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# THE ROLE OF EQUIPOISE IN FAMILY LAW

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*"In a revolution . . . the most difficult part to invent is the end."*

*Alexis de Tocqueville*

## *Abstract*

*Scholars reviewing family law over the last twenty years have described the field as having undergone a revolution. While true, both scholars and front-line family law advocates have failed to invent a satisfying end to the revolution. This Article takes up that challenge and offers a novel way forward. It identifies two translation challenges that have prevented the revolution from reaching its end. The first challenge is translating reform so that its benefits accrue equally across all kinds of participants—rich and poor, those with lawyers and those without. The second challenge is translating theory into on-the-ground practices useful to family courts. The Article uses the collaborative law movement as an example of the translation problem of unequal access and distribution, and scholarship on family law and emotions as an example of the translation problem of crafting useful on-the-ground practices. To solve both translation challenges, the Article proposes that courts and court-annexed programs build out practices of equipoise. The Article defines equipoise as a mode of processing information and emotions that disrupts habituated and unhelpful interactions between persons and instead encourages thoughtful engagement with emotions, resulting in reduced adversarialness and constructive problem solving. It considers examples of equipoise practices, some commonplace (such as role-playing) and some more esoteric (like meditation) and demonstrates how such practices can efficiently and productively be translated into court processes that are available to all family law participants. As a result, the Article demonstrates how to invent a satisfying end to the family law revolution.*

## INTRODUCTION

Family law has undergone a revolution. Where family law once committed fully to the adversary process, it now leads with processes designed to foster joint problem-solving. Where family law once eschewed the role of emotions, it now

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acknowledges the presence and influences of a full cycle of emotions within families. But, as de Tocqueville advised, the biggest challenge in a revolution is to create a satisfying end. The family law revolution now must contend with that challenge.

For family law, the challenge fundamentally is one of translation. Scholars, legislatures and courts have all embraced the theories of the revolution.<sup>1</sup> For example, scholars have written eloquently and at a sustained level for twenty years about why family law should eschew adversarialness and acknowledge the role of a full range of emotions.<sup>2</sup> Legislatures have amended family codes to note legislative intention to support “amicable” resolution of disputes.<sup>3</sup> Courts have embraced and mandated alternative dispute processes in family matters.<sup>4</sup> After this

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<sup>1</sup> See, e.g., JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000) (noting, among other developments, the “legal revolution” in family law).

<sup>2</sup> See generally ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE* (2004) (from a therapeutic view, demonstrating the risks of adversary process and the need for conflict resolution to acknowledge full range of emotions); Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 *FAM. CT. REV.* 203, 203–07 (2004) (describing shortcomings of adversary system in family cases); Clare Huntington, *Repairing Family Law*, 57 *DUKE L.J.* 1245, 1254–86 (2008) (noting need for an expanded role of emotions in family law and resulting rejection of adversary process); Elizabeth S. Scott, *Parental Autonomy and Children’s Welfare*, 11 *WM. & MARY BILL RTS. J.* 1071, 1081 (2003) (acknowledging that law reform related to child custody guided in part by goal of tamping down adversarialness between parents); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 *CALIF. L. REV.* 615, 632 (1992) (acknowledging that reducing conflict in divorce cases is an important way of protecting the well-being of children and parents); Jana B. Singer, *Dispute Resolution and the Post-divorce Family: Implications of a Paradigm Shift*, 47 *FAM. CT. REV.* 363, 363–65 (2009) (detailing “paradigm shift” in family law as including moves away from adversarial process and acknowledgment of role of emotions). *But see* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1581 (1991) (raising concerns that mandatory mediation failed to recognize its disempowering potential for some women); Amy Sinden, “*Why Won’t Mom Cooperate?*”: *A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J. L. & FEMINISM* 339, 351–52 (1999) (in the context of child abuse and neglect proceedings, complaining that informality in proceedings unreasonably privileges repeat players and undermines rights of respondent mother).

<sup>3</sup> See *COLO. REV. STAT. ANN.* § 13-22-311; 14-10-124(b)(8) (West 2011). See also *COLO. REV. STAT. ANN.* § 14-10-104.5 (West 2011) (effective July 1, 1988) (“The general assembly recognizes that it is in the best interests of the parties to a marriage in which a dissolution has been granted and in which there are children of the marriage for the parties to be able to resolve disputes that arise subsequent to the dissolution in an *amicable* and fair manner” (emphasis added)).

<sup>4</sup> For example, Colorado’s Judicial Branch has established an Office of Dispute Resolution through which mediation services are provided in family law and in other areas. See *Office of Dispute Resolution*, *COLO. JUD. DEP’T*, <http://www.courts.state.co.us>

important immersion period in theories of change, the struggle with which scholars, legislatures and courts must now contend is translating those theories so that they are alive and fruitful for the multitude of real spouses, parents, and children involved in family law matters.<sup>5</sup>

The translation problem comes in two varieties. The first is translating the revolution so that its benefits extend equally to all kinds of participants—those with money and those without; those with lawyers and those without. The second is translating theoretical conclusions into clear goals that are understandable to participants and can be effectuated by family courts. The family law revolution suffers from both problems.

This Article uses collaborative law as an illustration of the first translation problem. Collaborative law has dramatically reframed the role lawyers can and should play in enabling spouses to divorce cooperatively, with commitments to mutual gain, and without the need for a court to mandate results. The movement, however, is hindered by its limited use. That is partly a result of the requirement that participants must be represented by counsel and partly a result of other associated costs. Both hindrances are confirmed by data showing that collaborative law is used predominantly by well-resourced couples and by nationwide data showing that family courts face high numbers of *pro se* participants.<sup>6</sup>

The Article illustrates the second translation problem of taking theory and articulating it into clear goals by examining what it means to recognize a dynamic and fluid cycle of emotions at play in family disputes. As noted, scholars, legislatures, and courts have recognized the need for family law to help litigants move beyond acrimony and instead develop functional working relationships that will endure long after a court case is closed. Family law now recognizes that a family's emotions do not resolve just because a court enters a final order. But, it has struggled to answer whether there is one particular emotional end state to which family members should strive. For example, scholars have offered forgiveness and reparation as two possible end goals.<sup>7</sup> This Article demonstrates that neither is satisfactory because each is subject to multiple and contested definitions.

This Article offers an original and innovative solution to both translation problems by arguing that family courts and court-related personnel should foster “practices of equipoise.” First, the Article acknowledges the facts on the ground—that family courts work predominantly with *pro se* parties and that processes like collaborative law are unavailable to most people. Thus, a successful transformative solution must be situated within the courts and court-annexed programs in order to equally and most robustly distribute the benefits of the revolution. Next, the

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/Administration/Unit.cfm?Unit=odr (last visited Aug. 24, 2011). See also CAL. FAM. CODE §§ 3160–3165 (West 2011); WASH. REV. CODE ANN. § 26.09.015 (West 2011).

<sup>5</sup> Throughout this Article I refer to “family law” broadly, although my examples will focus on family law developments related to divorce or related to issues as between unmarried parents.

<sup>6</sup> See discussion *infra* Part II.A.

<sup>7</sup> See discussion *infra* Part II.B.

Article defines equipoise as a mode of processing information and emotions that encourages thoughtful engagement with emotions, resulting in reduced adversarialness and more constructive problem-solving. Instead of focusing on a particular end state (like forgiveness or reparation) as a goal, the Article argues that participants need an effective *mode* of responding to a myriad of situations that may have multiple emotional valences.

At the core of a practice of equipoise is the idea that much of what is unhelpful about “bad” interactions between family members are habituated responses. Examples include spouses who are in the habit of responding to each other with negative emotions like anger or hurt, or a parent who is in the habit of responding to a child with irritation. As a practice, equipoise encourages a person to interrupt those mental habits and to replace them with more intentional, forward-looking conduct.

The Article demonstrates that it will be both practical and productive for courts to incorporate equipoise practices into family courts. In other words, practices of equipoise solve both translation problems that currently prevent the family law revolution from reaching a satisfactory end. The Article explores various equipoise practices already nascent within family courts, such as within court-mandated parenting classes and within mediation. It also explores more robust forms of equipoise, including yoga, martial arts and meditation. The Article then scrutinizes whether equipoise is subject to its own definitional and operationalization challenges, whether it is appropriate to expect individuals to practice equipoise, and whether courts are institutionally capable of becoming sufficiently competent in equipoise practices. At its core, the Article demonstrates forcefully that equipoise makes available to the great numbers of *pro se* participants the same benefits of the family law revolution now available only to those of means.

## I. THE CHANGED LANDSCAPE OF FAMILY LAW

Over the past twenty or more years, the landscape of family law has been thoroughly reworked, particularly as it relates to familial relationship issues such as parenting time, parental decision-making and financial support for children or former spouses. Scholars have identified several important components of the changed landscape. Those include a commitment to tamp down adversarialness and a recognition that the disentangling and rearranging of familial relationships implicates “ongoing social and emotional processes.”<sup>8</sup> Changing the landscape was not the result of efforts of a single part of the legal system, but was a goal embraced equally by legislatures, courts, and the legal profession. In each forum, the change was motivated in large part by concerns that the old way of doing things adversely affected the current and long-term well-being of parents and children involved.<sup>9</sup>

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<sup>8</sup> See Singer, *supra* note 2, at 363–64.

<sup>9</sup> *Id.* at 363.

While the landscape has changed substantially, it has not yet reached a period of comfortable repose. During the period of active reform, scholars rightly focused on the elemental components that were necessary for fruitful change.<sup>10</sup> Now, as the field strives for repose, there is an opportunity to reflect more specifically, and with greater refinement, on what further changes should be impressed upon family law, on its courts, and on its actors (lawyers, court-annexed personnel, parties and the like). In order to understand where refinement is needed, it is first important to more thoroughly describe some of the most potent changes achieved during the initial period of revolution.

Before the revolution, family cases were understood as just average civil cases—no different than personal injury or breach of contract cases. All civil cases proceeded through the adversary system in the same fashion.<sup>11</sup> The system's repeat players (lawyers, judges, legislatures) presumed that the benefits of the adversary system as a dispute resolution process would hold as true in family cases as in any other civil case.<sup>12</sup> In other words, they believed that family cases would reach good, just, and positive results under the adversary system's presumptions that facts are best developed when both adversaries are ardently represented by skilled lawyers who press every advantage, and that a decision-maker must remain aloof and unengaged in order to render the best decision.<sup>13</sup> The adversary system embraces the idea that conflict, in a controlled form, is helpful.

Buttressed by social science data indicating that parents and children suffered physical and psychological harms when conflict was present, the family law revolution challenged the presumption that family cases should be handled like any other civil matter.<sup>14</sup> The apogee of the revolution's efforts to tamp down adversarialness is the collaborative law movement. It has profoundly altered the ways in which a subset of lawyers and their clients proceed with divorces. Collaborative law turned away from adversarialness along several dimensions. It

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<sup>10</sup> See *supra* note 1.

<sup>11</sup> See generally John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004) (noting the shift in family law away from traditional litigation, but acknowledging that traditional litigation may still be a preferred method of dispute resolution).

<sup>12</sup> That repeat family law players did not question the system before the revolution is demonstrated most easily in the negative. In other words, the assumptions of repeat players were laid bare through critiques of the ways in which the adversary system failed in family law cases. For an early critique, see Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) (focused on the adversary system's failure in particular when the legal issue was "best interests" of the child).

