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## Articles

### A CASE AGAINST COLLABORATION

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*In family law, as in other legal disciplines, the use of alternative dispute resolution has dramatically increased. In a process called collaborative divorce, separating spouses hire attorneys who agree to work together—almost entirely outside of the court system—to reach a settlement ending the marriage. A team of experts, including mental health professionals, financial neutrals, and parenting coordinators, helps the parties resolve conflicts and settle property, support, and custody disputes. For divorcing couples, the collaborative process promises emotional healing and avoidance of contentious litigation. Advocates for collaborative divorce describe the transformational effects of the process in an evangelical tone.*

*But collaborative divorce has costs. Collaboration can include considerations of marital fault that feminists helped eliminate from divorce laws. By focusing on conflict resolution, even for the purpose of building post-divorce relationships, collaborative negotiations introduce judgments of “good” and “bad” marital conduct, potentially reinforcing stereotyped gender roles, such as the blameless wife and the guilty husband. These heteronormative paradigms are out of date: gender roles have evolved, the population of married people has changed, and marriage rights have extended to couples of the same sex.*

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*Collaborative processes also have distributive consequences. Collaboration privileges wealthy parties who may understate their bargaining power. At the same time, collaboration may not reach vulnerable spouses who could benefit from therapeutic interventions. Collaborative divorce can be blind to situational power and structural inequality.*

*The purpose of these critiques is not to undermine therapeutic approaches or to argue that law should ignore spousal misconduct. Rather, this Article suggests that advocates for collaborative divorce—including some feminist scholars who have theorized the shortcomings of no-fault divorce laws—might understand better how parties negotiate, and what they may sacrifice, within a collaborative framework.*

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#### INTRODUCTION

Divorce can be expensive and emotionally difficult.<sup>1</sup> Films, books, self-help manuals, and almost anything that describes the dissolution of marriage lament that the traditional approach to divorce is not only a painful process,

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1. For example, the 2014 documentary, *Divorce Corp.*, made headlines with its jarring exposé of the costs of getting divorced and the problems with the nation's divorce process. *DIVORCE CORP.* (Candor Entertainment 2014); see also Robert Pagliarini, *Divorce Corp Documentary: How To Make Divorce Better*, FORBES (May 14, 2014, 12:07 PM), <http://www.forbes.com/sites/robertpagliarini/2014/05/14/divorce-corp-documentary-how-to-make-divorce-better>; Nicholas Rapold, *Splitsville, a Land of Diabolical Lawyers: "Divorce Corp.," a Documentary by Joseph Sorge*, N.Y. TIMES (Jan. 9, 2014), <http://www.nytimes.com/2014/01/10/movies/divorce-corp-a-documentary-by-joseph-sorge.html>.

but also a broken one.<sup>2</sup> Family courts are overstretched, and legal professionals who represent divorcing individuals are overworked, charge expensive fees, and often are accused of insensitivity to their clients' needs.<sup>3</sup> Responsive to some of these problems, alternative dispute resolution ("ADR") mechanisms, such as mediation and arbitration, have proliferated in state family law systems, moving away from court-managed processes and toward client-centered, private dispute resolution.<sup>4</sup>

Although collaborative divorce is part of a trend toward ADR in family law, collaborative divorce is distinct from mediation and arbitration in several ways.<sup>5</sup> Separating spouses in a collaborative divorce hire attorneys who agree to work together, before parties file a divorce petition and without court assistance, to reach a settlement agreement. A team of non-legal professionals—mental health experts (or divorce coaches), accountants acting as financial neutrals, and parenting coordinators—assists the parties in resolving property, support, and custody issues. Because disclosure of financial information is entirely voluntary, the lawyers and other professionals agree to withdraw from representation if either party threatens litigation or negotiates in bad faith.<sup>6</sup> The collaborative process concludes with the filing of a joint divorce petition and settlement agreement.

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2. See generally WENDY PARIS, *SPLITOPIA: DISPATCHES FROM TODAY'S GOOD DIVORCE AND HOW TO PART WELL* 145–65 (2016) (describing the emotional and psychological costs of divorce, as well as how to respond in a proactive manner); SUZANNE RISS & JILL SOCKWELL, *THE OPTIMIST'S GUIDE TO DIVORCE: HOW TO GET THROUGH YOUR BREAKUP AND CREATE A NEW LIFE YOU LOVE* (2016). One of the best-known advice books on divorce is CONSTANCE AHRONS, *THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART* (1994). Handbooks and websites on navigating the conflicts and costs of divorce are too numerous to list here. See, e.g., Susanna Schrobsdorff, *The Rise of the 'Good Divorce'*, TIME (July 3, 2015), <http://time.com/3969264/the-rise-of-the-good-divorce>.

3. See generally Gerald Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57 (2005); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004).

4. For discussion of the trend toward ADR in family law, see generally JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (2015); *RESOLVING FAMILY CONFLICTS* (Jana B. Singer & Jane C. Murphy eds., 2008); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443. For a scholarly critique of ADR in various legal disciplines, see Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

5. See, e.g., KATHERINE E. STONER, *DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION & COLLABORATIVE DIVORCE* (2d ed. 2009).

6. See *infra* Part I.A.1 (describing the collaborative divorce process); see also STUART G. WEBB & RONALD D. OUSKY, *THE COLLABORATIVE WAY TO DIVORCE: THE REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS—WITHOUT GOING TO COURT* 191 app. A, at 197 (2006) (including a sample participation agreement with a provision requiring attorney withdrawal in the event either party "has taken unfair advantage of [the] process").

Buoyed by advocacy and marketing, collaborative divorce is reshaping divorce practices across the country.<sup>7</sup> Yet, academic commentary about collaborative divorce is surprisingly thin. Scholars have questioned whether the withdrawal provisions or the team approach violate professional ethics and, to date, most legal scholarship has focused on the intersection of collaborative divorce with professional responsibilities.<sup>8</sup> Many of these concerns have been resolved by state laws and have been addressed by the model Uniform Collaborative Law Act.<sup>9</sup> Statutes in several jurisdictions explicitly authorize collaborative teams to work with divorcing couples in compliance with professional responsibility rules.<sup>10</sup>

In contrast to that literature, most writings on the substance or outcomes of collaboration support its advancement and extol its transformational promise. For many, collaborative divorce embodies a uniquely client-centered approach.<sup>11</sup> Participants in a collaborative divorce are encouraged to “put law to the side” and find creative solutions, tailored to their problems.<sup>12</sup> Advocates for collaboration argue that clients’ control of settlement negotiations eliminates uncertainty about how courts will apply indeterminate alimony and custody laws.<sup>13</sup> In this way, collaborative divorce is a potential response to the critiques of indeterminism: for instance, some courts have applied broad alimony and custody standards in ways that undervalue domestic contributions or make invisible caretaking work. Collaborative divorce also allows parties to contract around what courts might otherwise order. Private negotiations address some scholars’ concerns about the erasure of fault. Collaborating couples can discuss marital misconduct that would be irrelevant to

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7. See Geoff Williams, *Why a Collaborative Divorce Makes Financial Sense*, U.S. NEWS & WORLD REP. (Aug. 19, 2013, 10:15 AM), <http://money.usnews.com/money/personal-finance/articles/2013/08/19/why-a-collaborative-divorce-makes-financial-sense>. See generally PAULINE H. TESLER & PEGGY THOMPSON, *COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE* 258 app. B (2006) (providing a sample participation agreement, which illustrates differences between collaborative divorce and traditional divorce litigation).

8. See, e.g., *infra* notes 51–57 and accompanying text (summarizing the existing literature on collaboration and professional ethics).

9. Andrew Schepard & David A. Hoffman, *Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape*, 17 DISP. RESOL. MAG. 26, 28–29 (2010).

10. See *infra* note 53 and accompanying text.

11. Collaborative divorce draws from the field of therapeutic jurisprudence because it seeks to introduce concerns about clients’ mental and emotional wellbeing into legal processes. Bruce Winick describes therapeutic jurisprudence as an interdisciplinary approach, incorporating an assessment “of law’s impact on health and mental health.” Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 645, 647–52 (David B. Wexler & Bruce J. Winick eds., 1996).

12. See *infra* Part I.B (describing the client-centered, therapeutic approach of collaborative divorce).

13. See *infra* Part II.B (describing contemporary objections to custody and alimony rules).

establishing a no-fault ground or typically immaterial to spousal support or property rights.<sup>14</sup>

A goal of collaboration is to reduce acrimony between parties by addressing the damage caused by the marital split, focusing on the parties'—and their children's—emotional wellbeing.<sup>15</sup> The process is thus future-oriented; the examination of marital miscommunication or misbehavior is for the purpose of building a foundation for a healthy post-divorce relationship and protecting children from the fallout of separation. Meeting those objectives, however, often requires accounting for the past. Collaboration encourages divorcing couples to express anger and to seek forgiveness for harms caused in marriage, and it promises to provide parties with tools for managing disagreements and reducing conflict.<sup>16</sup> For these purposes, marketing for collaborative divorce targets spouses who will share parenting responsibilities or otherwise have continuing roles in each other's lives. Yet, generally, proponents view collaborative divorce as appropriate for almost anyone, except spouses in abusive relationships.<sup>17</sup>

Supporters use an almost evangelical tone to describe collaborative divorce's benefits for clients and lawyers. Collaboration's orientation toward providing a humane process and reparative outcomes is a significant and important intervention in divorce reform. But this Article suggests that introducing parties' marital misconduct and focusing on their post-divorce relationship may undercut some of the advantages of no-fault divorce. Collaborative approaches to improving communication and promoting forgiveness may entrench stereotypes that were common in the fault era. Collaborative materials tend to rely on patterned narratives about how and why

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14. See *infra* Parts II.A–B (describing the transition to no-fault divorce). In no-fault proceedings, marital misconduct does not establish a ground for divorce as it did under a fault regime; in most states, fault is irrelevant to alimony determinations. For both a history of alimony to compensate the wronged spouse under a fault regime and a contestation of parts of that history, see June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925, 928–36 (2015).

15. For summaries of the therapeutic aspects of collaborative divorce, see generally KATE SCHARFF & LISA HERRICK, *NAVIGATING EMOTIONAL CURRENTS IN COLLABORATIVE DIVORCE: A GUIDE TO ENLIGHTENED TEAM PRACTICE* (2010), Susan J. Gamache, *Family Peacemaking with an Interdisciplinary Team: A Therapist's Perspective*, 53 FAM. CT. REV. 378 (2015), and Marina Tolou-Shams, *Collaborative Divorce: An Oxymoron?*, 31 BROWN U. CHILD & ADOLESCENT BEHAV. LETTER 1, 4–6 (2015).

16. See PA. BAR INST., *EVOLUTION, ENHANCEMENT, AND ENRICHMENT IN FAMILY COURT* 2011, 136, 137 (2011) (demonstrating that participation agreements require that clients pledge to “resolve or minimize the negative emotional and behavioral dynamics that contribute to conflict,” and to make compromises that “meet the fundamental needs” of the other party); WEBB & OUSKY *supra* note 6, at 217 (listing objectives of collaborative divorce, including emotional stability and making amends to the other party). Amy Cohen persuasively argued that modern ADR responded to earlier critiques that family law negotiations minimized and excluded parties' emotions like anger. Amy J. Cohen, *The Family, The Market, and ADR*, 1 J. DISP. RESOL. 91, 118–22 (2011).

17. See *infra* note 105 (summarizing authors who believe relationships marked by domestic violence make couples poor candidates for collaborative divorce).

marriages end, loosely analogous to the stock explanations of marital failure that pervaded the fault regime. Examples in collaborative handbooks, guides, and manuals—which are designed to instruct professionals on how to conduct a collaborative divorce and to entice clients to participate in a collaborative process—portray bad-behaving men and duped women. And, case studies rarely involve couples of the same sex.<sup>18</sup> Collaborative materials tend to rely on stereotypes about feminine and masculine behavior: women are caretakers concerned mostly about children’s well-being during divorce, and men are breadwinners concerned mostly about protecting their assets and future earning potential.<sup>19</sup> Collaboration has the potential to reduce marriage to gendered, heteronormative roles that may sustain rather than subvert gender stereotypes.<sup>20</sup> Even if these stereotypes reflect some realities, collaborative divorce’s malleability and client-centered approach can accommodate all manner of relationships and lifestyles.

These characterizations of spousal roles and priorities may have consequences for settlement agreements. Collaborative negotiations could disfavor women who engage in marital misconduct or who do not conform to the conventional expectations of wives or mothers. It may also understate some women’s bargaining power, who are not financially vulnerable or disadvantaged compared to their spouses. Further, emphasizing post-divorce relationships will also shape parties’ negotiations. The collaborative process might exert pressure on the spouse with less wealth to agree to have a post-divorce relationship in order to receive financial support.<sup>21</sup> It can also induce a spouse to provide spousal support in exchange for forgiveness or friendship when

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18. See *infra* Part III.A. The scarcity of examples that involve couples of the same sex in collaborative materials is not necessarily surprising given the contemporary nature of same-sex marriage rights. That said, several states have extended marriage rights to same-sex couples for over a decade, and, as Part III.A contemplates, the omission of same-sex couples from collaborative materials will become all the more significant after the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

19. See *infra* Part III.B (citing contemporary collaborative divorce training materials).

20. Amy Cohen, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis?*, 13 TEX. J. WOMEN & L. 169, 171, 173 (2003).

21. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991). In Trina Grillo’s iconic article on mediation’s downsides for women, she stated: “If two parties are forced to engage with one another, and one has a more relational sense of self than the other, that party may feel compelled to maintain her connection with the other, even to her own detriment. For this reason, the party with the more relational sense of self will be at a disadvantage in a mediated negotiation.” *Id.* For a feminist critique of out-of-court measures, see generally *id.* at 1601–07, Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 33–34 (1995), and Amy Sinden, “*Why Won’t Mom Cooperate?*”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339, 374–76 (1999).

the application of statutory factors (or a state formula) might result in a limited alimony award, or none at all.<sup>22</sup>

It is difficult to evaluate whether collaboration results in empathy and stability or conflict and disappointment—indeed, the private aspects of collaboration make its “success” challenging to assess. Good faith financial disclosure can invite incomplete information and abuse that are hard to measure. Ex-spouses may end up in court after collaboration over modifications to the settlement agreement and custody arrangements. Commitments to conflict resolution and emotional healing during collaborative negotiations may obscure the likelihood of these future disagreements.<sup>23</sup>

The purpose of this Article is not to discredit collaborative divorce; rather, it is to examine what role collaboration plays in sustaining gendered ideas of spousal behavior in marriage and in settlement negotiations. Part I describes how collaboration works, the agreement parties are required to sign, and the purported benefits for clients and their lawyers. Part II describes the historical backdrop against which collaborative divorce emerged, including the introduction of no-fault laws and reform of alimony and custody rules. Part III shows how collaborative divorce builds on feminist and family law scholarship that calls for consideration of marital misconduct in settlement negotiations and in divorce proceedings. The Article concludes by arguing that collaborative processes can both benefit and disadvantage women; even when wives receive all they want from collaborative negotiations, it is often at the expense of perpetuating stereotypes about women’s negotiation power within families and at divorce.

