults throughout their lives. *See id.* at 61–62 & 61 n.1.

A key element of reparation is the acknowledgment of hate and aggression. As one of Klein's colleagues, Joan Riviere, wrote, "we spend our lives in the task of attempting to keep a sort of balance between the life-bringing and the destructive elements in ourselves."[67] Balancing these forces requires recognition of the destructive, and universal, force of hate. Without such recognition, hate and aggression are more likely to take extreme forms[68] and the cycle of human intimacy is more likely to be forestalled.[69] Recognizing hate enables people to move to the guilt and reparation phases of intimacy.[70]

Similarly, in Klein's view, guilt is a productive emotion, fueling the reparative drive.[71] Unlike empathy, which is a "bystander emotion" experienced by someone who is not responsible for hurting another, guilt is the recognition that the person feeling it played a role in hurting another.[72] It thus becomes a signal to that person that a relationship is threatened and some action should be taken.[73]

The reparation that follows can occur within a person's own internal, emotional landscape, but it takes its primary expression in a person's relationships with others and becomes a powerful force for constructive action in repairing those relationships.[74] Klein

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67. *Id.* at 45–46.

68. *See id.* at 48.

69. *See id.* at 51–53.

70. *See id.*; 3 KLEIN, ENVY AND GRATITUDE (1957), *reprinted in* THE WRITINGS OF MELANIE KLEIN, *supra* note 52, at 176, 226 ("[O]ne should not underrate the loving impulses when they can be detected in the material. For it is these which in the end enable the patient to mitigate his hate and envy.").

71. *See* KLEIN & RIVIERE, *supra* note 7, at 65–66. Numerous studies since Klein's time support the view that guilt is a prosocial emotion. *See* HANS-WERNER BIERHOFF, PROSOCIAL BEHAVIOUR 139–45 (2002) (describing such studies). Guilt and shame are different emotions, although both may stem from the same situation. *See id.* at 145. When an individual transgresses, that conduct can be perceived either as a failure of the core self, reflecting on the individual's identity, which leads to shame, or simply as a failure of the moment, which leads to guilt. *See id.* Shame typically gives rise to a desire to retaliate or simply escape, whereas guilt gives rise to a desire to make reparations. *See id.* Although guilt is prosocial, in excessive amounts it loses this quality; similarly, its absence also leads to social difficulties. *See id.* at 149. Thus, prosocial "predispositional guilt" is negatively correlated with antisocial behavior and criminality, whereas "chronic guilt" is positively correlated with depression, anger, and resentfulness. *See id.*

72. *See* BIERHOFF, *supra* note 71, at 139.

73. *See id.* at 144 ("[Guilt] is an emotional response to harming a person . . . with whom a positive relationship has been established.").

74. *See* R.D. HINSHELWOOD, A DICTIONARY OF KLEINIAN THOUGHT 399–400 (1989). The form of the reparation varies with the individual. For example, when a mother has felt

acknowledged that not everyone is able to realize the drive toward reparation, but she contended that it exists in everyone.[75]

Although Klein makes claims of innateness,[76] the reparative drive does not have to be universal to be relevant.[77] Instead, Klein's reparative theory is emblematic of a broader discourse on the importance of repair and need not be seen as a definitive statement of human nature.[78] Moreover, the reparative drive is part of a larger

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jealousy and rivalry toward her own siblings during childhood, these feelings may have given rise to aggressive phantasies toward the siblings. If she can overcome the guilt and conflict from these aggressive impulses and make room for the drive to reparation, the mother will be better able to parent her own child by experiencing love more fully. *See* KLEIN & RIVIERE, *supra* note 7, at 78. Similarly, a mother who is able to separate herself sufficiently from her child and is not too closely identified with the child will be able to

> get full satisfaction from the possibility of furthering the child's development—a satisfaction which is again enhanced by phantasies of doing for her child what her own mother did for her, or what she wished her mother to do. In achieving this, she also repays her mother and makes good the injuries done, in phantasy, to her mother's children, and this again lessens her feelings of guilt.

Id. at 79.

75. *See* KLEIN & RIVIERE, *supra* note 7, at 82–87.

76. *See id.* at 65–66.

77. Claims of universality are always fraught. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–86 (1990) (arguing that categorical unity is an illusion obtained through the sacrifice of silenced voices). Whether the reparative drive is innate or socially constructed is not particularly relevant for present purposes. *See* JESSICA BENJAMIN, THE BONDS OF LOVE; PSYCHOANALYSIS, FEMINISM AND THE PROBLEM OF DOMINATION 247 n.1 (1988) (describing the disagreement, present even within the psychoanalytic community, about instinct (innateness) versus socialization). The point is simply that the reparative drive is a widely shared human experience.

78. I do not argue that Klein's theory is indisputably "right." *Cf.* Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1130–31 (2005) (introducing a discussion of Freud's castration anxiety theory by clarifying that the theory was not presented as scientific proof, but rather as the work of a writer and cultural critic whose ideas profoundly influenced modern thought wholly apart from their veracity). Nonetheless, it is important not to dismiss it unthinkingly. A reader may be inclined to reject Klein's theory for numerous reasons. Aside from the commonly experienced aversion to acknowledging hate, *see* KLEIN & RIVIERE, *supra* note 7, at 6 (noting that despite the ubiquity of hateful and aggressive feelings, "on the whole we do not much like the idea of them, so unconsciously we minimize and underestimate their importance"), a reader may think psychoanalysis itself is a flawed enterprise. To be sure, psychoanalysis is the subject of well-deserved criticism, but it still has interesting insights to offer. *See infra* note 97. Moreover, the Kleinian theory I rely upon has transcended psychoanalytic theory and is widely accepted in numerous disciplines, at least at a higher level of generality concerning the cyclical nature of emotions and the oft-experienced drive to repair relationships. *See infra* Part II.B. In short, a reader can reject psychoanalysis and Klein entirely and still agree with the basic argument of this Article.

I acknowledge that a reader may find Klein's ideas too "out there." *See* Karen Proner, 'The Georgies of Prehistory': Conducting to the Sounds of Melanie Klein's Theories, *in Learning and Teaching the Theories of Melanie Klein*, 24 J. CHILD PSYCHOTHERAPY 449, 450 (1998) (describing the challenges of teaching Klein's theories because they "stir[] the most

group of relational instincts and motivations, such as tending[79] and altruism,[80] and parallels the inquiry of moral psychologists.[81] This Article does not dwell on these other intriguing facets of human experience, except to note that these tendencies are all concerned with how and why people sustain and maintain relationships.

In short, Klein recognized an important cycle of intimacy and argued that facilitating the flow from one phase to the next holds great potential both for individual development and well-being as well as for relationships between individuals.

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primordial anxieties and subsequently defences"). Although Klein's theories have moved from "outrageous" to "the orthodox," *see* Elizabeth Bott Spillius, On Teaching Klein to Non-Kleinians, *in Learning and Teaching the Theories of Melanie Klein*, *supra*, at 458, 459, she had and still has many critics. In her time, Klein was a subject of considerable controversy and also the central protagonist in a rivalry with Anna Freud. *See* Elizabeth Bott Spillius, *Freud and Klein on the Concept of Phantasy*, *in* KLEINIAN THEORY: A CONTEMPORARY PERSPECTIVE 17, 21, 25 (Catalina Bronstein ed., 2001) (describing the "Controversial Discussions" of the 1940s, which sought to address Klein's unorthodox psychoanalytic theories).

79. Shelly Taylor has written an excellent account of the "tending instinct," which she describes as "a fundamental truth about human nature: The brain and body are crafted to tend . . . in order to attract, maintain, and nurture relationships with others across the life span." *See* SHELLY E. TAYLOR, THE TENDING INSTINCT 12 (2002).

80. For a partial survey of the robust literature on altruism, see Robert A. Prentice, *"Law & " Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 884–90 (2007).

81. The field of moral psychology is centrally concerned with how and why humans care for one another. As Marc Hauser has described, there are three main schools of thought on the morality of care, drawing respectively on the work of Immanuel Kant, David Hume, and John Rawls. *See* MARC D. HAUSER, MORAL MINDS 12–45 (2006). In the Kantian tradition, moral reasoning is derived from conscious thought leading to universal principles. *Id.* at 14. Drawing on this approach, cognitive-developmental theorists, such as Lawrence Kohlberg, posit a progression of moral development, beginning with an obedience and punishment orientation and continuing on to universal principles. *See* 2 LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: ESSAYS ON MORAL DEVELOPMENT 174–76 (1984); Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, *in* HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347, 376 (1969). In the Humean tradition, emotion is the basis for moral reasoning. HAUSER, *supra*, at 23. Martin Hoffman draws on this tradition, arguing that empathy is the source of caring and justice as well as moral judgment. *See* MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT 3 (2000). In the Rawlsian tradition, principles are universal (with differing cultural interpretations) but are derived from unconscious judgment about the causes and consequences of certain actions. HAUSER, *supra*, at 42–43. Hauser aligns himself most closely with Rawls, arguing that moral thinking is an instinct, developed evolutionarily, and that morality is innate in the sense that humans possess a "moral grammar"—an innate capacity for moral thought and action, which is shaped by a child's experience in the surrounding culture. *See id.* at 2, 43–55.

B. The Cycle of Intimacy in Perspective

The idea that emotions are cyclical and that the drive to repair relationships is a widely shared human experience appears repeatedly as a central theme throughout Western culture.[82] Classical literature gives us both the compulsion of Antigone to honor her brother with a proper burial and thus repair the damage done to him by Creon,[83] and Psyche's efforts to amend her betrayal of Eros.[84] Shakespeare's work is permeated with themes of rupture and repair, with *King Lear* as a stark but by no means solitary example.[85] Examples in nineteenth-

82. Although this Article focuses on Western culture because it is the foundation for the American legal system, the reparative drive is also present in other cultures. *See, e.g.*, NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 37–44 (1991) (discussing the important tradition of apology, a form of repair, in Japanese culture); Michele Stephen, *Reparation and the Gift*, 28 ETHOS 119, 127–38 (2000) (describing Kleinian themes of repair in numerous, non-Western cultures, particularly in Melanesia and New Guinea). Indeed, the veneration of repair—albeit in different forms and with different terms—is found in nearly all major world religions. *See, e.g.*, *Matthew* 5:23–24 (King James) ("Therefore if thou bring thy gift to the altar, and there rememberest that thy brother hath ought against thee; Leave there thy gift before the altar, and go thy way; first be reconciled to thy brother, and then come and offer thy gift."); THE NEW ENCYCLOPEDIA OF JUDAISM 89 (Geoffrey Wigoder et al. eds., 2002) (discussing Yom Kippur but noting that "[t]he Day of Atonement can help bring atonement . . . only for offenses against God" whereas "[f]or those sins committed against one's fellow man, atonement is granted only after the sinner has made full restitution and sought the offended party's forgiveness"); WALPOLA RAHULA, WHAT THE BUDDHA TAUGHT 46 (2d ed. 1974) (1959) (describing compassion in Buddhist tradition); ED VISWANATHAN, AM I A HINDU? 35–36 (1992) (describing repair in the Hindu tradition); David B. Burrell, *Interfaith Perspectives on Reconciliation*, *in* THE POLITICS OF PAST EVIL 113, 122 (Daniel Philpott ed., 2006) ("[T]he Islamic path of reconciliation becomes receiving one another under the canopy of God's prevailing mercy, to which all practicing Muslims feel themselves beholden. It is less a matter of making specific amends for personal injury than a mutual recognition that we are walking a path together, along which we all stumble, so that we are each empowered to welcome the other back, even when that means stepping across a divide exacerbated by personal injury.").

83. Most Greek tragedies are centrally concerned with the destructive forces, but Sophocles' Antigone invokes the reparative drive. *See* SOPHOCLES, ANTIGONE 5, 7 (David Franklin & John Harrison trans., Cambridge Univ. Press 2003) (n.d.). In a work nearly completed when she died, Melanie Klein wrote about *The Orestia* and found in it examples of the reparative drive. *See* 3 KLEIN, *Some Reflections on "The Orestia*," *in* THE WRITINGS OF MELANIE KLEIN, *supra* note 52, at 275, 275–99 (1975).

84. LUCIUS APULEIUS, THE GOLDEN ASS 85–96 (William Adlington trans., Wordsworth Editions Ltd. 1996) (n.d.). Psyche's mother-in-law required her to complete many arduous tasks to restore Psyche's relationship with Eros, which was damaged when Psyche violated her promise not to look upon him in the light. *Id.*

85. *See generally* WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR; *see also* JOSEPH WESTLUND, SHAKESPEARE'S REPARATIVE COMEDIES 9, 13 (1984) (noting that *King Lear* "tellingly reveals both potential destructiveness and heart-felt attempts to repair the damage" and explaining that "Shakespeare's comedies stir up reparative impulses in us by awakening potential fears . . . and then showing us various ways in which they can be transcended").

and early twentieth-century literature are plentiful: Elizabeth and Mr. Darcy's twin efforts to overcome their earlier prejudices and hurtful speeches in *Pride and Prejudice*,[86] and Ethan Frome's need to make right after a sledding accident.[87] Modern writers continue to draw on this theme: Toni Morrison addresses rupture and repair in the context of slavery,[88] while Ian McEwan explores it within upper-middle-class English families.[89] Although the transgression in these stories may come from within or without the relationship, the drive for repair is a constant.[90]

The theme of cyclical emotions and the importance of repair echoes throughout popular culture as well. Think of almost any romantic comedy (or buddy movie, for that matter): after the meet-cute, the pair inevitably finds conflict, which is then resolved with a reconciliation. Cue the credits. Indeed, like synchronicity,[91] once perceived, examples of the reparative drive abound.[92]

Beyond culture, the cycle of intimacy and the reparative drive has been recognized in and has influenced several disciplines. Beginning with the field of psychology, the existence of a reparative drive is well accepted. For example, insights into the maternal object[93]

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86. JANE AUSTEN, PRIDE AND PREJUDICE (Frank W. Bradbook ed., Oxford Univ. Press 1970) (1813).

87. EDITH WHARTON, ETHAN FROME (Scribner 1997) (1911).

88. *E.g.*, TONI MORRISON, BELOVED (1987).

89. *E.g.*, IAN MCEWAN, SATURDAY (2005); IAN MCEWAN, ATONEMENT (2001).

90. For example, in *Antigone*, Creon is the source of conflict by prohibiting a proper burial for Antigone's brother, Polyneices. *See* SOPHOCLES, *supra* note 83, at 3, 5. Antigone's efforts to bury her brother are not about repairing her relationship with Creon, but instead about restoring the larger wrong of not following the religious rules concerning a proper burial. *See id.* at 35. Creon then later seeks to repair his damage to Antigone by trying to reverse his sentence, but it is too late. *Id.* at 81, 83.

91. CARL JUNG, SYNCHRONICITY: AN ACAUSAL CONNECTING PRINCIPLE (R.F.C. Hull trans., 1973) (1955).

92. For example, the sonata form is based on this structure, with a single movement containing three parts—the first introducing a melodic theme, the second playing on that theme, and the third offering a resolution of the various themes. *See* CHARLES ROSEN, SONATA FORMS 1–2 (1988). For another example, see JOHN W. BURBIDGE, HISTORICAL DICTIONARY OF HEGELIAN PHILOSOPHY 16–17 (2001) (describing the structure of Hegelian philosophy, with its focus on thesis, antithesis, and synthesis, as the rhythm of human logical thought—"understanding, dialectic, and speculation back to understanding"). David Henry Hwang's play *Yellow Face* places a rupture with his father in the larger setting of American racial politics, exploring the potential for (even an uneasy) repair in both contexts. *See* DAVID HENRY HWANG, YELLOW FACE (2007).

93. *See* JESSICA BENJAMIN, LIKE SUBJECTS, LOVE OBJECTS: ESSAYS ON RECOGNITION AND SEXUAL DIFFERENCE 81–113 (1995) (discussing the maternal object in general).

are a cornerstone of modern psychological theory, particularly object relations theory, which attempts to explain the processes underlying relationships with the observation that the self exists only in terms of its relationship with other objects.[94] Object relations theory builds upon the insight that these relationships develop during infancy[95] and that the effort to repair damage done to the other is the effort to restore the good object within ourselves.[96]

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94. *See* BENJAMIN, *supra* note 77, at 247–48 n.1 (describing the relationship between psychoanalytic theory and object relations generally and Klein's role specifically).

95. As one observer describes the seminal influence of Klein:

> Object-relations theorists, emerging from and reacting to the work of Melanie Klein, image a course of transactions between self and other(s) that help form our first subjectivity and sense of self, and that throughout life are renegotiated to recreate the sense of self and other in terms of connection, separation, and in between. These transactions give depth and richness of meaning to experience, by resonating with the past and with constructions of the past.

NANCY CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY 10 (1989).