<sup>13</sup> See Deborah J. Cantrell, *What's Love Got to Do with It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296, 302–04 (2010), for a fuller description of the bases of the adversary system.

<sup>14</sup> See, e.g., EMERY, *supra* note 2, ch. 3 (using case studies to detail the emotional and physical toll of divorce on children); Firestone & Weinstein, *supra* note 2, at 203–07; Singer, *supra* note 2, at 364.

adopted insights from the negotiation field demonstrating that better, longer-lasting agreements could be created when parties worked to find shared interests rather than negotiated from tit-for-tat positional exchanges.<sup>15</sup> It looked at psychology research to understand better how adversarial litigation created emotional dynamics that were hurtful to spouses, parents, and children who would have some kind of ongoing relationship despite the adult relationship terminating.<sup>16</sup> It rejected the view that the appropriate role for lawyers was that they should not cooperate with each other.<sup>17</sup>

Building on that learning, collaborative law embraced a profoundly different method of dispute resolution. It required parties to freely and fully share relevant information without need for formal discovery requests.<sup>18</sup> It required the parties jointly to seek out the advice of a neutral expert to the extent that expert help was needed for issues such as asset valuation or issues related to children, avoiding the typical adversarial battle of the experts.<sup>19</sup> While the parties each retained attorneys to advise and counsel them individually, the attorneys themselves committed to the goals of successfully problem-solving through cooperation and transparency.<sup>20</sup> Finally, all four participants (both parties and both counsel) agreed that should the parties be unable to agree on all of the issues related to their divorce, the attorneys would withdraw from their representations, and the parties would have to seek new counsel to handle any subsequent litigation.<sup>21</sup>

Collaborative law understands the parties to be in the best position to creatively problem solve.<sup>22</sup> However, the movement's focus has been on training lawyers and other professionals in the ethos and skills called for by collaborative law processes so that the professionals remain the experts, guiding and counseling the parties through the process. Under the Uniform Collaborative Law Act

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<sup>15</sup> See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991); PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2008).

<sup>16</sup> TESLER, *supra* note 15, at 2–3; William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 356–57 (2004).

<sup>17</sup> TESLER, *supra* note 15, at 3–4.

<sup>18</sup> Schwab, *supra* note 16, at 358.

<sup>19</sup> *Id.* at 359–60.

<sup>20</sup> Compare TESLER, *supra* note 15, at ch. 3, with Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 146 (2008) (noting that collaborative lawyers themselves have varying understandings of the levels of cooperation and transparency to which they are committing).

<sup>21</sup> Schwab, *supra* note 16, at 358.

<sup>22</sup> J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 571 (2009) (“Collaborative lawyers are engaged in shifting power in the legal system from lawyers to clients. The goal is to empower clients to achieve the resolution they view as most appropriate”).

(UCLA), each party must retain her or his own attorney.<sup>23</sup> The parties themselves need not have any particular training to participate. They need only have a sufficient understanding of the parameters of collaborative law processes so that their signing of a collaborative law “4-way”<sup>24</sup> contract legitimately reflects informed consent.<sup>25</sup>

Over the past twenty years, collaborative law has increasingly gained traction. There is now an international umbrella organization for collaborative law, the International Academy of Collaborative Professionals (IACP).<sup>26</sup> In the United States, as of 2009, there were 175 collaborative law practices across the states.<sup>27</sup> A study commissioned by IACP reported that over 22,000 lawyers across the globe have been trained in collaborative law, as well as thousands of mental health and financial professionals.<sup>28</sup> Reports indicate that “thousands of cases” have been resolved using collaborative law, in the United States and elsewhere.<sup>29</sup>

The second potent change made during the period of revolution was a rejection of family law, particularly marriage and divorce, as a binary system.<sup>30</sup> Under the binary model, the state understood its role as defining what two people must do to start their legal relationship (get married) and what they must do to end that relationship (get divorced.) Individuals similarly understood themselves as

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<sup>23</sup> UNIF. COLLABORATIVE L. ACT in *Prefatory Note, The Need for Legal Representation in Collaborative Law*, 38 HOFSTRA L. REV. 421, 447 (2009) [hereinafter *UCLA*] (“Under the act, parties can sign a collaborative law participation agreement only if they engage a collaborative lawyer. Collaborative law is not an option for the self-represented”).

<sup>24</sup> A “4-way” contract refers to the fact that a collaborative law agreement is usually signed by both parties and their lawyers, with each party and lawyer having various obligations as to each of the other three signatories. See TESLER, *supra* note 15, at 161–62. For a sample collaborative law participation agreement, see also TESLER, *supra* note 15, at 249–56.

<sup>25</sup> Collaborative law scholars and practitioners have spent much time analyzing and justifying what kind of advice and counsel must be provided by a collaborative lawyer in order for a client to be able to legitimately give informed consent. While this Article will not delve further into that issue, fuller discussions may be found in, Robert F. Cochran, Jr., *Legal Ethics and Collaborative Practice Ethics*, 38 HOFSTRA L. REV. 537 (2009); Forrester S. Mosten & John Lande, *The Uniform Collaborative Law Act’s Contribution to Informed Client Decision Making in Choosing a Dispute Resolution Process*, 38 HOFSTRA L. REV. 611 (2009); Peppet, *supra* note 20, at 144–46.

<sup>26</sup> For a brief history of the International Academy of Collaborative Professionals, see INT’L ACAD. OF COLLABORATIVE PROF’LS, [http://www.collaborativepractice.com/\\_t.asp?M=3&MS=3&T=History](http://www.collaborativepractice.com/_t.asp?M=3&MS=3&T=History) (last visited Aug. 25, 2011).

<sup>27</sup> Yvonne M. Homeyer & Susan L. Amato, *Collaborative Law: Good News, Bad News, or No News?*, THE ST. LOUIS B.J., Spring 2009, at 24.

<sup>28</sup> *UCLA*, *supra* note 23, at 429.

<sup>29</sup> *Id.*

<sup>30</sup> See Huntington, *supra* note 2, at 1246 (2008); see also Singer, *supra* note 2, at 363–64.



having the same binary start and finish choices to those relationships they wished to have legally recognized.<sup>31</sup>

Professor Clare Huntington has labeled the binary model of family law the “Love-Hate Model” as a way of foregrounding the limited emotional spectrum then recognized by family law.<sup>32</sup> When the state acknowledged the beginning of a legally binding relationship like marriage, it acknowledged a starting emotion of “love.” When the state permitted the legal dissolution of a marriage, it ended the relationship with a finality that is akin to the emotion of “hate.” As Huntington demonstrated, the binary model failed to capture descriptively the reality of spouses’ remaining connections post-dissolution, especially if there were children of the marriage. The binary model also failed normatively because it reified an ending state (hate) that discouraged parents and children from progressing through a more nuanced and productive cycle of emotions.<sup>33</sup>

Huntington uses a particular lens, which she calls the “Reparative Model,” to capture family law’s transformation from a binary model to one that recognizes that familial relationships follow a “dynamic cycle of intimacy.”<sup>34</sup> Under the Reparative Model, the particular cycle experienced by family members begins with love, moves to hate, followed by a sense of rupture from the other, then guilt, and finally a drive to repair the rupture.<sup>35</sup> The move to a dynamic and cyclical model of emotion created space for family law itself to embrace a wider range of policy choices. To illustrate, in a divorce under the Love-Hate Model, a state legislature may have articulated one of its goals as the final distribution of marital assets. In contrast, under a Reparative Model, it might articulate its goal as promoting the “amicable settlement of disputes,” and “mitigat[ing] the potential harm to the spouses and their children” caused by the divorce.<sup>36</sup> Shifting family law away from a binary model has productively modified the frame from the short term of seeing the final court order as the end, to the longer term, setting up a system that re-adjusts relationships between family members.

## II. THE CHALLENGES THAT REMAIN IN THE CHANGED LANDSCAPE

As noted in the Introduction, the challenges that remain in the changed landscape relate to translation. When it comes to the revolution away from the adversary process, take as true that collaborative law is a robust, well-developed, and effective alternative to it. Unfortunately, collaborative law’s ability to stimulate broad transformative change in family law depends directly on how many families can choose to use it. Similarly, now that the revolution has illuminated the importance of acknowledging non-binary cycles of emotions in

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<sup>31</sup> Huntington, *supra* note 2, at 1248–49.

<sup>32</sup> *Id.* at 1247–49.

<sup>33</sup> *Id.* at 1248–50.

<sup>34</sup> *Id.* at 1261–72.

<sup>35</sup> *Id.*

<sup>36</sup> COLO. REV. STAT. ANN. § 14-10-102(2)(a)–(b) (2011) (language modeled after the Uniform Divorce and Marriage Act).

family law, we need to understand better any differences between proposed models of emotional cycles, as well as to operationalize concretely the goals of those cycles.

*A. The First Translation Problem: The Limited Access to Collaborative Law*

As noted earlier, the number of collaborative law practitioners has grown exponentially since the movement was founded in 1990.<sup>37</sup> As the website of the International Academy of Collaborative Professionals reveals, one can now find a collaborative lawyer in many states in the US, with some states like California, Colorado, and New York heavily represented.<sup>38</sup> Collaborative law has received regular and positive media attention.<sup>39</sup> State legislatures have acknowledged its role.<sup>40</sup> Collaborative law is no longer novel in family law. While collaborative law is now an established way in which a family law matter may be handled, there are two features that severely limit its widespread use. First, parties engaged in collaborative law must each hire her or his own lawyer. Second, the process itself is expensive.

The UCLA makes clear that “[u]nder the rules/act, parties can sign a collaborative law participation agreement *only if they engage a collaborative lawyer*. Collaborative law is not an option for the self-represented.”<sup>41</sup> The UCLA acknowledges low-income clients only to the extent that it relaxes its attorney disqualification rule when a collaborative lawyer is representing a low-income client and providing collaborative services for free.<sup>42</sup> In that situation, should the collaborative process fail, the collaborative lawyer may end her work, but a lawyer in her organization could pick up the *pro bono* representation of the low-income client for the forthcoming litigation.<sup>43</sup> The *pro bono* collaborative lawyer must be screened from the continuing representation, and both parties and counsel must have agreed in advance to the possibility of continued *pro bono* representation.<sup>44</sup>

The purpose of the modified disqualification rule is to acknowledge the challenge low-income parties face finding a lawyer at all, and the even greater

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<sup>37</sup> Homeyer & Amato, *supra* note 27, at 24.

<sup>38</sup> INT’L ACAD. OF COLLABORATIVE PROF’LS (Aug. 22, 2011, 6:44 PM), <http://www.collaborativepractice.com> (Search completed using the “Locate a Collaborative Professional near you” feature, searching for California, Colorado, and New York).

<sup>39</sup> See UCLA, *supra* note 23, at 428–34 (listing media reports).

<sup>40</sup> See *Collaborative Law Act Summary*, NAT’L CONF. OF COMM’R ON UNIF. STATE LAWS, <http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative%20Law%20Act> (last visited Oct. 11, 2011).

<sup>41</sup> UCLA, *supra* note 23, at 447 (emphasis added).

<sup>42</sup> *Id.* at 452–54.

<sup>43</sup> *Id.* at 454.