## I. THE ORIGINS AND OPERATION OF COLLABORATIVE DIVORCE

Collaborative divorce reflects longstanding efforts to reform family law courts through ADR,<sup>24</sup> and ADR mechanisms recognize a “therapeutically

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22. See Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 367 (2009) (critiquing “therapeutic, holistic, and interdisciplinary interventions” as detracting from the court’s “role as a forum for fair and authoritative dispute resolution”).

23. Many collaborative agreements include provisions that pledge to return to a collaborative process if one party desires to modify the agreement or if the parties disagree about enforcement of the settlement’s terms. See, e.g., PA. BAR INST., *supra* note 16. However, if divorced parties refuse to collaborate, it is difficult to know how such a provision would be enforced.

24. In the early 1900s, progressive reformers sought to stabilize families through a juvenile court system. Reformers considered dependency and delinquency courts to be a better alternative to adversarial, civil processes, because these new courts could help “rescue” children from bad families and rehabilitate struggling parents. Social workers, probation officers, and other state actors were part of the courts’ design, and by 1925, almost every state had some type of juvenile court. MURPHY & SINGER, *supra* note 4, at 14. However, concern over the coercive sanctions judges handed down dampened enthusiasm for the approach used by these courts. See generally Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM.

enhanced, ecological human development model as a means of promoting problem solving.”<sup>25</sup> Therapeutic and ecological approaches to legal services promote positive emotional and psychological outcomes. These types of services typically rely on experts, such as caseworkers or psychologists, to assist judges and lawyers.<sup>26</sup> This Part explains how the defining features of collaborative divorce draw from these influences and incorporate therapeutic goals through a team-led participation agreement.<sup>27</sup> It also examines the increasing number of attorneys who proclaim the therapeutic rewards of the collaborative process.

### A. *The Collaborative Process*

Most collaborative materials begin with the well-known premise that divorce litigation and the conflict it entails are costly, time consuming, and, most importantly, destructive for parties and their children.<sup>28</sup> The clear trend in family law disputes is away from adversarial forums and toward mediation, conferencing, and other ADR approaches.<sup>29</sup> Court-facilitated mediation

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L.Q. 3 (1998); see also Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 775 (1997) (noting that the legal realism movement underpins support for therapeutic courts); Penelope Eileen Bryan, “Collaborative Divorce:” *Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL’Y & L. 1001, 1003 n.5 (1999).

25. Marsha B. Freeman, *Love Means Always Having to Say You’re Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN’S L.J. 215, 237 (2008). Like collaboration, mediation attempts to help families manage the emotional aspects of dissolution of a relationship. *Id.*

26. Babb, *supra* note 24, at 779–800; Ross, *supra* note 24, at 3–4.

27. Concurrent histories locate the beginning of collaborative divorce in Minnesota with the work of lawyer Stuart Webb or with psychologist Peggy Thompson in California. Webb writes that he coined the phrase “collaborative law” and reached out to other lawyers to join him in “play[ing] the collaborative game.” Stu Webb, *Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 157 (2008). The basis of collaborative divorce in California began with a team of psychologists, therapists, and attorneys influenced by the 1997 book *Divorce: A Problem to be Solved, Not a Battle to be Fought*. KAREN FAGERSTROM ET AL., *DIVORCE: A PROBLEM TO BE SOLVED, NOT A BATTLE TO BE FOUGHT* (1997); see also Marsha Baucom, *Collaborative Divorce*, 41 ORANGE COUNTY LAW., 18, at \*28 (1999), WL 41-JUL OCLAW 18 (discussing the influence of Fagerstrom’s theory).

28. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 324, 325 (2004); see also CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 33 (2014) (“The children of high-conflict divorce struggled with painful feelings of anger, grief, and distress, and were uncertain and self-conscious about their own intimate relationships.” (citing Robert E. Emery, *The Consequences of Divorce for Children: Post Divorce Family Life for Children*, in *THE POST DIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY* 16 (Ross A. Thompson & Paul R. Amato eds., 1999)).

29. See generally Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 453 (2000).

became popular during the 1980s for settling custody disputes, as did voluntary mediation through a neutral facilitator in the 1990s.<sup>30</sup> Several states now either require or encourage mediators to assist parties in resolving their property, support, and custody issues before court intervention.<sup>31</sup> And, there is evidence that mediation has smoothed divorce processes for couples and reduced custody conflict for parents.<sup>32</sup>

Collaboration, similar to mediation, refashions divorce “as primarily a social and emotional process, rather than a legal event” and neutralizes conflict by tailoring the process to each client and his or her emotional needs.<sup>33</sup> Collaborative divorce is nevertheless distinct from mediation and other forms of ADR in many ways—parties conclude settlement negotiations before filing, for example.<sup>34</sup> And, unlike mediation, collaborative divorce promises an “interdisciplinary team approach that . . . offer[s] divorcing couples a consistent, positive, supportive, contained system for working with mental health and financial professionals on divorce-related issues.”<sup>35</sup>

The next Section identifies the various components of collaborative divorce, and, specifically, the content of the participation agreement.

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30. Freeman, *supra* note 25, at 219; cf. Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004); Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 436 (2002) (noting the coercive aspect of mediation compelled by a court).

31. See John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 424 (2012).

32. Some empirical research has found that settlement rates are higher in mediation and that children have better relationships with non-residential parents over the long term. *E.g.*, Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 26, 30–31 (2005) (finding such results twelve years after mediation). However, that research did not find differences between mediated and non-mediated processes with regard to the psychological health of either party or an improvement in the relationship between ex-spouses. *Id.* at 31–32.

33. Singer, *supra* note 22, at 364. Marsha Baucom, for example, describes traditional divorce as “notoriously adversarial,” managed by family courts that are “incredibly overloaded and understaffed” and are unable to offer “legal, financial and emotional help.” Baucom, *supra* note 27, at \*29–30.

34. Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099, 1116 (2014) (distinguishing mediation and collaborative divorce); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 148–49 (2004).

35. Tesler, *supra* note 28, at 330–31. Tesler argues that collaborative divorce responds to the shortcomings of mediation, including “[t]he lack of built-in advice and [neutral] advocacy during negotiations,” and “[t]he emotional and other imbalances between spouses trying to bargain face-to-face in one of life’s most stressful passages.” Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967, 973 (1999) (emphasis omitted) [hereinafter Tesler, *A New Paradigm*].

### 1. *The Participation Agreement*

To establish a team approach, everyone who participates in collaboration—the clients, lawyers, and neutral professionals—must sign a participation agreement.<sup>36</sup> The non-lawyer professionals on a team can include a licensed mental health professional or “divorce coach” (usually a psychologist or clinical social worker), a child specialist or parenting coordinator (also typically a psychologist), and a neutral financial specialist or accountant.<sup>37</sup> With the advice of attorneys, parties pick the professionals they need, and the specialists work with the lawyers who explain the legal framework to their clients.<sup>38</sup> Because collaboration happens entirely out of court, the team urges parties to reach a settlement agreement fitted to their particular situation and not shaped only or primarily by state divorce laws.<sup>39</sup> Pauline Tesler, a founder and leader of the collaborative divorce movement, explains that her “clients [have] an opportunity to seek consensus based on highest shared values for the restructured family after the divorce rather than on what a judge might or might not decide, and . . . professional services . . . can keep them moving toward their values-driven goals.”<sup>40</sup>

The participation agreement governs how collaborative negotiations will operate. The process consists of a series of meetings: the parties and their lawyers meet, each party meets individually with each expert, and the entire group meets once or twice (or more, as needed). The team shares a self-enforced “commitment to keep the process honest, respectful, [private], and productive for both sides.”<sup>41</sup> A participation agreement requires parties to disclose all material information, actively participate in settlement conferences and team meetings, keep communications and documents confidential, and negotiate in good faith.<sup>42</sup> Collaborative guidelines and rules describe the concept of “good faith” in terms of the conduct clients must avoid, such as

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36. See, e.g., Kelly McClure & Chris Meuse, *Family Law for the Non-Family Specialist: How to Master Conversations on Family Law*, ADVOC. STATE B. LITIG. SEC. REP., Spring 2012, at 3. Out-of-court negotiations can always occur without the assistance of collaborative divorce professionals if a divorcing couple drafts a settlement agreement because they agree about custody, property, or support duties. And many divorcing couples cannot afford to hire lawyers in any case. See *infra* Part III.B (discussing the costs of collaborative divorce).

37. Webb, *supra* note 27, at 165.

38. Baucom, *supra* note 27, at 29.

39. Pauline H. Tesler, *Informed Choice and Emergent Systems at the Growth Edge of Collaborative Practice*, 49 FAM. CT. REV. 239, 241–42 (2011).

40. *Id.*

41. Tesler, *A New Paradigm*, *supra* note 35, at 975.

42. Webb, *supra* note 27, at 160–61; Tesler, *A New Paradigm*, *supra* note 35, at 975 n.22.

threatening litigation, misleading the other party, or failing to disclose pertinent information.<sup>43</sup> Specifically, the parties pledge to provide complete and accurate financial information and agree that information will be reviewed by a financial neutral.<sup>44</sup> Parties have no right to court-designated, expert valuation of the marital assets, and they waive application of court discovery rules.<sup>45</sup>

The withdrawal or disqualification provision is the “universal and necessary element”<sup>46</sup> or “the engine that drives collaborative law.”<sup>47</sup> If the process breaks down, both attorneys, and all neutral professionals, agree to withdraw from the case and refrain from further representation of either party against the other.<sup>48</sup> The financial and emotional costs of starting over with new representation are usually significant.<sup>49</sup> Tesler described the potential cost of starting again as the “factor [that] can keep parties working toward

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43. The New Jersey Family Collaborative Law Act of 2014 is illustrative of this point. N.J. STAT. ANN. § 2A:23D-7(b) (West Supp. 2016). The Act provides seven ways to terminate the collaborative process:

- (1) a party gives notice to other parties in a record, with or without cause; or
- (2) a party files a document without agreement from other parties that initiates a court proceeding related to the dispute; or
- (3) either party obtains or is subject to a restraining order against the other party; or
- (4) an emergency relief action to protect the health, safety, welfare, or interests of a party is commenced; or
- (5) a party discharges a family collaborative lawyer, unless as is allowed under the Act; or
- (6) a party fails to provide relevant information and the other party decides to terminate the process as a result; or
- (7) a collaborative lawyer ceases to further represent a party.

*Id.*

44. See, e.g., PA. BAR INST., *supra* note 16, at 135, 137.

45. Tesler, *A New Paradigm*, *supra* note 35, at 976. For example, the Pennsylvania Bar model participation agreement notifies the client that he or she waives the right “to formally object to producing any documents or providing any [material] information.” PA. BAR INST., *supra* note 16, at 126.

46. Webb, *supra* note 27, at 168.

47. Spain, *supra* note 34, at 143.

48. The Uniform Collaborative Law Act makes a disqualification clause mandatory in order to apply the protections of the Act. UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT § 9 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010), *reprinted in* 48 FAM. L.Q. 55, 163 (2014). The Act provides that “[a] collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.” *Id.* There are two exceptions to this mandate. A collaborative lawyer may represent a party “(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or (2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party . . . if a successor lawyer is not immediately available to represent that person.” *Id.*

49. Tesler, *A New Paradigm*, *supra* note 35, at 976. Per some agreements, withdrawing counsel is permitted to assist in the transition to another, non-collaborative lawyer. *Id.*

resolution of their differences; without it, they might find themselves in an avoidable trial.”<sup>50</sup>

The team structure, self-regulation, and threat of attorney withdrawal have led some commentators to question how collaborative lawyers can fulfill their professional responsibilities. A participation agreement requires attorneys to balance their commitment to work as a team with their professional duty to remain advocates for their clients.<sup>51</sup> This provision did not necessarily satisfy ethical concerns over the withdrawal provision. Over the last decade, however, bar associations and professional organizations have issued guidance explaining how mandatory withdrawal provisions comport with ethical and professional rules.<sup>52</sup> For example, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued a formal opinion in 2007, stating that the disqualification provision is “not an agreement that impairs [the lawyer’s] ability to represent the client, but rather is consistent with the client’s limited goals for the representation” if the client has given informed consent.<sup>53</sup> In addition to withdrawal provisions, several commentators have debated ethical issues for collaborative lawyers on the

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50. *Id.* With some participation agreements, “the parties can agree to submit designated, narrowly limited issues for third-party decision by an arbitrator or privately retained judge, as long as both parties and both attorneys agree that doing so does not compromise the integrity of the collaborative process.” *Id.* at 978 (footnotes omitted).

51. Tesler notes that the ABA Model Rules of Professional Conduct “instruct[s] that a lawyer may refer not only to the law, but also to other considerations such as moral, economic, and social factors that may be relevant to the clients’ situation.” Pauline H. Tesler, *Interdisciplinary Team Collaborative Practice: Transforming the Way Lawyers Understand and Deliver Conflict Resolution Services*, in UNDERSTANDING COLLABORATIVE FAMILY LAW: LEADING LAWYERS ON NAVIGATING THE COLLABORATIVE PROCESS, WORKING WITH CLIENTS, AND ANALYZING THE LATEST TRENDS 277, 294–95 (2011) [hereinafter UNDERSTANDING COLLABORATIVE FAMILY LAW].