96. *See* HANNA SEGAL, INTRODUCTION TO THE WORK OF MELANIE KLEIN 92 (1964) ("It is the wish and the capacity for the restoration of the good object, internal and external, that is the basis of the ego's capacity to maintain love and relationships through conflicts and difficulties."). Further, research in the field of neuroscience has begun to demonstrate a connection between the brain and the emotions of love, hate, guilt, and reparation. For example, studies have shown that individuals who have suffered damage to the frontal lobe, and in particular the brain's ventromedial area, do not experience key emotions, such as guilt, and as a result are less able to engage in social behavior, including sustaining marriages and parent-child relationships. *See* DAMASIO, LOOKING FOR SPINOZA, *supra* note 51, at 140–59. Other studies likewise support the connection between love, hate, and guilt and how these emotions are tied, on a neurological level, to the drive for reparation. *See* LOUIS J. COZOLINO, THE NEUROSCIENCE OF PSYCHOTHERAPY: BUILDING AND REBUILDING THE HUMAN BRAIN 176–77, 210–11 (2002) (explaining the neurochemistry underlying mother-child attachment and further describing how adults can heal childhood trauma, reflected in "[t]he integration of neural circuitry across cognitive, behavioral, sensory and emotional domains," thus repairing their own damage and preparing themselves to provide secure attachment to their children); Michael Kosfeld et al., *Oxytocin Increases Trust in Humans*, 435 NATURE 673, 674 (2005) (showing that the neuropeptide oxytocin plays a key role in increasing trust, an essential part of love). Indeed, the simple act of expressing forgiveness has been shown to improve physiological well-being and health. *See* Kathleen A. Lawler et al., *A Change of Heart: Cardiovascular Correlates of Forgiveness in Response to Interpersonal Conflict*, 26 J. BEHAV. MED. 373, 388–90 (2003) (stating this finding from the authors' own study and noting that it was particularly acute with respect to forgiveness "in relationships that are long-standing and from which extrication is difficult, if not impossible," such as a parent-child relationship); Charlotte vanOyen Witvliet et al., *Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology, and Health*, 12 PSYCHOL. SCI. 117, 117–18 (2001) (surveying research). Researchers also have found that remaining in the hate phase, in Kleinian terms, increases stress levels, while moving to repair reduces stress. *See* Judy A. Makinen & Susan M. Johnson, *Resolving Attachment Injuries in Couples Using Emotionally Focused Therapy: Steps Toward Forgiveness and Reconciliation*, 74 J. CONSULTING & CLINICAL PSYCHOL. 1055, 1062–63 (2006) (noting the centrality of trust in repairing attachment relationships); vanOyen Witvliet, *supra*, at 117–22 (reporting evidence that "rehearsing the hurt" and "harboring a grudge" contribute to allostatic load—the physiological

Although Melanie Klein's field of psychoanalysis is itself the subject of considerable controversy[97] and may carry little weight with modern psychologists,[98] the idea that emotions are cyclical and that humans often seek to repair damage in their relationships is a cornerstone of much psychological literature, especially theories about familial relationships.[99]

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cost of chronic exposure to neural or neuroendocrine stress response—while "developing feelings of empathy" and "letting go of the negative feelings" reduces allostatic load).

97. There are many well-deserved criticisms of psychoanalysis. *See, e.g.*, CHODOROW, *supra* note 95, at 3, 165–77 (describing early feminists' rejection of Freudian psychoanalysis for its depiction of woman as defective and limited); *see also* Paul Robinson, *Freud and Homosexuality*, *in* WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE 144, 144–49 (Peter Brooks & Alex Woloch eds., 2000) (describing Freud's role in creating an understanding of homosexuality as deviant behavior but noting that although Freud may have viewed female homosexuality as deviant behavior, he did not view male homosexuality as an illness and instead believed that the repression, rather than the expression, by males homosexuals of their homosexual desires led to neuroses; further discussing the "kernel of truth" linking Freud to homophobia in Freud's views that homosexuality was regressive and heterosexuality normal). Even the move within psychoanalysis, spawned by Melanie Klein, to focus on the relationship between a mother and infant, rather than solely on a child's relationship to a father, has come under criticism by feminists. *See* JANICE DOANE & DEVON HODGES, FROM KLEIN TO KRISTEVA: PSYCHOANALYTIC FEMINISM AND THE SEARCH FOR THE "GOOD ENOUGH" MOTHER 1–2 (1992) (arguing that Klein's focus on the mother-infant relationship is entirely from the infant's perspective, ignoring the mother's subjectivity, and further that this focal point continues to place women in the traditional place of mother). Additionally, psychoanalysis is often criticized for universalizing the experience of the subjects, who were typically affluent Europeans. *See* Jean Walton, *Re-Placing Race in (White) Psychoanalytic Discourse: Founding Narratives of Feminism*, 21 CRITICAL INQUIRY 775, 799–804 (1995) (arguing that claims of universal experiences by psychoanalysts often were built upon racialized works—the hated and feared "other" is always a person of color—and thus "whiteness has come to pose as deeply constitutive of female subjectivity").

Despite these criticisms, the basic insights developed by psychoanalysts into motivations, actions, and consciousness remain highly relevant to understanding human nature. *See, e.g.*, CHODOROW, *supra* note 95, at 4 (arguing that psychoanalytic insights are profoundly important given the universal experience of the unconscious, but noting that trouble has arisen from particular arguments made about the universal experiences of all humans without separately addressing issues of, for example, race and class); HINSHELWOOD, *supra* note 53, at 10 (describing widely accepted views on the importance of the unconscious, which stem from the work of psychoanalysts).

98. *See* Peter Brooks, *Introduction* to WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE, *supra* note 97, at 2 ("[P]sychoanalysis holds little prestige in most university departments of psychology, where it is disconsidered as outmoded and unscientific.").

99. These themes animate John Bowlby's seminal three-volume exploration of attachment, separation and loss, *see* 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (2d ed. 1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS (1980); SEGAL, *supra* note 53, at 134–35 (describing Klein's influence on Bowlby), as well as more recent writings on divorce and family dynamics, *see* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY,

Apart from psychology, numerous other fields reflect and draw upon the insight that emotions are cyclical and that a reparative drive exists. The reparative drive, for example, is an important aspect of the sociology of relationships, as Charles Tilly has explored in his work on narrative and conduct.[100] Other sociologists have focused on the existence of the reparative drive in relation to the role of apology both within relationships and on a collective level. For example, sociologists have studied the remarkable effect of a sincere apology in resolving conflicts and repairing relationships.[101] In particular, apologies regulate membership in social groups because membership requires knowledge of social norms. When members of the group apologize for transgressing a norm, they are confirming their knowledge of the norm and underscoring its importance.[102] As in Kleinian theory, a true apology requires the transgressor to embrace the wrong, rather than gloss over it.[103]

AND MEDIATION 26–28 (1994) (describing the emotional process accompanying divorce and arguing that it is not linear but rather cyclical, with emotions cycling back and forth between love, anger, and sadness). Professor Emery's cycle is not so different from the one Klein described. The important features are that emotions are cyclical, not static, and that individuals are capable of forgiveness. *See* ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE 26–42 (2004) [hereinafter EMERY, CHILDREN AND DIVORCE]. Similarly, allowing the flow of one phase to the next is essential to healing. *See id.* Importantly, as contrasted with the stages of grief typically associated with the death of a loved one, *see* ELISABETH KÜBLER-ROSS, ON DEATH AND DYING 34–121 (1969) (describing the five stages of grief as denial, anger, bargaining, depression, and acceptance), the loss associated with divorce and most other family law–related matters, such as adoption and child welfare disputes, is potentially revocable, *see* PAULINE BOSS, AMBIGUOUS LOSS: LEARNING TO LIVE WITH UNRESOLVED GRIEF 8–12, 61–76 (1999) (defining ambiguous loss to "include losses within divorced and adoptive families, where a parent or child is viewed as absent or missing" but is still psychologically present, and contending that the uncertainty of ambiguous losses can freeze the grieving process, leading to cycles of hope and hopelessness; further arguing that recognizing ambiguous losses can clarify what is "irretrievably lost" versus what can be "revitalized, and begun anew or restructured").

100. Professor Tilly contends that a core human tendency is to provide reasons for conduct, CHARLES TILLY, WHY? 8 (2006), and that providing a reason is a way to confirm, establish, negotiate, or repair a relationship, *id.* at 15, 19–20. Reasons fall into four categories: conventions, stories, codes, and technical accounts. *Id.* at 15. Depending on the context, it is possible to repair relationships using any of the four types of reasons, but stories are particularly powerful in this regard. *See id.* at 95. Stories are a way to make the exceptional understandable, and thus are particularly relevant in the context of unusual life events, such as marriage and divorce. *See id.* at 16.

101. *See* TAVUCHIS, *supra* note 82, at 5, 17–18.

102. *See id.* at 7–8.

103. *Id.* at 19. An authentic apology requires an acknowledgement of the wrongdoing, accepting responsibility for the transgression, an expression of regret, and "a promise not to repeat the [action]." *Id.* at vii. For a longer discussion of these various stages, see *id.* at 15–44,

Anthropologists likewise describe phases of conflict within a society, echoing the phases of human intimacy. In anthropological terms, a breach, in which a norm is violated, is followed by a crisis, in which the breach grows and taps into an underlying division within the society, and is later followed by redressive action, in which formal or informal mechanisms are used to restore peace and ensure reintegration.[104] If the redressive action fails, the fourth phase becomes one of "irreparable schism."[105]

Similarly, political scientists recognize the catalytic power of productive guilt in transitional justice efforts.[106] Moving beyond hate and drawing on the human drive for reparation was the central goal of, for example, South Africa's Truth and Reconciliation Commission.[107] The truth telling embodied in perpetrators accounting for their offenses was intended to ensure the harm was not forgotten.[108] Although not uncontroversial,[109] the idea behind the

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and for a discussion of how an apology can go awry and not repair a relationship, see *id.* at 45–46. On the role of apology more generally, see AARON LAZARE, ON APOLOGY (2004).

104. VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY 38–42 (1974).

105. *Id.* at 41. Anthropologists have also studied the exchange of gifts in other cultures as a means of repairing relationships. *See* Stephen, *supra* note 82, at 123–38 (describing the role of gift exchange in Kleinian repair in numerous cultures).

106. *See* Donald W. Shriver, *Where and When in Political Life Is Justice Served by Forgiveness?*, *in* BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 25, 28–32 (Nigel Biggar ed., 2003). For a discussion of transitional justice, see generally MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey M. Weinstein eds., 2004) (discussing the process of rebuilding after genocide and ethnic cleansing, including the role of trials and tribunals, and offering a model of social reconstruction as an alternative).

107. The Commission was intended "to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human fights [*sic*] have occurred, and to make the findings known in order to prevent a repetition of such acts in [the] future." Promotion of Nat'l Unity & Reconciliation Act 34 of 1995 pmbl. As set forth in the interim Constitution of South Africa, the Truth and Reconciliation Commission sought "to advance . . . reconciliation and reconstruction," by granting "amnesty . . . in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past." S. AFR. (Interim) CONST. (1993) postamble.

108. The reparative power of storytelling is central to the work of truth and reconciliation commissions. *See* Braithwaite, *supra* note 14, at 427 ("A key idea of restorative justice theory is that conarration can collectively affirm a norm, vindicate a victim, and denounce the evil of an act without labeling any person as a villain.").

109. *See, e.g.*, RICHARD A. WILSON, THE POLITICS OF THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 224–30 (2001); Mahmood Mamdani, *A Diminished Truth*, *in* AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 58, 58–61 (Wilmot James & Linda Van De Vijver eds., 2000).

commission was that by acknowledging the hate, South African society, on a collective level, had a tool to move on to guilt and reparation.[110] Without this acknowledgement, South Africa risked remaining in the hate phase, and reparations, if they occurred, would have been hollow.[111] Ideally, then, political reconciliation and personal reconciliation operate in parallel ways.[112]

Philosophers, and particularly legal philosophers, also recognize the power of guilt to encourage reparations on a collective level.[113] Christopher Kutz has written about "the unpleasantness of guilt . . . [as] a part of its function" and that, once harnessed, this guilt can aid "the creation of a new political community, one less likely to create classes of victims, with a future lived in the shadow of its past."[114]

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110. *See* Jean Bethke Elshtain, *Politics and Forgiveness*, *in* BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT, *supra* note 106, at 45, 57–58 (describing the role of the Commission and noting that "the emphasis was on victims" and uncovering the truth about human rights abuses because "we should never underestimate how important [the truth—recounting the basic facts] is to survivors"; further describing that the importance of truth telling was not to let off the offenders, but rather to require the offenders to "face a very new community that has full knowledge of what they did" and that "[t]he political aim is to create the conditions for domestic peace rather than for the new South Africa to be tormented by a virtually endless round of trials and punishments that would preoccupy it for years to come").

111. The demand for reparations, be it for the internment of Japanese Americans during the Second World War or for the enslavement of Africans in the United States, also reflects the idea that acknowledging the wrongdoing of the past allows society to move forward. *See* Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277, 279–80 (2004) (describing the goal of reparations as, in the case of monetary damage, setting the clock back to the "status quo ante," or in the case of nonmonetary damage, a symbolic gesture to make the other feel the pain of the injured); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 698–711 (2003) (describing ethical theories of reparations); *see also* Maxine Burkett, *Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. (forthcoming 2008) (manuscript at 24, on file with the *Duke Law Journal*) (arguing that nonrepetition is the most important element of any reparation effort).

112. *See, e.g.*, MICHAEL RUSTIN, THE GOOD SOCIETY AND THE INNER WORLD: PSYCHOANALYSIS, POLITICS AND CULTURE 36–38 (1991) (describing the relevance of Kleinian ideas of repair to a relational view of society).

113. *See* Kutz, *supra* note 111, at 279–82.

114. *Id.* at 279–80, 282. As Kutz elaborates, in the context of addressing mass atrocities, "the aim of reparative justice is not, strictly speaking, repair at all," but rather, as the quote in the text indicates, to create a new community, and "gestures of repair help constitute the identity of a transforming nation." *Id.* at 282. For an example of a nonlegal philosopher drawing upon Kleinian insights into repair, see EMILIA STEUERMAN, THE BOUNDS OF REASON: HABERMAS, LYOTARD AND MELANIE KLEIN ON RATIONALITY 63–71 (2000) (describing the relevance of Klein's insights on reparation to debates over relativism, objectivism, and the capacity for reason).

This recognition of the cycle of emotions across academic disciplines is hardly exhaustive. Other examples can be found in the fields of literary criticism,[115] feminism,[116] and social theory.[117] To be sure, each discipline recognizes the cycle of emotions in a different way. The point is not to equate, in absolute terms, the Truth and Reconciliation Commission with, for example, societal schisms recognized by anthropologists. Rather, the observation is that one uniting characteristic of these phenomenon is the recognition that emotions are cyclical and that to achieve reparation, there must be acknowledgement of harm.

To conclude with a note of caution—the reparative drive does not always reign supreme. Nor is the reparative drive inevitable or uncomplicated. As any casual student of human nature and history can attest, the reparative drive is often mediated by other, more destructive impulses. For example, some studies show that immediate reactions to transgressions in intimate relationships "tend toward grudge and retaliation."[118] Rupture, as much as repair, is a possibility in familial relationships, and it too echoes throughout culture. As *Anna Karenina* makes clear, not all stories end happily, and the protagonist may end up on the tracks instead of at the altar.[119] Moreover, conflicts and misattunements can run from the mundane to the life threatening.[120] Some relationships should not be repaired.[121]

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115. *See* ANNE CARSON, EROS THE BITTERSWEET 3–9 (1986) (describing the role of *glukupikros*, "sweetbitter" in ancient Greek—in classical literature and in particular discussing the inevitable intertwining of love and hate in classical writing); 2 MELANIE KLEIN TODAY: DEVELOPMENTS IN THEORY AND PRACTICE 221–25 (Elizabeth Bott Spillius ed., 1988) (describing the use of Kleinian insights in literary criticism); WESTLUND, *supra* note 85, at 1–16 (discussing reparative themes in Shakespeare's comedies).

116. *See, e.g.*, BENJAMIN, *supra* note 77, at 11–12 ("[D]omination and submission result from a breakdown of the necessary tension between self-assertion and mutual recognition that allows self and others to meet as sovereign equals.").

117. *See, e.g.*, SELYA BENHABIB, *The Generalized and the Concrete Other*, *in* SITUATING THE SELF 148, 156–57 (1992) (arguing that the iconic image of an autonomous individual is appealing precisely because it denies the importance of the primal relationship with, and dependence on, the mother).

118. Eli J. Finkel et al., *Vengefully Ever After: Destiny Beliefs, State Attachment Anxiety, and Forgiveness*, 92 J. PERSONALITY & SOC. PSYCHOL. 871, 871 (2007) (listing these studies). Acting on these impulses, however, undermines the relationship. *See id.* Additionally, the cycle of emotions, and hence the reparative drive, can be hindered by other human tendencies, such as denial and rationalization. *See* HINSHELWOOD, *supra* note 53, at 266.

119. LEO TOLSTOY, ANNA KARENINA (Leonard J. Kent & Nina Berberova eds., Constance Garnett trans., Modern Library 2000) (1877).

120. Many women and children face grave dangers from family members. *See, e.g.*, U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.:

But one need not take the Pollyannaish position that humans are innately good and that the reparative drive always prevails to recognize that after an expression of hate, humans do often seek to repair the damage inflicted both within individual relationships and on a collective level. Knowing when to repair a relationship and when to allow complete rupture is important but, as explained in the next Part, traditional family law is predicated on rupture alone, virtually ignoring the drive to repair.