<sup>44</sup> *Id.* at 454.

hardship that would attach should *pro bono* counsel have to withdraw.<sup>45</sup> Further, the UCLA drafters hoped that relaxing the disqualification rule for low-income parties would “encourage legal aid offices, law school clinical programs and private law firms who represent the poor through *pro bono* programs to incorporate collaborative law into their practice.”<sup>46</sup>

However well-intentioned, the modification only helps modestly. Consider a two-parent family with children, where both parents work in minimum wage jobs. Should the parents decide to divorce, each would likely qualify for free legal services. However, the local legal aid program still would only be able to represent one of the parents, even with the relaxed disqualification rule. Traditional conflict of interest rules prohibit the legal aid program from representing both spouses at the start regardless of the legal aid program’s ability to assign another of its lawyers to one spouse should the collaborative process fail.<sup>47</sup> The other low-income parent must still find *pro bono* counsel elsewhere.

It is not only low-income families who are challenged to afford the collaborative law process, but also those of modest means. In general, if a person earns income that would put her or him at an amount greater than 125% of the federal poverty level, she or he will not qualify to receive free legal aid.<sup>48</sup> For an adult with one child, the legal aid qualifying amount is about \$1500 per month, which roughly is only \$300 more than would be earned by a person working 40 hours a week at the current federal minimum wage.<sup>49</sup> Each party earning more than \$1500 a month will face collaborative law costs that have been estimated to run anywhere from \$6,000 to \$19,000.<sup>50</sup> It may be the case that higher collaborative law costs relate to more complicated cases, such as a case in which a business must be valued. However, one study found that on average each lawyer spends about 30 hours on a collaborative law case.<sup>51</sup> Even an average case will still produce a bill out of reach for most people of modest means.

Second, knowing the data above, it is not surprising to learn that research has also shown that the typical collaborative law client is “white, middle-aged, well-

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<sup>45</sup> *Id.* at 453–54 (“For most other [non low-income] parties, the disqualification requirement imposes a hardship, but they at least have the financial resources to engage new counsel”).

<sup>46</sup> *Id.* at 454.

<sup>47</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.7, Conflict of Interest, Current Clients (2010).

<sup>48</sup> See Income Level for Individual Eligible for Assistance, 45 C.F.R. § 1611 (2011), available at <http://edocket.access.gpo.gov/2010/2010-19449.htm>.

<sup>49</sup> See 29 U.S.C. § 206 (effective 2007), which sets the current federal minimum wage at \$7.25. Thus a person working 40 hours per week at minimum wage would gross \$1256 monthly ((40 x 7.25 x 52)/12).

<sup>50</sup> See Patrick Foran, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 793 (2009) (noting studies of collaborative law cases in Boston where the average cost was \$19,723, and noting another study in which collaborative law matters cost between \$6,000 to \$10,000).

<sup>51</sup> Schwab, *supra* note 16, at 377.

educated and affluent.”<sup>52</sup> In one study, 84% of the collaborative law clients had combined household incomes greater than \$100,000.<sup>53</sup> In contrast, the average median household income in the United States in 2008 was \$52,029.<sup>54</sup> Thus, many people are being left out of the collaborative law process.<sup>55</sup>

That is confirmed when one looks at data about the number of people who appear *pro se* in family law courts across the country. It may be helpful first to have a sense of what portion of a state court’s docket is comprised of family law matters. According to nationwide data collected by the National Center for State Courts, roughly 5% of a state court’s total annual caseload is comprised of domestic relations matters.<sup>56</sup> However, traffic cases comprise 54% of a court’s annual caseload, and criminal cases add another 20%. When looking at the remaining non-traffic and non-criminal cases, domestic relations cases represent about 21% of that caseload.<sup>57</sup> Thus, domestic relations cases are a steady and non-trivial portion of state court dockets.

Looking at state-specific research about the volume of *pro se* parties in family law cases, it is clear that it is an area in which courts see a very high number of unrepresented parties. For example, a 2006 report from Utah found that 49% of petitioners in family law cases were unrepresented while an astounding 81% of respondents were unrepresented.<sup>58</sup> In California, the state judicial council’s Center for Families, Children and the Courts surveyed local courts and found that 82% of the courts reported that *pro se* parties most frequently appeared in family law

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<sup>52</sup> *Id.* at 373 (reporting findings from survey research of 367 collaborative family law attorneys and their clients across the US); see also DiFonzo, *supra* note 22, at 603–06 (acknowledging that “steep financial entry cost into collaborative law” has created a barrier in participation for those other than the wealthy).

<sup>53</sup> Schwab, *supra* note 16, at 373.

<sup>54</sup> See U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS, <http://edocket.access.gpo.gov/2010/2010-19449.htm> (last visited Oct. 13, 2011).

<sup>55</sup> One might argue that collaborative law was never intended to reach all family law participants, but only those who had resources to hire counsel. However, collaborative law developers themselves have stated higher aspirations. See *UCLA*, *supra* note 23, at 452–54 (rule 10). Furthermore, there are mechanisms that could be used to support the use of collaborative law more widely. For example, in the United Kingdom, where there is a slightly more generous government-funded legal aid program, there are plans to approve collaborative family law services as available under the legal aid program. See Press Release, Legal Servs. Comm’n, LSC Proposes Introduction of Collaborative Law From 2010, [http://www.resolution.org.uk/site\\_content\\_files/files/collaborative\\_law\\_consultation\\_26\\_10\\_09.pdf](http://www.resolution.org.uk/site_content_files/files/collaborative_law_consultation_26_10_09.pdf).

<sup>56</sup> NAT’L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 38 (2010), [http://www.ncsconline.org/D\\_Research/csp/2008\\_files/EWSC-2008-Online%20Version%20v2.pdf](http://www.ncsconline.org/D_Research/csp/2008_files/EWSC-2008-Online%20Version%20v2.pdf).

<sup>57</sup> *Id.*

<sup>58</sup> COMM. ON RES. FOR SELF-REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE, REP. TO THE JUD. COUNCIL 5 (July 25, 2006), [http://www.utcourts.gov/resources/reports/docs/ProSe\\_Strategic\\_Plan-2006.pdf](http://www.utcourts.gov/resources/reports/docs/ProSe_Strategic_Plan-2006.pdf).

cases.<sup>59</sup> The mean percentage of self-represented litigants in family law cases was 67%, although some local courts reported percentages as high as 95%.<sup>60</sup> Similarly, in a study focused on one county in Arizona, researchers found that the percentage of family law cases in which at least one party was *pro se* had increased over a ten-year period from 24% to 90%.<sup>61</sup>

The data on the cost of collaborative law and on the number of *pro se* parties appearing in family courts across the county make clear that no matter how transformative collaborative law has been for those participants who have been able to use it, the scope of transformation is severely limited. Thus, as the family law revolution attempts to find a satisfying ending, it must acknowledge that family courts remain a critical locus for reform efforts. The challenge is to determine how the important lessons produced by collaborative law can be translated for use in a busy court system with many unrepresented parties.

As we look to meet that challenge, pragmatism is imperative. Proposals for reform must attend to important considerations that flow from the data showing high levels of *pro se* participation in family courts. First, and most directly, reforms need to be understandable and accessible to people without need for expert guidance or translation by a lawyer. None of the existing data suggests that the numbers of *pro se* parties in family courts will decline. No data suggests that there will be an increase in the number of lawyers available to low or modest income people. Reforms will only assist family courts if they do not increase the need for some kind of expert help, legal or otherwise.

Second, reforms need to be low cost and should not increase in a burdensome way the current expenses of a family law case. Parties who do not have money to hire lawyers or experts also do not likely have money to pay for additional court-mandated processes.

Finally, reforms need to increase the likelihood that parties will not return to court contentiously after the court enters its final order in the original family law matter. As noted above, family courts already have a steady and full docket with original filings in family cases.<sup>62</sup> Courts do not need to expand their dockets with post-decree matters—those cases in which a parent or spouse returns to court seeking to reconsider issues already once resolved in the initial case. As collaborative law has demonstrated, a family is better served by reforms that develop the participants' abilities to solve jointly any challenges that arise in the future. A family court will be similarly benefitted if it can find and support processes that build problem-solving skills in its *pro se* participants. For example,

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<sup>59</sup> JUD. COUNCIL OF CAL. CTR. FOR FAMILIES, CHILDREN & THE COURTS, A REPORT AND ANALYSIS OF ACTION PLANS THROUGHOUT CALIFORNIA: INTEGRATING SERVICES FOR SELF-REPRESENTED LITIGANTS INTO THE COURT SYSTEM 6 (2003), <http://www.courtinfo.ca.gov/programs/cfcc/pdf/FILES/SJIRreport.pdf>.

<sup>60</sup> *Id.* at 8.

<sup>61</sup> Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS UNIV. L.J. 553, 594 (1993) (looking at an increase in unrepresented parties in Maricopa County from the period of 1980–90).

<sup>62</sup> See *supra* note 56.

if after the court's initial order, one of the parties needs to relocate for a job that will require her to reconfigure parenting time, it benefits a family court if the parties do not need to litigate to a solution, but are able to create a new stipulated parenting plan that they jointly present to the court for its approval.

*B. The Second Translation Problem:  
How to Pragmatically Acknowledge Cycles of Emotions*

Turning now to the second translation challenge of how family law can acknowledge an emotional cycle more complicated and dynamic than "Love-Hate." Scholars have theorized about several alternative cycles, two of which are forgiveness<sup>63</sup> and reparation.<sup>64</sup> That work was critical in pushing family law to recognize emotional cycles that existed beyond the confines of a family court proceeding. However, if one takes seriously the existing needs of family courts to work with modestly-resourced *pro se* parties, then theorized alternative cycles must be made concrete. That has not happened.

Consider first the proposal that family law should encourage participants to work towards an emotional end state of forgiveness. The idea that forgiveness is an appropriate goal on which a court should focus owes its heritage largely to the Restorative Justice Movement and its work in criminal law settings between crime victims and offenders.<sup>65</sup> In the family law setting, Professor Solangel Maldonado has been an eloquent advocate for the role of forgiveness.<sup>66</sup> Professor Maldonado argues that family law cases, like divorce, generally trigger in the parties negative emotions like anger, betrayal, guilt, and vengeance.<sup>67</sup> Those negative emotions in turn trigger unhelpful or damaging behaviors that may range from extreme actions like destroying property or abandoning children to more mundane, but still harmful, actions like arguing in front of children about parenting time.<sup>68</sup> Maldonado offers forgiveness as a way of helping spouses, partners, parents and children to move from an emotional state filled with negative and unproductive emotions to a more positive and productive emotional state.<sup>69</sup> Parents, spouses, partners and children are then able to translate that positive and productive emotional state into positive and productive behaviors towards each other and for themselves.

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<sup>63</sup> See generally Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441 (2008).

<sup>64</sup> Huntington, *supra* note 2, at 1247, 1260.

<sup>65</sup> See generally 30 FORDHAM URB. L.J. (2000) (entire volume focused on restorative justice in criminal law settings).

<sup>66</sup> See Maldonado, *supra* note 63; see also Solangel Maldonado, *Taking Account of Children's Emotions: Anger and Forgiveness in "Renegotiated Families,"* 16 VIR. J. OF SOC. POL'Y & L. 443 (2009).

<sup>67</sup> Maldonado, *supra* note 63, at 448-49.