52. Frederick J. Glassman, *Is Collaborative Family Law a Win-Win or a Lose-Lose? Reflections on the Screening of Clients and Timing for Lawyer Withdrawal or Termination*, in UNDERSTANDING COLLABORATIVE FAMILY LAW, *supra* note 51, at 205, 231–39.

53. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-447 (2007). The ABA Model Rules of Professional Conduct outline when lawyers can withdraw from a case. MODEL RULES OF PROF’L CONDUCT r. 1.16 (AM. BAR ASS’N 2016); Spain, *supra* note 34, at 162. Rule 1.16, which outlines mandatory and permissive counsel withdrawal, “appears to provide a basis for a collaborative lawyer to withdraw from further representation if an agreement is not reached.” Spain, *supra* note 34, at 162. The withdrawing attorney, under ethical rules, must “take steps to the extent reasonably practicable to protect a client’s interests.” UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010), *reprinted in* 48 FAM. L.Q. 55, 106 (2014) (quoting MODEL RULES OF PROF’L CONDUCT, r. 1.16(b)(1)). But, under collaborative law agreements, the attorney is barred from “divulging information or assisting the client in any subsequent litigation.” Spain, *supra* note 34, at 164–65. The ABA Standing Committee on Ethics and Professional Responsibility found the only negative state bar opinion unpersuasive, which was from Colorado (although the Litigation Section of the ABA has also voiced a negative opinion). UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT, 48 FAM. L.Q. at 79–80.

scope of representation,<sup>54</sup> limitations on zealous advocacy,<sup>55</sup> confidentiality,<sup>56</sup> and conflicts of interest.<sup>57</sup>

These important issues have been thoroughly explored in other writings, and states largely address these questions through legislation, as described in the next Section. Of interest to this Article, however, is the growing support for collaborative divorce among family law practitioners as well as its focus on conflict resolution and the parties' emotional well-being. It is difficult to measure the success of collaboration in meeting both goals; parties typically file a petition in court only at the completion of private negotiations and after an agreement is signed, leaving no trail of court orders or motions. Collaborative divorce's adherents nevertheless appear convinced of its benefits and success. The next Section describes the enthusiasm for collaborative divorce among its supporters.

## 2. *The Collaborative Movement*

Practitioner materials describing collaborative divorce suggest that it is not just an alternative to litigation, but a thriving "grassroots movement" and "a worldwide phenomenon."<sup>58</sup> Collaborative lawyers and their organizations

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54. Spain, *supra* note 34, at 160; *see also* J. Herbie DiFonzo, *From Dispute Resolution to Peacemaking: A Review of Collaborative Divorce Handbook—Helping Families Without Going to Court* by Forrest S. Mosten, 44 FAM. L.Q. 95, 102–03 (2010) (book review).

55. Under the ABA Model Code of Professional Conduct attorneys are required to "[r]epresent a client zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY Canon EC 7-1 7 (AM. BAR ASS'N 1983); *see also* Spain, *supra* note 34, at 165.

56. According to Larry Spain, "There is some uncertainty as to whether documents disclosed and statements made by participants in a collaborative law process would be protected by the confidentiality provisions that may apply to other ADR procedures." Spain, *supra* note 34, at 169. Another scholar has argued:

Clients may waive the right of confidentiality, and in a [collaborative divorce] proceeding each spouse must do just that. In the retention agreement, the spouse gives up "the right to formally object to producing any documents or to providing any information to the other side that [the spouse's lawyer] determine[s] is appropriate." The spouse authorizes the lawyer "to fully disclose all information which in [the lawyer's] discretion must be provided to [the other] spouse and his or her lawyer."

Gary M. Young, *Malpractice Risks of Collaborative Divorce*, WIS. LAWYER, May 2002 (footnotes omitted) (first citing WIS. SUP. CT. R. 20:1.6(a); WIS. STAT. § 905.11 (2002); then quoting PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 138 (2001); and then quoting *id.*), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=5&ArticleID=228#z>.

57. The ABA Model Rules of Professional Conduct Rule 1.2(a) allocates decisionmaking responsibility to the client, stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." Spain, *supra* note 34, at 171 (quoting MODEL RULES OF PROF'L CONDUCT, r. 1.2(a)).

58. Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 184–85 (2014); *see also* Tesler, *supra* note 51, at 290 ("Collaborative lawyers are now found in twenty nations.").

generate training manuals, books, brochures, and websites that proclaim the virtues of the process<sup>59</sup> and “commit significant resources to restructuring their [legal] practices in the collaborative vein.”<sup>60</sup> Collaborative lawyers often join practice groups that work exclusively with other collaborative professionals across local, state, and national networks.<sup>61</sup> These attorneys share an identity rooted in the tenets of collaboration—to “become part of the solution, not part of the problem.”<sup>62</sup>

In 2001, Texas became the first state to pass legislation authorizing collaboration in family law matters and clarifying the procedural grounds for collaborative divorce.<sup>63</sup> The Texas statute, which was repealed and replaced in 2011, begins: “It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship . . . .”<sup>64</sup> The movement has gained traction on the national level since then. Drafted in 2010, the Uniform Collaborative Law Act (“UCLA”) provides a model for statutory recognition of collaborative law and encourages uniformity in collaborative processes.<sup>65</sup> As of 2016, fifteen states and the District of Columbia have passed laws that permit and encourage couples to pursue collaborative divorce, and many of those statutes’ provisions overlap with the language of the UCLA.<sup>66</sup> Several states are

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59. Webb, *supra* note 27, at 160; *see also* Bryan, *supra* note 24, at 1011 n.52 (noting the similarities in marketing rhetoric for mediation and collaborative divorce).

60. Aviel, *supra* note 34, at 1119; Pauline H. Tesler, *The Believing Game, the Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOL. PUB. POL’Y & L. 1018, 1019 n.4 (1999) (discussing the “considerable energy, creativity and resources” that went into a legislative proposal for restructuring California’s family law courts and procedures).

61. *See* Webb, *supra* note 27, at 166 (discussing monthly gatherings with local collaborative divorce attorneys). Webb also believes the benefits of collaborative divorce include networking and making professional friends. *Id.*

62. Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISP. RESOL. 83, 88.

63. *See* TEX. FAM. CODE ANN. § 15.001–.116 (West 2014); TEX. FAM. CODE ANN. § 6.603 (West 2006) (authorizing use of collaborative law processes in the dissolution of marriages) (repealed 2011); TEX. FAM. CODE ANN. § 153.0072 (West Supp. 2005) (authorizing use of collaborative law processes in suits affecting the parent-child relationship) (repealed 2011); Spain, *supra* note 34, at 151.

64. TEX. FAM. CODE ANN. § 15.001.

65. *See* UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010), *reprinted in* 48 FAM. L.Q. 55, 110 (2014).

66. Nat’l Conference of Comm’rs on Unif. State Laws, *Legislative Fact Sheet—Collaborative Law Act*, UNIFORM L. COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Collaborative%20Law%20Act> (last visited Jan. 4, 2017). For example, West Virginia’s statute draws heavily from the UCLA. *See* W. VA. CODE ANN. § 48-5A-101 (LexisNexis 2015).

considering similar legislation, and supporters argue that collaborative divorce is transportable and adaptable across jurisdictions regardless of differences among states' substantive and procedural family laws.<sup>67</sup>

An international umbrella organization—the International Academy of Collaborative Practitioners (“IACP”)—promotes collaborative divorce globally.<sup>68</sup> The IACP publishes training standards for collaborative lawyers, recommending a minimum of twelve hours of basic collaborative training and at least thirty hours of training in “client-centered, facilitative conflict resolution.”<sup>69</sup> Notably, “by 2010, IACP had approximately 5,000 members from twenty nations . . . offering services to clients in nearly every US state and Canadian province, as well as major cities across the UK, Ireland, and Australia.”<sup>70</sup>

While collaborative divorce is gaining momentum, evidence of its effectiveness is mixed. On the one hand, supporters describe collaborative divorce as an unqualified success story. Tesler states that clients are rarely disappointed with the collaborative model.<sup>71</sup> Participating professionals emphasize that collaborative divorce is less expensive, time consuming, and stressful than litigation.<sup>72</sup> Collaborative practitioners likewise testify to the speed of the process, contending that “whereas traditional divorces can take an average of eighteen months to complete, a typical collaborative divorce can take a mere eighteen *weeks* or less to settle.”<sup>73</sup> Supporters further assert that collaborative settlements are fairer than court-managed settlements because “all of the parties’ resources are being devoted to a fair and equitable outcome for both sides, and no money or time is wasted on preparing for a trial no one wants to take part in.”<sup>74</sup> Unlike a process managed by a court, collaborative attorneys highlight the benefits of confidentiality for their clients, who can negotiate and settle their affairs with privacy.<sup>75</sup>

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67. Tesler, *supra* note 28, at 317.

68. *Id.* at 332.

69. Richard W. Shields, *On Becoming a Collaborative Professional: From Paradigm Shifting to Transformative Learning Through Critical Reflection and Dialogue*, 2008 J. DISP. RESOL. 427, 433–34.

70. Tesler, *supra* note 51, at 281.

71. See Tesler, *supra* note 60, at 1021 (“If there are growing ranks of unhappy, poorly served clients who have entered into disadvantageous agreements because of pressures arising from the collaborative law model, I would expect to have heard about them. I have not.”).

72. Tesler, *supra* note 62, at 111 n.52.

73. Salava, *supra* note 58, at 187.

74. Nancy K. Brodzki, *Reaching a Successful Outcome Through Collaborative Family Law*, in UNDERSTANDING COLLABORATIVE FAMILY LAW, *supra* note 51, at 195, 201.

75. Tesler, *A New Paradigm*, *supra* note 35, at 970–72, 970 n.13; see also Tesler, *supra* note 28, at 327–28 (“In most U.S. jurisdictions, litigated court proceedings and files (including those of cases that ultimately settle) are open to the public and all vestiges of privacy are lost, at the same time that matters formerly decided privately by the couple are handed placed [sic] under the control of disinterested and busy professionals.”). But see Owen M. Fiss, *Against Settlement*, 93 YALE L.J.

On the other hand, it is not clear that litigation is a useful comparator. First, as noted, most divorcing couples do not engage in litigation and rely on other court-based and non-court mediation tools.<sup>76</sup> Very few divorces are litigated because few parties can afford the costs of attorneys or have enough assets that would make such costs worthwhile.<sup>77</sup> Moreover, evidence of the cost-effectiveness of collaborative divorce is unavailable or difficult to find.<sup>78</sup> It seems clear, however, that collaborative divorce can be expensive.<sup>79</sup> Because there are no motions filed and the process is, by design, client-tailored, it is also difficult to measure how long the typical collaborative negotiation takes. The speed of a collaborative divorce depends on the parties' behavior and schedules. Usually absent from the collaborative timeline, for example, is the time and cost of any modification, interpretation, or post-divorce negotiation of a settlement agreement. Although research is scarce on the topic, small-sample studies suggest that some parties resort to courts to modify their custody and financial arrangements, potentially thwarting the goals of finality, cost-savings, and speed, or abandon the collaborative process to begin

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1073, 1088–89 (1984) (“Many of the factors that lead a society to bring social relationships that otherwise seem wholly private (e.g., marriage) within the jurisdiction of a court, such as imbalances of power or the interests of third parties, are also likely to make settlement problematic. Settlement is a poor substitute for judgement; it is an even poorer substitute for the withdrawal of jurisdiction.”).

76. For example, Tesler concedes that over ninety percent of divorces conclude with a settlement rather than with litigation. Tesler, *supra* note 62, at 94.

77. See *infra* Part III.B (noting that most couples in a divorce do not have sufficient assets to retain two lawyers (or even one lawyer) and that marriage is stratified by income and educational level). Jane Murphy and Jana Singer highlighted the cost of collaborative divorce as particularly burdensome for low-income families and called for experimentation with community-based services, different types of dispute resolution processes, like “evaluative mediation,” and training in collaboration for lawyers that serve these clients. MURPHY & SINGER, *supra* note 4, at 130–32, 137–39. Murphy and Singer describe a clinic at the University of Denver Law School, which provides intensive mediation, counseling and integrated clinic services at affordable rates. *Id.* at 132.

78. FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK: HELPING FAMILIES WITHOUT GOING TO COURT 64 (2009) (“[T]here appear to be no data showing [collaborative divorce] is less expensive than traditional lawyer-negotiated settlements . . . and no data comparing the cost of collaborative divorce to mediation, even with consulting attorneys”); see also McClure & Meuse, *supra* note 36, at 4 (noting that the advantages of collaborative divorce are paying for privacy (not airing out the details of divorce in court), timing the divorce to the parties' schedules, keeping the process “civilized and dignified,” and reducing costs as compared to adversarial litigation).

79. Baucom, *supra* note 27, at \*33 (citing the costs of up to \$425 per hour). A 2012 source estimates that “two attorneys at \$300-\$500 per hour each, along with a psychotherapist and financial advisor at \$150 per hour each, would cost \$900-\$1300 per hour.” Luke Salava, Collaborative Divorce—Unknown, Unwanted, or Unneeded? The Underwhelming Advance of a Promising Solution in Marriage Dissolution 12 n.64 (Jan. 2, 2012) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2367999](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2367999); see also Williams, *supra* note 7 (“People think they’ll save money going through the divorce in a collaborative process, and it’s a big sell for them. But I’ve had clients come here after a collaborat[iv]e process has failed. They say that they tried working it out, and now they’re starting over, and so they’re spending more money.” (quoting Carolyn Mirabile, a partner at the family law practice Weber Gallagher)).

again.<sup>80</sup> To the last point, there is unreliable and insufficient information about how often collaboration fails.<sup>81</sup>

In sum, and contrary to the claims in collaborative literature, some clients do not view the costs of collaborative divorce as reasonable and were dissatisfied with the process.<sup>82</sup> When faced with criticisms of steep price or prolonged process, supporters of collaborative divorce respond that the appeal of collaboration is not just speed and cost savings.<sup>83</sup> The reward of collaborative divorce is its transformative potential for clients and attorneys. Extolling the benefits for lawyers, Marsha Baucom asked and answered, “Why do it? To save yourself!”<sup>84</sup> Stuart Webb similarly proclaimed, “I can testify to the fact that it has also transformed the quality of my life!”<sup>85</sup> This transformation is, in part, the result of collaboration’s therapeutic component: lawyers shed their disillusion with divorce litigation and “embrace an identity as a member of a ‘helping profession’” that assists parties in navigating the emotional trauma of divorce.<sup>86</sup> The next Section explores the role of conflict resolution in the collaborative process and examines the communication and psychoanalytic skills that collaborative lawyers—and their clients—are expected to learn.