III. STASIS AND OPPOSITION IN FAMILY LAW

Despite its fundamental importance to the relationships that family law regulates, family law remarkably fails to account for the cyclical nature of emotions in general and the reparative drive in particular. The substance of family law allows love in many (although not all) forms and intervenes to end relationships when there is hate. If love and hate define the substance of family law, a related binary opposition, which incorporates the larger legal system's adversarial orientation, frames the procedures for resolving family law disputes. This procedure in turn drives the practice of family law. Together, this substance, process, and practice form what this Article calls the Love-Hate Model of family law.

By giving legal force to rupture but providing no room for repair, the traditional family law system short-circuits the cycle of intimacy, thwarting the reparative drive and freezing relationships at the moment of conflict. But repairing harm is essential for the ongoing personal relationships that often persist even after legal relationships end. Although divorce, termination of parental rights, and adoption mark transitions from one formal status to another, more often than not the underlying personal relationships continue in some form—and hold the potential to progress from transgression to repair.

Before presenting a model of family law that would overcome this stasis and opposition, this Part explains the fundamental tensions

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INFANTICIDE (2007), *available at* http://wwww.ojp.usdoj.gov/bjs/homicide/children.htm (reporting that 67 percent of homicides of children under five are committed by a relative—31 percent of the homicides are committed by fathers and 29 percent by mothers); U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDES (2007), *available at* http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm (about one-third of female homicide victims are killed by an intimate partner, a proportion that has been increasing).

121. *See infra* Part IV.C (describing boundaries of the Reparative Model of family law).

that the binary Love-Hate Model creates as it is imposed on the complex world of familial disputes. This Part begins with a description of the Love-Hate Model, explores the significant problems the model poses, and then concludes with a description of the reforms in specific areas of family law that have attempted to move beyond this oppositional approach.

As described more fully in this Part, although some of these reforms are fairly widespread and are beginning to move family law away from the Love-Hate Model, the reforms are decidedly undertheorized and still incomplete. Moreover, in some instances, the reforms have been met with active resistance. Without a theoretical construct to support the reforms, it is unclear where family law is headed and why. The theoretical framework in the Reparative Model would both promote the reforms in place and provide fuel and guidance for other changes.

One clarifying note: "Hate" in the Love-Hate Model refers to actual hate in the sense of an emotion. But it also refers to symbolic hate—the privileging of rupture without accounting for the possibility of repair. Thus, even in circumstances in which there is no emotional hate—such as a mutually and amicably agreed upon divorce or an adoption following a voluntary relinquishment of parental rights—the law insists on hate in the symbolic sense by requiring complete legal rupture and thus imposing two binary choices—love (legal recognition of a family) or hate (no legal recognition whatsoever). Thus, this Article draws upon Melanie Klein's model of intimacy both literally and symbolically. When Klein referenced hate, she meant the emotion.[122] This Article uses Klein's model of intimacy not only as an accurate description of at least some relationships but also as a symbol of family law's incomplete accounting of the real lives of families.

A. The Prevailing Love-Hate Model

The legal system is built upon a set of well-recognized core values that transcend the subject matter and identity of the disputants. These values include finality,[123] uniformity,[124] judicial

122. *See* KLEIN & RIVIERE, *supra* note 7, at 6.

123. *See* Calderon v. Thompson, 523 U.S. 538, 558 (1998) (discussing the importance of finality in criminal law); Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 133–34 (1997) (noting the importance of finality in civil law, although concluding that in some instances this value is outweighed by the need for accuracy).

efficiency,[125] and the goal, above all else, of determining winners and losers.[126] The adversarial system is valued because it is thought to protect due process and other fundamental rights, increase accuracy in fact-finding, ensure the integrity of the decisionmaking process, and instill a sense of legitimacy among participants.[127]

Although there are some important countercurrents,[128] in its essence the family law system embraces the values of the larger, adversarial legal system. Substantively, family law provides essentially binary rules governing entry into and exit from close relationships:[129] A couple is either married or divorced.[130] In the child welfare system, even though the state ostensibly is working toward reunification of the family if possible, there are only two legally recognized outcomes—parents must regain custody of their children or face termination of their parental rights.[131] In the adoption context, after

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124. *See* United States v. Mead Corp., 533 U.S. 218, 234 (2001).

125. *See, e.g.*, FED. R. CIV. P. 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("To be effective, judicial administration must not be leaden-footed.").

126. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) (explaining that the objective of a trial is to determine the truth). To be sure, the vast majority of marital dissolution cases end in settlement, not trials. *See infra* note 151. But these settlements are, as with all settlements, conducted in the shadow of the law, and parties bargain in anticipation of how a court might rule. Moreover, even though a marital dissolution is intended to decide issues in an equitable fashion, parties still experience a win or loss in the determination of child custody and awards of marital property and spousal maintenance. *See infra* notes 146–49 and accompanying text.

127. David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1063–65 (2005).

128. *See infra* Part III.C.

129. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. (forthcoming 2008) (manuscript at 3–4, on file with the *Duke Law Journal*) (describing binary rules for assigning parental rights and noting that these rules do not reflect the reality of families' lives and in particular the role of nonparental caregivers); Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 377 (1996) (describing how family law does not account for the complex relationship between mothers and their children and, in particular, for the continuum of mothers separating from their children).

130. There is some recognition of cohabiting couples, although this state is regarded as a distinctly lesser union in the eyes of the law. *See* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1395 (2001). Some states require a separation period prior to a divorce, *see* N.Y. DOM. REL. LAW § 170(5)–(6) (McKinney Supp. 2008) McKinney's DRL § 170(5-6) (requiring, in New York, that a couple be separated for one year prior to the granting of a no-fault divorce); N.C. GEN. STAT. ANN. § 50-6 (West 2000) (same for North Carolina), but this is a temporary status.

131. *See* 42 U.S.C. § 671(a)(15) (2000). In reality many children live in limbo for years. *See* Huntington, *Rights Myopia*, *supra* note 21, at 660.

giving birth, a biological parent either places the child for adoption, thus losing all parental rights, or retains custody of the child with parental rights completely intact.[132] Gestational surrogates and close intimates are either granted parental rights or not.[133] These binary rules are based upon arguments turning on the need for certainty and stability for the child[134] and the need to induce parents to undertake the difficult work of parenting.[135]

These binary rules of entry and exit instantiate the first two stages of Klein's cycle of intimacy. They acknowledge and give legal force in the first instance to love by giving formal recognition to marriage and to parenting. But much more importantly, the law reifies hate, in both the symbolic and real sense: Divorce freezes the moment of rupture. Terminating parental rights is the ultimate sanction for transgressing parents. And adoption rules take the decision to relinquish parental rights and transform it into a hard dichotomy of parent/nonparent.[136]

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132. *See* Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consent to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 513–18 (2005). Open adoptions—in which the birth parents and adoptive parents agree to some form of ongoing contact—are more complicated. *See* Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483, 501–08 (1996) (describing state statutes sanctioning "cooperative adoption"). Although not conceived of as a form of shared parental rights in the minority of states where these agreements are enforceable, *see id.*, the agreements could be viewed in this way.

133. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding gestational surrogates do not have parental rights). There are growing exceptions to the traditional rule that only two individuals of opposite sexes may be recognized as parents to a child. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (granting parental rights to a lesbian mother who had donated eggs to her partner but who, under traditional donation rules, would not be considered a parent); *In re* E.L.M.C., 100 P.3d 546, 559–61 (Colo. Ct. App. 2004) (applying the psychological parent doctrine to a same-sex couple to allow the nonbiological mother to visit the child).

134. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979); JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD (1986). Goldstein and his coauthors argue that placement decisions should safeguard the child's need for continuity of relationships, reflect the child's, not the adult's, sense of time, and should take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

135. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2440 (1995) ("[P]arental authority over the relationship with children is offered as the quid pro quo for satisfactory [parental] performance. It is unlikely that, in a hypothetical bargain over the terms of their performance, parents would agree to undertake the responsibilities desired by the state without assurance that their investment would receive legal protection.").

136. By placing adoption rules in the context of "hate," this Article does not subscribe to the view that parents who relinquish their children are "bad" parents, inflicting a "primal wound" on their children. *See* Joan H. Hollinger, *Adoption and Aspiration: The Uniform Adoption Act,*

This binary substance, in turn, suffuses the process through which family law conflicts are resolved. For example, as in other areas of law, finality is a core value in family law disputes. In marital dissolution cases, the law directs courts to decide all legal issues in a single final order, although the court does retain jurisdiction over child custody and child support.[137] In child welfare cases, federal legislation requires states to develop permanency plans for children and expedite their placement in an adoptive home if reunification with parents is not possible.[138] And in adoption cases, finality is particularly important with courts reluctant to reopen cases after the adoption has been finalized.[139]

Narratives of family law bolster the privileging of finality, as courts determine the "truth" about a familial dispute by settling on a single account of a disputed incident or circumstance. Courts determine whether a parent abused or neglected a child,[140] whether a putative father established a relationship with a child such that he should be entitled to full parental rights,[141] and whether a gestational surrogate intended to relinquish the child upon birth.[142] Although a court will hear evidence on contested facts representing multiple perspectives, the court will ultimately choose one set of facts to the exclusion of others.

Once these Manichean narratives reach their conclusion, the family law system then discourages disputants from revisiting such judgments. Courts often invoke judicial efficiency as a rationale for

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the DeBoer-Schmidt *Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 38–40 (1995) (describing two narratives of adoption in American culture). This Article uses "hate" in the adoption context to refer to the binary world of legal relationships, which in adoption means requiring (or imposing, in the case of involuntary termination of parental rights) the complete relinquishment of parental rights.

137. *See, e.g.*, CAL. FAM. CODE. § 3022 (Deering 2007) ("The court may, during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper.").

138. *See* 42 U.S.C. §§ 620–632, 670–679 (2000).

139. *See* Samuels, *supra* note 132, at 511 (discussing finality as a principal goal).

140. *See, e.g.*, Chronister *ex rel.* Morrison v. Brenneman, 742 A.2d 190, 193 (Pa. Super. Ct. 1999) (ruling that "strapping" a sixteen-year-old daughter was not abuse because it was only "painful and made her cry" but left no bruising).

141. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 254 (1983) (affirming a state court determination that father did not take sufficient steps to establish parental rights).

142. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that intent to procreate is the determinant factor in establishing legal parental relationship in which two women each present acceptable proof of maternity).

deciding all issues at one time and for all time.[143] Heightened standards for the modification of custody orders,[144] for example, are intended to dissuade parents from returning to court. And a termination of parental rights in the adoption context is exceedingly difficult to reverse.[145]

The process of resolving family law disputes thus valorizes the clean lines that determining "winners" and "losers" yields, assigning parental rights and child custody to one parent over another, dividing marital assets between the parties, and otherwise bringing legal relationships to what the legal system perceives to be closure.[146] Parents often share custody of a child, but the sense persists that the person with the greater allocation of time with the child has won.[147] And although marital assets are generally divided "equitably,"[148] parties often experience a sense of victory or defeat in this context as well.[149]

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143. *See, e.g.*, *In re* Marriage of Hill, 166 P.3d 269, 272 (Colo. Ct. App. 2007); *In re* Marriage of Cohn, 443 N.E.2d 541, 544 (Ill. 1982).

144. *See, e.g.*, COLO. REV. STAT. § 14-10-129(1.5) (2007) (imposing two-year ban on requests for modification absent a finding by the court that "the child's present environment may endanger the child's physical health or significantly impair the child's emotional development or that the party with whom the child resides a majority of the time is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party").

145. *See* Hollinger, *supra* note 136, at 18–38 (describing the twisted path of a highly publicized case in which the birth parents sought to reverse the relinquishment of parental rights).

146. Family law similarly embraces uniformity. The larger legal system, of course, has long grappled with the familiar tension between uniformity and flexibility—rules and standards—and the family law system has some aspects that tend toward open-ended resolution. The "best interests of the child" standard for awarding custody is perhaps the paradigm example, but a body of case law establishing what is and is not in the best interest of a child has developed, thus giving some guidance to families and judges. *See generally* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2291 (1991) ("Even where only the best-interest principle is provided, it may be given meaning by judicial interpretation that evolves into rules.").

147. *See, e.g.*, Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 510 (2004) (acknowledging that "regardless of which party wins or loses in the adversarial system, the end result is that a common child gets a winning parent and a losing parent").

148. *See, e.g.*, HAW. REV. STAT. § 580-47(a) (2007) ("[T]he court may make any further orders [regarding property division] as shall appear just and equitable . . . ."); VT. STAT. ANN. tit. 15, § 751(a) (2007) ("[T]he court shall . . . equitably divide and assign the property."); WYO. STAT. ANN. § 20-2-114 (2007) ("[T]he court shall make such disposition of the property . . . as appears just and equitable . . . .").

149. *See* Katharine B. Silbaugh, *Money as Emotion in the Distribution of Property at Divorce*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S

Although some alternatives are developing, and mediation is widely used,[150] the adversarial system remains at the center of family law, overshadowing other procedures. Most marital dissolution actions are settled,[151] but the court remains an important force, with the parties aware that they cede control if the court decides the issues for them.[152] Child welfare cases are largely decided in courtroom proceedings.[153]

Finally, the practice of family law not surprisingly embodies—and itself reinforces—the oppositionalism that this substance and process generates. Although it is important not to overstate the case, family law practitioners are often criticized for fueling their clients' winner-take-all mentality in familial disputes.[154] A 2006 survey found that family law practitioners are far more likely to engage in

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PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 234, 238–44 (Robin Fretwell Wilson ed., 2006) (arguing that the drafters' reluctance to consider nonfinancial matters in determining the distribution of financial assets may improperly exclude the most significant conflicts from the legal system, leaving those conflicts to "express themselves" elsewhere).

150. *See* CONNIE J.A. BECK & BRUCE SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 5–16 (2001) (describing history of divorce mediation in the United States as well as various mediation practices).

151. Among types of family law disputes, marital dissolution has the highest rate of out-of-court settlements, with only 1.5 percent of cases being decided by a judge. *See* MACCOBY & MNOOKIN, *supra* note 16, at 137–38 (reporting the results of a survey of divorcing California parents in late 1980s).

152. *See* AUSTIN SARAT & WILLIAM F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER & MEANING IN THE LEGAL PROCESS 120–26 (1995).

153. *See* Huntington, *Rights Myopia*, *supra* note 21, at 658–59 (describing the system whereby courts make ultimate decisions in child welfare cases).

154. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 541–50 (1994) (describing potential barriers to cooperative problem-solving among matrimonial lawyers and concluding that in some legal communities, such as elite lawyers in San Francisco, incentives do exist to practice cooperatively and resist the clients' "'dysfunctional patterns of dealing with each other,'" but further noting that this is less true in larger legal communities, such as Los Angeles and New York, where lawyers are more likely to engage in adversarial behavior) (quoting MACCOBY & MNOOKIN, *supra* note 16, at 52–54). For a nuanced description of the interaction between divorce attorneys and their clients, see generally SARAT & FELSTINER, *supra* note 152. In addition to numerous other topics, Professors Sarat and Felstiner explore how divorce attorneys help clients settle cases, observing that even though settlement rather than a full-blown trial was the typical outcome, and compromise and cooperation did occur, "the [settlement] negotiations themselves were generally quite contentious," *id.* at 108, and that "[c]lients often resist the pro-settlement messages of their lawyers and deploy tactics of resistance to keep alive the possibility of contested hearings or trials," *id.* at 109. Further, Professors Sarat and Felstiner describe how attorneys, under pressure to identify with the need of their clients to share the client's world view, cast settlement "as a different kind of combat, but as combat nonetheless," *id.*, and that "[s]ettlement is presented as a search for advantage unencumbered by the formality and rigidity of adjudication," *id.*

relationship-destroying, adversarial behavior than lawyers in any other type of practice.[155]

In short, the Love-Hate Model of family law takes the norms that prevail in the most arms-length, impersonal disputes—finality, clear rules, settling on a single factual narrative, determining winners and losers—to freeze relationships at the moment of greatest conflict. The substance of family law provides only two options for family members—love and hate. The process of family law fuels the hate by pitting one family member against another in a win/lose battle. And the practice that flows from this substance and process reinforces the binary, adversarial approach. As the next Section demonstrates, this approach to family law exacts a tremendous human cost.

B. Failings of the Model

Family law holds great potential to exacerbate or alleviate emotional harm. Although the law should not presume to interfere with private decisions about familial relationships—such as whether to get divorced or give up a child for adoption—the law does determine how those decisions are effectuated. The Love-Hate Model of family law greatly exacerbates harm because it actively thwarts the movement from hate through guilt to reparation. The Love-Hate Model takes its toll on those enmeshed in the family law system and on the legal system itself.