<sup>68</sup> *Id.* at 449-60.

<sup>69</sup> *Id.* at 479-82.

Inspired by work in psychology and philosophy, Maldonado frames forgiveness as a willing act in which a person voluntarily forgoes negative emotions like vengeance, resentment and bitterness towards a wrongdoer.<sup>70</sup> Instead, a person cultivates understanding and compassion toward a wrongdoer without excusing the wrongdoer's bad conduct.<sup>71</sup> The appeal to Maldonado is that forgiveness should lead to "the reduction of anger."<sup>72</sup>

Maldonado is further encouraged by research suggesting that forgiveness is teachable, and not just an idealistic, but unobtainable, emotional state.<sup>73</sup> As one forgiveness researcher has put it, "[f]orgiveness is a trainable skill just like learning to throw a baseball."<sup>74</sup> Maldonado points to three different teaching models, each of which has resulted in some empirical data that the models' creators offer as support for the efficacy of their respective teaching model.<sup>75</sup>

Interestingly, one way that forgiveness is measured empirically is to assess whether a person is exhibiting other useful emotional end goals, such as feeling less stress, and not relying on anger as a response.<sup>76</sup> For example, the empirical study of the Stanford Forgiveness Project (one of the training models noted by Maldonado) included pre- and post-training measures on a "forgiveness scale" that asked about feelings related to negative emotions like hatred and revenge, and positive emotions like feeling at peace or feeling compassion.<sup>77</sup> The study also included measures on a "perceived stress scale," and a scale designed to measure angry feelings over time ("trait anger").<sup>78</sup> The empirical studies help illuminate the primary challenge of forgiveness—the question of whether there is a sufficiently standardized meaning of "forgiveness" and a sufficiently standardized notion of what forgiveness looks like in terms of conduct or emotional states.

Very practically, researchers acknowledge that there is not a "gold standard" definition of forgiveness.<sup>79</sup> Further, researchers acknowledge that their definitions of "forgiveness" may be inconsistent with, or more nuanced than, the ordinary understanding of the term.<sup>80</sup> An average person often conceives of "forgiveness"

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<sup>70</sup> *Id.* at 479.

<sup>71</sup> *Id.* at 480.

<sup>72</sup> *Id.* at 479–81.

<sup>73</sup> *Id.* at 485–86.

<sup>74</sup> FRED LUSKIN, *FORGIVE FOR GOOD: A PROVEN PRESCRIPTION FOR HEALTH AND HAPPINESS* vii (2002).

<sup>75</sup> Maldonado, *supra*, note 63, at 487–89.

<sup>76</sup> See, e.g., Alex H. S. Harris, Frederic Luskin, Sonya B. Norman, Sam Standard, Jennifer Bruning, Stephanie Evans & Carl E. Thoresen, *Effects of a Group Forgiveness Intervention on Forgiveness, Perceived Stress, and Trait-Anger*, 62 *J. OF CLINICAL PSYCH.* 715 (2006).

<sup>77</sup> *Id.* at 719–20.

<sup>78</sup> *Id.* at 720.

<sup>79</sup> *Id.* at 716; See also ROBERT D. ENRIGHT & RICHARD P. FITZGIBBONS, *HELPING CLIENTS FORGIVE: AN EMPIRICAL GUIDE FOR RESOLVING ANGER AND RESTORING HOPE* (2000) (in which the authors use over forty pages of their book to define forgiveness).

<sup>80</sup> *Id.*; see also Frank D. Fincham, *Forgiveness: Integral to Close Relationships and Inimical to Justice?*, 16 *VA. J. SOC. POL'Y & L.* 357, 371 (2009) (noting that for crime

as requiring her to excuse the bad behavior of the person or to reconcile with him or her.<sup>81</sup> For people going through a divorce, the suggestion that a court will require them to forgive each other will likely strike them, at best, as premature, and, at worst, as offensive and inappropriate.

Further, it is not only lay people who may balk at forgiveness. While writing this Article, I queried some family law judges about whether they thought a family court should have the goal of helping parties to forgive each other. The uniform response was an unhesitating chortle of incredulity. In other words, family law judges are as likely to employ ordinary meanings of forgiveness (rather than research definitions) as are the people appearing in front of them. Forgiveness, then, as a family court's choice of end goal for the emotional developmental cycle, is a non-starter, even if only as a strategic choice about labeling.

If we were able to move beyond the definitional and labeling challenges of using the term "forgiveness," we still would need to consider whether the ambitious goal of fostering forgiveness is appropriate for a family court. Research showing the positive physical and mental health benefits of forgiveness,<sup>82</sup> suggests that a court should support the parties' mutually agreed upon efforts towards achieving forgiveness. If the parties have decided to try to forgive each other, or try on behalf of their children, then the appropriate role of the court is to support those ambitions. For example, the court can applaud the parties' efforts in remarks in open court. Or a court can make sure that in documents like a parenting plan that the parties detail (possibly with the court's help) their specific plans for working towards forgiveness, such as the specific training that the parties and their children will attend, and how the parties will pay for the training.

On the other hand, the ambitiousness of forgiveness also makes it unreasonably challenging as a mandated goal for a family court. While research has shown that forgiveness is a teachable skill,<sup>83</sup> it has not shown, and likely could not show, any certainty as to the percentage of adults or children that learn forgiveness and to what extent. Further, forgiveness research has focused on guided interventions—meaning that the training is lead by an expert teacher.<sup>84</sup> We do not have information that helps us understand under what conditions forgiveness can be learned effectively on one's own through self-help materials or

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victims the word "forgiveness" can be a "lightning rod" because a victim may presume it means to excuse a crime).

<sup>81</sup> MICHELE LOWRANCE, *THE GOOD KARMA DIVORCE: AVOID LITIGATION, TURN NEGATIVE EMOTIONS INTO POSITIVE ACTIONS, AND GET ON WITH THE REST OF YOUR LIFE* 120–21 (2010).

<sup>82</sup> Maldonado, *supra* note 63, 479–82; *see also* LUSKIN, *supra* note 64, at ch. 7.

<sup>83</sup> *See* Maldonado, *supra* note 63, at 485–86; *see also* LUSKIN, *supra* note 64, at ch. 9.

<sup>84</sup> *See, e.g.,* Thomas W. Baskin & Robert D. Enright, *Intervention Studies on Forgiveness: A Meta-Analysis*, 82 J. OF COUNSELING & DEV. 79 (2004) (reviewing existing empirical studies on forgiveness intervention trainings).



the like.<sup>85</sup> Thus, a choice to affirmatively engage family courts in moving people towards forgiveness means that the court system will have to put itself into the business of guided forgiveness training.

Advocates of forgiveness rightly point out that many family courts have already moved to mandating parenting classes for all divorcing parents.<sup>86</sup> Those courses are usually two to four hours long, often in one session.<sup>87</sup> Thus, courts have some experience in how to build out a court-annexed training program. Forgiveness advocates can assert that building out forgiveness training is just another step in that already-familiar process. However, both the benefit and the challenge is that almost all of the existing models of forgiveness training are substantially longer and more intensive than a parenting class. While one forgiveness model involves a 1-hour letter writing session, most models include multi-week training sessions (from four to twelve weeks), and at least one study included weekly counseling sessions of up to fourteen months.<sup>88</sup>

With increased intensity and frequency comes increased cost. For a family court trying to keep down costs to the parties of divorce proceedings, mandating a multi-week forgiveness training program for parents and children is too much of a financial burden. In the end, forgiveness as an end state of a developmental cycle of emotions may be attractive when considering the court's practical goal of getting parties to jointly problem-solve, but is impractical when considering the court's goals of making sure that the process is definitionally understandable and accessible to lay parties, as well as to the court personnel with whom they interact.

Another possible goal for a family court is to encourage parties towards an emotional state of reparation. As noted earlier, that is the goal suggested by Professor Huntington in her critique of the "Love-Hate Model."<sup>89</sup> Huntington draws on the work of psychoanalyst Melanie Klein, in which Klein posits that each of us is innately driven to repair the harm we inflict upon another with whom we share intimacy.<sup>90</sup> Huntington positions reparation as something other than forgiveness,<sup>91</sup> as well as something other than "simply a kiss-and-make-up idea . . ."<sup>92</sup> Instead, reparation is a way to acknowledge dynamism in emotions, and to allow for an emotional developmental state beyond hate or anger.<sup>93</sup> Reparation as a

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<sup>85</sup> There are self-help materials designed to teach forgiveness created by experts in the field of forgiveness interventions. See LUSKIN, *supra* note 74. But I am not aware of any empirical studies looking at whether any self-help materials effectively teach forgiveness.

<sup>86</sup> Maldonado, *supra* note 63, at 475–76.

<sup>87</sup> *Id.* at 475; see also YWCA OF BOULDER COUNTY, CO-PARENTING FOR LIFE CLASSES, <http://www.ywcaboulder.org/programs/coparenting.html> (last visited Oct. 13, 2011) (includes a brief description of the court-approved three-hour parenting class for divorcing parents living in Boulder County, Colorado).

<sup>88</sup> Baskin & Enright, *supra* note 82, at 80–84.

<sup>89</sup> Huntington, *supra* note 2, at 1294–1302.

<sup>90</sup> *Id.* at 1260–64.

<sup>91</sup> *Id.* at 1300.

<sup>92</sup> *Id.* at 1295.

<sup>93</sup> *Id.* at 1297–98.

goal requires parties, and a family court, to address and accommodate the fact that familial relationships continue in some fashion after a rupture like divorce.<sup>94</sup>

The specific attractiveness of reparation as a developmental goal is its signaling function as identified by Huntington. It tells the parties that something in the family constellation has to be put back together: that while a divorce may initially splinter parents from each other, children from their parents, and possibly children from each other, the court will work to put some splintered pieces back together. But, under Huntington's conception, reparation does not signal to the parties that *all* splintered pieces must be put back together nor that *all* negative emotions need be resolved. In that regard, it is a less ambitious goal than forgiveness.

Nonetheless, the challenge of reparation is similar to that of forgiveness—to a lay person it may too quickly and firmly trigger notions of reconciliation and unity. Thus, a court might risk provoking unnecessary anxiety and disbelief if it tells parties that they will be expected to repair their relationship with each other and with their children. In a very practical way, a court might find the goal of repair more destructive than constructive.

Further, while it was not Huntington's task to operationalize reparation fully, a family court adopting reparation as a developmental goal would need to articulate its criteria as well as be able to instruct parties in what steps to take to achieve reparation. Huntington sees the seeds of reparation in some "partial reforms" already taking place in family law.<sup>95</sup> For example, the use of mediation in family law cases, court-ordered parenting classes and court-approved parenting coordinator programs.<sup>96</sup> Each of those reforms seeks to engage parents in particular in learning how to communicate with each other productively about their ongoing relationship as co-parents.<sup>97</sup> As a practical matter, it is unclear whether reparation means more than that. Is repair something in addition to a baseline ability to communicate? Could repair have occurred between parents who are able to exchange information between themselves about their children, but who still do so with venom in their voices? It is the operationalizing of repair that makes it a difficult goal for family courts.