### *B. Therapeutic Benefits for Participants*

Two uncontroversial premises are the foundation of collaborative divorce: first, divorce is a trying and entangling event, and second, the traditional legal system does not attend to parties’ emotional or mental well-being. Tesler begins her foundational text on collaborative divorce by describing dissolution as an “emotional trauma second only to the death of a spouse, and to involve a grief and recovery process that parallels the stages of recovery from death of a loved one.”<sup>87</sup> The problem is that litigation does not (and

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80. See, e.g., Gregg Herman, *Family Law: Why Are There Fewer Collaborative Divorce Filings?*, WIS. L.J. (June 8, 2011, 12:45 PM), <http://wislawjournal.com/2011/06/08/why-are-there-fewer-collaborative-divorce-filings/>.

81. *Id.* For example, two studies of collaborative divorce in a Wisconsin county revealed that collaboration failed to produce an agreement in eleven percent of cases in 2008 and almost eighteen percent in 2014. *Id.*

82. Salava, *supra* note 79, at 18–19, 18 nn.96–97 (describing studies on the cost of and client satisfaction with the collaborative process).

83. Tesler, *supra* note 60, at 1018. Tesler argues that, “Collaborative lawyers increasingly describe qualitative differences in process and outcome between the settlements they have facilitated via collaboration and those they have facilitated via mediation or friendly negotiations.” Tesler, *supra* note 62, at 101.

84. Baucom, *supra* note 27, at \*32.

85. Webb, *supra* note 27, at 169.

86. Tesler, *supra* note 28, at 318.

87. *Id.* at 321. Clare Huntington similarly writes: “Divorce . . . is generally understood to be one of the greatest emotional upheavals in a lifetime.” HUNTINGTON, *supra* note 28, at 84.

perhaps cannot) incorporate the “relational and long term interests” of divorcing parties.<sup>88</sup> The family court system, according to Tesler, “wreak[s] unintended anti-therapeutic consequences of considerable magnitude on the families passing through it, with damaging societal effects that are only beginning to be understood and measured.”<sup>89</sup> Collaborative divorce, however, includes and values couples’ experience of grief, anxiety, and anger. Martha Ertman argues, for example, that collaborative divorce “honors the role of emotions in disputes by including mental health professionals as necessary to help divorcing spouses work through any fear, anger, or other fiery emotions that get in the way of resolving the financial and legal disputes.”<sup>90</sup>

One goal of collaborative divorce is to create “an atmosphere of honesty, cooperation, integrity, and professionalism geared toward the future well-being of the family.”<sup>91</sup> But, collaborative divorce promises more than just civility and professionalism; it also addresses disagreements that gave rise to the marital split as well as conflicts that might persist after the divorce.<sup>92</sup> Writings on collaboration proclaim the process’s transformative potential—from “restructuring of highly significant intimate personal relationships” to incorporating “ethical or religious beliefs about fairness, appropriate dispute-resolution procedures, forgiveness, and personal accountability” and “preserv[ing] the most positive post-divorce” relationship.<sup>93</sup> Collaboration looks both to the past and to the future, resolving conflicts in order to build a better relationship for the benefit of the parties and their children.

To meet these goals, the collaborating parties are expected to develop communication and coping skills. In the participation agreement, clients pledge to “resolve or minimize the negative emotional and behavioral dynamics that contribute to conflict.”<sup>94</sup> Checklists for clients in collaborative manuals include steps to resolve issues “with dignity” and privacy, “to become more stable emotionally,” and “to atone for the harm . . . caused.”<sup>95</sup> Parties agree to make compromises and “meet the fundamental needs” of the

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88. Tesler, *supra* note 28, at 327–28.

89. Tesler, *A New Paradigm*, *supra* note 35, at 995.

90. MARTHA M. ERTMAN, LOVE’S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 169 (2015). Solangel Maldonado argues that no-fault divorce, though intended to reduce acrimony between divorcing spouses by eliminating grounds that prompted blame and punishment does not end conflict because it deprives the “betrayed or abused spouse” the forum to express “anger, indignation, and desire for revenge.” Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 460, 465 (2008).

91. MOSTEN, *supra* note 78, at 26.

92. TESLER & THOMPSON, *supra* note 7, at 5.

93. Tesler, *A New Paradigm*, *supra* note 35, at 972.

94. PA. BAR INST., *supra* note 16, at 136.

95. WEBB & OUSKY, *supra* note 6, at 217.

other person.<sup>96</sup> Mental health professionals or divorce coaches assist parties in making these compromises and understanding each other's needs. According to one training manual, divorce coaches listen to clients and validate their feelings, attempt to de-escalate conflict, and help a party discuss contentious issues, like infidelity.<sup>97</sup> For instance, a case study in a collaborative handbook directs divorce coaches to address the hurt caused by a husband's affair and to help the unfaithful spouse apologize.<sup>98</sup>

Building a post-divorce relationship may be particularly attractive to parents. Collaborative divorce is marketed to couples with children who will stay in contact even though their intimate relationship has ended.<sup>99</sup> Indeed, a consistent selling point for collaborative divorce is its attention to the emotional well-being of children.<sup>100</sup> Tesler argues that collaborative divorce allows parents to work with a team "using a process that provides a safe vehicle for the voice of the child and a structure that insists on attention to their needs."<sup>101</sup> Thus, even if parties have deep conflict, collaboration seeks to resolve the parents' differences so that their children do not experience turmoil or instability after divorce.

However, all collaborative materials recognize that some people will be poor candidates for the process. Individuals described as ill-suited for collaborative divorce include those "intent on exacting revenge," "incapable of honesty," or with "severe personality disorders and untreated mental health or substance abuse issues."<sup>102</sup> Almost all materials on collaborative divorce conclude that parties with a history of abuse should not choose collaboration.<sup>103</sup> The UCLA, for instance, directs lawyers to vet collaborative cases for signs of domestic or intimate partner violence.<sup>104</sup> The justifiable concern

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96. PA. BAR INST., *supra* note 16, at 137.

97. SCHARFF & HERRICK, *supra* note 15, at 4, 25, 39, 74, 142, 148.

98. *Id.*

99. Brodzki, *supra* note 74, at 196. Brodzki notes that, in contrast, "[c]ouples without any children have few ties once their relationship has ended, and therefore lack the incentive that couples with children have to maintain a level of cooperation and civility after the relationship has ended either in divorce or permanent separation in the case of unmarried couples." *Id.*

100. *Id.*

101. Tesler, *supra* note 62, at 110 n.51.

102. Brodzki, *supra* note 74, at 196. Rachel Virk writes of picking clients: "When a party has borderline personality disorder, is narcissistic, is an active alcoholic or a 'dry drunk,' or is abusive or being abused, rationality does not usually carry the day." Rachel L. Virk, *When Is Collaboration the Most Appropriate Method of Dispute Resolution in Divorce, and Why is it Beneficial to Collaborate?*, in UNDERSTANDING COLLABORATIVE FAMILY LAW, *supra* note 51, at 79, 81.

103. *But see* Brodzki, *Reaching a Successful Outcome Through Collaborative Family Law*, in UNDERSTANDING COLLABORATIVE FAMILY LAW, *supra* note 51, at 197 ("Individuals with severe personality disorders . . . present challenges to successful collaboration, but these challenges are not always insurmountable if the appropriate resources are available to address those issues.").

104. UNIFORM COLLABORATIVE LAW RULES & UNIFORM COLLABORATIVE LAW ACT § 15 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010), *reprinted in* 48 FAM. L.Q. 55,

is that an abusive party will manipulate or dominate the abused party in negotiations.<sup>105</sup>

Interestingly absent from discussions of suitability for collaboration are people at a financial disadvantage to their spouses. For parties with wealth disparities, collaborative attorneys argue that the financial neutral resolves any economic imbalance because “all of the financial information coming from the economically advantaged spouse will not only be presented, but will also be evaluated by the neutral expert for the benefit of the economically disadvantaged spouse.”<sup>106</sup> In other words, the contractual and ethical obligations of full, honest disclosure under the participation agreement should balance the scales.

The responsibility to vet clients highlights the special role that collaborative lawyers assume. Of note, collaborative lawyers receive training on meeting the needs of clients. In his “how-to” manual, Stuart Webb provides a list of skills that a good collaborative lawyer should possess, including “[g]uarding against adversarial instincts. . . . total unconditional respect to all the participants[,] [d]ispelling negativism[,] [l]etting go of personal attachment to the outcome[,]” and “[u]sing a natural sense of honesty and integrity to the process.”<sup>107</sup> Beyond working as a team, collaboration requires a particular approach to client communication.<sup>108</sup> Lawyers are expected to employ interpersonal skills and emotional intelligence.<sup>109</sup>

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167 (2014). Recently, however, some mediation materials have suggested that ADR processes should be available to couples with abusive histories, with procedural safeguards, precisely because of the couples’ level of conflict.

105. Aviel, *supra* note 34, at 1127, 1140 (arguing that domestic violence makes a person a poor fit for either collaborative divorce or joint representation). Ertman similarly argues that spouses subjected to abuse or who feel disempowered during the marriage are bad candidates for collaborative divorce. ERTMAN, *supra* note 90, at 171; *see supra* Part III.A (noting the critique of mediation for similar reasons).

106. Glassman, *supra* note 52, at 205, 226.

107. Webb, *supra* note 27, at 158–59.

108. Tesler, *supra* note 51, at 282–83. Tesler writes that: “Learning how to provide this new kind of professional legal conflict resolution service can’t be accomplished by reading a book, or even by attending trainings and workshops. . . . ‘On the job’ experience of a particular kind is what teaches lawyers how to facilitate deeper and more durable conflict resolution.” Tesler, *supra* note 39, at 242.

109. Tesler, *supra* note 51, at 282–83. Jane Murphy and Jana Singer describe shifting roles for lawyers as “healer[s]” and practitioners of “creative problem solving.” MURPHY & SINGER, *supra* note 4, at 92–94. Murphy and Singer note how judges play a therapeutic role by supporting collaborative programs and serving potentially as “‘coach,’ ‘social workers,’ ‘cheerleader,’ or ‘therapist.’” *Id.* at 97 (footnotes omitted) (first quoting Victor E. Flango, *Problem-Solving Courts under a Different Lens*, in *FUTURE TRENDS IN STATE COURTS* 42 (2007), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spets/id/177>; then quoting Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), [http://www.nytimes.com/2005/04/26/nyregion/in-problemsolving-court-judges-turn-therapist.html?\\_r=0](http://www.nytimes.com/2005/04/26/nyregion/in-problemsolving-court-judges-turn-therapist.html?_r=0)).

Tesler additionally believes that collaborative professionals (lawyers as well as other specialists) should become experts in certain aspects of psychology.<sup>110</sup> She explains:

[L]awyers must learn psychological theory (including child development, family dynamics, the dynamics of grief and bereavement, defense mechanisms, transference and countertransference, some exposure to differential diagnosis criteria for mental illness and character disorders) as well as some new psychological and communications skills (nondirective interviewing and counseling skills, active listening, reframing, conflict management) and thorough mastery of negotiating theory and technique.<sup>111</sup>

In this vein, training manuals suggest lawyers should assess clients' mood, state of mental health, and "capacity for rational thought."<sup>112</sup>

The list of traits that collaborative lawyers ideally develop and exhibit is long and, at least in part, aspirational.<sup>113</sup> These skills presumably convert a family law practice into a life-changing experience.<sup>114</sup> Lawyers are encouraged to push themselves to engage in self-reflection and self-growth,<sup>115</sup> and become professionals that are "self-aware [and] self-reflective . . . [who] can do a better job of client-centered conflict resolution."<sup>116</sup>

While aspiring to possess all of these abilities, lawyers at the same time should make clear that they are not their clients' therapists. Instead, collaborative professionals should emphasize the role of parties' emotions as a pragmatic means to overcome conflict for constructive, future-oriented ends.<sup>117</sup> Whatever characteristics collaboration may share with therapeutic processes, conflict resolution strategies for divorcing parties can encourage the expression of remorse, guilt or anger—emotions that might have been previously channeled through fault grounds but now seem irrelevant for a no-

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110. Tesler, *A New Paradigm*, *supra* note 35, at 988.

111. *Id.*

112. SCHARFF & HERRICK, *supra* note 15, at 85.

113. Bryan, *supra* note 24, at 1012 n.57 (arguing that it would be difficult for most lawyers to act with all the skills collaborative materials suggest legal professionals should have).

114. Tesler, *A New Paradigm*, *supra* note 35, at 969–70 ("The professionals in our culture who have been delegated the *de facto* responsibility for helping people dismantle and restructure their most sensitive, private, and emotionally charged human relationships are lawyers trained in a legal system devised to prosecute criminals and resolve disputes about money and property.").

115. TESLER & THOMPSON, *supra* note 7, at 127.

116. Tesler, *supra* note 39, at 241. Webb argues that lawyers who have experience with mediation will have a smoother transition to collaborative law than those who have no training in mediation, because mediation is also client-centered and rooted in clients' interests and goals. Webb, *supra* note 27, at 158.

117. See Baucom, *supra* note 27, at 31. Marsha Baucom, for example, describes suitable clients as those who "want to protect their emotional and financial resources, get closure on the marriage and move on with their life." *Id.*

fault divorce.<sup>118</sup> The next Part describes the transition from fault to no-fault divorce, as well as the changes to alimony and custody rules that happened concurrently with the enactment of no-fault statutes. Gender-neutral language and indeterminate standards helped dismantle the overtly sexist legacies of the fault regime. But many of these reforms, according to some feminists and family law scholars, also hurt wives and mothers. An out-of-court process like collaborative divorce circumvents some of these effects while at the same time appeals to those who see advantages in considering during-marriage behavior in negotiating settlements.