To understand these harms, it helps to recognize how family law is different from other areas of law. In family law, the parties have close relationships with one another: parties include spouses and other romantic partners, biological and adoptive parents, children, extended family members, birth parents, surrogates, and prospective parents. These parties know each other on the deepest personal level

155. *See* Andrea K. Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate* 11 (Marquette Univ. Law Sch. Legal Studies Research Paper No. 06-29, 2006), *available at* http://ssrn.com/abstract=920505. This is a complex dynamic, and there may be several reasons why family law attorneys engage in this type of behavior. For example, clients may push their lawyers to engage in negative behavior, the emotional content of the subject matter may lead to negative behavior, and cases with lawyers may be disproportionately "hard," thus requiring adversarial behavior. *See id.* Determining the basis for the adversarial behavior is an important empirical question and beyond the scope of this Article. For current purposes, it is sufficient to note that it exists in some legal communities and that it can be detrimental to families. For further discussion of the incentives for lawyers to problem-solve cooperatively and help clients move beyond an adversarial mindset, see Gilson & Mnookin, *supra* note 154, at 541–64.

and are likely to have, as nearly all people do, complicated, emotional relationships with particular histories. And the family itself is changing in society in dramatic ways, with an increased number of single parents, blended families, cohabiting parents, same-sex partnerships, and other relationships that challenge the legal system's traditional narrow categories.[156]

Moreover, the kinds of relationships regulated by family law more often than not continue even after the most significant shifts in legal status. Even when the *legal* relationship between the parties is severed—the marital union dissolved, parental rights terminated, legal parentage changed from a birth parent to an adoptive parent—an *emotional* relationship or tie is likely to endure:[157] A divorcing couple with children will continue to relate to one another for years to come, even if only about the children.[158] A parent in the child welfare system whose parental rights are terminated may well continue to see that child, especially if the child is placed with a relative, as so many older children are.[159] And in the adoption context, only 20 to 30 percent of domestic adoptions are of infants by unrelated individuals.[160] In all other cases, it is far more likely that the adopted child will maintain a relationship with the birth parent.[161] Even in infant, nonrelative adoptions, adopted children may either remain in touch with their birth parents if their adoptions were

156. *See, e.g.*, ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339 (2004) (cataloguing state cases and laws regarding same-sex marriage and the legal rights of same-sex couples).

157. Beyond the central categories of divorce, child welfare, and adoption, the law also fails to account for human emotions in other related areas of family law, such as recognizing the anguish of the "parents" of a stillborn child. *See* Tamar Lewin, *Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*, N.Y. TIMES, May 22, 2007, at A16 (describing the growing demand for states to issue a "certificate of birth resulting in stillbirth" rather than the fetal death certificate provided by the majority of states, and noting that nineteen states do provide such certificates). The certificates are an attempt to validate the life and commemorate the loss. *See id.* Further, a legal divorce is only part of the process of separating a once-married couple. *See* Paul Bohannan, *The Six Stations of Divorce*, *in* DIVORCE AND AFTER 29, 29–30 (Paul Bohannan ed., 1970) (identifying "six stations" of divorce—emotional, legal, economic, co-parental, community, and psychic).

158. *See* Amato, *supra* note 10, at 1269 (stating that approximately half of all divorces involve children).

159. *See* AFCARS REPORT, *supra* note 11 (citing the statistic that 25 percent of children adopted out of the child welfare system are placed with a relative).

160. Hollinger, *supra* note 12, § 1.05[2].

161. This is particularly true for the 50 percent of adoptions that are by a relative or stepparent. *See id.*

"open," or they may reconnect with their birth parents at some later point in their lives.[162]

The Love-Hate Model works against these fundamental realities. The central harm of the model is that it reinforces hate with no recognition of the need to repair relationships. The Love-Hate Model thwarts the cycle of emotions in general and the reparative drive in particular by pitting one family member against the other:[163] In marital dissolution cases, spouses compete for custody and marital property.[164] In child welfare cases, parents' rights are counterpoised with children's rights.[165] And in adoption cases, biological and adoptive parents dispute numerous matters, including the intent to relinquish the child.[166] Thus, the family law system takes the complex and ongoing relationships it regulates and shoehorns disputants into narrow categories that stop at the moment of hate, be it real or symbolic.

Whatever breach the members of the family have suffered, subjecting that breach to the pressures of the adversarial system is likely to heighten the emotions surrounding the breach. The Love-Hate Model takes the very attempt to resolve legal status and further cements a particularly harmful emotional status. Although there may be good reasons for family law rules—for example, heightened modification standards are intended to provide stability for the child—the legal system's failure to address emotional issues undercuts the effectiveness of at least some of these rules. For example, leaving emotional issues unaddressed in a divorce may lead a parent to relitigate the emotional issues through a claim for a change in custody.

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162. *See* Cahn & Hollinger, *supra* note 13, at 123 (discussing the various motivating factors behind adoptees seeking out their birth parents); *see also* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 998–1013 (1995) (describing unique characteristics of adoptive families and the need to recognize, not obscure, this uniqueness).

163. *See, e.g.*, Weinstein, *supra* note 27, at 123–34 (describing the deleterious effects of the adversarial system on both children and parents).

164. *See, e.g.*, Tresa Baldas, *Taking Combat Out of Custody*, NAT'L L.J., Nov. 21, 2005, at 4, 17 (quoting a lawyer as saying: that "there is a certain amount of nastiness that comes out in a custody dispute . . . that's necessary. The main goal in a contested custody situation is to win. It's not to protect the feelings of the other side.").

165. *See* Huntington, *Rights Myopia*, *supra* note 21, at 642–52 (describing contest between parents' rights and children's rights).

166. *See* Hollinger, *supra* note 136, at 18–38 (describing disputes between biological and adoptive parents).

There is little recognition in the legal system that "winning" may create or further weaken a fragile relationship with an ex-spouse, who now is a co-parent and with whom the litigant must work out myriad issues. The Love-Hate Model takes any instinct for reconciliation and compromise and directs it toward hard lines and conflict. It is no wonder that in these win/lose contexts, family members are frequently unable to move beyond the rupture.[167] Some practitioners try to help disputants reach amicable solutions, but in a fundamentally adversarial system, there are substantial constraints on the practice.[168]

Family law disputes carry terrible potential for a high level of emotional harm. Divorce can be deeply hurtful to one or both spouses.[169] High-conflict divorces[170] hold even greater potential of

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167. *Cf.* SANFORD M. PORTNOY, THE FAMILY LAWYER'S GUIDE TO BUILDING SUCCESSFUL CLIENT RELATIONSHIPS 6 (2000) ("The system that the client enters deals with laws, reason, formulae, and rational solutions. We thus have highly passionate people entering a dispassionate system; and those are the ingredients for a bomb waiting to explode.").

168. *See* Gilson & Mnookin, *supra* note 154, at 541–50 (discussing potential for prisoner's dilemma–type behavior among divorce lawyers, but also noting that incentives exist for lawyers to "create and sustain reputations for cooperation," although acknowledging that this is less true in larger legal communities where "the size and culture of these larger communities leads to a more adversarial bar").

169. *See* PORTNOY, *supra* note 167, at 3 ("Few life events can match the intensity of the emotional distress or the upheaval of divorce. Divorced individuals have higher rates of absenteeism from work, higher rates of a variety of illnesses including stroke, cancer, and heart disease, higher rates of psychiatric illness, and four times the rate of automobile accidents. While it would be inappropriate to assign divorce a causal role in these events, it is nonetheless clear that the distress and disorganization that accompany divorce can have an impressive impact on the afflicted person." (footnote omitted)); Weinstein & Weinstein, *supra* note 27, at 369 ("A desire on the part of one spouse to terminate the relationship can set off a number of personal threat alarms. At a basic survival level, the loss of a spouse can raise issues of economic survival—how will there be enough money to pay the rent, to buy food and clothes? It is also an attack on the sense of self—I am not good enough, not attractive enough, not smart enough, etc. A marital dissolution also raises issues of social loss—which of our friends will continue to be *my* friend? The ultimate sense of loss comes from the feeling of betrayal—I opened myself to the other and have been hurt. All of these losses, and there are innumerable others, are insignificant compared to the potential loss of a child—the threat that appears to be presented in a custody and/or visitation battle.").

170. The percentage of high-conflict cases is itself a matter of dispute, with estimates ranging from 6 to 33 percent. *See* Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 498 n.11 (2001) (citing studies with figures ranging from 6 to 33 percent of cases); Ron Neff & Kat Cooper, *Parental Conflict Resolution: Six-, Twelve-, and Fifteen-Month Follow-Ups of a High-Conflict Program*, 42 FAM. CT. REV. 99, 99 (2004) (stating 10 percent of divorces are high conflict); *see also* MACCOBY & MNOOKIN, *supra* note 16, at 137–38 (finding that in a survey of divorcing California parents in late 1980s, approximately 20 percent required a neutral third party's involvement, whereas 50 percent involved no significant conflict between the parties).

harm for the parties and children.[171] Child welfare proceedings, with their potential for foster care placement and termination of parental rights, clearly raise difficult emotional issues for all involved.[172] Adoption proceedings can be emotionally charged on many fronts: one parent chooses (or is forced, after a termination of parental rights) to relinquish a child for adoption, the adoptive parents live in uncertainty of the finality of the decision, and adopted children may wish to know the identity of their biological parents.[173]

The Love-Hate Model exacerbates the negative emotions that can drive decisionmaking in these family law cases.[174] Familial disputants do not necessarily act rationally in family law cases.[175] Instead, their emotional responses can affect cognitive reasoning and lead disputants to engage in a range of self- and relationship-destructive behaviors.[176]

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171. Divorce itself need not be overly harmful for children, *see* EMERY, CHILDREN AND DIVORCE, *supra* note 99, at 62–83 (describing potential harm to children but also noting resilience of most children and how parents can work to lessen the negative impact of the divorce on the children), but high-conflict divorce does pose serious risk to children, *see* ABA, Family Law Section, *The Wingspread Report and Action Plan, High-Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146, 146–47 (2001) (setting forth findings from a major study and concluding that high-conflict divorce cases are marked by high levels of anger and distrust and seriously harm children); Weinstein & Weinstein, *supra* note 27, at 371–73 (describing manifold negative consequences for children in high-conflict divorce cases).

172. *See* Huntington, *Rights Myopia*, *supra* note 21, at 660–62 (documenting the harm to children from state intervention and subsequent placement in the child welfare system).

173. *See* Hollinger, *supra* note 136, at 38–40 (describing legal issues at play in adoptions).

174. Moreover, despite the commitment to finality, family law cases often drag on for years. In marital dissolution cases, because of continued jurisdiction over child custody and child support, disgruntled parents often seek to relitigate the issue by seeking modification of the order. For example, in 2004 in Ohio, 89 percent of the cases concerning custody and child support were requests for modification or enforcement of previous orders. *See* NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 34 (2006). Two-thirds of all domestic relations cases are reopened or reactivated cases. *See id.* at 33. Although not true in all cases, these statistics are some evidence that ongoing familial conflict provokes the need for ongoing court supervision. Additionally, despite the federal requirement that states allow only a fifteen-month period for parents to regain custody of their children, a parent can defend against termination of parental rights on this ground if the court finds that the state failed to make reasonable efforts to reunify the family. *See* 42 U.S.C. § 675(5)(E) (2000). Due to a lack of funds, states often are unable to do so and thus children stay in foster care far longer than fifteen months. *See* Huntington, *Rights Myopia*, *supra* note 21, at 660 (describing how children are likely to remain in foster care for as many as five years).

175. *See* Weinstein & Weinstein, *supra* note 27, at 361–74 (discussing the role of emotion between parties in family law disputes).

176. *See id.*

The harm that the Love-Hate Model inflicts is felt not just by clients but also by family law attorneys and judges. There are numerous symptoms of this disaffection, including the increased risk of physical violence to family law attorneys[177] and the reluctance of many judges to hear family-related cases.[178] This is no small problem in light of the substantial proportion of family law cases on state court dockets.[179]

In sum, traditional family law—embodied in the Love-Hate Model—actively thwarts the constructive human tendency to feel guilt and seek reparation. By recognizing only love and hate, family law freezes familial relationships at the moment of rupture. But because former family members so often continue to relate to one another, stopping at the moment of hate, be it real or symbolic, hinders the ability of individuals to heal the rifts that initially led to the legal proceedings and engage in the reparative work necessary for the future.[180] A regulatory system that governs intimate, emotionally fraught relationships should fundamentally differ from a regulatory system that governs other kinds of relationships—yet family law largely does not.

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177. *See* Diane Curtis, *Lawyering Can Be a Dangerous Job*, CAL. B.J., Mar. 2004, at 18 (detailing the results of an ABA survey regarding threats of violence, as well as anecdotal evidence of acts of violence toward family law attorneys, including vandalism and trespassing).

178. *See, e.g.*, JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR MEN AND WOMEN IN THE COURTS § 5, at 159 (1996) ("Judges rate the family law assignment as their lowest preference by a wide margin."); REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 77 (1990), *reprinted in* 42 FLA. L. REV. xv, xviii (1990) (reporting judges' strong dislike of family law assignments); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1091 (1994) (describing judicial dislike for family law cases and further noting that even specialized family courts do not address the underlying concerns because many judges rotate through these courts, sometimes for only one year); Mo. Bar Ass'n, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 537–39 (1993) (describing judges' dislike of family law cases).

179. *See* NAT'L CTR. FOR STATE COURTS, *supra* note 174, at 33 (reporting that approximately 25 percent of state trial court civil cases involve divorce, custody, paternity, interstate support, and adoption, with dependency and neglect cases falling into a separate, significant category).

180. Moreover, family law can involve disputes, such as between siblings in probate, in which legal status is not the issue and family relationships inherently continue beyond the dispute. *See infra* note 190 and accompanying text.

C. Partial Reforms

Family law is slowly developing new rules and procedures that are beginning to move the system beyond the Love-Hate Model. These isolated reforms seem intuitively to embody the reparative drive, but this central organizing instinct has not been well recognized and remains undertheorized.

Much of the innovation has occurred in the field of marital dissolutions.[181] For example, the recent trend toward sharing parenting responsibility between parents after a divorce, rather than awarding complete custody to one parent and only visitation rights to the other,[182] recognizes the ongoing tie between a child and both parents, as well as the possibility that former spouses can co-parent after a divorce. It is also an example of a less-stark rule—instead of full custody versus visitation, the choices are more nuanced and better reflect the relationships between the parents and the child.[183]

Similarly, the move toward no-fault divorce was, in part, an attempt to acknowledge that relationships do not always persist and that couples can choose, amicably, to end their marriages.[184] Requiring one party to demonstrate fault (hate) did not reflect this reality. Thus family law has at least moved away from requiring hate in the literal sense, although no-fault divorce still reflects hate in the symbolic sense by recognizing only two legal statuses: marriage and divorce.

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181. There are some historical antecedents to the efforts described here, such as conciliation courts, which began in the 1930s. *See* J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535, 543–44 (1994) (describing various state initiatives from the 1930s and 1940s); *see also* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 151 (1991) (describing the expanding role of social workers in divorce). Additionally, no-fault divorce was originally conceived of as a method for decreasing hostility between the divorcing spouses by putting these actions in family courts with specialized judges and trained staff available to help families resolve their disputes. *See* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 4–5 (1987) (providing an overview of the no-fault divorce movement).

182. *See* CARBONE, *supra* note 17, at 180–94.

183. *See* Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1072–74 (2003) (arguing that substantive and procedural changes to child custody "can be understood as unplanned but coherent efforts to encourage divorcing parents to function more like parents in intact families rather than in the traditional roles of divorced parents" by, for example, encouraging more post-divorce contact).

184. *See* Kay, *supra* note 181, at 4–5.

In another example of innovation in marital dissolutions, practitioners have led efforts to resolve disputes outside the adversarial system.[185] In the growing field of collaborative law,[186] both the parties and their lawyers agree to negotiate divorce settlements without litigation. To this end, the lawyers and parties decide that the attorneys will represent the clients only during settlement negotiations and, if settlement fails, the attorneys will be disqualified from taking the case to trial. The parties contract for this representation through a limited retention agreement between each attorney and client. The attorneys and clients also often sign a "four-way" agreement setting forth the intention of the representation and understanding of the process.[187] Collaborative coaches trained in the field of mental health help couples address emotional issues underlying the divorce, issues that may undermine the collaborative process.[188] Collaborative law practitioners contend that the process is appropriate for a broad range of individuals, leads to far more creative and responsive settlements between the parties, is generally less expensive than traditional adversarial litigation conducted by attorneys, and is more satisfying for clients and attorneys.[189] Although collaborative law is best known for its use in marital dissolution proceedings, it is starting to be used in other settings, such as estate

185. For example, Charles Asher, a practitioner in Indiana, has been making both local and national efforts at reform and in particular has been attempting to help parents understand the impact of adversarial proceedings on children. In a website he designed, Asher asks parents to enter into commitments regarding their behavior toward each other and their children. Up To Parents, Home of Parents' Commitments to Their Children During and Following Divorce, http://www.uptoparents.org (last visited Feb. 2, 2008).

186. Collaborative law was first devised by a practitioner, Stuart Web, in Minneapolis. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION, at xix n.1 (2001). Pauline Tesler, a practitioner in California, has been one its leading advocates.