As the above discussions about forgiveness and reparation help illuminate, it is difficult to move from acknowledging a cycle of emotions and selecting an end emotional goal to translating that transformative process to a court system that has limited resources and many *pro se* participants. That difficulty, however, helps uncover another possibility. Instead of focusing on an end emotional state of a cycle of emotions, might it be more productive to consider whether there is a *mode* of thinking or of processing emotional information or responses that would be helpful to family courts and their participants? My answer is yes, and I offer a mode of thinking that I call equipoise.

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<sup>94</sup> *Id.* at 1298–99.

<sup>95</sup> *Id.* at 1287.

<sup>96</sup> *Id.* at 1288–90.

<sup>97</sup> *Id.* at 1288–90.

## III. EQUIPOISE AS A MODE OF RESPONSE

By equipoise, I mean to suggest a kind of emotional equilibrium<sup>98</sup> as well as a sense of non-attachment to any particular emotion that threatens to take hold of a person at any particular time. It is not a “letting go” of emotions. Rather, it is clearly identifying and acknowledging the presence of particular emotions, but distancing oneself from the knee-jerk reaction that a particular emotion often triggers (i.e., noticing that one is angry at the remark just made by one’s ex-spouse, but not reflexively reacting with a hostile retort). Equipoise allows a person a moment of self-reflection immediately after one notices she or he is feeling an emotion (either negative or positive). In that moment of self-reflection, a person has the opportunity to quickly recall the patterned response that the emotion usually triggers in her or him, to identify another possible response, and to choose between the two. It might go something like this:

Father: “Why didn’t you pack Janie’s medication for me and have it ready when I’m here to pick her up for the weekend?”

Mother, to herself: “Ugh, there he goes again, always blaming me. I just want to drop Janie’s bag on the ground right here and turn around and go back in the house.”

“Okay, I know his remark has made me angry. I can either drop the bag and then be angry myself all weekend, or I can try something else. I think I’m feeling strong enough to try something else.”

Mother to Father: “How about we talk to Janie’s doctor and see if she’ll write another prescription for us that you can have. That way, you’ll have Janie’s medicine at your house, too, and neither of us will have to worry about getting it back and forth between our houses.”<sup>99</sup>

Most of us are likely able to recall a situation of our own that would be equivalent to the one above. We know that the entire sequence of thinking might take no more than a handful of seconds once the mother has learned how to notice emotional triggers. Equipoise can be very quick and effective.

The equilibrium contemplated by equipoise is an end state, but not necessarily a constant state. In the example above, the mother clearly feels angry, but through

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<sup>98</sup> The Oxford English Dictionary defines equipoise as “equality or equal distribution of weight; a condition of perfect balance or equilibrium.” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>99</sup> In this vignette, I am not suggesting that the mother’s solution is the best or the one that is most likely to work—only that the vignette demonstrates a move away from an habituated emotional response.

an intentional effort to be aware of how emotional states get triggered in her, the mother is not captured by her anger. She can see what is happening, identify some options about how to respond, and thereby, disengage herself from the emotion and move to a state of equipoise. But, five minutes later when she is driving home and someone cuts in front of her, she may again feel anger rise, moving her out of equipoise. The developmental goal of equipoise assuredly is to cultivate a capacity to maintain equipoise for greater periods of time, but the practice of equipoise is grounded in our everyday experiences of rising and falling emotions, both positive and negative.

Those who have spent time in family court and heard a judge say to parties that they need to work on reducing conflict between them may question whether equipoise is just a fancy name for conflict reduction or anger management. It is not, but in some situations equipoise may very well include outcomes that would be similar to those resulting from conflict reduction or anger management. The differences lie in scope and focus. For a person striving for equipoise, the first step is to effectively recognize and identify that one is in a situation which has prompted a particular emotional response—fear, hurt, happiness, love—and then confirm the response one would show before showing it. A person could still decide that the appropriate response is anger or confrontation, but at a measured, not uncontrolled, level.

There are three primary benefits to family members of equipoise as a mode of responding. First, equipoise readily acknowledges that a person may feel very negative emotions (or very positive emotions) towards another family member. It validates the fact of emotions as well as the range of emotions. Second, equipoise sets two immediate goals—self-awareness of emotional responses and self-reflection about options for responses. While the goals may be very challenging (i.e., it can be hard to self-reflect when one's immediate impulse is to yell), they are immediate goals that do not depend on a person feeling benevolent towards the other family member.

For example, a spouse need not have committed to forgiving the other spouse in order to practice successfully the steps leading to equipoise. Nonetheless, a secondary benefit of equipoise is that it may set the groundwork for a person to move to a more challenging long-term emotional development goal like forgiveness. As a person becomes more skilled in identifying and reflecting, and, thus, retains equipoise for greater periods of time, she may be more amenable to goals such as forgiveness.

The third primary benefit of equipoise is that it is a self-directed enterprise. Any person can work on equipoise without waiting for, or needing the participation of, other family members. Thus, even if one or more family members is attached to a Love-Hate Model, other family members can still move beyond that and opt to respond using emotional equipoise.<sup>100</sup>

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<sup>100</sup> This benefit is not unique to equipoise. Other emotional developmental goals like forgiveness share that feature.

The remaining questions for equipoise are the three practical ones identified earlier. Would equipoise decrease the chances of parties returning to court to argue about post-decree issues? Would court-encouraged efforts towards equipoise be financially manageable for parties? And, is the practice of equipoise one that parties can understand and make progress towards without the use of, or need for, lawyers? It is those three practical questions that I turn to in the next section.

#### IV. THE PRACTICALITIES OF EQUIPOISE

In order to answer the three practical questions, it is necessary to describe further how one “does” equipoise. As I have depicted equipoise, at its core it is a set of mental habits one tries to learn and solidify. There is not one way, or a right way, to learn equipoise, and we find hints of it already in the ways in which family courts have begun to transform themselves away from the Love-Hate Model.

For example, I have observed family court judges talking with parties at their first court hearing about the parties’ need to understand that their relationship is changing, but not ending, and that the parties should think about each other more as if they had a business relationship. With a business relationship, the court advises the parties’ obligations to each other are limited to effective and efficient communications about very specific topics, like their children, and nothing further.<sup>101</sup> Implicit in the judges’ remarks is the idea that such a “business” relationship does not have the same emotional volatility as does a personal relationship, and that emotional equilibrium would be useful to the parties.<sup>102</sup>

The judges’ remarks are cursory and do not give the parties any guidance on how it is that they are to transform their relationship, nor what it is about a business relationship in particular that they should try and emulate. But, the judges’ interest in, and willingness to try, some kind of colloquy with the parties about the importance of changing the emotional valence of their interactions sets the stage for a more thorough colloquy introducing the components of equipoise.

Another example is parents who use a notebook to exchange information with each other about their children.<sup>103</sup> Each parent writes down the information that she or he needs to communicate about the child (i.e., “Sarah has a cold and I’ve been giving her children’s aspirin. Her last dose was at 3pm.”) Using a notebook mirrors important facets of equipoise. First, it takes more time to write down what one intends to say rather than to just say it. That extra time creates an opportunity

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<sup>101</sup> The idea that former spouses should understand themselves as business partners is also one recommended by mental health experts who work with divorcing parents. Robert Emery describes it this way: “All that keeps you and your ex involved now is your joint enterprise: your children. They are your ‘business,’ and you two are ‘business partners.’” EMERY, *supra* note 2, at 51.

<sup>102</sup> I am not arguing here that it is descriptively true that business relationships never have emotional volatility, but only that it resonates for most people that intimate relationships can be more emotional than business relationships.

<sup>103</sup> This technique is generally used only with children who have not yet learned how to read.

for the writer to become aware of any emotional response she or he is having. Next, the fact that one can rip out a page of the notebook and start again creates the possibility of reflecting on the emotional tenor of one's response and then deciding to alter it. The use of a notebook in no way guarantees equipoise—if a parent wishes to write intemperately, the parent can follow through on that impulse. The point is that the notebook technique lends itself to a practice of equipoise and makes that practice more apparent to parents.

In my experience, when someone, usually a mediator or one of the lawyers, suggests to parents that they use a notebook, the technique is often introduced as a way for the parents to avoid getting angry with each other. The conversation is fairly brief and does not break out for the parents the way in which writing may help them identify emotions and reflect on responses, or the possibility of starting over by ripping out a page of the notebook upon reflection. Yet, it would not be hard to expand the notebook conversation.

A final example is court-annexed parenting classes. Such classes are increasingly a part of the divorce process, with a recent study reporting that at least forty-six states mandate such classes.<sup>104</sup> Researchers have categorized classes along a dimension labeled “levels of family involvement,” identifying three levels of parenting classes.<sup>105</sup> Level one classes focus on providing parents with basic “research information” about issues such as how their relationship to each other will change because of divorce, the ways children often react to divorce, and techniques for effectively communicating with each other and with children.<sup>106</sup> Level one classes might include video vignettes of parents and children interacting, with the class then discussing how parents might best respond, or experts from the video giving suggestions on how to respond.<sup>107</sup> Level one classes are usually one session lasting a few hours.<sup>108</sup>

Level two and three classes include the same kind of information as level one classes, but go beyond didactic learning and are often longer than one session.<sup>109</sup> Level two classes focus on teaching and practicing “cooperative parenting skills” with the goal that parents who practice those skills in a calm setting can then transfer those skills to “emotionally charged settings.”<sup>110</sup> For example, in one level two class, parents watch video vignettes of divorcing parents interacting with each other, then discuss what they saw, including particulars like the specific word choices that parents made, offer alternative options, and then practice similar

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<sup>104</sup> Barbara A. Babb, Gloria Danziger, Judith D. Moran & Itta Englander, *Parent Education Programs: Review of the Literature and Annotated Bibliography*, UNIV. OF BALT. SCH. OF L. CTR. FOR FAM., CHILD. & THE COURTS, [http://law.ubalt.edu/downloads/law\\_downloads/June2009\\_ParentEdPrograms\\_FINAL.pdf](http://law.ubalt.edu/downloads/law_downloads/June2009_ParentEdPrograms_FINAL.pdf).

<sup>105</sup> Karen R. Blaisure & Margie J. Gleasler, *The Divorce Education Intervention Model*, 38 FAMILY & CONCILIATION CTS. REV. 501, 501–02 (2000).

<sup>106</sup> *Id.* at 507.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 508–09.

<sup>110</sup> *Id.* at 508.

conversations themselves.<sup>111</sup> Level three classes are similar in content to level two but presume that participants will need more intensive direction and assistance in becoming competent at the skills being taught.<sup>112</sup>

In each kind of parenting class described above, at least part of what parents are being introduced to is the idea that they have choices that they can make about how they respond to the other parent or to their child. Parents are introduced, either implicitly or explicitly, to the skills of identifying emotional responses to communication and reflecting on the choices they have about how to respond. In level two and three classes, parents essentially simulate the steps for a practice of equipoise—they deconstruct an interaction, first identifying what words triggered what kinds of emotions, then identifying what response could be used to alter the emotional tenor. In practice, however, the parents do not actually have to press themselves to reach equipoise, but the idea is that when they are next in an emotionally charged setting with their co-parent, the simulated experience will spark a process of self-reflection and intentional choice about how they choose to respond.