## II. COLLABORATION AS A FEMINIST PROJECT

Collaborative divorce is neither a revolution nor a fringe movement; it reflects the family law reforms that have developed over the last forty years.<sup>119</sup> This Part provides a short background on the shift from fault to no-fault divorce and the corresponding changes in state alimony and custody rules.<sup>120</sup> The transition to no-fault divorce mirrored a broader shift in marriage from a status defined by sex to an egalitarian partnership.<sup>121</sup> The purpose in providing a snapshot of this well-known history is to highlight the persistence of gender stereotypes in assessing the relevance of spouses' misconduct. This Part then summarizes feminist critiques of the contemporary no-fault system—specifically, the gender neutrality and the indeterminacy of alimony and custody laws—to highlight the argument that modern divorce

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118. See GREGG HERMAN, SETTLEMENT NEGOTIATION TECHNIQUES IN FAMILY LAW: A GUIDE TO IMPROVED TACTICS AND RESOLUTION 31 (2013). A guide on settlement negotiations for lawyers repeats the problems of omitting or erasing emotions in no-fault divorce: "Sometimes clients just want to be heard. Even though most states are 'no fault,' many clients are not emotionally there." *Id.*

119. Countless books and articles have addressed the transition from a fault-based divorce system to a no-fault regime, and the changing status of marriage. See generally JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 167 (2011).

120. This Article only briefly summarizes the transition to no-fault divorce and does not attempt to summarize the voluminous commentary on the subject. For histories of no-fault divorce, see the pioneering scholarship of Herma Hill Kay. See, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2061 (2000) [hereinafter Hill Kay, *Second Sex*]; Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27 (2002); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

121. For leading scholarship on the evolving nature of marriage, see generally STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE (2005), STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992), and NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2002).

reform backfired against wives. The perceived shortcomings of no-fault divorce strengthen arguments for privately managed processes that allow parties to contract around the harsher application of divorce laws by courts.<sup>122</sup>

A. *From Fault to No-Fault and Egalitarian Marriage*

Under the fault regime, “mutual misery,” as termed by Lawrence Friedman, was not a sufficient ground for divorce.<sup>123</sup> Spouses could divorce only if they suffered marital wrongs that made cohabitation and consortium impossibly difficult.<sup>124</sup> Typical grounds included adultery, cruelty, desertion or abandonment, impotence and insanity.<sup>125</sup> But, courts routinely bent fault grounds to grant divorces to unhappy couples.<sup>126</sup> The gap between what law required as a cause of action and what courts actually permitted became wider with the rampant collusion of parties who manufactured grounds for divorce.<sup>127</sup>

The consequences of dissolution and collusion fell on women and men in notoriously gendered ways. First, as Friedman documents, “[w]ives, not husbands, brought actions of divorce, and, in some jurisdictions, overwhelmingly so.”<sup>128</sup> Second, wives as plaintiffs “had to allege some evil act—adultery, cruelty, or desertion. . . . [because] it was socially acceptable for a woman to be a victim.”<sup>129</sup> In contrast, “[i]t was difficult for a man to claim he was deceived, deserted, or beaten up by a woman.”<sup>130</sup> Thus, fault grounds perpetuated gender stereotypes: “women [told] stories about themselves as innocent victims; the men they married [were] cruel or adulterous worms.

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122. Compare Bryan, *supra* note 24, at 1011 n.51 (“At its inception feminists saw mediation as a way for women to avoid the male-biased substantive divorce laws and achieve more favorable settlements.”), with Singer, *supra* note 4, at 1504–06 (noting the narrative propounded by mediation advocates: the shift to no-fault divorce was a shift from state control of exit from marriage to individual control, which also enabled private processes to flourish, permitting divorcing individuals to refashion gender roles).

123. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1510 (2000).

124. See LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, *FAMILY LAW* 274–75 (5th ed. 2014) (summarizing typical fault grounds in state laws).

125. *Id.* at 274–76.

126. But see Friedman, *supra* note 123, at 1509–10 (listing cases where divorce was denied to unhappy couples).

127. *Id.* at 1504. Perhaps the most famous example of collusion concerned New York couples, who had a limited number of grounds for divorce, but adultery was one of them. Parties who wanted a divorce would fabricate adultery, almost always by the husband, and submit manufactured evidence as proof of an affair. *Id.* at 1512–13; see also Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 662, 666–67 (1984), as reprinted in HARRIS, CARBONE & TEITELBAUM, *supra* note 124, at 280.

128. Friedman, *supra* note 123, at 1524 (citing ROBERT L. GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890*, at 29–30 (1982)).

129. *Id.* at 1525.

130. *Id.*

The standard practice cast[ed] the men as villains.”<sup>131</sup> Fault also helped construct and sustain narratives about the types of relationship harms that led to divorce. Only certain kinds of betrayals mattered—sexual infidelity, physical abuse, or abandonment, for example—and these forms of fault (committed or proffered) were totalizing in their destructive effect on a marriage.

Feminists in equal rights campaigns, along with sociologists and court reformers, understood fault divorce as a legacy from coverture that epitomized and maintained gender roles for husbands and wives.<sup>132</sup> In brief, coverture was a common law status that treated a husband and a wife as a single legal personality.<sup>133</sup> This so-called myth of marital unity was a justification for prohibiting divorce, although law never treated husbands and wives as one legal person to the extent that the concept implied.<sup>134</sup> However, the duties of men and women in marriage were traditionally gendered, with women owing obedience to husbands and men owing financial support to wives.<sup>135</sup> Insofar as divorce grounds evolved from these gendered responsibilities, second-wave feminists contested how fault perpetuated women’s dependency on men.<sup>136</sup> Beginning in the late 1960s, states revised divorce laws by removing fault requirements or adding a no-fault ground, allowing husbands and wives equal opportunity to exit marriages.<sup>137</sup> Feminist advocacy supported no-fault divorce as well as reforms to laws governing property division and alimony.<sup>138</sup>

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131. *Id.* at 1525, 1528.

132. Hill Kay, *Second Sex*, *supra* note 120, at 2032–33; *see also* GROSSMAN & FRIEDMAN, *supra* note 119, at 164, 193.

133. *See* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 111 n.96 (2005).

134. HARRIS, CARBONE & TEITELBAUM, *supra* note 124, at 33–34; *see also* Friedman, *supra* note 127, at 653 (“In other words, legislatures recognized the need for an efficient way to dissolve a marriage, but the enacted statutory schemes were never too efficient. They were, in short, compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and physical force to the sanctity and stability of marriage.”).

135. Singer, *supra* note 4, at 1474.

136. For a more detailed account of the transition from coverture, *see* Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 129 (2015). Mayeri concludes: “By the 1980s, as a matter of formal law—though not of social reality—feminist advocacy made marriage a gender-neutral institution, a presumptively equal partnership of spouses with identical, reciprocal legal rights and responsibilities.” *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 99 (1977); *Orr v. Orr*, 440 U.S. 268 (1979)).

137. JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 104 (2014). The role of feminist activism in early divorce reform, however, is contested. Hill Kay wrote, “family law reforms that began in the mid-twentieth century were conceived, and largely drafted, without the active participation of an organized women’s movement.” Hill Kay, *Second Sex*, *supra* note 120, at 2035; *see also* Singer, *supra* note 4, at 1518 n.352.

138. *See* GROSSMAN & FRIEDMAN, *supra* note 119, at 201 (locating feminist principles as the source of change in alimony laws). Particularly, “proponents embraced the concept that the [Equal Rights Amendment] would mandate equal treatment in the financial aspects of divorce, in particular

The feminist influence on law reform is evident in no-fault laws' application. Early in the life of no-fault divorce reform, social workers, judges, lawyers, and others called for a process that emphasized counseling in order to thwart or slow down separation.<sup>139</sup> Ultimately, however, no-fault grounds evolved to permit unilateral exit from marriage based on either spouse's allegation of irretrievable breakdown or irreconcilable differences.<sup>140</sup> As Janet Halley demonstrates, this marked a major shift in the field of domestic relations—away from an area of law organized to deliver social services so as to mitigate the harms caused by divorce.<sup>141</sup> Feminist arguments for no-fault laws contested that divorce was the unraveling of the social fabric of society or indicative of the moral failings of spouses; feminists did not support divorce reform that dwelled on reconciliation or on saving a marriage.<sup>142</sup>

No-fault divorce swept the country as the popular perception (as well as the legal definition) of marriage was changing from a permanent, hierarchal institution to a reciprocal and egalitarian relationship.<sup>143</sup> Liberal feminist values emphasized the ways in which equality in marriage and at divorce could enable women to reject caregiving roles and to pursue advancement in public life on the same footing with men.<sup>144</sup> With no-fault rules, women could exit

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the obligation of support during marriage, the award of spousal support after separation, and property division.” Hill Kay, *Second Sex*, *supra* note 120, at 2060 (citing JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 91–98 (1986)). Drawing from the work of the California Women's Commission, California was one of the first states to “expand the financial power of wives by more nearly equalizing their managerial rights with those of their husbands consistent with the call for equal rights.” *Id.* at 2061.

139. See GROSSMAN & FRIEDMAN, *supra* note 119, at 174 (“Many experts wanted to get rid of collusion and replace it with something more ‘therapeutic,’ something more in tune with human and family values.”).

140. HARRIS, CARBONE & TEITELBAUM, *supra* note 124, at 281–83. All states now have a no-fault ground, such as irretrievable breakdown or irreconcilable differences; some states added no-fault grounds to the existing fault grounds and some states repealed fault divorce and replaced it with no-fault causes of action. *Id.* at 283.

141. *Id.* at 269.

142. Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 269–70 (2011).

143. See *supra* note 121 and accompanying text (discussing the evolving state of marriage); see also Kerry Abrams, *Family History: Inside and Out*, 111 *MICH. L. REV.* 1001, 1011 (2013) (reviewing GROSSMAN & FRIEDMAN, *supra* note 119); Hill Kay, *Second Sex*, *supra* note 120, at 2019 (“The movement of twentieth century family law in the United States has been away from a patriarchal model and toward a more egalitarian one.”).

144. Singer, *supra* note 4, at 1520. “No-fault, in the public and academic mind, was associated with a generation of liberal women, and other women were hesitant to break ranks.” JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 21 (2000).

marriage and win an equal share of marital assets without proving victimhood.<sup>145</sup> Alimony and custody laws began to shed their gendered underpinnings, too, as statutes incorporated gender-neutral language.<sup>146</sup> Fault laws, in theory, compensated the wronged spouse through support awards as well as potentially penalized the wrongdoer with the loss of child custody.<sup>147</sup> As noted, wives petitioned for divorce more often than husbands, and wives were more likely to allege and prove fault.<sup>148</sup> In some jurisdictions, only women could receive alimony.<sup>149</sup> Moreover, alimony theoretically replaced the permanent financial support that husbands owed to wives if marriage was a lifelong duty rather than a romantic tie that could be broken.<sup>150</sup> Unilateral exit from marriage supported a clean-break approach to alimony: once a marriage was over, so were the obligations of support between spouses, which were duties no longer defined by sex at law.<sup>151</sup> And, gender neutrality meant

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145. ERTMAN, *supra* note 90, at 166 (“Today, thanks to advocacy by both feminists and men’s rights groups, family law treats spouses as equal partners instead of assigning rights and duties according to gender.”).

146. Carbone & Cahn, *supra* note 14, at 930 (writing “alimony has been debated in every era . . . . As the status of women changes, so do the assumptions that underlie the debate, sometimes in subtle ways.”).

147. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2538 (1994); *see also* Friedman, *supra* note 123, at 1521–22 (describing a case in which a wronged wife received alimony and sole custody). Alimony was always rare and the need for alimony is hard to establish when both spouses contribute financially in marriage. June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 78 n.154 (2002) (noting “the difficulty of measuring career contributions”). Even so, alimony today is still gendered: a very small number of alimony recipients are men. CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 27 (2014).

148. *See* D. KELLY WEISBERG, *FAMILY LAW CODE, SELECTED STATES, AND ALI PRINCIPLES* 93 (2004) (“The traditional rationales for spousal support were need and fault. . . .”); Friedman, *supra* note 123, at 1525 (“[I]f the woman was to end up with children, with child support, with alimony, it helped immeasurably to cast her as the innocent party.”).

149. The U.S. Supreme Court struck down several sex-specific family laws on equal protection grounds under the Fourteenth Amendment of the Constitution. *See Orr v. Orr*, 440 U.S. 268, 278, 283 (1979) (striking down a statute that “authorize[d] the imposition of alimony obligations on husbands, but not on wives”). These cases were part of broader and well-known litigation strategy over the 1960s and 1970s to undo sex discrimination in state and federal laws. *See* HARRIS, CARBONE & TEITELBAUM, *supra* note 124, at 78–83.

150. Carbone & Cahn, *supra* note 14, at 935 (“No-fault divorce ended the insistence, however unconvincing it had become by the seventies and eighties, that marriage was a life-long relationship.”). Still, “breach of contract” justifications for alimony make sense if marriage is viewed as a covenant and not, according to Herma Hill Kay’s view, a “joint venture undertaken for limited purposes and dissolvable by either party at will.” *See* Carbone, *supra* note 147, at 77. Carbone shows this with two hypothetical couples, one exiting marriage with “fault” and one without “fault.” *Id.* at 73–75.

151. WEISBERG, *supra* note 148, at 93. The Weisberg family law casebook notes that “the purpose of spousal support has changed today, influenced largely by the women’s movement and the acceptability of no-fault divorce.” *Id.* However, and as noted again in Part III, alimony awards, especially permanent or long term support awards, were and are rare. June Carbone and Naomi

that custody law should not explicitly favor mothers over fathers.<sup>152</sup> Thus, along with no-fault, alimony and custody become untethered from the gendered duties of an earlier era.