187. *See id.*; PAULINE TESLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE 39–64 (2006); Jill Schachner Chanen, *Collaborative Counselors*, 92 A.B.A. J., June 2006, at 52, 54; Sherri Goren Slovin, *The Collaborative Process: Divorce with Dignity*, EXPERIENCE, Spring 2006, at 14–16. For a detailed discussion of the variations in agreements and contracts, as well as the important ethical consequences that flow from the different arrangements, see Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. (forthcoming 2008) (manuscript at 22–30, on file with the *Duke Law Journal*).

188. *See* TESLER & THOMPSON, *supra* note 187, at 43–45.

189. *See* TESLER, *supra* note 186, at 14 (describing how in a bell curve of high-functioning, low-conflict spouses to low-functioning, high-conflict spouses, all but the two extremes benefit from collaborative law); *see id.* at xx–xxi (describing creative problem solving and satisfaction of participants); TESLER & THOMPSON, *supra* note 187, at 55–56 (describing cost savings of collaborative law).

planning and probate, in which maintaining or repairing family relationships is at a premium and traditional litigation may threaten those relationships.[190]

Mediation has a well-established place in marital dissolution proceedings,[191] and studies have demonstrated its success, particularly over the long term.[192] Courts sometimes use trained mediators to help parents work through their anger before going into court.[193]

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190. As one proponent of collaborative law in estate planning sums up the alternatives,

> If anyone thinks about his or her own family and what would happen if there were a disagreement about who's going to get the dining room table or $400,000 of annuities, would you prefer to go to court and cause as much humiliation and expense as possible, or would you prefer to resolve it, and talk to your siblings and parents at Thanksgiving?

Nora Lockwood Tooher, *Estate Planners Put Trust in Collaborative Law*, LAW. USA, June 5, 2006, at 3, 20 (quoting collaborative law practitioner John Raskin).

191. *See* Barlow, *supra* note 147, at 500–01 (discussing the prevalence, application, and future of divorce child custody mediation in the United States); Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS 3, 6 (Jay Folberg et al. eds., 2004) ("Since its inception in the early 1970s, the landscape of the mediation field has evolved as more programs and services have been established. Mediation is now used in thousands of divorce-related disputes annually."). In 2006, New York recommended far greater use of alternative dispute resolution processes, and particularly mediation. *See* MATRIMONIAL COMM'N, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 27–33 (2006). Of course, not every case is appropriate for mediation. *See* Carol Bruch, *When to Use and When to Avoid Mediation: An Attorney's Guide*, 31 FAM. & CONCILIATION CTS. REV. 101, 102–05 (1993) (describing which type of cases are appropriate for mediation). One advocate of collaborative law claims that its advantage over mediation is that the risk and cost of a failed process are spread evenly among clients and lawyers because if the case ends in litigation, the lawyers are off the case. *See* TESLER, *supra* note 186, at 4.

192. For example, in a study that diverted some divorce cases to court-ordered mediation in lieu of litigation, the parties in the two groups reached relatively similar agreements. *See* Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 325–31 (2001). But twelve years later, the mediation cases had far better outcomes with respect to parental involvement by the noncustodial parent. *See id.* at 330 (finding, for example, that among mediation cases, after twelve years 30 percent of noncustodial parents saw their children at least weekly compared with only 9 percent of noncustodial parents in the litigation group). Practitioners and judges report satisfaction with alternative dispute resolution methods in domestic cases. *See, e.g.*, Lisa Sullivan, *ADR Offers What the Bench Cannot*, MICH. B.J., Feb. 2006, at 17–18 (detailing the benefits of alternative dispute resolution, including giving participants a greater opportunity to "vent" and, importantly, resolving disputes largely for themselves, which typically leads to a greater ability to resolve disputes without intervention in the future).

193. *See* Baldas, *supra* note 164, at 17. Many lawyers, both those engaged in collaborative law and also those with traditional litigation practices, are calling upon the help of so-called divorce coaches. *See* Dick Dahl, *Divorce Coaches: Smoothing the Waters for a Cheaper, More Successful Divorce*, LAW. USA, Sept. 11, 2006, at 514. These coaches help clients address emotional and psychological issues and guide clients through the divorce so that issues are

Mediation may work particularly well with younger couples who do not necessarily view divorce as overwhelmingly negative and stigmatizing.[194]

States are also experimenting with innovations focused on co-parenting after divorce. Seventeen states, for example, have formal parenting coordinator programs.[195] The parenting coordinator, typically a mental health professional paid by the hour by the parents, helps parents work through issues related to the children.[196] Although charged with decisionmaking responsibility, the coordinator more often helps the parents negotiate their own compromise.[197] Another innovation is parenting programs. In one study, a program designed for noncustodial fathers showed that participants had a significant increase in co-parenting with a corresponding decrease in parental conflict after fathers participated in the program.[198]

In the field of child welfare, family group conferencing is a legal process designed to help families solve problems and avoid what are often unproductive and traumatic judicial proceedings.[199] After substantiating a report of child abuse or neglect, the state convenes a conference with immediate and extended family members and other important people in the child's life, such as teachers or religious leaders, to decide how to protect the child and support the parents. Although professionals representing the state organize the meeting and share information, only the family and community members devise the plan for protecting the child and addressing the issues

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resolved more quickly and with less rancor. *See id. See generally* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 795 (1984) (arguing that alternative dispute resolution processes enables participants to discover the underlying needs and interests of each other).

194. *See* Stefani Quane, *It's Not Your Parents' Divorce: How Generational Shifts in Attitude Are Affecting One Practice Area*, LAW PRAC., June 2006, at 35 (describing one practitioner's perspective that younger divorcing couples are less likely to view divorce as stigmatizing and shameful and are more open to alternative dispute resolution).

195. *See* Nora Lockwood Tooher, *Parenting Coordinators Help Divorced Couples Who Won't Stop Fighting*, LAW. USA, Nov. 20, 2006, at 12.

196. *See id.*

197. *See id.*

198. *See* Jeffery T. Cookston, *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 132–35 (2007). In another example, Colorado authorizes courts to require a divorcing couple to attend a parenting class to teach the individuals how to co-parent after the divorce. *See* COLO. REV. STAT. § 14-10-123.7 (2006).

199. For a longer description of family group conferencing, see Huntington, *Rights Myopia*, *supra* note 21, at 674–76.

facing the parents that led to the abuse and neglect, such as substance abuse, lack of housing, or inadequate child care. The participants of the family group conference and the state then work together to provide the needed supports to the family.

Family group conferencing is part of the restorative justice movement, which seeks to repair the damage that has been done to relationships, property, and communities.[200] One tenet of restorative justice is that formal legal proceedings alone do not repair relationships,[201] often because personal stories are lost in the formality of the courtroom and the technicality of legal language.[202] By contrast, restorative justice allows both offenders and victims to tell each other their stories, in their own words.[203] This storytelling can facilitate the cycle of intimacy that leads to healing for victim and offender alike.[204]

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200. *See* MARK S. UMBREIT, U.S. DEP'T OF JUSTICE, FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS 1 (2000) (describing the restorative justice movement as an attempt to reform the justice system to incorporate victims and allow the offender to "restore" the status quo); John Braithwaite & Heather Strang, *Restorative Justice and Family Violence*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 1, 4 (Heather Strang & John Braithwaite eds., 2002) ("The most general meaning of restorative justice is a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong."). Usually in lieu of traditional courtroom proceedings (although sometimes in addition to such proceedings), restorative justice "is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future." John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 5 (citations and internal quotation marks omitted).

201. In retributive justice "[c]rime is a violation of the State, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules." HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990). By contrast, in restorative justice "[c]rime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance." *Id.*

202. *See* Braithwaite, *supra* note 14, at 428 ("The core insight of the South African Commission . . . was that impunity might not be replaced primarily with punishment, but with truth and reconciliation based on empowerment of victims through testimony and storytelling that might reconfigure national memory.").

203. *See id.* at 428–29. For a wonderful description of one such encounter, see Malcolm Gladwell, *Here's Why*, NEW YORKER, Apr. 10, 2006, at 80–82.

204. *See* Braithwaite, *supra* note 14, at 438 ("[T]he experience of love from family members in restorative justice conferences can trigger the experience of remorse, and thereby remorse-apology-forgiveness sequences"). The role of narrative in legal scholarship has been both encouraged, *see, e.g.*, Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435–40 (1989), and critiqued, *see, e.g.*, Toni M. Massaro, *Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2106–20 (1989). But the point here is that stories can help repair relationships.

Similarly, much as the psychoanalytic claim that the primary human struggle is to balance the love and hate tendencies, restorative justice is also an attempt to balance these forces within the offender.[205]

In the adoption field, birth parents and adoptive parents have crafted agreements (often called open adoptions) to ensure ongoing contact between the child and birth parent. Approximately twenty-two states make such agreements legally enforceable, although sometimes only in limited circumstances, such as adoptions from the child welfare system, adoptions among relatives, or adoptions by stepparents.[206]

As these reforms attest, family law already has begun to move beyond the Love-Hate Model. But this movement lacks a larger theoretical framework to support these reforms and encourage others. Additionally, although these nascent developments are promising, some of these efforts have met considerable resistance. For example, the Ethics Committee of the Colorado Bar Association in 2007 declared the practice of collaborative law unethical.[207] The Committee found that the four-way agreement violated the rule of professional conduct that bars a lawyer from representing a client if that representation is materially limited by the lawyer's responsibility to a third party.[208] The American Bar Association quickly responded with an opinion of its own, sanctioning the use of collaborative law,[209]

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205. *See* Braithwaite, *supra* note 14, at 440 ("The restorative justice strategy for the repair of a flawed self is to bring those audiences together in a conversation in which the 'good' self is interpreted as the core self.").

206. *See* ADMIN. FOR CHILDREN & FAMILY, U.S. DEP'T HEALTH & HUMAN SERVS., POST-ADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES: SUMMARY OF STATE LAW 2–4 (2005). The Uniform Adoption Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1994 and endorsed by the American Bar Association in 1995, is also skeptical of open adoptions, except in the context of stepparent adoptions. *See* Joan H. Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 372–77 (1996) (discussing various views on open adoptions and the compromise struck not to sanction it but also not to forbid it in all circumstances).

207. *See* COLO. BAR ASS'N ETHICS COMM., ETHICS OPINION 115: ETHICAL CONSIDERATIONS IN THE COLLABORATIVE AND COOPERATIVE LAW CONTEXTS (Feb. 24, 2007), http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//.

208. *See id.*

209. *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Ethical Considerations in Collaborative Law Practice, Formal Op. 07-447, 3–5 (Aug. 9, 2007) (disagreeing with Colorado opinion and finding four-way agreements permissible limitations on the scope of representation). For an excellent discussion of the ethical issues at stake, see Peppet, *supra* note 187 (arguing that both the Colorado and ABA opinions oversimplify the process of collaborative law and the relevant ethical issues, but ultimately concluding that although

but it has not quelled the discomfort with placing the family law attorney in a new, more reparative role. Similarly, although used with success in other countries, family group conferencing is still on the margins of the child welfare system in the United States, with states and localities not implementing it on a widespread basis.[210] And courts are often reluctant to uphold open adoption agreements precisely because they contravene the idea of clean lines in the law, raising concerns about who, exactly, is the parent of the child.[211]

Finally, despite the reforms, adversarial behavior in at least some contexts is waxing, not waning. This is true even in the field of marital dissolutions, which has seen the most reform and innovation. For example, judges and lawyers report that high-conflict custody cases—cases that are rightly described as "combat"—are on the rise, with an increase in the number of allegations of sexual and physical abuse, and claims of custody being made for financial gain.[212] These examples are far from the only evidence that a more complete move away from the Love-Hate Model is needed, on both the theoretical and practical level.

IV. ACCOMMODATING THE POSSIBILITY OF REPAIR

The Love-Hate Model stands in stark tension with the cycle of human intimacy. The goal of the law should be to facilitate and nurture this cycle, or, at least, not to complicate and hinder it. Robert Cover has argued that the law can codify, legitimate, and sanitize violence[213]—hate in Kleinian terms. All too often, as Cover notes, the actors in the legal system overlook this aspect of the law and thereby fail to appreciate how the law motivates individuals to engage in violence.[214] If the law both expresses and motivates violence (hate),

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difficult ethical issues are at stake, the process of Collaborative Law can satisfy rules of legal ethics).

210. *See* Huntington, *Rights Myopia*, *supra* note 21, at 680.

211. *See* Hollinger, *supra* note 206, at 373.

212. *See* Baldas, *supra* note 164, at 17 (describing the perceived increase in high-conflict cases); *see also* Neela Banerjee, *Religion Joins Custody Cases, to Judges Unease*, N.Y. TIMES, Feb. 13, 2006, at A1 (quoting Ronald William Nelson, chair of the custody committee of the American Bar Association, as saying "[t]here has definitely been an increase in conflict over religious issues. Part of that is there has been an increase of conflicts between parents across the board, and with parents looking for reasons to justify their own actions.").

213. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613–15 (1986).

214. *Id.*

the law likely can express and motivate the drive for reparation. But the Love-Hate Model fails to do so.

With the reforms described in Part III, family law is moving in a more reparative direction, particularly in the field of marital dissolutions. But these reforms remain undertheorized and are still incomplete. A comprehensive and clear theoretical framework would undergird these reforms and point to additional and more far-reaching changes that could be made in all areas of family law. A self-conscious theory also would demonstrate that the relics of the old approach lead to expressive and real harm.

The Love-Hate Model should be replaced by what this Article calls the Reparative Model of family law. This model would better reflect the cycle of intimacy by acknowledging a range of emotions in familial relationships, and in particular by incorporating the key, missing elements of guilt and reparation into the substance, procedure, and practice of family law. This Part outlines the Reparative Model, explores the changes that would flow from it, and concludes by identifying a few areas in which its adoption may be problematic.[215]

A. The Reparative Model

The Reparative Model is an approach to family law that aims to link substantive and procedural rules with the emotional reality of familial relationships. The Model is built upon the idea that emotions in familial relationships are cyclical, complicated, and often

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215. Several scholars have suggested changes to family law to account for the emotional needs of family law disputants. For example, some scholars have argued that a family law system based on procedural justice would lead to better outcomes for family members and would promote the emotional and psychological well-being of family members. *See, e.g.*, PENELOPE EILEEN BRYAN, CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM 5 (2006). Other scholars have contended that the best path lies in the adoption of a therapeutic jurisprudence approach to family law. *See, e.g.*, Babb, *supra* note 27, at 802. Such an approach would seek to improve the behavior and situation of family law disputants by assessing the therapeutic or antitherapeutic effects of legal rules, procedures, and actors. *See id.* at 798. Still others have advocated in favor of a family systems approach. *See, e.g.*, Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL. J.L. & PUB. POL'Y 1, 3–4 (1997) (arguing that a family systems theory should be applied to child custody disputes); Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951, 953–55, 960–61 (1999) (arguing that a family systems theory should be applied to child welfare disputes). These are all promising and interesting suggestions. But the Reparative Model is a necessary first step for improving family law. Once adopted, these other reforms can better take root.

conflicting. The aim of the Reparative Model is to facilitate better relationships between former family members, and to reach this goal by embracing the emotional life of familial disputants. These emotions include love, hate, guilt, and the drive for reparation, as well as many other variants, not all of which fit the Kleinian model.

The Reparative Model is not simply a kiss-and-make-up idea of reparation, nor is it the stark idea of reparation arguably embodied in the Love-Hate Model—that it is best for individuals to sever past ties and go their own ways.[216] Instead, the Reparative Model welcomes the emotional complexity of familial relationships. The Model draws upon Klein's four stages as a useful framework for thinking about emotions in families. The object of building upon Kleinian ideas is not to prescribe rigid adherence to the four phases of intimacy. Rather, her theory is a starting point for contemplating how family law can more fully account for the emotional reality of the relationships it seeks to regulate.

Turning to that task, the central challenge is to tie decisionmaking processes to the full cycle of human intimacy—not just love and hate, but also guilt and reparation. Even within the existing binary model, the system is inadequate in its account of love and hate. In one sense it already acknowledges love through the granting of a privileged legal status to familial relationships. But in another sense family law embodies a narrow definition of love by not, in the majority of states, recognizing relationships that fall outside the tradition of male-female intimates, marriage, and families with two parents and biological or adopted children.[217] This is not the place to

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216. It could be argued that family law does embrace repair, but defines it in a different manner. For example, facilitating marital dissolution and conceiving of no ongoing relationship between the parties could be understood as an attempt to repair the damage of an unhappy marriage and free a person to enter into a new, hopefully more functional relationship. Similarly, adoption laws could be seen as an attempt to repair the damage to a child by an original family, or, in the case of voluntary adoptions, to allow a parent to relinquish the child to a home that she hopes will be better for the child and permit the parent to continue with her life. The Reparative Model rejects this cramped vision of repair because it ignores the reality of ongoing emotional ties and is itself informed by family law's commitment to binary dichotomies.