While the above examples all contain the preliminaries for a practice of equipoise, there are other common activities available to parents and children that more explicitly include equipoise. One example is yoga.<sup>113</sup> In most forms of yoga, the practice of equipoise flows from exercises related to breathing.<sup>114</sup> By learning techniques for focusing on the breath, yoga practitioners train themselves to more specifically attend to their immediate surroundings and to the things that they are sensing presently, both physical and mental.<sup>115</sup> Both in breathing practices and posing practices, yoga instruction usually includes reminders to notice sensations or thoughts, but not to judge them. The idea is that just being aware of one's physical and mental processes allows one to have some remove from the habituated response one ordinarily would have. For example, noticing that my back hurts in a yoga pose and not immediately judging that sensation as harmful allows me space to decide whether I should respond in accord with my habit and squirm or instead remain in the pose because I realize the pain is more discomfort than a sign of harm or injury.

Yoga classes are now ubiquitous in most cities and towns across America. For example, if one looks at the schedule of classes for YMCA branches across the

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<sup>111</sup> *Id.* at 509.

<sup>112</sup> *Id.*

<sup>113</sup> When I talk about yoga in this Article, I am referring to it in its typical form in America. For a helpful discussion of the differences between yoga in America and its more originalist Hindu form, see Wade Dazey, *Yoga in America: Some Reflections from the Heartland*, in *THEORY AND PRACTICE OF YOGA: ESSAYS IN HONOR OF GERALD JAMES LARSON* (Knut Kacobsen, ed., Koninklijke Brill, 2005).

<sup>114</sup> Richard C. Miller, *Working with the Breath*, in *LIVING YOGA: A COMPREHENSIVE GUIDE FOR DAILY LIFE 27–38* (Georg Feurstein & Stephanie Bodian eds., 1993).

<sup>115</sup> Stephan Bodian, *The Buddhist Yoga of Mindfulness: An Interview with S.N. Goenka*, in *LIVING YOGA*, *supra* note 114, at 138–40.

country, one generally will find some kind of yoga class offered.<sup>116</sup> There are also yoga classes designed specifically for children, although it may be more common to find such classes at private yoga studios than at a YMCA.<sup>117</sup>

There are other sports in which mental equanimity is an important part. For example, many martial arts include training for finding and maintaining a calm mind. In Tae Kwon Do, an art form originally developed in Korea, one grandmaster described the ultimate state of mind that students strive to achieve as being “at peace with themselves and the world around them, regardless of the setting,”<sup>118</sup> which allows a person not to “be upset by anything they encounter in life.”<sup>119</sup> The specific techniques of Tae Kwon Do often have a core component related to “focus.” As described by Grandmaster Yeon Hwan Park, “[f]ocus is the ability to channel all of the power in your body to a specific point in space. . . . Focus is developed through a combination of precisely controlled movement and relaxation.”<sup>120</sup> Tae Kwon Do, like most martial arts, embraces all ages of students from young children to older adults.<sup>121</sup>

Furthermore, many other kinds of sports might be coached or taught in a way in which a component of instruction considers mental processes that relate to focus and awareness of emotions. For example, a soccer coach might include mental exercises that help a player respond calmly in a tense moment like a penalty kick. If a parent were aware of the benefits of emotional equipoise, then a parent could look for that facet when comparing sports or activities and selecting the one that might help her or her children not only physically, but emotionally as well.

Finally, there are practices that directly focus on emotional equipoise, the primary example of which is meditation. Meditation may be the practice least familiar to courts, parents and children. However, burgeoning research suggests that meditation is, in fact, highly effective at training a person in emotional

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<sup>116</sup> I randomly selected YMCA branches across the country and found the following yoga classes offered: YMCA of Athens, GA: <http://www.athensymca.org/fitness.shtml>; YMCA of Billings, MT: <http://www.billingsymca.org/>; YMCA of Greater Des Moines (Riverfront location): [http://www.dmyymca.org/support/upload/schedule\\_292.pdf](http://www.dmyymca.org/support/upload/schedule_292.pdf); YMCA of Ithaca & Tompkins County: [http://www.ithacaymca.com/schedules/fitness/Fall\\_10\\_Session\\_1\\_Group\\_&Specialty\\_Descriptions.pdf](http://www.ithacaymca.com/schedules/fitness/Fall_10_Session_1_Group_&Specialty_Descriptions.pdf); YMCA of Superior California (Sacramento): [http://sacymca.org/pdf/Schedule\\_oct09.pdf](http://sacymca.org/pdf/Schedule_oct09.pdf); YMCA of Central New Mexico: [http://www.ymcacnm.org/programs/health-fitness.php?program\\_id=4](http://www.ymcacnm.org/programs/health-fitness.php?program_id=4).

<sup>117</sup> I reach that conclusion fairly unscientifically by comparing the number of entries produced by a Google search of “kids yoga class” compared with “YMCA kids yoga class.” For examples of kid’s yoga classes at private studios, see <http://www.karmakidsyoga.com/>, and <http://www.happyyoga4kids.com/>. For examples of YMCA kid’s yoga classes, see <http://www.wikichild.com/Ohio/Columbus/All/Fitness/Static.aspx>, and <http://www.ymcainfo.org/family/youth.html>.

<sup>118</sup> YEON HWAN PARK AND JON GERRARD, *BLACK BELT TAE KWON DO: THE ULTIMATE REFERENCE GUIDE TO THE WORLD’S MOST POPULAR BLACK BELT MARTIAL ART 6* (2000).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 22.

<sup>121</sup> *Id.* at 236–37.



equipoise. Neuroimaging studies have been one of the ways researchers have captured the effects of meditation on the brain.<sup>122</sup> In one review, researchers noted that subjects who learned a type of meditation called “mindfulness” meditation showed greater activity levels in parts of the brain associated with the ability to recognize the emotional tone of an experience and parts associated with regulating emotional responses.<sup>123</sup> Similarly, in a study comparing experienced meditators with novice ones, brain imaging showed that experienced meditators responded to distracting sounds with parts of the brain related to response inhibition and attention, while novice meditators did not, leading researchers to conclude that meditation improves a person’s capacity to remain unperturbed.<sup>124</sup> Finally, another neuroimaging study found that experienced and novice meditators who practiced meditation designed to foreground empathy and compassion showed greater brain activity in empathy centers of the brain.<sup>125</sup>

There are numerous meditation practices, often with different entry points. For example, one entry point may be healthful living or pain reduction.<sup>126</sup> Another

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<sup>122</sup> For an overview of numerous neurological studies on animals and humans relating to the ways in which mental processes can tangibly affect the brain, see SHARON BEGLEY, *TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES* (2007). See also Sindya N. Bhanoo, *How Meditation May Change the Brain*, N.Y. TIMES, (Jan. 28, 2011, 10:29AM) <http://well.blogs.nytimes.com/2011/01/28/how-meditation-may-change-the-brain/>.

<sup>123</sup> Antoine Lutz, Heleen A Slagter, John D. Dunne & Richard J. Davidson, *Attention Regulation and Monitoring in Meditation*, 12 TRENDS IN COGNITIVE SCI. 163 (2008); see also Britta K. Holsel, James Carmody, Mark Vangel, Christina Congelton, Sita M. Yeramsetti, Tim Gard, Sara W. Lazar, *Mindfulness Practice Leads to Increases in Regional Brain Gray Matter Density*, 191 PSYCHIATRY RES.: NEUROIMAGING 36 (2011) (longterm practitioners of “mindfulness-based stress reduction” meditation showed increased gray matter in areas of the brain related to emotion control).

<sup>124</sup> J.A. Brefczynski-Lewis, A. Lutz, H.S. Schaefer, D.B. Levinson & R.J. Davidson, *Neural Correlates of Attentional Expertise in Long-Term Meditation Practitioners*, 104 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 11483 (2007). For a brief review of other studies finding beneficial wellness consequences of meditation, see also Heleen A. Slagter, Antoine Lutz, Lawrence L. Greischar, Andrew D. Francis, Sander Nieuwenhuis, James M. Davis, Richard J. Davidson, *Mental Training Affects Distribution of Limited Brain Resources*, 5 PLOS BIOLOGY E138 (June 2007), available at <http://www.plosbiology.org/article/info%3Adoi%2F10.1371%2Fjournal.pbio.0050138>; Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J. L. SCI. & TECH. 755, 775–76 (2008).

<sup>125</sup> Antoine Lutz, Julie Brefczynski-Lewis, Tom Johnstone, Richard J. Davidson, *Regulation of the Neural Circuitry of Emotion by Compassion Meditation: Effects of Meditative Expertise*, 3 PLOS ONE E1897 (2008), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0001897>.

<sup>126</sup> Jon Kabat-Zinn is one of the best known authors who writes about health, pain or stress as entry points for a meditation practice. See JON KABAT-ZINN, *FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN AND ILLNESS* (1990); JON KABAT-ZINN, *THE MINDFUL WAY THROUGH DEPRESSION: FREEING YOURSELF FROM CHRONIC DEPRESSION* (2007).

may be stress reduction.<sup>127</sup> Yet another might be a spiritual focus.<sup>128</sup> Finally, there are meditation practices targeted at children.<sup>129</sup> Regardless of the entry point, the actual techniques of meditation practices train a person to identify mental processes, including physical sensations or emotional responses, to resist an impulsive response to a mental process, and to cultivate an ability to hold equanimity when reflecting on, and choosing, a response.<sup>130</sup>

Turning now to practicalities, the first question is whether or not equipoise is a goal that courts can explain to lay people and help them look for opportunities to develop that competency without the need for a lawyer. Just like the labels of “forgiveness” and “reparation” presented some preliminary challenges, so does equipoise. On the most basic level, equipoise is not a legal concept, and also not a word commonly used. Contrast that with forgiveness, where it may be possible for a court to say to parties that it would facilitate and encourage the parties to reach forgiveness, knowing that the parties would have some instant (even if unhelpful) sense of “forgiveness.”

But, the benefit of equipoise being a less familiar term is that it is also less freighted with unhelpful meanings. As we have seen, family courts already have started to describe some of the precursors of equipoise by describing to parties that their relationship is not ending, but instead is changing from a personal, intimate one to a business one. Courts could build on that dialogue to introduce more fully the contours of equipoise, whether or not the word “equipoise” is ever used. For example, a court might offer one goal of a business relationship as the efficient exchange of information about a shared interest, and suggest that efficiency is increased when both business partners pay attention to the ways in which they add emotional content to their descriptions.

Importantly, there is nothing about the way in which I have described the practice of equipoise that could not be understood by a lay person. A court would not need additional assistance from a lawyer to make sure that spouses, parents or children functionally understand the developmental goal of equipoise. Of course, understanding the goal of equipoise and practicing equipoise are two different

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<sup>127</sup> See, e.g., *Meditation: Take A Stress Break Wherever You Are*, MAYO CLINIC, <http://www.mayoclinic.com/health/meditation/HQ01070> (last visited Oct. 11, 2011).

<sup>128</sup> For example, meditation is a notable component of Buddhism. See generally Deborah J. Cantrell, *Can Compassionate Practice Also Be Good Legal Practice: Lessons from the Lives of Buddhist Lawyers* 12 RUTGERS J.L. & RELIGION 3, 34 (2010).

<sup>129</sup> See generally LINDA LANTIERI, BUILDING EMOTIONAL INTELLIGENCE: TECHNIQUES TO CULTIVATE INNER STRENGTH IN CHILDREN (2008); DAVID FONTANA AND INGRID SLACK, TEACHING MEDITATION TO CHILDREN: THE PRACTICAL GUIDE TO THE USE AND BENEFITS OF MEDITATION TECHNIQUES (2007); LISA DESMOND, BABY BUDDHA: A GUIDE FOR TEACHING MEDITATION TO CHILDREN (2004).