In addition, custody and alimony laws gave courts power to order spousal support, to divide marital assets, and to award custody based on indeterminate factors.<sup>153</sup> That is, statutes governing property, alimony, and custody list numerous factors that courts must or should consider, and give judges ample discretion to apply those factors on a case-by-case basis.<sup>154</sup> Perhaps the most commonly-cited example of indeterminacy is the “best interests of the child” standard:

Especially in contrast to the approaches it replaced, which provided fixed rules for child custody that were explicitly gender-based, the best-interests standard seems “wonderfully simple, egalitarian, and flexible”. . . . [T]hese same commentators go on to assert that the standard “has no objective content” and “is not determinate enough to produce predictable results, yielding instead a process that is contentious, expensive, subjective, and unjust.”<sup>155</sup>

After the introduction of no-fault divorce, family law scholars, writing from cultural feminist perspectives, began to argue that the combination of gender neutrality and indeterminacy in alimony and custody had backfired

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Cahn have questioned the often-recounted story that it was the disappearance of fault, or gender-neutral laws, that made alimony irrelevant. Even when alimony was awarded, courts rarely treated it as “damages” for the innocent spouse. Carbone & Cahn, *supra* note 14, at 933–34.

152. The trend over the last twenty years has been toward awarding joint or shared custody. HARRIS, CARBONE & TEITELBAUM, *supra* note 124, at 570. Like alimony, gender neutrality in custody is also informed by court decisions applying the Equal Protection Clause of the Fourteenth Amendment of the Constitution. *See id.* at 78–83.

153. *See* Thomas Oldham, *Economic Consequences of Divorce in the United States: Recent Developments*, in *FAMILY LAW IN BRITAIN AND AMERICA IN THE NEW CENTURY: ESSAYS IN HONOR OF SANFORD KATZ* 55 (John Eekelaar ed., 2016) (“Almost all states give divorce courts substantial discretion regarding both the decision to award support and the amount and duration of such awards.”). Oldham notes that a few states have introduced guidelines or caps on amount and duration of alimony to limit judicial discretion. *Id.* at 59.

154. Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2011 n.16 (2014); Lande, *supra* note 31, at 415 (“Although no-fault divorce, joint custody, and domestic violence laws have generally been quite appropriate as reflections of social norms and ideals of fairness, they often require difficult decisions using much vaguer legal standards than in the past.” (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 977–80 (1979))). For a summary of the debate over rules or standards in family law, see Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 9–14 (1990) (outlining consequences of moving to guidelines), and Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 241–42 (1991).

155. Aviel, *supra* note 154, at 2014 (footnotes omitted) (first quoting David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481, 488 (1984); and then quoting Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 849 (1998)).

against women.<sup>156</sup> Rather than advance sex equality, alimony and custody laws could penalize caretakers who were predominantly women and whose work was undervalued. As courts applied indeterminate alimony and custody laws to women's disadvantage, negotiating around courts in ADR proceedings was an increasingly available option.<sup>157</sup> In this way, collaborative divorce aligns with feminist ideas because it can give parties control over an indeterminate process so as to blunt the gendered effects of custody and support laws.<sup>158</sup>

### B. Feminist Critiques of No-Fault Divorce

The liberal feminist support for formal equality in divorce conflicted with competing concerns of what women were losing in the era of no-fault laws. Two trends in custody and alimony have drawn feminist criticism *because of laws' gender neutrality*: the rarity of alimony awards and presumptions for shared custody.<sup>159</sup> Some feminist scholars suspected that formal equality and indeterminate standards allowed courts and lawyers to perpetuate biases against women.<sup>160</sup> Penelope Bryan, for example, argues that “[t]raditional lawyers afflicted with this bias [that wives should receive spousal

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156. See, e.g., Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 110–16 (2016) (arguing that legal sex neutrality may have entrenched or exacerbated sex inequality); see also CARBONE, *supra* note 144, at 193 (claiming that custody has “become ground zero in the gender wars”). Jana Singer identified the intersection of no-fault divorce and shared custody as a “mixed message”: “A commitment to shared postdivorced parenting . . . sends a decidedly mixed message to divorcing and separating parents—your emotional and economic partnership is over, but your parenting relationship remains intact.” Singer, *supra* note 22, at 366.

157. Naomi Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 249 (1997) (noting that with the “deletion of the vocabulary of fault” came a “recognition of private ordering”).

158. Although collaborative divorce is a fairly new phenomenon, it is not immune from feminist critique. See, e.g., Aviel, *supra* note 34, at 1119 (critiquing the assertion that collaborative divorce lawyers are a team and not individually oriented); see *supra* notes 21, 27 (citing scholarship that explores feminist cases against mediation); Bryan, *supra* note 24, at 1011 n.51 (arguing that equal control over the collaborative process is illusory because typically men maintain power in bargaining and have more financial resources at divorce). John Lande writes that the collaborative divorce bar is comprised mostly of women with a decade or more of practice experience: “60–70% of the collaborative lawyers are females with an average or median of 11–20 years in practice.” Lande, *supra* note 31, at 430. This suggests that many collaborative practitioners are from the cohort of women who entered the legal profession in the 1970s and 1980s. *Id.* Lande also notes that “females were more likely than males to be family law specialists; women constituted 33% of the overall sample [of lawyers] of the study but 67% of the lawyers whose practices involved three-quarters or more of divorce cases.” *Id.* at 428.

159. See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194–95 (2007) (“Many family law scholars view this revolution [to formal gender equality] as ‘the most significant and pervasive transformation’ of family law.” (quoting Appleton, *supra* note 133, at 110)); Appleton, *supra* note 133, at 111 (“Today, however, explicit gender-based family laws have all but vanished.”).

160. GROSSMAN & FRIEDMAN, *supra* note 119, at 202. Grossman and Friedman write: “Formal gender neutrality and no-fault made it easy for courts to limit or reduce alimony awards drastically.”

maintenance from husbands] frequently encourage or coerce their women clients into relinquishing their requests for maintenance.”<sup>161</sup> Gender neutrality and court discretion cut against long-term or permanent spousal support, even for wives who earned less than their husbands or had no income at all. Jill Hasday argues that courts consistently deny wives alimony for the purported reason of formal equality: “Since the 1970s, state courts deciding whether to award divorcing women alimony have repeatedly relied on the contention that family law has eradicated its roots in coverture.”<sup>162</sup>

The gender neutrality that characterizes no-fault divorce also transformed custody decisions, resulting in a “bittersweet victory.”<sup>163</sup> On the one hand, standards-based, gender-neutral custody was, as Janet Halley writes, “part of a sweeping feminist-inspired law reform in which formal equality in marriage erased the rules of coverture one by one.”<sup>164</sup> On the other hand, “a fully neutral principle meant that fathers . . . could lay claim to custody of children at the time of divorce and litigate it under a standard so open-ended and indeterminate that the outcome was, technically at least, completely unpredictable.”<sup>165</sup>

Whereas liberal feminists had argued for equality between men and women, cultural feminists asserted that formal equality put women in straightjackets.<sup>166</sup> Martha Fineman, for example, urged that family law should abandon gender neutrality and formal equality, especially in regard to child care and child custody.<sup>167</sup> If women remained responsible for the bulk

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*Id.*; see also Bryan, *supra* note 24, at 1015 (contending permanent alimony for wives is appropriate in more instances than courts allow). Janet Halley recognized this trend in an earlier edition of the family law casebook edited by Judith Areen and Milton C. Regan, Jr.:

“To put it bluntly, the traditional division of labor within households often leaves the husband in better financial shape than the wife at the time of divorce,” and then offers a lengthy excerpt from a specifically feminist reconsideration of alimony. The casebook follows this quite elegant synthesis of ostensibly opposed feminist positions with the editors’ own protracted denunciation of current property division and alimony law for directing judges to consider too many contradictory factors . . . .

Halley, *supra* note 142, at 284 (footnotes omitted) (quoting JUDITH AREEN & MILTON C. REGAN, JR., *CASES AND MATERIALS ON FAMILY LAW 75* (5th ed. 2006); and then citing *id.* at 758–63).

161. Bryan, *supra* note 24, at 1013 (footnotes omitted) (first citing Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 *BUFF. L. REV.* 1153 (1999); and then citing *In re Marriage of Harding*, 545 N.E.2d 459, 469 (1989); *In re Marriage of Frederick*, 578 N.E.2d 612, 620 (1991)).

162. HASDAY, *supra* note 137, at 105, 115. Carbone argued that alimony awards rest on nascent claims about one party’s breach of the marital contract: “Considerations of fault also continues to play a surprisingly influential if not always visible role.” Carbone, *supra* note 147, at 55.

163. Halley, *supra* note 142, at 274.

164. *Id.*

165. *Id.*

166. *Id.*

167. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 38–42 (1995).

of children's care in practice, treating mothers and fathers equally for the purposes of custody and support saddled women with caregiving without additional financial assistance and forced them to submit to custody arrangements that did not reflect the realities of child care.<sup>168</sup> The problem was not just that law reinforced women's roles as mothers or caregivers, but also that law and public institutions treated caregiving as their altruistic, expected (and thus uncompensated) duty.<sup>169</sup> Even when no-fault divorce statutes required that courts consider the value of domestic labor, feminists argued that courts routinely undervalued those contributions.<sup>170</sup> Laws on the equitable distribution of marital property, for instance, include factors that account for child-care and unpaid work.<sup>171</sup> However, the capacity of equitable distribution standards to compensate wives for their domestic labor has been a steady topic of debate, with many arguing that the costs of care work, as well as women's inequality in the paid workforce, are perennially understated.<sup>172</sup>

By the end of the 1980s, the cultural feminist critique of the no-fault regime permeated family law scholarship<sup>173</sup>; indeed, women's disadvantage in divorce has been a subject of inquiry for the last thirty years.<sup>174</sup> Today, for the most part, family law scholars do not question if women suffer more than men because of divorce.<sup>175</sup> Lenore Weitzman's empirical research on

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168. CARBONE, *supra* note 144, at 22 (citing the work of Martha Fineman); *see also* Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 387–90 (2007) (citing the scholarship of Joan Williams, Martha Fineman, and Katharine Silbaugh in work-care debates and noting reactions to that scholarship in the work of Vicki Schultz, Mary Anne Case, and Katherine Franke).

169. Bennett Woodhouse, *supra* note 147, at 2528. Bennett Woodhouse has argued, “As feminists have demanded new protections for women in the public sphere, we seem to have simultaneously acquiesced in a reductionist vision of moral responsibility in the domestic sphere. Ironically, this is the sphere in which women are most at risk of economic, physical, and emotional injury.” *Id.*

170. Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1260 (2015) (discussing feminist scholars critical of courts' application of equitable distribution standards).

171. *Id.* at 1258 (“[A]ll states have adopted either equitable distribution or community property principles, and state legislatures have entirely eliminated title-based systems.”).

172. *See, e.g.*, Carbone & Cahn, *supra* note 14, at 937 (recounting the case of a wife who had been a full-time homemaker and, when her husband divorced her, “was left with almost nothing—no employment history, no skills, no significant property settlement, no child support and no alimony” (citing STARNES, *supra* note 147, at 2)).

173. CARBONE, *supra* note 144, at 21–22; *see also* Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1338 (2013) (“Cultural feminism has become so well-known and prominent in feminist circles that some have called it the ‘official’ theory of the second wave.” (citing Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 28 (1988); Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 162 (2010))).

174. *See* Tsoukala, *supra* note 168, at 358.

175. GROSSMAN & FRIEDMAN, *supra* note 119, at 192 (noting that “even under the modern rules, women suffer more financially than men after divorce”); *see also id.* at 203 (citing the Weitzman study, which found that women's standard of living declines disproportionately compared to men after divorce); HASDAY, *supra* note 137, at 116 (“Many studies have found that divorce is

women's post-divorce quality of life is cited in almost every family law casebook as proof that women have lower standards of living than men after divorce.<sup>176</sup> Subsequent studies have contradicted Weitzman's conclusions, but many family law scholars have asserted that Weitzman's central claim still holds true. Hasday, for example, described the problems with Weitzman's study and then referred to research that rehabilitates Weitzman's findings, concluding that "a wave of scholarship confirms the general trend that Weitzman highlighted."<sup>177</sup>

Yet, studies describing women's post-divorce quality of life are twenty or more years old.<sup>178</sup> Wendy Paris questions generalizations about women's post-divorce lives and experience of divorce.<sup>179</sup> She argues that studies about women's post-divorce poverty are dated and based on participant populations that are not disaggregated for age, income, or location.<sup>180</sup> As the next Part notes, race, class, and region heavily influence marriage and dissolution choices.<sup>181</sup> This does not undermine the importance of gender in understanding the costs of divorce; but it suggests that collapsing all wives into one category oversimplifies the financial outcomes of divorce for varying populations of women.<sup>182</sup>

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economically disastrous for the average woman and her children . . ."); Abrams, *supra* note 143, at 1014 (noting that child support guidelines were intended to ameliorate the post-divorce poverty of mothers: "Congress took an interest in child support guidelines, it argues, because divorce pushed women and children into welfare. . ."); Bryan, *supra* note 24, at 1007–09, 1009 n.37 (restating feminist claims that divorce falls hardest on women and children); Singer, *supra* note 22, at 370 n.37 (summarizing the perception that men win at traditional divorce and women lose).

176. See generally LENORE WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

177. HASDAY, *supra* note 137, at 116–17. Herma Hill Kay also examined feminists' embrace of Weitzman and other studies of post-divorce poverty. She noted that in response to studies of no-fault divorce's effects on women, including the Weitzman study, feminists found themselves in an odd alliance with family-values conservatives. Hill Kay, *Second Sex*, *supra* note 120, at 2066–69.

178. HASDAY, *supra* note 137, at 117 n.145. Three studies cited by Hasday, for example, are from the early 1990s (1990, 1991, 1993) and one is from 2001. *Id.* This most recent study, from 2001, is based on data from the early 1990s. *Id.* Researchers Matthew McKeever and Nicholas Wolfinger relied on the 1992–1994 National Survey of Families and Households and argued that "marital disruption now has much more modest economic consequences for women than in years gone by." Matthew McKeever & Nicholas Wolfinger, *Reexamining the Economic Costs of Marital Disruption for Women*, 82 SOC. SCI. Q. 202, 202 (2001).

179. PARIS, *supra* note 2, at 21–22.

180. *Id.* at 2–3, 21–22; see also Naomi Cahn & Jana Singer, *Divorce American Style: Splitopia: Dispatches from Today's Good Divorce and How to Part Well* by Wendy Paris, 50 FAM. L.Q. 139, 145 (2016) (book review) (noting Paris's critique of Weitzman and her argument that "some people may become more productive after divorce, once they are free to concentrate on their careers").