217. *See, e.g.*, COLO. REV. STAT. § 14-2-104 (2007) (defining one of the formalities of marriage to be that "[i]t is only between one man and one woman"). *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (extending marriage under Massachusetts law to same-sex relationships). Apart from marriage, legal recognition of alternative family forms is in flux. On the one hand, courts are sometimes reluctant to grant rights to individuals who are not legal parents. *See* Troxel v. Granville, 530 U.S. 57, 72–74 (2000) (striking down state statute allowing "any person" to be granted visitation rights when it is in the best interests of the child as applied in the case, but declining "to hold that specific nonparental visitation statutes violate

wade into the very active debate over same-sex marriage and alternative parenting arrangements. Rather, the point is simply that family law has a fairly circumscribed conception of love. A Reparative Model would embrace a broader definition of love in that it would recognize intimacy in all its forms.[218]

More fundamentally, the existing binary model contains an incomplete account of hate.[219] The Love-Hate Model views hate as the end of the process rather than as a stage in a relationship: once love is over, only complete rupture is appropriate. To be sure, the Love-Hate Model does not envision actual hate in every relationship, and no-fault divorce reflects this understanding. But even in consensual, no-fault divorces, the Love-Hate Model imposes a symbolic version of hate by allowing couples only one option: complete rupture.[220] Additionally, in no-fault divorces, negative feelings are often still very much present.[221] The no-fault model provides no room for acknowledging these feelings.[222] The Reparative Model would embrace the emotional aspect of a divorce, including the negative feelings.

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the Due Process Clause as a *per se* matter"). On the other hand, when the nonlegal parent seems more like a parent, some courts protect the relationship. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546, 559–61 (Colo. Ct. App. 2004) (applying the psychological parent doctrine to a same-sex couple to allow the nonlegal mother to visit the child).

218. Where this recognition might lead, as well as the potential downsides to such recognition, is the subject for future work.

219. *See supra* Part III.B.

220. Moreover, even though no-fault divorce allows a couple to divorce without accusations of hate, the processes that accompany a divorce, and in particular the battles for marital property and child custody, do not allow a couple to move beyond the rupture.

221. As Austin Sarat and William Felstiner describe in their study of divorce lawyers and their clients,

> Even after no-fault, divorce clients consider marriage and marital conduct a highly moralized domain where judgments of rights and wrong still seem both necessary and appropriate. Marriage is more than an economic union. The meaning of marriage remains tied to the idea of loyalty, commitment, and personal responsibility. As a result, lawyers and clients in divorce cases engage in conversations involving a reconstruction of the past in which descriptions of the behavior of the parties within the marriage plays a large part.

SARAT & FELSTINER, *supra* note 152, at 28; *accord* Barbara Bennett Woodhouse & Katherine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2531 (1994) (arguing that "judgments about fault are unavoidable" because narrative "is a core component of human experience and human understanding" and thus "[p]eople (including legislators, judges, and litigants) continue to use fault in the stories they tell about marriage and divorce").

222. *See* SARAT & FELSTINER, *supra* note 152, at 28 (describing their observation that clients rehearse their hurts "generally on their own initiative and in the face of an unresponsive lawyer").

Further, hate can be very real. Terrible things happen in families—from murder and physical and psychological abuse to the more mundane every day misattunements between intimates and between parents and children. The Reparative Model would not gloss over this harm, but instead acknowledge it fully. In other words, the Reparative Model is not a conflict-muting dynamic but rather a process for recognizing conflict. In this way, family law would not simply be a dry rendering of legal status, but would take seriously the emotional harm that led to the legal proceeding.

The legal process would not end with the recognition of hate.[223] Instead, it would view hate as a stage leading to guilt and reparation. On the more horrific end of hate, repairing the relationships between family members may well be misguided, as discussed in this Part.[224] Regardless of an ongoing external relationship, however, internal repair will most likely be necessary. And in most cases, the relationship will continue and repair is needed, both internally and externally, practically and symbolically.

By acknowledging hate, the Reparative Model opens the door to the emotion of guilt.[225] The idea, at least in the context of adult relationships,[226] is not to identify a wrongdoer and a victim, and thus expect one person to feel guilty and make amends to the other. Instead, the aim is to acknowledge mutual responsibility for wrongdoing. Thus, the Reparative Model would not re-introduce or

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223. By contrast, the Love-Hate Model fuels hate. *Cf.* EMERY, CHILDREN AND DIVORCE, *supra* note 99, at 29–34, 160 (describing how divorcing spouses use anger to remain connected with each and protect themselves from more painful emotions such as grief over the loss of the relationship, and, further, how the legal system abets this defense by giving the divorcing spouses a means for fighting).

224. *See infra* Part IV.C.

225. Recognition of a transgression does not always promote forgiveness. *See, e.g.*, Michael E. McCullough, *Rumination, Emotion and Forgiveness: Three Longitudinal Studies*, 92 J. PERSONALITY & SOC. PSYCHOL. 490, 490–91 (2007) (arguing that rumination about a transgression hinders forgiveness).

226. It is important to set aside relationships between parents and children. The Reparative Model is not predicated on the idea that children bear some responsibility for their abuse or neglect. Indeed, given the disproportionate abuse and neglect of very young children, this simply would not be possible. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., CHILD MALTREATMENT 2004 (2006) *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm04/ ("[T]he rate of child victimization of the age group of birth to 3 years was 16.1 per 1,000 children of the same age group. The victimization rate of children in the age group of 4–7 years was 13.4 per 1,000 children in the same age group. . . . Children younger than 1 year accounted for 10.3 percent of victims."). By emphasizing the situation of young children, I also do not mean to imply that older children *would* bear some responsibility. I am simply making the point in its starkest terms.

support the continued use of marital fault in family law. That concept—which recognizes only one wrongdoer and one innocent—is far too simplistic and one-sided. It fails to capture the reality of most marriages, where there is inevitably a dynamic that feeds transgressions.[227] By identifying mutual responsibility, the prosocial aspects of guilt will help fuel the reparative drive for both adult parties.

In the reparation phase, any attempt for reparation must be genuine. To the extent the law encourages only a stylized reparation, little would change in the family dynamic, and the Reparative Model itself would be undermined.[228] Klein differentiated between various types of reparation. She distinguished a manic reparation, which contains a note of triumph, as when a child reverses roles with a parent, and obsessional reparation, in which a person compulsively repeats actions without any intrinsic creativity, from "a form of reparation grounded in love and respect for the object, which results in truly creative achievements."[229] The manic and obsessional types of reparation act as if no damage was done—they deny the damage in the first place.[230] By contrast, making right an acknowledged injury can relieve the guilt and thus reinforce and affirm the capacity to love.[231]

Repairing relationships between individuals would, for example, help former partners co-parent their children after the divorce.[232] In

227. For an alternate view of at least some marriages, and for an argument that no-fault divorce fails to protect "conventionally 'virtuous' spouses," see Woodhouse & Bartlett, *supra* note 221, at 2526.

228. Some attempts to introduce a reparative element into family law have been misguided for this reason. For example, some states still require courts to attempt to reconcile a couple filing for divorce. *See, e.g.*, S.C. CODE § 20-3-90 (2006). This type of law undermines client autonomy and does little to encourage true reparation.

229. HINSHELWOOD, *supra* note 74, at 397; *see also* MELANIE KLEIN, MOURNING AND ITS RELATION TO MANIC-DEPRESSIVE STATES 306–43 (1940).

230. *See* HINSHELWOOD, *supra* note 74, at 397 (describing "manic reparation, which carries a note of triumph, as the reparation is based on a reversal of the child–parent relation, which is humiliating to the parents" and "obsessional reparation, which consists of a compulsive repetition of actions of the undoing kind without a real creative element, designed to placate").

231. STEUERMAN, *supra* note 114, at 69.

232. For the nearly one in five children born and raised in cohabitating relationships, *see* Lisa Mincieli et al., *The Relationship Context of Births Outside of Marriage: The Rise of Cohabitation*, CHILD TRENDS RESEARCH BRIEF 1, 3 (May 2007), *available at* http://www.childtrends.org/Files//Child_Trends-2007_05_14_RB_OutsideBirths.pdf, the divorcing paradigm does not address the needs of these families, and the legal system needs another means to

the child welfare context, it would help repair the harm inflicted by the original abuse and neglect,[233] aiding a smoother reunification or, if parental rights are terminated, make room for an ongoing relationship between parent and child, if that is appropriate. In the adoption context, the Reparative Model would help repair the sense of loss experienced by both birth parent and adoptee that can follow the relinquishment of a child for adoption.[234]

Allowing for reparations would not necessarily lower divorce rates or increase reunifications between children in foster care and their original families. The Reparative Model would not promote this kind of "repair." Instead, the Reparative Model would enable the rupture the parties (or the state) seek, be it a divorce, termination of parental rights, or adoption, while also allowing for the possibility of repair following that rupture. In short, taking the cycle of intimacy seriously would allow for new relationships after legal status has changed.

In emphasizing reparation, it is important to distinguish between at least two meanings of the term "reparative." This Article uses the term to refer to the idea of mending or repairing relationships. As noted, this does not mean that relationships are necessarily restored, but rather recreated for the future. The term is also used in other contexts, described above, such as in South Africa with the Truth and Reconciliation Commission, and in the context of reparations to African Americans for slavery. In these latter contexts, the idea of reparation is, at least in part, to compensate a victim for an injury inflicted by a wrongdoer. Although there are some instances where intimate relationships between adults reflect stark categories of wrongdoer and victim, the reality is often far more complicated. Thus, the idea of the Reparative Model in family law, at least as it pertains to relationships between adults, is not about identifying a wrongdoer and requiring that wrongdoer to apologize or compensate for the injury she has inflicted.[235] Rather, the idea is to acknowledge the transgressions of all parties.

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encourage the adults to relate well after the relationship ends. This is the subject of future research.

233. It would also address the harm that might have occurred from placement in foster care. *See* Huntington, *Rights Myopia*, *supra* note 21, at 662 (describing the increased risk of abuse and neglect, especially sexual abuse, children face while in foster care).

234. *See* Appell, *supra* note 162, at 998–1001 (describing the feelings of loss experienced by all parties in an adoption).

235. One exception is discussed *infra* in the text accompanying note 298.

Incorporating guilt and reparation into family law should not obscure the importance of love and hate, thus overemphasizing a different part of the cycle. If the Love-Hate Model fails to recognize guilt and reparation, the Reparative Model should not similarly fail to acknowledge the importance of love and, particularly, hate. Indeed, although this Article terms the model "Reparative," to emphasize what is currently missing, it could also be named the Cyclical Model, to capture the idea that it is the *full* cycle of intimacy that needs to be reflected in family law.[236]

The Reparative Model would not mandate forgiveness, nor attempt to regulate all aspects of familial relationships.[237] Instead, the Reparative Model would function both when there are familial disputes—changing the substantive and procedural rules governing disputes—and as a background principle against which families live their lives. Thus, the Reparative Model would affect how disputes are conducted even when they do not play out in the legal system. A spouse could threaten divorce for a transgression, but if the legal system did not simply vindicate the feelings of hate and instead also encouraged guilt and reparation, the threat of divorce might well ring hollow, or at least the spouse might have to find another way of expressing the hateful feelings. The law would no longer be a servant exclusively to hate, but also would be a harbinger of guilt and reparation.

Similarly, the adoption of a Reparative Model would have an expressive impact.[238] The Reparative Model would reflect values of reconciliation and redemption, rather than simply separation and termination. This would convey the idea that the law (and society, by

236. This would also better reflect the idea that by helping a relationship move on to guilt and reparation, the cycle will also begin again, with love and then hate. Klein's idea about this however, is that each time the cycle is repeated, the individual and the relationship grow. *See supra* text accompanying notes 62–66.

237. *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 84 (2004) ("While the law can and should support interpersonal trust between spouses, if marriage is to be a true community, the law should not entirely constitute that trust.").

238. This Article uses the term expressive in the sense of the value conveyed by the law. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 nn.1–2 (2000) (summarizing literature on the expressive function of the law, which claims that the law influences behavior apart from its sanctions, and the expressivist claim that the law has a normative value based on its substance apart from its consequences); *see also* Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992) (describing the expressive function in family law, which both provides a means for citizens to speak and seeks to alter the behavior of those the law affects).

extension) recognizes the reality of familial relationships and is not going to impose an overly simplified model of human behavior on families.

Encouraging reparative laws, procedures, and practice mindsets will not necessarily lead to reparations-like behavior for numerous reasons, such as the intrinsic nature of the disputes (litigants feel there is too much at stake) or the administrative machinery (a lack of information) that perverts the reparations process. Moreover, the time element of healing is important to respect—an individual may well not be ready to repair a relationship soon after a transgression.[239] For these parties, the Reparative Model is less about facilitating an immediate repair and more about creating the possibility for repair in the future. By allowing more than hate, the Reparative Model leaves the door open to guilt and reparation, today or tomorrow.

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Before making the Reparative Model concrete with examples of changes to the substance, procedure, and practice of family law, it is necessary to clarify the kinds of family law cases that are in the system. The Love-Hate Model is premised on paradigmatic cases. In the divorce context, the paradigm case involves disputants who should no longer relate to one another, possibly because of a history of violence. In the child welfare context, the paradigm case concerns parents who terribly abused or neglected their children and should no longer see them. And in the adoption context, the paradigm case addresses an infant adoption by nonrelatives and is premised on the belief that birth parents are no longer relevant to the child.

Embracing the Reparative Model will require recognizing the reality that most conflicts in the family law system, although perhaps deeply acrimonious and emotionally injurious, represent a different paradigm. In marital dissolutions, 50 percent of the cases involve little to no conflict.[240] In child welfare cases, only 10 percent warrant criminal proceedings, 50 percent are poverty related, and the remaining 40 percent fall somewhere in between, involving abuse or neglect that does not require intervention by the criminal justice

239. *See* EMERY, CHILDREN AND DIVORCE, *supra* note 99, at 292–94.

240. MACCOBY & MNOOKIN, *supra* note 16, at 137–38; *see also* Amato & Hohman-Marriott *supra* note 16, at 628 (describing a study finding that approximately 21 percent of divorces involve domestic violence).

system but still rises above the level of poverty-related neglect.[241] In the adoption context, 70–80 percent of adoptions are relatives adopting non-infants.[242] The Love-Hate Model disserves families in these types of cases because it assumes a level of discord and detachment that is out of step with reality. By contrast, the Reparative Model is built around these realities and thus holds promise for most family law cases.

B. Applying the Model

Having described the Reparative Model as a conceptual matter, the challenge is to identify the tools and procedures family law should adopt as a practical matter to further the goals of the model. These proposed changes to the substance, procedure, and practice of family law are intended to begin a conversation—they hardly exhaust the Reparative Model's potential.

1. *Substance*. The Reparative Model could lead to significant changes in the substance of family law. A few examples will illustrate the possibilities of the model.

a. Child Custody and Property Division. The Reparative Model would encourage further adoption of predictable rules governing custody. For example, the American Law Institute has proposed a custody principle that would award physical custody in an approximation of the time each parent spent with the child during the marriage.[243] If adopted, this rule would decrease litigation by establishing a settled rule that is fairly easy to apply and that parents could know in advance of the litigation.[244] By contrast, unpredictable

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241. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 124–25 (1998).

242. *See* Hollinger, *supra* note 12, § 1.05[2][b]. By contrast, 50 percent of adoptions are by a relative or stepparent. *See id*. § 1.05[2][a].

243. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.08, 2.09 (2002).

244. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992) (first proposing this standard); *see also* Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40 FAM. CT. REV. 350, 352 (2002) (noting that averting parental conflict and distress is a potential benefit of the rule). *But see* Shelley A. Riggs, *Is the Approximation Rule in the Child's Best Interests?: A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 486–89 (2005) (arguing that the approximation rule rests upon certain assumptions about the attachment between a child and the caretaking parent, and

rules encourage parties to litigate emotional issues through a custody dispute, thus prolonging the hate phase and hindering the movement to guilt and reparation.

The search for laws that better reflect the cycle of intimacy, including the existence of transgressions, should not lead to the re-introduction of the concept of marital fault. It has been argued that the failure to recognize fault in property distribution in at least some circumstances is a failure to acknowledge the emotional aspect of property distribution.[245] But the principle of marital fault, with its view that only one party has wronged the other, is too narrow and simplistic.[246] The Reparative Model should steer clear of such one-sided notions of familial dynamics. Moreover, encouraging this mindset among litigants—that the court will determine who has wronged and who has been wronged—will only encourage parties to dig in their heels, thus prolonging the hate phase.[247] On the other hand, the current approach of largely ignoring fault is too antiseptic and fails to acknowledge any wrongdoing, even if it is mutual wrongdoing. A more constructive inquiry is to ask which property division rules will acknowledge mutual responsibility at an interpersonal level but not necessarily lead to legal consequences. I leave this inquiry to another day, but note the importance of finding the right balance.

b. Legal Status after Rupture. The Reparative Model identifies the need for a new legal status for family members who are no longer legally related but who, nonetheless, retain emotional connections. When a couple divorces, for example, if the marriage produced a

particularly equates attachment with time together, rather than analyzing the quality and security of the attachment).

245. *See* Silbaugh, *supra* note 149, at 234–48 (critiquing further the ALI decision to separate financial from emotional issues and address only the former, Silbaugh notes that "[f]inances are not distinct from emotions in relationships, but are an avenue through which spouses express emotions"). Although some states consider marital fault in the award of alimony, *see* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Problems Take Center Stage*, 39 FAM. L.Q. 879, 917 chart 1 (2006), states consider only economic misconduct, not marital fault, in the division of property, *see id.* at 921 chart 5.