<sup>130</sup> For descriptions of meditative practices and goals from several traditions, compare, NYANAPONIKA THERA, THE HEART OF BUDDHIST MEDITATION 64–84 (1965) (describing Vipassana meditation); SEUNG SAHN, THE COMPASS OF ZEN 268–70 (1997) (describing Zen meditation); SANGHARAKSHITA, A GUIDE TO THE BUDDHIST PATH (1990) (describing meditation in a pan-Buddhist approach).

things. While the court may be able to place the goal of equipoise on a family's agenda, the family may still need additional help identifying activities or practices that will help its members develop equipoise. Fortunately, a family proceeding *pro se* can find information and assistance on that topic from sources other than lawyers. Further, a family court might develop a list of resources related to equipoise that it could make available to *pro se* parties through a court's *pro se* assistance program.<sup>131</sup>

Next, consider whether it is financially reasonable for courts to expect spouses, parents, and children to pursue a developmental goal of equipoise. As we have seen, already there are court-imposed costs in family court that relate to programs designed to help families in transition. Those costs can include parenting classes,<sup>132</sup> and possibly mediation costs in those jurisdictions requiring it.<sup>133</sup> For spouses or parents grappling with the change to, and challenge of, covering the expenses of two households instead of one, every new cost matters. Thus, it would be particularly useful if training on equipoise could be incorporated into existing parenting classes or mediation requirements.

As noted in the discussion above, even the most basic level one parenting classes often contain the seeds of a practice in equipoise. Courts adopting a developmental goal of equipoise could require parenting class providers to more fully develop components related to equipoise. It is likely that providers would be able to respond using modest effort, and the modifications need not change the existing costs of the parenting class. For example, take the basic level one course where participants view a video vignette of a parent interaction. In the discussion, the parenting class instructor could help participants identify what kinds of emotions they would have felt had they been in the conversation, then practice delaying their responses until they have identified the emotion, ending with brainstorming about alternative ways to respond and predictions about whether the outcome of the conversation would change. The parenting class instructor could conclude by having the class break into small groups to do short role plays to try out techniques.

Finally, parenting class providers might be required to provide all of their participants with a list of local activities or resources that they might use to further their training in equipoise. The list could include very low cost options such as self-help materials available at the local library that introduce practices of

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<sup>131</sup> If a family court were to develop a list of equipoise-related resources, then an ancillary benefit is that the court could provide that list to all parties. Even well-resourced parties may prefer to choose options that are less expensive.

<sup>132</sup> See, e.g., *Co-Parenting for Life Classes*, YWCABOULDER.ORG, [http://www.ywca-boulder.org/?page\\_id=222](http://www.ywca-boulder.org/?page_id=222) (last visited Aug. 19, 2011).

<sup>133</sup> See, e.g., *Revised Fee Schedule for Alternative Dispute Resolution Services Provided by the Office of Dispute Resolution*, COLO. STATE JUD. BRANCH, <http://www.courts.state.co.us/userfiles/file/Administration/Executive/ODR/Resources/fee%20order%202008.pdf> (last visited Aug. 19, 2011) (providing mediation fees in a jurisdiction which requires mediation in family law matters like dissolution, allocation of parental responsibilities and child support).

equipoise along diverse entry points (e.g., books or videos on stress reduction, yoga, martial arts, meditation).

One of the most promising places in which the developmental goal of equipoise might be introduced more robustly is through mediation.<sup>134</sup> The core techniques used in consensus-building processes, like mediation, introduce participants to a form of equipoise. Leading researchers in this area have described some of the techniques in the following shorthand: separate the people from the problem, focus on interests rather than positions, invent options for mutual gain, and use objective criteria.<sup>135</sup>

Consider “separate the people from the problem” in more detail to discern how it introduces notions of equipoise. The researchers describe the challenge as follows: “Everyone knows how hard it is to deal with a problem without people misunderstanding each other, getting angry or upset, and taking things personally.”<sup>136</sup> To effectively respond to that challenge, negotiators need to be able to discern separately the contours of the substantive problem and the contours of the relationships of the people at the negotiating table (the “people problem”).<sup>137</sup> Each problem is then dealt with independently, with the people problem requiring parties to recognize their emotions and the emotions of others untied to the underlying substantive issues, and to respond to emotional content directly, instead of burying it within the substantive issue.<sup>138</sup> The teasing apart of “people” from “problem” encourages participants to attend to emotions, while also encouraging participants to resist responding only to emotions. By refocusing on underlying substantive issues, participants gain some time to internally reflect on emotions before having to respond. In other words, participants gain moments of equipoise.

Further, mediators themselves have recognized the benefits of a practice of equipoise for their own work, developed through contemplative practices like mindfulness meditation. Leonard Riskin is exemplary in this area, having written extensively about the ways in which mindfulness meditation makes for better ADR practitioners (as well as for better lawyers).<sup>139</sup> Riskin notes that mindfulness

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<sup>134</sup> In fact, I expect that some mediators reading this Article would say that mediation already robustly incorporates equipoise as a primary component. Len Riskin has been a leading voice for the benefits to a mediator of a contemplative practice. Riskin founded and leads the Initiative on Mindfulness in Law and Dispute Resolution at the University of Florida Levin College of Law. *The Initiative on Mindfulness in Law & Dispute Resolution*, LAW.UFL.EDU, <http://www.law.ufl.edu/imldr/> (last visited Aug. 19, 2011).

<sup>135</sup> FISHER & URY, *supra* note 15, at 15–81.

<sup>136</sup> *Id.* at 17.

<sup>137</sup> *Id.* at 18–21.

<sup>138</sup> *Id.* at 22–25, 29–32. For further examples of how the *Getting to Yes* techniques include equipoise, see Don Ellinghausen, Jr., *Venting or Vipassana? Mindfulness Meditation's Potential For Reducing Anger's Role in Mediation*, 8 CARDOZO J. CONFLICT RESOL. 63, 73–74 (2006).

<sup>139</sup> See Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their*

practices help prevent having a “limiting mind set,” which can preclude a mediator from fully listening, from being aware of her own habitual reactions, and from envisioning the broadest set of potential solutions and challenges to a problem.<sup>140</sup> Family courts likely have a cadre of mediation professionals already familiar and skillful in emotional equipoise who would be able to assist the court in adjusting the existing court-annexed programs to foreground training and practices related to equipoise.

As the above discussion illustrates, there should be low-cost ways for a family court to build into existing court-annexed programs more overt training related to equipoise. Nonetheless, to the extent spouses, parents, or children want to, or may need to, have further training to develop equipoise, that may require them to have additional resources. It takes money to sign up for classes at a YMCA or to participate in a local sports team. For some families, the issue may be only one of switching to equipoise-related activities. But for many low-income families they have no extra resources to pay for those activities. That may constrain how much equipoise training a court can mandate, but a family court still would be able to look for ways to encourage parties to make the choices they do have available to them in ways that support a developmental goal of equipoise.

However, regardless of cost, the court will not be able to control training outcomes. The willingness and ability to learn emotional equipoise ultimately resides with the parent, spouse or child. Nonetheless, a court can be consistent and repeated in the way it encourages families to take full advantage of the opportunities to learn equipoise, and in the ways it requires court-annexed programs like parenting classes and mediation to include instruction on equipoise. The move to equipoise is beneficial for all who choose to learn, and that, in turn, is beneficial for family courts, even if the move does not pick up all participants.

That beneficial turn leads to the final practical question for a family court: Will equipoise increase the likelihood that participants will not need to return to court after their original proceeding? As noted in Section II, changing the frame of family law cases to adopt equipoise as a mode of thinking is of little practical assistance to a court if that change does not also help the court better manage its docket. One way a family court’s docket could be helped is if it did not have to

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*Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); see also Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 (2006) (discussing author’s development of a more advanced mindfulness practice to be used in dispute resolution processes); Ellinghausen, *supra* note 135 (comparing a mindfulness practice with approaches that encourage venting of emotion and arguing that a mindfulness approach is a more productive mediation strategy).

<sup>140</sup> Compare Riskin, *The Contemplative Lawyer*, *supra* note 136, at 48–57, with Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002) (arguing that one risk of a mindfulness practice in negotiation is that mindfulness requires compassion for others to a degree that may impinge on a negotiator’s ability to remain true to partisan interests).

address contested post-decree filings.<sup>141</sup> Thus, family law courts should be skeptical of changes that do little to relieve the court's docket.

Ultimately, whether encouraging practices of equipoise will relieve a court's docket will be an empirical question, which can be answered most accurately post hoc. Helpfully, some of the research already noted in this Article suggests that equipoise will enable participants to better navigate conflict.<sup>142</sup> First-person accounts of equipoise practices like meditation also support that equipoise better enables a person to manage disagreement and conflict.<sup>143</sup> Given the evidence thus far on practices of equipoise, even if only one family member learns the practice of equipoise, that should still increase the chances that later disagreements can be resolved without the need to return to court.

Further, to the extent participants do return because they have been unable to move out of unhelpful emotional cycles like hate or anger, the court can take the opportunity to encourage the parties once again towards equipoise. For example, if a jurisdiction requires mediation for its original family law filings, and it has required approved mediators to incorporate equipoise practices, the court could additionally mandate that the parties return to mediation in a contested post-decree filing before the court will hear the post-decree motion.<sup>144</sup> Again, the best that a family court can do is inform, encourage, and re-encourage family members to make the effort to learn practices of equipoise. Adopting a policy of equipoise is not a magic wand that a family court can wave to clear away all high-conflict cases from its docket. Nonetheless, equipoise should make a meaningful difference to a court's docket, as well as case resolutions.

## V. CAN FAMILY LAW LOSE WITH EQUIPOISE?

Equipoise offers family courts a mode of processing information and emotions that usefully supports policy choices as well as practically assists courts. In this section, I consider whether the choice of equipoise comes at any costs to

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<sup>141</sup> It is a minimal burden on the court's docket to handle uncontested post-decree filings since in those instances the parties generally are filing a joint document in which they agree on modifications, and to which the court needs only to review and give its assent. It is only those post-decree matters in which the parties cannot agree how to modify parenting time, child support or the like, which burden the court. Those matters generally require the court to hold a hearing and issue a written ruling.

<sup>142</sup> See *supra* notes 123–25 & 138–39.

<sup>143</sup> STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* 43–76 (10th ed. 2009) (chronicling several first-person accounts of lawyers who have benefitted in their legal practice from contemplative exercises).

<sup>144</sup> The jurisdiction in which my students and I practice family law has such a post-decree mediation requirement. While local mediators are not required to incorporate equipoise practices into their work, many do. In my experience with post-decree mediations, mediators talk with the parties about the fact that they have had to return to mediation once again, and spend some time in mediation working with the parties on developing conflict resolution strategies for the longer term.

family law, its courts, or participants. I examine four potential risks. First, that the move to equipoise brings with it an unhelpful move away from the adversary system, which hurts the least powerful members of a family—like an abused spouse. Second, that the move to equipoise is too intrusive on individuals and their own choices—the problem of individual autonomy. Third, that the move to equipoise asks too much of many individuals—the problem of individual competency. Finally, that the move to equipoise asks too much of family court judges, who are trained in the law but not in therapeutic interventions—the problem of institutional competency.