181. See generally NAOMI CAHN & JUNE CARBONE, *RED FAMILIES AND BLUE FAMILIES* (2010).

182. See Tsoukala, *supra* note 168, at 400 ("Women's position in the family regularly gets conflated with their children's, while the impoverishment precipitated by divorce is further identified with poverty *tout court*, with very little regard to actual differences in income levels.").

In tandem with reactions to changes in custody and alimony laws, some feminists lamented the disappearance of spousal misconduct in divorce proceedings. Part III demonstrates that research on the gendered effect of divorce provides a justification for the quasi-therapeutic aspects of a collaborative approach. Feminists needed to look outside of courts and beyond state statutes if they were going to mitigate the burden that divorce imposed on wives and mothers. So, although collaborative divorce may not be framed as a feminist project, it nonetheless accommodates certain feminist critiques. The next Part begins by examining how collaborative divorce is in conversation with scholarship that calls for the acknowledgement of marital wrongs in dissolution processes. It concludes by considering how collaborative divorce might advance or contradict other feminist-minded goals, such as anti-stereotyping and strengthening women's agency in bargaining.

### III. CONSEQUENCES OF COLLABORATION

Collaboration divorce's incorporation of parties' emotions, including their negative feelings, can support arguments for why spousal misbehavior during marriage should have consequences at divorce. Noting the tendency to depict wives as the wronged spouses, this Part concludes by questioning how collaborative divorce might work for and against women.

#### A. *A Forum for Fault*

Fault grounds and fault-based considerations, despite the uptake of no-fault divorce, continue to exist. Around one-third of states retain fault grounds alongside no-fault grounds, and about half of U.S. states permit courts to consider marital misconduct in awarding alimony (with only a few states permitting the same for property division).<sup>183</sup> However, in half of the states, fault is not an explicit consideration in any part of the divorce process.<sup>184</sup> Even in states that consider misconduct, Joanna Grossman and Lawrence Friedman note that judges do not often entertain fault or misconduct at divorce unless there is economic misconduct, such as intentional dissipation

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183. In states that consider misconduct in divorce, most statutes incorporate considerations of misconduct in alimony awards and not in property division. GROSSMAN & FRIEDMAN, *supra* note 119, at 207–09; Bennett Woodhouse, *supra* note 149, at 2536. Three states continue to bar alimony to parties sued on fault grounds and fault is proven. GA. CODE ANN. § 19-6-1(b) (2015); N.C. GEN. STAT. ANN. § 50-16.3A(a) (2015); S.C. CODE ANN. § 20-3-130 (2016).

184. This approach is consistent with the Uniform Marriage and Divorce Act (UMDA), which rejected fault in setting out a model for states' no-fault laws. Describing the UMDA, Ertman states: "No-fault divorce is so businesslike that drafters of the new divorce laws renamed it 'dissolution,' a term borrowed from the law of business partnerships." ERTMAN, *supra* note 90, at 166.

of marital assets, or outrageous behavior, such as attempting to murder one's spouse.<sup>185</sup>

No-fault divorce was intended to relieve courts from the “moralistic judgments” of judging marital conduct.<sup>186</sup> For example, in *Mani v. Mani*,<sup>187</sup> the New Jersey Superior Court explained why courts are hesitant to consider the during-marriage behavior of spouses in awarding alimony: “without concomitant benefit, considering non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship.”<sup>188</sup> The opinion concluded: “[W]e have . . . relieved matrimonial litigants and their counsel from the need to act upon the nearly universal and practically irresistible urge for retribution that follows on the heels of a broken marriage.”<sup>189</sup>

The resistance of courts to fault-based evidence has not changed. But state laws need not require the establishment of fault grounds, like adultery, for misconduct to matter: non-court forums can include parties' behavior during marriage for any number of purposes. This Section explores two purposes—recognizing the inevitable role that emotions play and vindicating a wronged spouse. The first justification sits at the intersection of law and psychology, and it draws heavily from scholarship on law and emotion as well as therapeutic jurisprudence. The second justification depends on norms of justice and accountability. These calls for including misconduct are not necessarily calls for out-of-court processes; feminist scholars, for instance, might advocate instead for substantive law reform.

First, psychological studies of relationships suggest that even if no-fault laws do not assign responsibility for a breakup, many people assign blame or experience guilt because they feel loss at the end of a relationship.<sup>190</sup> Therapeutic jurisprudence recognizes this reality and asks how the legal system might protect and not damage a person's emotional health. Clare Huntington studied therapeutic approaches in family law, and she explains that traditional dispute-resolution works against the “cycle of intimacy”: “[A] widely shared

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185. GROSSMAN & FRIEDMAN, *supra* note 119, at 208. For example, the New Jersey Supreme Court held “that marital fault is irrelevant to alimony except in two narrow instances: cases in which the fault has affected the parties' economic life and cases in which the fault so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice.” *Mani v. Mani*, 869 A.2d 904, 906 (N.J. 2005).

186. Bennett Woodhouse, *supra* note 147, at 2536 (“Modern reformers tended to view alimony as a relic of an era of moralistic judgments . . .”).

187. 869 A.2d 904 (N.J. 2005).

188. *Mani*, 869 A.2d at 917.

189. *Id.* at 918.

190. HUNTINGTON, *supra* note 28, at 117 (arguing that “[a]lthough [guilt] has strong negative connotations, guilt can be a productive emotion, fueling the reparative drive” and that in certain cases not involving abuse, “it may be useful for all adult family members to consider how they contributed to the rupture”).

human experience is that individuals experience love, inevitably transgress against those they love, feel guilt about the transgression, and then seek to repair the damage.”<sup>191</sup> Recognizing this “cycle of intimacy” has an instrumental purpose. For parents of minor children, for instance, ignoring what happened in and at the end of a marital relationship can impede negotiating shared custody.<sup>192</sup> An adversarial, court-managed no-fault divorce, however, “thwarts any instinct that people may have for reconciliation and compromise. It is no wonder that in these win-lose contexts, family members are frequently unable to move beyond whatever rupturing event led them to become entangled in the legal system.”<sup>193</sup>

This is not a call to reintroduce fault *grounds*; it is a call to reorder the legal process to recognize the discord caused by ending a relationship and to provide legal services that help heal rather than deepen relationship conflict.<sup>194</sup> A collaborative divorce, in this way, seeks to improve the health and stability of parties’ post-divorce lives. Particularly through the use of a divorce coach, collaboration is a forum to assist parties in resolving anger and managing their emotions for their present and future well-being. Its relational, tailored, client-centered approach seeks to accomplish those goals in ways a court cannot or will not.<sup>195</sup> Such an approach should not only make the divorce process more responsive to (and arguably effective at) handling disputes, but collaborative materials also suggest that addressing blame and guilt at the end of relationship can be personally rewarding.<sup>196</sup> Invoking collaborative rationales, Solangel Maldonado argues that forgiveness can contribute to parties’ well-being after divorce because unresolved conflict or resentment causes long-lasting physical and mental health problems.<sup>197</sup>

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191. *Id.* at 86.

192. *Id.* at 118. Huntington argues that a better parenting relationship is one goal of a therapeutic approach in family law disputes: “reparation means helping the ex-spouses understand that theirs will continue to be a joint enterprise, built on a shared love for children, rather than a shared love for each other.” *Id.* at 119.

193. *Id.* at 91.

194. *See also id.* at 116. Huntington explains:

We should not return to the days when a divorce could be obtained only by showing that one party was at fault, but no-fault divorce can be more wishful thinking than reality” and proposing that “the new vision for dispute-resolution family law should be not a conflict-muting process but rather a process for first recognizing and only then resolving conflict.

*Id.*

195. MURPHY & SINGER, *supra* note 4, at 102–03 (demonstrating that courts are not skilled at “forward-looking” tasks of conflict resolution and improving communication styles of a couple).

196. Freeman, *supra* note 25, at 221. Marsha Freeman, for example, describes part of collaborative divorce as including the recognition that “the mere act of contrition on the part of the offender can contribute to a feeling of validation on the part of the victim,” which restores one’s faith in the other party. *Id.*

197. Maldonado, *supra* note 90, at 451–52.

Dealing with anger means confronting previous conflict and often necessitates an apology for harm caused, which can be something that, as Part I explained, divorce coaches urge parties to do.<sup>198</sup> As a caveat, all conflicts need not end with peaceful resolution; the role of voicing emotions may not be eliminating conflict but channeling emotions for productive objectives.

Second, introducing misconduct can give a wronged spouse a sense of justice.<sup>199</sup> This justification for considering misconduct is often more concerned with vindication.<sup>200</sup> No-fault grounds hide the “salacious, shameful stories of adultery and abuse,” and this may minimize a spouse’s unjustified suffering or sense of betrayal.<sup>201</sup> Barbara Bennett Woodhouse laments that at least the fault regime rewarded a “virtuous” spouse and in the no-fault era, “sex, lies, and dissipation—the beating, boozing, cheating, exploitation, and abuse that constituted ‘grounds’ for a traditional divorce—continue to present serious risks to the dependent spouse.”<sup>202</sup> Bennett Woodhouse compares marital deceit to rape: “Between spouses, lies are the dissipation of an intangible asset, the abuse (indeed, the metaphorical rape) of an accumulated trust.”<sup>203</sup> The problem then with no-fault laws is that guilty spouses are not punished for their abuse of marital trust and, without that punishment, there are few incentives for better behavior in marriage.<sup>204</sup> Most relationships, of course, do not involve only good or bad actors.<sup>205</sup> Depictions of “unilateral” breach of a marital contract do not account for the more likely scenario in which both parties have contributed to the end of the relationship or share some type of blame.<sup>206</sup>

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198. *Id.* at 492–93, 498. However, Maldonado suggests eliminating all marital misconduct from the formal, court-based divorce process, and promoting out of court alternatives as well as court-ordered forgiveness education. *Id.* at 448.

199. Calls for inclusion of marital misconduct in contemporary divorce have taken a variety of forms and are not novel. *See, e.g.*, LINDA HIRSHMAN AND JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 285 (1998) (proposing a cause of action for damages at divorce when a spouse committed adultery).

200. Grillo writes: “Quite suddenly it became close to irrelevant whether one member of the couple had deceived, sexually or financially abused, or otherwise oppressed, the other.” Grillo, *supra* note 21, at 1559.

201. ERTMAN, *supra* note 90, at 166.

202. Bennett Woodhouse, *supra* note 147, at 2526.

203. *Id.* at 2545.

204. *Id.* at 2556.

205. Compare Jill Hasday’s implication that there are two types of people in the world—deceivers and the deceived—and the question of deception is straight forward: “A lie is a lie . . .” JILL ELAINE HASDAY, *INTIMATE LIES AND THE LAW: GOVERNING DECEPTION IN OUR CLOSEST RELATIONSHIPS* 8 (forthcoming) (excerpts on file with the author).

206. Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce*, 37 J. LEGAL STUD. 315 (2008).

However, the perpetration of deception in marriage, at least in the literature that is dubious of no-fault, is typically gendered with gendered consequences. Bennett Woodhouse argued:

A fault-blind approach to divorce—like a fault-blind approach to domestic violence—hurts women by suppressing more authentic narratives of their lives. I will propose that, instead of ignoring marital misconduct, we consider reshaping the discourse of fault in marriage so that it provides affirmative protections for women. As in workplace harassment and domestic violence, we must acknowledge fault if we are to provide protection and compensation for victims of abuse of spousal trust.<sup>207</sup>

Some collaborative materials similarly presume that the cheated-on, lied-to, or mistreated spouse is typically the wife.<sup>208</sup> Indeed, that women are the victims of marital fault seems to be taken as fact without the need for evidence. Bennett Woodhouse states: “I know of no empirical evidence on whether women are more ‘innocent’ than men, but I am persuaded by researchers who say they are on average less violent and more faithful (for whatever reason) than men.”<sup>209</sup>

Narratives of women’s innocence and men’s wrongdoing might roughly approximate the victim/perpetrator themes of fault divorce, in which husbands often were held responsible for the destruction of marriages. Collaborative materials typically do not offer examples in which a wife has deceived a spouse or had an extramarital relationship.<sup>210</sup> This is what fault grounds tended to do—simplify marital wrongs into a one-way harm and fit spouses into stereotyped roles of innocence and blameworthiness.<sup>211</sup> But, these heteronormative paradigms are out of date and have always been limited; marital roles have evolved, understandings of gender are increasingly nuanced, and marriage now includes couples of the same sex.

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207. *Id.* at 2529–30.

208. SCHARFF & HERRICK, *supra* note 15, at 4, 74, 148.

209. Bennett Woodhouse, *supra* note 147, at 2556. In a forthcoming book, Jill Hasday asserts that there is common presumption that women are more likely to be deceived than men, pointing to surveys of self-described behavior. HASDAY, *supra* note 205, at 3–4 (citing surveys of college students asking if they have ever lied about sex and studies of participants’ misrepresentation on dating websites). She argues that law should play a role in compensating those deceived. *Id.* at 23.

210. On gender roles, see generally JUDITH BUTLER, UNDOING GENDER 176–203 (2004) (complicating the definitions of, and commitments to, sexuality, gender, and sexual difference). See also Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 520 (1988) (“In distinguishing sex from gender, feminist theorists have disputed causal explanations that assume that sex dictates or necessitates certain social meanings for women’s experience.”).

211. Bennett Woodhouse, *supra* note 147, at 2557. Bennett Woodhouse contemplates a similar criticism of her approach: “The danger, of course, is that allowing judges to consider fault, no matter how broadly defined, invites them to continue judging what is ‘good’ and ‘bad’ conduct according to their own fondly held stereotypes about ‘proper’ gender roles.” *Id.*

Collaborative divorce materials, for example, rarely reference same-sex couples.<sup>212</sup> With marriage equality, after *Obergefell v. Hodges*,<sup>213</sup> this is an ever more conspicuous omission.<sup>214</sup> Collaborative materials will evolve to accommodate this new population of potential clients, and this provides an opportunity to complicate depictions of marital relationships. Presently divorcing couples of the same sex have not arranged their lives with the backdrop of no-fault rules or with the protection of states' family laws.<sup>215</sup> Without a doubt, the exclusion of LGBT persons from marriage was not only discriminatory and stigmatizing, but also a significant obstacle to the realization of LGBT relationship rights. Yet the exclusion also fostered varying means of ordering family life and establishing duties in a partnership. Katherine Franke writes that "the diverse, nontraditional relationships and families . . . formed before [same-sex] marriage was a possibility will be shoe-horned into a one-size-fits-all kind of justice, slotting gay men and lesbians into the predetermined gender roles of marriage: husbands and wives."<sup>216</sup> This is an area in which collaborative divorce could pioneer new approaches by recognizing that any number of couples or families do not necessarily fit neatly into traditional husband-wife dyads.