246. Marital fault typically includes adultery or desertion. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 254–55 (2d ed. 1988).

247. There may be some instances where acknowledging fault is appropriate. For example, in a divorce case involving severe domestic violence, a New York court found the violence relevant to the determination of an equitable distribution of the property. *See* DeSilva v. DeSilva, N.Y.L.J., Oct. 20, 2006, at 46.

child and if, as in almost all such marriages, both parents retain at least some legal right to maintain a relationship with the child,[248] the divorcing adults could receive a "co-parent" designation. This legal status would recognize that the parents will almost certainly continue to relate to one another and would reflect that reality, instead of adhering to the legal fiction that the relationship has completely ended. A similar designation could apply to relationships that produce children out of wedlock, provided both partners have legal rights to the children. In the child welfare and adoption contexts, after birth parents' rights are terminated, they could receive the legal status of "former legal parent" or "birth parent."

Although this proposal cuts against one of the central principles of the legal system—the value of clean lines—it would better reflect the messiness of real lives. Rather than wishing that a clear legal name—spouse/legal stranger, parent/nonparent—will resolve the underlying psychological issues, the new legal status acknowledges the ongoing connection that exists and thus conceives of a place beyond rupture.

These designations would not necessarily entitle the former legal parent or birth parent to any legally enforceable rights in the child, but they would acknowledge the prior relationship.[249] To be sure, critics could reject these changes as "merely semantic." But legal monikers recognize and give value to underlying relationships, thus legitimizing those connections. Further, the designations would play an important expressive function by conveying societal acknowledgment of the ongoing ties.

Other formal changes along these lines could help encourage the reparative drive. Some states have dropped the terms physical and legal custody and replaced them with "parenting time" and "decision-making responsibilities."[250] These changes are a first step toward

248. It is the rare marital dissolution case that results in the termination of parental rights for one parent. Instead, the court allocates legal and physical custody between the parents. Even if one parent has sole custody over the child, the other parent typically retains some parental rights, such as the right to visit the child.

249. I leave to another day an exploration of the intriguing question of whether some rights should be retained.

250. *See, e.g.*, COLO. REV. STAT. § 14-10-124 (2007) ("The court shall determine the allocation of parental responsibilities, including parenting time and decision-making responsibilities, in accordance with the best interests of the child"); Act of April 30, 1993, ch. 165, 1993 Colo. Sess. Laws 575, 578, § 1 ("The general assembly hereby finds . . . that the term 'visitation' . . . has a connotation which does not adequately express the importance of the relationship between the noncustodial parent and the child.").

decreasing the win/lose mentality dominating family law litigation. They provide a model for instantiating more substantive changes in custody law that better acknowledge what is at stake—caring for children.

c. Beyond Binary Opposites. The full implications of applying the Reparative Model to questions that have come to the forefront of family law scholarship are the subject for future exploration. But it bears noting that the Reparative Model provides a compelling theoretical construct for arguments that family law should move beyond binary opposites in its substance. For example, I have argued elsewhere for a reconception of the relationship between families and the state—away from a rigid definition of family autonomy—to recognize the mutual dependency of both the state and families in caring for children.[251] Further, I have argued that the narrow categories of parent's rights and children's rights obscure the true problems facing families in the child welfare system.[252] Other scholars have examined the need to move beyond binary opposites in caregiving, with its narrow categories of parents and legal strangers, and have argued that the law should instead recognize a caregiving continuum.[253] Still others have argued that the traditional understanding that children are socialized either at home or at school fails to recognize the important socialization that occurs between these two sites and that family law needs to recognize this space.[254] Applying the Reparative Model to these debates will yield important new perspectives.

2. *Procedure*. In many ways, procedural innovations such as collaborative law and family group conferencing (as well as mediation, which has been in existence longer) have made it easier to envision a new approach to resolving family law disputes under the Reparative Model.[255] These efforts all intuitively seek to move away

251. *See* Huntington, *Mutual Dependency*, *supra* note 21, at 1487–88.

252. Huntington, *Rights Myopia*, *supra* note 21, at 655–72.

253. *See* Murray, *supra* note 129, at 3–4.

254. *See* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833–37 (2007) ("Much of childhood takes place in spaces between home and school: in playgrounds, parks, child care centers, churches, community gyms, sporting fields, dance studios, music rooms, after-school clubs, and cyberspace. Family law has been virtually silent about what happens or should happen in these spaces.").

255. *See supra* Part III.C.

from the binary world of love and hate and help family members work creatively toward individualized solutions. Clients using these alternative processes report high rates of satisfaction.[256]

More importantly, there is evidence that these alternative processes lead to long-term reparation. For example, in a study that randomly assigned cases either to mediation or litigation, the parties in the two groups reached relatively similar agreements. But twelve years later, the mediation cases had far better outcomes with respect to paternal involvement and co-parenting measures.[257] The researchers in the study hypothesized that one of the benefits of mediation is that it allows for greater recognition of emotion. In particular, parents in mediation would express anger, but once the mediator probed the anger, it quickly transformed into grief and hurt.[258]

This research on mediation supports the need for the Reparative Model. It could be argued that even in the Love-Hate Model former family members will, with the passage of time, heal their rifts. Although this may be true in some cases, the research on mediation provides compelling evidence that the procedures governing familial disputes inform outcomes—*how* families are split affects the chance for better relationships in the future.[259] The law can both help people down a reparative path and also hinder their progress down this path. Thus, even if the reparative drive is a widely shared human

256. *See, e.g.*, JAMES J. ALFINI, MEDIATION THEORY AND PRACTICE 555–62 (2006) (describing benefits of alternative dispute resolution processes from multiple perspectives, including that of clients); Huntington, *Rights Myopia*, *supra* note 21, at 682–83 (recounting conference participants' satisfaction with the process).

257. *See supra* note 192 (discussing a study by Robert Emery finding that among mediation cases, 30 percent of fathers saw their noncustodial children at least weekly compared with only 9 percent of fathers in the litigation group and similarly better results for mediation group on co-parenting measures). For a discussion of the potential benefits of mediation for high-conflict child custody cases, see Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents*, 7 PEPP. DISP. RESOL. L.J. 501, 520–33 (2007) (describing techniques for making mediation effective for high-conflict couples).

258. *See* Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 33 (2005) ("We often followed an angry outburst between the parents with an individual caucus and found that, for many parents, anger quickly dissolved into tears of desperation over the end of the marriage.").

259. In this regard, the researchers in the mediation project contended that the connection between the process and the outcome was causal, not merely correlative. *See* Emery et al., *supra* note 192, at 325–31.

experience, there is reason to believe traditional family law interferes with this tendency.

Apart from alternative processes, changes can also be made within the adversarial system.[260] For example, procedural rules that discourage strategic behavior can help decrease acrimony.[261] Programs that help parents ascertain how their claims for custody might fare if the case were to proceed to a custody evaluation and disputed hearing can lead to settlement and thus help families avoid an intrusive and conflict-creating formal process, which typically focuses one parent on the deficits of the other.[262] Specialized family courts are designed with these goals in mind, providing judges who are trained in family dynamics.[263]

Similarly, because family law cases—particularly marital dissolution cases with children—rarely "end," it would be helpful to provide ongoing opportunities to adjust and resolve microdisputes, rather than one single resolution.[264] The parenting coordinator

260. It is not always possible to leave the adversary system, and therefore it is important to devise reforms within that system. *Cf.* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 125–26 (2004) (acknowledging benefits of restorative justice but arguing that remorse and apology can be integrated into the adversarial system as well). For a description of one practitioner's approach to litigating familial disputes civilly, see MARK CHINN, THE CONSTRUCTIVE DIVORCE GUIDEBOOK: EMPOWERING FAMILIES TO REACH LONG-TERM POSITIVE RESULTS, at vii–viii (2007). Australia has implemented a countrywide approach to family law cases—keeping them in the adversarial system but attempting to make the process less adversarial. *See* Family Court of Australia, Less Adversarial Trial Fact Sheet, http://www.familycourt.gov.au/presence/connect/www/home/about/media_centre/fact_sheets/fact_sheet_Less_Adversarial_Trial (last visited Feb. 2, 2008). The hallmark of the Australian approach is to put the judge, rather than the lawyers, in control of the proceedings, and for the judge to hear directly from the parties. *See id.* Studies from a pilot program found that parents were better able to co-parent following the less adversarial proceedings and that less harm was inflicted on the already fragile families. *See id.*

261. *See* COLO. R. CIV. P. 16.2. ("It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible.").

262. See Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 672–73, 680 (2006) (describing Early Neutral Evaluation, in which one male and one female evaluator listen to the disputed issues, as presented by the parties' attorneys or the parties themselves in pro se cases, and provide an assessment of the strengths and weaknesses of the case, thus encouraging settlement, or at least a narrowing of the contested issues).

263. *See* Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 148–50 (1998) (describing the structure and background of family courts).

264. This is not to suggest a complete revisitation of the custody award but rather to provide an opportunity for parties to continue to adjust to their post-divorce world.

approach described in Part III.C fits well with this reality by acknowledging that there is rarely a single moment of resolution; what is needed instead is a forum that will help parents make difficult decisions. Trained coordinators would help parents distinguish true parenting conflicts from expressions of anger about the underlying divorce.

Even if legal outcomes will be the same under a Reparative Model as they are under the status quo, the law can do more to improve the parties' extralegal outcomes by, for example, allowing multiple narratives about familial disputes. On one level, there is a need for a single truth for judicial purposes: Did the parent neglect the child? Did the birth parent consent to the adoption? But this imperative need not exclude other narratives. A judicial opinion or a settlement agreement could acknowledge the competing narratives, thus giving credence to different perceptions and the need to understand a conflict from each participant's perspective.

3. *Practice.* Finally, the Reparative Model suggests fundamental changes to the practice of family law. The mindset with which attorneys approach their cases has a tremendous impact on the experience of clients.[265] This is particularly true in family law cases.[266] The Reparative Model would lead attorneys to think more broadly about disputes. Attorneys would have to ask themselves whether they were advocates for the tendency toward hate and aggression or advocates for the tendency toward guilt and reparation.

Asking an attorney to help move a client from hate and on toward guilt and reparation admittedly places the attorney in a very difficult position. Some clients may not be ready to move on and instead may insist that the attorney litigate the case from a place of hate. This situation raises the question whether the attorney should act according to the client's stated wishes or help the client

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265. *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-partisanship in Lawyering*, 72 TEMP. L. REV. 785, 791–92 (1999) (describing the effect of "gladiator" attitudes that blind attorneys to important alternative considerations and solutions).

266. *See* Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 137, 155–58 (1998) (describing preventive and therapeutic strategies lawyers can adopt to encourage divorcing spouses to mitigate the emotional harm to their children); *see also* MACCOBY & MNOOKIN, *supra* note 16, at 108 ("[T]he involvement of lawyers [has] an impact on both requests and outcomes [in divorce].").

understand that doing so will not serve the client in the long run because it will hinder reparation.[267] In this circumstance, the attorney could try to explain that reparation may well be essential to other interests the client holds dear, such as fostering a healthy relationship with the client's child (particularly for noncustodial parents) or the child's well-being in general. In the case of collaborative law, the clients themselves have chosen the alternative process and therefore have already concluded that they do not want to pursue the case from a place of hate. But whether a reparative mindset can be imposed on an unwilling client, and whether doing so is paternalistic or possibly unethical, are important questions.

There are at least two ways to address these issues. First, attorneys could simply try to persuade their clients of the benefits of following a reparative path. Attorneys could model reparative behavior themselves by not adopting a win/lose attitude in their approach to cases. Attorneys also could counsel their clients, attempting to move their clients beyond hate and help them make decisions from a reparative mindset.[268]

This counseling function is analogous to the role of attorneys representing children in abuse and neglect proceedings under a direct representation model. There, the attorney is supposed to advocate for the expressed wishes of the child client, rather than the best interests of the child.[269] Experienced attorneys acknowledge, however, that even within a direct representation model there is an inevitable counseling role for the attorney to play to help the child client see what is in the child's best interests, particularly in the long term.[270] This modeling and counseling approach would be beneficial for both attorneys and clients. In addition to holding the potential to create a

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267. The difficulty arises because the lawyer has a professional obligation to follow the client's wishes. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

268. *See* Gilson & Mnookin, *supra* note 154, at 550–64 (suggesting strategies for lawyers to "help clients achieve cooperation when the clients cannot do so themselves," including developing norms of professional conduct related to cooperation and developing organizations that will "facilitate the operation of reputational markets").

269. Emily Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700–01 (1996).

270. *See id.* at 1721–25 (citing MODEL RULES OF PROF'L CONDUCT pmbl., para. 2 ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.")).

more satisfying legal practice,[271] an attorney's reparative mindset would help curb some of the hateful tendencies of familial disputants.

A second, far more sweeping approach would be to reconceive of the role of the family law attorney in the code of professional conduct to require that the attorney provide holistic advice rather than merely advocating for the stated interests of a client.[272] This would not require the attorney to counsel a divorcing couple to reconcile, but rather would require the attorney to resist taking steps that would further harm the relationship. The shift to a reparative focus would not elevate amicable relations to the exclusion of all other interests.[273] Rather, the point is that in addition to considering the interests of the client, the lawyer also would consider the interests of the family and attempt to find a way forward that accommodated all these potentially divergent interests.

The development of a reparative standard of practice and sanctions for those who clearly violate the standard could encourage attorneys to practice in a reparative mindset.[274] For example, a sanction could be imposed when an attorney files for sole custody in a case in which there clearly is no basis for it, and is doing so simply to put the other side on the defensive. Such conduct begins the case on a hateful basis. A reparative standard of practice would help create practice norms and establish that in family law, a particular kind of practice is needed and expected.[275]

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271. *See* Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 39–42, 46–51 (2001) (arguing that lawyers are unhappy because of, *inter alia*, the win/lose mentality fostered by the adversarial system, and contending that alternative means of resolving disputes, such as collaborative law, hold the potential to improve lawyers' job satisfaction rates).

272. The introduction of this second approach is meant only to stimulate discussion and is not intended as a concrete proposal. Indeed, there are many potential objections that may well counsel against such a sweeping change. A full exploration of the challenges and benefits of this approach are beyond the scope of the Article.

273. The boundaries of the Reparative Model are discussed *infra* in Part IV.C.

274. One starting point for such a standard would be a close examination of the aspirational standards written by the American Academy of Matrimonial Lawyers in 1992. *See* AM. ACAD. OF MATRIMONIAL LAW., *The Bounds of Advocacy*, *Standards of Conduct* (Robert Aaronson ed., 1992).

275. *Cf.* Andrew Schepard, Kramer v. Kramer *Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 28 PACE L. REV. (forthcoming 2008) (manuscript at 2, on file with the *Duke Law Journal*) (proposing that lawyers in divorce cases that involve children have an affirmative obligation to advise the client about alternative dispute resolution, in an effort to "change the adversary culture").

Developing such a standard, one that distinguishes family law disputes from other types of legal disputes, would require reform in legal education.[276] Family law courses would need to train students in the reparative method. This would involve teaching students to have greater emotional competence in the typical emotions surrounding divorce, child welfare cases, and adoptions, but also training students to recognize the limits of their own emotional competence.[277] There are constraints on the lawyer as a locus of reparation.

Under either approach, attorneys should not become therapists. Although the lawyer should not be the primary person addressing the emotional needs of the client, addressing these needs is central to good representation. Indeed, providing nonlegal counseling is an inevitable part of an attorney's work, particularly for family law attorneys.[278] Working with the client from a reparative point of view could be as simple as acknowledging the emotions of the client,[279] even while knowing that the court will not address these emotions.

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276. *See* Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project: Final Report*, 44 FAM. CT. REV. 524, 525 (2006) ("Students would be exposed to the paradox that, in this age of increasing legal specialization, a family law practice demands a quite broad-based expertise.").

277. For an interesting discussion of the need for emotional competence in lawyers in the family law setting, but also the need to establish boundaries with clients, see Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 973–97 (2007). *But see* Mary Pat Treuthart, *A Perspective on Teaching and Learning Family Law*, 75 UMKC L. REV. 1047, 1056–63 (2007) (describing student resistance to incorporating emotion into the classroom and hypothesizing as to its cause).

278. *See, e.g.*, Larry O. Natt Gantt II, *More Than Lawyers: The Legal and Ethical Implications of Consulting Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS, 365, 391 (2006) ("For instance, in the context of representing a client in a divorce proceeding, the client might ask the lawyer whether she feels that divorce is morally justified in the case."); s*ee also* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY para. 1.2 cmt. (2000), *available at* http://www.aaml.org/files/public/Bounds_of_Advocacy.htm ("Although few attorneys are qualified to do psychological counseling, a discussion of the emotional and monetary repercussions of divorce is appropriate.").

279. Even this simple acknowledgment is often lacking in attorney-client interactions. *See* SARAT & FELSTINER, *supra* note 152, at 28, 31–37 (observing that clients rehearse their hurts "generally on their own initiative and in the face of an unresponsive lawyer" and providing specific examples).