*A. The Adversary System Protects the Less Powerful Members of a Family*

For those concerned with power dynamics in court processes, the adversary system is held out as an effective way to level imbalances. The weaker party gains strength and protection from having a zealous advocate (the lawyer), and from having all decisions made by a neutral third party (the judge), whose only job is to impartially apply the law.<sup>145</sup> Under the ideal of the adversary system, power imbalances are negated by a set of checks and balances that are available to every litigant equally.<sup>146</sup> According to adversary system proponents, those checks and balances are upset to the extent a court or a legislature moves away from the adversary system—either by engaging judges more fully in court processes<sup>147</sup> or by grafting on court-annexed dispute resolution processes.<sup>148</sup>

There are two flaws in the above argument. First, it presumes that the adversary system in place on the ground in courthouses around the country is, in fact, the ideal adversary system with all litigants represented by equally competent counsel. That assumption is false as can be seen from the statistics cited earlier in this Article about the percentages of *pro se* parties appearing in family cases. Further, any lawyer in practice can confirm that there is no uniform level of skill among lawyers, and parties regularly have lawyers with different skill levels. Once it is no longer factually true that every litigant is equipped with an equally-skilled

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<sup>145</sup> See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS ch. 2 (3d ed. 2004); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (decrying the advent of case management in which judges engage with litigants from pre-trial forward and thereby lose objectivity and neutrality); but see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 53–58 (2000) (describing the “premises of partisanship” of the adversary system and rejecting them); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY ch. 4 (1988) (for a thoroughgoing description of the adversary system by an opponent of the adversary system).

<sup>146</sup> See FREEDMAN & SMITH, *supra* note 145, at 36–38 (noting the appropriateness of the role of “checks and balances” in the adversary system).

<sup>147</sup> See Resnik, *supra* note 145.

<sup>148</sup> See Grillo, *supra* note 2, at 1552 (arguing that mediation can present particular disadvantages for women because the process can exacerbate power imbalances, thus, women might be better served within the adversary system).

advocate, the checking power of lawyer equals falls away. The lesser-equipped litigant is at risk of losing, not on the merits, but because of gamesmanship. Given that the ideal of the adversary system does not exist on the ground, it is not an appropriate comparison for a system that has adopted equipoise.

Next, the pro-adversary system argument suggests that non-adversarial problem solving necessarily means that one side capitulated to the demands of the other. It does not. The practice of equipoise does not ask a person to set aside or capitulate to challenging interpersonal dynamics, but instead to acknowledge them and to take time to reflect on the force exerted by those dynamics in triggering a patterned response. By making salient those interpersonal dynamics, equipoise offers an opportunity for the less powerful person in the relationship to imagine more choices about how to respond.

I am not asserting that equipoise guarantees that the less powerful person will find it easier to act contrary to a pattern hoped for by the more powerful person, only that equipoise does not demand capitulation. In cases of extreme power imbalance, or when one participant insists on deploying the adversary system in an extreme and dysfunctional manner, it remains appropriate for the court, counsel, and court-annexed personnel to intervene more fully on behalf of the less powerful participant.<sup>149</sup>

### *B. The Problem of Individual Autonomy*

Some may object that adopting a goal of equipoise will intrude inappropriately on individual autonomy—that choices about one's emotional well-being are deeply personal and not an arena that family courts should intrude upon. Here, the worry of state intrusion misperceives the nature of equipoise. At its core, equipoise is a simple (but not necessarily easy) practice of good cognition. Its starting goal is to provide a practitioner with the skills to attend accurately to her surroundings, including any emotional component, to attend to her response to the information she perceives without immediately responding, to acknowledge other possible ways of responding, and only then to choose affirmatively her actual response. The individual remains fully in control of her response, be it helpful or unhelpful. Equipoise does not impinge on individual autonomy, but it hopefully makes one's exercise of autonomy more thoughtful and useful.

There also may be a concern about individual autonomy framed more largely—that the state exceeds its authority over the private family sphere by setting any goals whatsoever for a family's emotional development. Whether one agrees or disagrees with such a broad framing of autonomy, as a very practical matter, that framing has not carried the day. State legislatures already have made policy choices that permit the state, through its family courts, to intercede in the

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<sup>149</sup> In those high conflict cases, a practice of equipoise may become less effective as a matter of pragmatic court policy, but becomes substantially more important as a well-being practice for a participant who feels captured in the conflict by a contentious spouse or partner.



family.<sup>150</sup> Those policy choices already demonstrate that the state has adopted a developmental cycle more dynamic than the Love-Hate Model. Given our political and policy reality, the more helpful task now is to refine those policy choices in a way that increases the possibilities for positive emotional outcomes for family members, which in turn benefits the courts.

### C. *The Problem of Individual Competency*

Regardless of concerns about individual autonomy, another possible challenge of equipoise is that for too many people it is too hard to learn or to achieve. Thus, it would be inefficient or futile to have the courts involved in efforts to teach equipoise. As noted earlier, it will take further empirical work to establish whether any particular equipoise practice is sufficiently effective to warrant a court's resources. The best we can do at this *a priori* stage is to consider other arenas in which equipoise practices exist and examine whether we see excessive barriers to participation and learning.<sup>151</sup>

One salient barrier may be that participants would perceive the practices as too weird, or uncomfortable, or culturally off-putting for them. (The person who does not have a regular exercise regime who cannot imagine going to a class where one spends most of the time confined to a 2 x 4 foot rubber mat. Or, the person who understands meditation to be part of a religious practice, and who considers herself to be unreligious. Or, the person of color who browses yoga videos and sees only white instructors.) Another barrier may be participants' perception that equipoise practices will demand time from them that they do not otherwise feel they have. (The single parent who wakes up, gets the kids to school, works all day, picks up the kids, gets them fed, helps them with their homework, and then falls into bed, exhausted.) A final barrier may be that participants understand the practice to ask them to behave perfectly at all times. In other words, to become a saint or a Buddha, a goal that understandably feels out of reach.

Each of the above barriers can be mitigated by thoughtful planning by family courts. Courts can introduce equipoise practices incrementally in familiar and accessible language, with awareness of cultural diversity, and with different entry points. Courts can emphasize that equipoise is a "practice"—meaning that practice presumes good, mediocre and poor performances throughout the course of a

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<sup>150</sup> I note, also, that trumping individual autonomy is not unique to family law. In many substantive legal areas, the law has developed in ways that impinge on individual autonomy. For example, contract law prohibits certain contracts of adhesion. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §4.26 (3d ed. 2004). Local governments make choices about gun ownership, subject to Constitutional limitations. *See, e.g., McDonald v. City of Chicago*, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Tort law imposes liability for certain kinds of reckless behavior. *See* STUART M. SPEISER, CHARLES F. KRAUSE, ALFRED W. GANS, THE AMERICAN LAW OF TORTS §10.12 (2008).

<sup>151</sup> For purposes of this discussion, I am not considering the barrier of cost. Should a court adopt equipoise practices, I am assuming it will do so in a way that minimizes cost in order to accommodate the financial limits of *pro se* parties.

participant's efforts. Thus, perfection is not expected and failures do not get one "kicked out of the program."

For example, a family court might start each case with a status conference at which a judge or a court assistant describes goals for the process including acknowledging the presence of strong emotions and a description of the participants developing the ability to jointly problem-solve without court intervention.<sup>152</sup> The judge or court assistant could also describe what will be included in the mandated parenting class, describing some of the problem-solving role plays and might conclude by providing a list of local resources, including materials related to equipoise. The list could include books or videos available through the public library, local yoga classes, relevant sports programs, stress reduction groups, relevant programs through local churches or community groups, meditation groups and the like. The introduction will be built upon by subsequent activities like parenting classes and mediation during which instructors can work more specifically with participants on issues like time management and finding equipoise practices that are comfortable and accessible given participants' interests and backgrounds. Instructors can also work through the choices participants have when they respond without employing equipoise, so that participants become comfortable with the idea of equipoise as an ongoing effort, not a constant state of emotional repose.

Despite a family court's efforts to introduce equipoise practices in accessible ways, it certainly will be the case that equipoise practices will be unobtainable by some participants. Some participants will refuse to consider proceeding in any way other than with anger and hostility. There will be participants who are distracted by other issues who cannot fully engage in the family matter. Those categories of participants already exist. Equipoise will not eliminate that completely nor need it do so. To be useful to courts, equipoise need only help a sufficient number of participants so that courts can move through their family law dockets with reasonable speed, accuracy and fairness. The fact that equipoise, like any other policy commitment, cannot be a cure-all should not deter family courts from exploring its efficacy.

#### *D. The Problem of Institutional Competency*

Several of the suggestions that I have offered about how a family court could adopt a goal of equipoise require action by family court judges. For example, I suggested that judges expand their discussions in status conferences, or expand their discussions about how partners' relationships are changing from intimate to business, so that the idea of a business relationship includes practices of equipoise.

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<sup>152</sup> In many jurisdictions, most civil cases, including family cases, already start with some sort of status conference. Thus, the only change required of court personnel is to build out the content about equipoise to be included in the conference. *See, e.g.*, COLO. R.CIV. P., R. 16.2(c) (West 2010) (requiring "initial status conference" for all domestic relations cases).

For some judges, the policy move that family law has already made away from the Love-Hate Model may have been discomfoting. One can imagine judicial mutterings in back courtroom hallways, "I'm a judge, not a therapist." The notion is that legal training, from law school through professional practice and onto judicial training reinforces two fundamental competencies related to judges. First, knowledge of substantive legal doctrine, and second, the ability to remain aloof and detached from other participants in front of the court. Judges may worry that requiring them to lead discussions about equipoise pushes them too far from the ideal of aloof and detached judging, and too close to a model of judge as therapist.

It would be worrisome if adopting a goal of equipoise required judges to become therapists. Fortunately, such is not the case. As I have articulated the model of equipoise, a judge's job is to make clear to the parties that the court is aware of the descriptive fact that emotions are very salient in family matters, to note for the parties that it anticipates the family will experience a range of emotions, and that the court wishes to facilitate a helpful way of responding to emotions. The judge needs to understand equipoise sufficiently to be able to articulate its basic premises to the parties. But, the main opportunities for parties to learn equipoise will happen outside the courtroom, such as by participating with experts teaching parenting classes or with mediators skilled in equipoise. Finally, the judge needs to understand equipoise sufficiently to be able to make decisions in a particular case that encourage, not discourage, equipoise practices. While that means a judge is partisan, by state mandate, regarding the policy used to make a decision, the judge remains a neutral arbiter as to the specific application to the parties.

## VI. CONCLUSION

The family law revolution needs to invent and implement its satisfying ending. It is critical that the revolution address the two translation problems it currently faces—full access to the benefits of reduced adversarialness and clear delineation of the goals of acknowledging a full and ongoing cycle of emotions. Crafting a satisfying end to the family law revolution must account for the facts on the ground showing that a high proportion of participants in family cases appear *pro se* and have limited to modest resources. The innovative and unique way forward is for courts to adopt practices of equipoise as a mode of understanding and responding to information and emotions. Equipoise is welcoming to all. It does not discriminate between those with income and those without, or between those with higher education or those without. It requires no particular background and no prior training. It turns the theory of a family law revolution into the actuality of a revolution.