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As these examples of potential changes to the substance, procedure, and practice of family law illustrate, the Reparative Model can and should address overarching theoretical matters as well as the minutiae of the interaction between families and the legal system.[280] These examples are only preliminary suggestions for how family law might take a more reparative path.[281] Much more discussion and exploration is needed. Once the Reparative Model is adopted as a theoretical apparatus for family law, a rich conversation can begin about the many ways family law can better reflect and encourage the full cycle of intimacy.

C. Boundaries of the Model

As noted at the outset, not every relationship can or should be repaired. There are boundaries to the Reparative Model, and it is important not to devise a one-size-fits-all system, particularly if that size does not account for violence. This Section briefly identifies a few such boundaries, opening the conversation for further debate on the propriety of the Reparative Model in certain contexts.

Domestic violence is perhaps the most important boundary to the Reparative Model.[282] There is a strong argument that a battered partner should never be asked to repair a relationship with the batterer and that any ongoing contact, such as through shared custody, creates opportunities for the batterer to continue to control the victim. This is an important argument, and the response to it is complex. To begin, some experts believe that a less adversarial approach to domestic violence can benefit survivors. For example, a

280. On the minutiae end, even changes such as installing child-sized furniture in courtrooms creates an environment that better accounts for the needs of families and where families may be better able to engage in the reparative work that is both possible and essential. Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 68, 70 (1998).

281. Further, these examples raise numerous questions that cannot be addressed in a single article, but merit additional exploration. To give just one example, the Reparative Model will need to be sufficiently flexible to meet the needs of various families, but the extent of the give in the model should be identified.

282. It could be argued that Klein's cycle of human intimacy eerily tracks the cycle of domestic violence articulated by Lenore Walker, in which tension building is followed by an acute battering syndrome and then extreme contrition and then resumption of the tension. *See* LENORE E. WALKER, THE BATTERED WOMAN 56–70 (1979). *But see* Joan Zorza, *Workplace Violence*, *in* VIOLENCE AGAINST WOMEN 7-2, 7-3 (Joan Zorza ed., 2002) (describing view, held by Walker and others, that this cycle describes only half of all domestic violence cases).

leading advocate of restorative justice has asserted that "court processing of family violence cases actually tends to foster a culture of denial, while restorative justice fosters a culture of apology," and that apology, "when communicated with ritual seriousness, is actually the most powerful cultural device for taking a problem seriously, while denial is a cultural device for dismissing it."[283] To the extent that the Reparative Model better acknowledges the harm done by violence, rather than glossing over it, it might help overcome this denial.

But this only speaks to the legal process for addressing domestic violence. The more difficult issue for purposes of this Article is whether reparation should be encouraged between former partners with a history of violence, especially if that repair is intended to lay the groundwork for future co-parenting. Rather than seeking a yes or no answer to this question, it is more useful to begin by acknowledging the debate among domestic violence researchers about typologies of violence between intimate partners. The sociologist Michael Johnson has argued that domestic violence is not a "unitary phenomenon," and that attempts to cast it solely as a problem of men assaulting women, as feminists have, or solely as a problem of equal violence among men and women, as family violence advocates have, misses the reality that there are distinct types of domestic violence.[284] Professor Johnson posits four categories of domestic violence among heterosexual partners: situational couple violence, intimate terrorism, violent resistance, and mutual violent control.[285] The categories are distinguished not by the type and

283. John Braithwaite, Restorative Justice and Social Justice, 63 SASK. L. REV. 185, 189 (2000); accord Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. REV. 1, 38–73 (1999) (describing benefits of Navajo Peacemaking for victims of domestic violence). But see Ruth Busch, Domestic Violence and Restorative Justice Initiatives: Who Pays If We Get It Wrong?, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, supra note 200, at 223, 223–24, 228 (arguing that safety, not reconciliation, should be the primary goal and that "[t]here are grave risks in assuming that all relationship conflicts can be patched by consensus. Since the consensual resolution of conflict requires an attitude of 'give a little, take a little' to reach an agreement, there are risks in translating these principles unthinkingly into relationships affected by violence . . . .").

284. See Michael P. Johnson, Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence, 12 VIOLENCE AGAINST WOMEN 1003, 1005, 1010–12 (2006) (setting forth this argument and noting that although each side has extensive empirical evidence to back their claim, the studies use different sampling methods and therefore produce different results); Ellen Pence & Shamita Das Dasgupta, Re-examining "Battering": Are All Acts of Violence Against Intimate Partners the Same?, June 20, 2006, http://data.ipharos.com/praxis/documents/FINAL_Article_Reexaming_Battering_082006.pdf.

285. See Johnson, supra note 284, at 1003.

severity of violence, but rather by the degree of control one partner exerts over the other.[286] Professor Johnson argues that in situational couple violence, although violence may be present, controlling behavior is largely absent.[287] By contrast, in intimate terrorism, the defining characteristic is one partner controlling the other, often using violence as one method of exerting control.[288]

If this typology holds up, it may be possible to treat situational couple violence differently from the other types of domestic violence for purposes of the Reparative Model. As Professor Johnson argues, the typical situational couple violence case involves far fewer incidents of violence, is less likely to escalate, is less likely to involve severe injury, and is initiated almost as frequently by a woman as by a man.[289] He contends that situational couple violence is probably a result of a conflict expressing itself in violence, rather than one partner controlling the other and using violence as one means of control.[290] Thus, situational couple violence, with its absence of control, may be ripe for a reparative approach, so long as that approach does not tolerate the continuation of the violence.

Professor Johnson's typology has been criticized, particularly with the argument that it is difficult to distinguish types of cases ex ante and that situational couple violence may over time escalate into intimate terrorism.[291] Resolution of this debate is not necessary to

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286. *See id.* at 1005–06.

287. *See id.* at 1006.

288. *See id.* In cases of intimate terrorism studied by Professor Johnson, the vast majority of batterers—97 percent of reported cases, were men, *see id.* at 1010, whereas in the cases involving situational couple violence, both men (56 percent) and women (44 percent) used violence, although not in exactly equal numbers, *see id.* In cases involving violent resistance, one partner (typically the woman) uses violence as a defense against the other partner's control, and in cases involving mutual violent control (representing only 3 percent of the cases in the study), both partners are controlling and violent. *See id.* at 1006, 1010.

289. *See id.* at 1010 (finding that in cases of situational couple violence the median number of violent incidents was three, as opposed to eighteen for intimate terrorism cases; the violence escalated in 28 percent of the situational violence cases as opposed to 76 percent of the intimate terrorism cases; the injuries were severe in 28 percent of the situational violence cases as opposed to 76 percent of the intimate terrorism cases; and finally that in the 146 situational violence cases, 56 percent involved male-on-female violence and 44 percent involved female-on-male violence).

290. *See id.* at 1005.

291. *See, e.g.*, Victoria Frye et al., *The Distribution of and Factors Associated with Intimate Terrorism and Situational Couple Violence Among a Population-Based Sample of Urban Women in the United States*, 21 J. INTERPERSONAL VIOLENCE 1286, 1290–93, 1303–10 (2006) (challenging the use of the number of controlling behaviors used by one partner as opposed to examining the frequency of control and the "success" of the control, and further contending that

argue that differentiation should be given a closer look.[292] Acknowledging that cases differ does not condone familial violence or imply that one type of violence is less serious than another. Instead, differentiation acknowledges the varied needs of families and can lead to more effective intervention and policies.[293]

The central point is that the Reparative Model should not be rejected out of hand when a case involves domestic violence. If the typologies hold up on closer examination, and if the different types of domestic violence can be predicted with reasonable accuracy, then the Reparative Model may be the appropriate theoretical framework to help some individuals engaged in situational couple violence move past the violence and be better able to co-parent. By contrast, for cases of intimate terrorism, encouraging reparation and co-parenting is likely a dangerous path to follow.[294] In some cases, complete rupture

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the two categories may not exist but instead represent different points on a time line—that situational couple violence will become intimate terrorism over time). This debate will be served by work by Mary Ann Dutton, of Georgetown University Medical Center, to develop a measure of coercive control that will help determine whether the typology holds up and whether cases can be distinguished based on varying levels of control. *See* Mary Ann Dutton, Speech at the AALS Mid-year Workshop on Family Law: Coercive Control in Intimate Partner Violence (June 22, 2007). An *outline of the speech is available at* http://www.ialsnet.org/documents/familylaw2007/DuttonOutline.pdf.

292. *See* Frye et al., *supra* note 291, at 1310 (calling for greater research into the typology); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1379–80, 1427 (2005) (arguing that courts should consider the different types of domestic violence when assessing custody in cases with a history of violence and that, in particular, courts need to be concerned with intimate terrorism). It is important to remember Katharine Bartlett's argument that the role of feminism in family law is to expose the family institution to scrutiny so that one can see how the law has permitted and sometimes reinforced the subordination of some family members to others. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836, 846–47 (1990). Requiring victims of intimate terrorism to co-parent with their batterers would, indeed, be the law reinforcing subordination. But this should not stop us from distinguishing, if possible, these cases from cases in which parents potentially stand on more equal ground.

293. *See* Johnson, *supra* note 284, at 1015. The child welfare field already has begun to differentiate among cases of child abuse and neglect. *See* Patricia Schene, *The Emergence of Differential Response*, *in* PROTECTING CHILDREN: DIFFERENTIAL RESPONSE IN CHILD WELFARE 4, 4–6 (2005) (describing the collaborative "differential response" approach to child welfare); *see also* Robert E. Emery & Lisa Laumann-Billings, *An Overview of the Nature, Causes, and Consequences of Abusive Family Relationships: Toward Differentiating Maltreatment and Violence*, 53 AM. PSYCHOLOGIST 121, 121–22 (1998) (calling for differentiation of "family maltreatment" and "family violence," which would lead to distinguishing those families who should receive supportive interventions from those families who should receive adversarial or coercive interventions).

294. *Cf.* Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, JUV. & FAM. CT. J., Fall 2003, at 57, 57–65 (describing several

is necessary, and for these cases, the Love-Hate Model should be retained. But this only underscores the point that a one-size-fits-all approach to family law misses the important differences between cases and the disparate needs of families.[295]

As with domestic violence, differentiation in child welfare cases is important. For the 10 percent of particularly egregious child abuse and neglect cases,[296] repairing the relationship likely is misguided. But for the remainder of cases, some repair may be both possible and desirable.

Even if personal contact between a former parent and child or between intimates should not continue, the individuals will need to heal the relationship internally. Just as an adult whose parent has died may still have "mother issues" or "father issues,"[297] family law can and should account for the impact of a relationship and attempt to foster reparation within a single person. In this way, the Reparative Model would not facilitate the cycle of intimacy through ongoing relationships, but instead by acknowledging the harm within the person. This recognition would provide a rationale for funding domestic violence and mental health services. It would also provide a rationale for a different form of reparation, such as a disproportionate award of marital property to the victim.[298]

Turning to a different boundary of the model, an oft-raised concern with respect to mediation and other alternative processes is

misconceptions about separation in abusive relationships and how women, even those separated from their abusers, are still subject to violence).

295. *See* Brenda V. Smith, *Battering, Forgiveness, and Redemption: Alternative Models for Addressing Domestic Violence in Communities of Color*, *in* DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 321, 328–35 (Natalie J. Solokoff & Christina Pratt eds., 2005) (describing the need for alternative legal approaches to domestic violence in communities of color, and in particular the need to develop a response to domestic violence that incorporates forgiveness and redemption).

296. *See* WALDFOGEL, *supra* note 241, at 124.

297. *Cf.* Mary V. Sussillo, *Beyond the Grave—Adolescent Parental Loss: Letting Go and Holding On*, 15 PSYCHOANALYTIC DIALOGUES 499, 509–10 (2005) (describing how despite death's complete severance of personal contact, internalized attachment to the lost individual continues).

298. In some marital dissolution cases with horrific histories of domestic violence, the courts have used legal principles to award a greater portion of the marital estate to the victim of domestic violence. *See, e.g.*, DeSilva v. DeSilva, *supra* note 247 (setting forth the trial court's finding that domestic violence is egregious marital conduct and is relevant to equitable distribution of marital estate and therefore awarding the wife an unequal share of the estate). This is an important form of reparation—attending to the harm done by one partner to the other, without attempting to repair the actual relationship.

that they disadvantage women.[299] Arguments have been made that mediation may require women to speak in inauthentic voices, such as a voice that suppresses anger, and, further, that mediation may disadvantage the party with a more relational sense of self, arguably the woman, who will compromise to maintain a connection.[300] Although this concern should be taken seriously, there is also evidence suggesting that women fare just as well in mediated custody agreements as compared with litigated custody agreements.[301]

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299. A related, larger issue that I intend to explore at a later date is how the Reparative Model may or may not empower women. On the one hand, women do not need another message telling them to feel guilty and compromise. In this regard, guilt in relationships arguably may be differentially absorbed by men and women. On the other hand, the Reparative Model could be tremendously empowering for women. For example, if it leads to the widespread adoption of family group conferencing, mothers in the child welfare system may find they have far greater say over the future of their families and greater assistance in addressing the underlying causes of the abuse and neglect. *See* Huntington, *Rights Myopia*, *supra* note 21, at 688–95 (describing these potential benefits of family group conferencing). The overarching question is how to resolve conflicts in relationships without women carrying all the weight.

300. *See* Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 33 (1995) (exploring the effect of risk aversion and altruism on marital exit and suggesting that because men's investments in marriage are transferable, they have may have less to lose at dissolution, creating an inequality of decisionmaking power); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 454–56 (1992) ("Research on marital negotiations shows that the greater income and education and the higher occupational level of husbands, compared to wives, confers upon husbands greater power over routine decisions . . . . [U]nless the mediator intervenes, the husband's greater tangible resources will grant him the lion's share of power in divorce negotiations, particularly over critical financial issues."); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761–65 (1988) (noting costs, particularly to women, of moving away from deciding custody in legal settings); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1576, 1600–07 (1991); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 373–87 (1999) (arguing that informal proceedings disadvantage respondent parents, who are typically "female, poor, uneducated, and nonwhite," because the informality exacerbates the power imbalance between the parent and the state, and asserting that formal proceedings lead to better accuracy in fact-finding and more just results than informal proceedings).

301. *See* Emery et al., *supra* note 258, at 29–30 (citing a finding from own study that women were satisfied with outcomes in mediation); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1631–35, 1658–75 (2007) (reporting findings of an empirical study in a judicial district with mandatory mediation and concluding that, contrary to the concern that mandatory mediation would lead to increased joint custody, women were more likely to receive primary physical custody in mediation than in ether settlements or litigation, but sounding cautionary note that most women were represented by counsel).

Moreover, the relevant comparator is the traditional adversarial system, which often disadvantages women.[302]

A final boundary concerns persons who either choose not to seek the reparative path or are incapable of doing so due to mental incapacity or a resistance to recognizing the harm they have inflicted. When dealing with such intransigent or incompetent participants, it may not be possible to seek reparation between individuals. For example, when a parent refuses to admit the sexual abuse of a child, and the child refuses to have a relationship with the parent absent such acknowledgment, seeking reparation would be misguided. To address the emotional needs of the survivor there may well be a role for third parties—attorneys, friends, other family members—to play in acknowledging the hate (here, the sexual abuse) and helping the survivor continue on with life.[303] This support would focus on repairing the harm to the victim, but not repairing the actual relationship with the abuser.

CONCLUSION

As the field of law and emotion in family law develops, there will be ample opportunity to explore numerous interesting and significant questions. For example, a better understanding of more negative emotions—including the desire for vengeance and the ambivalence individuals experience in marriages and parenting—will help inform family law's approach to familial regulation. Through additional research and debate, commentators can help move family law scholarship, and family law itself, away from a rudimentary understanding of familial emotions and toward a richer understanding of the complex and conflicting emotions individuals experience in families.

As a first step in this direction, this Article has shown that traditional family law embodied in the Love-Hate Model fundamentally misunderstands the relationships it seeks to regulate. It is predicated on a binary view of relationships that admits of only love and hate, and thus precludes the possibility of repair. The cycle of intimacy is far more complex. People are capable of hate, but the

302. *See* Huntington, *Rights Myopia*, *supra* note 21, at 655–72, 688–95 (describing the disadvantages parents experience in the adversarial system governing the child welfare system and describing the benefits of an alternative, problem-solving approach).

303. *See* WILLIAM URY, THE THIRD SIDE 114–96 (2000) (describing the myriad roles that third parties can play to resolve conflicts).

reparative drive is a widely shared human experience. Traditional family law thus forestalls the cycle of intimacy by freezing family members at the moment of hate, rather than helping the relationship move on to guilt and reparation.

Despite some important reforms moving the system away from the Love-Hate Model, much work remains to be done, theoretically and practically. Although divorce, adoption, and termination of parental rights may be necessary and sometimes welcome changes in people's lives, how these changes are wrought can make a tremendous difference to the quality of the emotional relationships that persist, externally and internally, after legal relationships change. The Reparative Model would ensure that the legal process more clearly reflects the human process. Reparative laws, reparative procedures, and reparative practice standards would not only help repair the most important relationships people enter into, they would also help repair family law itself.