The adoption of collaborative divorce has distributive consequences, too. Narratives of women's vulnerability at the hands of bad-behaving men can both diminish and augment wives' bargaining power in a privately ordered process. Collaboration may privilege wives with wealth who—although not at an economic disadvantage vis-à-vis their partners—can claim injury that understates their bargaining power. At the same time, women at

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212. An increasing number of collaborative materials and websites advertise services to couples of the same sex, however. See, e.g., Angie Bain, *Gay Divorce: How the Collaborative Family Law Model Can Help Parting LGBT Couples*, HUFF. POST (Jan. 27, 2012), [http://www.huffingtonpost.com/angie-bain/gay-divorce-collaborative-family-law-model\\_b\\_1237969.html](http://www.huffingtonpost.com/angie-bain/gay-divorce-collaborative-family-law-model_b_1237969.html); *Gay and Lesbian Community*, N.Y. ASS'N OF COLLABORATIVE PROF'LS, <http://www.nycollaborativeprofessionals.org/who-is-collaborative-for/gay-and-lesbian-community/> (last visited Nov. 11, 2016); *GLBT Relationships*, COLO. COLLABORATIVE DIVORCE PROF'LS, <http://www.coloradocollaborativedivorceprofessionals.com/GLBT.htm> (last visited Nov. 11, 2016).

213. 135 S. Ct. 2584 (2015).

214. See Mayeri, *supra* note 136, at 131, 134 (noting that the *Obergefell* opinion may not challenge sex-specific roles in marriage: "Instead of propelling heterosexual couples toward more gender egalitarian partnerships, marriage pushes same-sex couples to replicate gender specialization, alleviating pressure on the state and on employers to help families integrate breadwinning and caregiving.").

215. Katherine Franke, *Lesbian Husbands and Gay Wives: The Gendering of Gay Divorce*, NATION (July 3, 2013), <https://www.thenation.com/article/lesbian-husbands-and-gay-wives-gendering-gay-divorce/> ("[S]ame-sex couples' marrying raises the hard question of what it means to be 'weaker' in a context where gender-based power is not creating an unequal playing field for the two parties' negotiating rights and responsibilities in a marriage.").

216. *Id.* Laura Rosenbury notes the ways in which family law scholarship assumes that caregiving is the most important aspect of family life—more important than sexual or romantic attachment. Rosenbury, *supra* note 159, at 200–01.

a financial disadvantage, even when benefiting from therapeutic interventions, may demand less from the other party in an effort to broker peace after divorce. The next Section considers the role of misconduct in settlement negotiations in light of empirical research on gender differences in bargaining. It then assesses what women may win and lose within a therapeutically oriented framework like collaborative divorce.

### *B. Stereotype and Settlement*

A foundation of collaborative divorce is that divorcing spouses should value relationship building and conflict reduction more than gaining a strategic advantage over each other.<sup>217</sup> This premise is evident in collaboration's informal and voluntary discovery, the pledge to deal in good faith, and the intervention of mental health professionals.<sup>218</sup> It is an approach that comports with the argument that marital misconduct, and the emotional consequences of it, matters to parties whether or not the legal system recognizes it as a ground for divorce or in alimony and property division. To put it differently, how spouses communicate and negotiate, and the successful resolution of their marriage, depends in part on how their relationship ended.

A number of studies have interrogated how fault, misconduct, blame, and forgiveness affect settlement negotiations. In the early 1990s, for example, Eleanor Maccoby and Robert Mnookin found that when spouses settle out of court, the "guilty" spouse often compensates the "innocent" spouse with a relatively generous settlement.<sup>219</sup> More recently, Tess Wilkinson-Ryan and Jonathan Baron conducted a study in which participants were asked to rate the fairness of a proposed agreement in twelve scenarios.<sup>220</sup> In each scenario, a spouse had committed a "fault," ranging from adultery to criminal activity.<sup>221</sup> Although participants were asked to ignore spousal behavior, they nevertheless rated the proposals of "wrongdoers" lower than proposals of "victims."<sup>222</sup> The data supported the authors' hypothesis that "the conflict

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217. See Aviel, *supra* note 34, at 1118 n.116 (making the argument in the context of joint representation); Tesler, *supra* note 28, at 326–28.

218. See, e.g., Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 887–88 (1994) (arguing that no-fault divorce incentivizes opportunistic behavior in marriage because there are no consequences for breach).

219. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN WITH CHARLENE E. DEPNER & H. ELIZABETH PETERS, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 123 (1992). Robert Emery and his colleagues interviewed divorcing couples and found that the hurt of being left by a spouse or the guilt of leaving a spouse shapes negotiations in divorce mediation. Emery et al., *supra* note 32, at 25, 30, 33.

220. Wilkinson-Ryan & Baron, *supra* note 206, at 320–25. For limitations of the study, see *id.* at 336–37.

221. *Id.* at 321–22. For the first experiment, seventy-eight percent of the subjects were female, and the gender of wrongdoer switched from hypothetical to hypothetical. *Id.*

222. *Id.* at 321, 323.

between the moral norm against marital misconduct and the legal rule of no-fault property division may disrupt efficient bargaining.”<sup>223</sup> Specifically, participants rated wrongdoers’ settlement proposals as less reasonable than offers with the same terms offered by the victims of spousal misconduct.<sup>224</sup> At the study’s conclusion, “[s]ubjects expressed distress that, under the no-fault law, parties can breach a contract without repercussions.”<sup>225</sup>

To make amends or to render justice in settlement negotiations can serve any number of interests. A purported victim of a marital breach or misconduct might ask for alimony, which a court might not award when applying the state’s statute, as proof of atonement or an apology. Parties may be distracted by the desire for retribution and undervalue a reasonable offer.<sup>226</sup> The desire to punish can be costly in divorce.<sup>227</sup> Or a party may minimize a justifiable request for durational or permanent financial support for fear of causing conflict or because settlement conversations have focused on resolving past disputes.<sup>228</sup> Collaborative divorce is relevant in these decisions because it too encourages parties to bargain for emotional stability or future peace. These are not necessarily bad deals; however, there is little analysis of how collaborative divorce caters to certain trades or how it shapes clients’ bargaining priorities and perceptions.

Indeed, research on gender and negotiation suspects that fault may often play an unproductive role in divorce settlements. Empirical studies of ADR bargaining have long hypothesized that women are more likely than men to give up assets for the purpose of conflict avoidance.<sup>229</sup> Beth Livingston, for example, describes the tactic of “relational accommodation,” in which parties adjust their self-interests to promote the interests of a relationship:

In many situations, individuals view negotiation as a chance to enhance and strengthen relationships . . . and are concerned with how the negotiation might affect the long-term relationship . . . . The

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223. *Id.* at 316.

224. *Id.* at 334.

225. *Id.* at 335.

226. Beth A. Livingston, *Bargaining Behind the Scenes: Spousal Negotiation, Labor, and Work-Family Burnout*, 40 J. MGMT. 949, 954 (2014). Livingston elaborates: “Couples do not always act as ‘rationally’ as the economic perspective of family bargaining would suggest; rather, they internalize gendered norms and re-create their family dynamics to meet these normative expectations.” *Id.*

227. Wilkinson-Ryan & Baron, *supra* note 206, at 319. Relying on psychological literature, Wilkinson-Ryan and Baron argue that divorce negotiations will trigger “people’s willingness to punish others, at a cost to themselves, for behavior perceived as unfair.” *Id.* at 318.

228. For a divorce regime that is dominated by private settlements with minimal court oversight, unilateral “breach” may result in greater number of impasses in negotiations. Wilkinson-Ryan & Baron, *supra* note 206, at 316. Jana Singer has noted that courts often rubberstamp the settlement agreements negotiated by divorcing couples with little oversight as to the agreements’ content. Singer, *supra* note 4, at 1475.

229. *See, e.g.*, Emery et al., *supra* note 32, at 29.

goal to increase relational capital (e.g., mutual liking, trust, etc.) and maintain the relationship may overwhelm the desire to obtain optimal economic outcomes.<sup>230</sup>

Studies on settlement negotiations suggest that women are more likely to engage in relational accommodation. Summarizing psychological and empirical research, Tess Wilkinson-Ryan and Deborah Small have written that women bargain based on the promise of apology or stability, and women tend to focus on maintaining good relationships rather than maximizing their self-interest.<sup>231</sup> The body of work that Wilkinson-Ryan and Small analyze indicates that women undervalue their entitlements as well as underestimate their post-divorce material needs; they broker deals they perceive will preserve or heal a relationship, but sometimes to their detriment.<sup>232</sup> The indeterminacy of divorce law also might work to women's disadvantage because it sets few boundaries for negotiations, and, as Wilkinson-Ryan and Small argue, women are less likely than men to manipulate ambiguity for their gain.<sup>233</sup> If women appear to care more than men about relationship preservation, it is because they suffer penalties (such as explicit and implicit discrimination) when they "negotiate aggressively or behave in a self-interested manner."<sup>234</sup>

To the extent gender influences bargaining, out-of-court processes that privilege relational accommodation should benefit women. That is, collaboration's concern with conflict resolution and relationship building should help parties who seek to preserve a relationship and work against parties looking to gain a strategic advantage.<sup>235</sup> As Amy Cohen demonstrates, taking

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230. Livingston, *supra* note 226, at 953 (citations omitted) (first citing Michele J. Gelfand et al., *Negotiating Relationally: The Dynamics of the Relational Self in Negotiations*, 31 ACAD. MGMT. REV. 427 (2006); then citing Leonard Greenhalgh & Roderick W. Gilkey, *The Effect of Relationship Orientation on Negotiators' Cognitions and Tactics*, 2 GROUP DECISION & NEGOT. 103 (1993); and then citing Kathleen L. Valley et al., *Friends, Lovers, Colleagues, Strangers: The Effects of Relationships on the Process and Outcome of Dyadic Negotiations*, in RESEARCH ON NEGOTIATIONS IN ORGANIZATIONS 65 (Robert J. Bies et al. eds., 1995)).

231. Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 115–16 (2008). For example, Wilkinson-Ryan and Small state that research suggests that women prefer face-to-face, private (rather than judge-directed) settlements that preserve relationships. *Id.* at 111.

232. *Id.* at 116, 126, 127; Livingston, *supra* note 226, at 526. *See also generally* Cohen, *supra* note 20, at 180–88 (describing and contemplating studies on the gendered implications of negotiation).

233. Wilkinson-Ryan & Small, *supra* note 231, at 123.

234. *Id.* at 118.

235. Cohen writes:

[G]lorification of feminine values has met with several persistent critiques: (1) it essentializes and reinforces stereotypes that have traditionally disempowered women, with little regard to class, race, or situational power; (2) it extols and idealizes qualities arising from women's subordination and thus serves to further entrench their oppression; (3) it ignores or even contradicts "empirical" evidence to the contrary; and (4) it maintains a

relational concerns seriously responds to the feminist critique of ADR mechanisms, which did not appear to incorporate what women valued in negotiations.<sup>236</sup> Collaboration takes up that challenge and justifies why non-financial or emotional factors should shape parties' conversations about settlement offers.<sup>237</sup>

The question for collaborating teams to decide is how much attention financial considerations should take, especially if they impede building trust for a post-divorce relationship.<sup>238</sup> One might imagine negotiations in which a spouse's monetary contribution to marital assets becomes less important than it would under a state's equitable division statute.<sup>239</sup> Relational accommodation in exchange for a lower financial settlement, for example, might help improve post-divorce communication, and, in the long term, each party's quality of life. But, there may be a "harsh reality" after settlement when relationships do not bear fruit and one spouse gave up property or assets in exchange for the promise of future goodwill.<sup>240</sup> Many couples who relied on mediation in their divorce process report that they remain unhappy with

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structural system of (heterosexual) masculine and feminine identity that ultimately perpetuates rather than subverts the status quo.

Cohen, *supra* note 20, at 171 (footnotes omitted) (citing Naomi R. Cahn, *Theoretics of Practice: The Integration of Progressive Thought and Action: Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1050–54 (1992); then citing Rachel T. Hare-Mustin & Jeanne Marecek, *Gender and the Meaning of Difference: Postmodernism and Psychology*, in MAKING A DIFFERENCE: PSYCHOLOGY AND THE CONSTRUCTION OF GENDER 22, 52 (Rachel T. Hare-Mustin & Jeanne Marecek eds., 1990); and then citing Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 90–91 (1994)).

236. Amy Cohen describes "a full-blown feminist assault" on ADR: "If anything, feminists predicted that under structural conditions of 'private' inequality, women, overly endowed with relational and affective traits, would be even further exploited by a regime of voluntary negotiated exchange." Cohen, *supra* note 16, at 118–19. For example, collaborative divorce may respond to the criticism that mediation and negotiation do not bring in "the woman-identified values of intimacy, nurturance, and care into a legal system" but rather "deliver something coercive in its place." Grillo, *supra* note 21, at 1603.

237. Wilkinson-Ryan & Baron, *supra* note 206, at 323. Studies demonstrate, however, that there is no extensive proof that mothers trade economic support for custody and that mothers had better outcomes in both adversarial and non-adversarial processes than fathers. MACCOBY & MNOOKIN, *supra* note 219, at 156; Emery et al., *supra* note 32, at 29.

238. See, e.g., Zoe Blomfield, *Keeping the Family Together: The Collaborative Approach to Family Law*, VIBERTS, <https://www.viberts.com/articles/keeping-the-family-together-the-collaborative-approach-to-family-law/> (last visited Feb. 12, 2017) ("Pauline Tesler . . . said of the process 'I say to them: if you would rather give up the right to dance at your daughter's wedding for another \$20,000 on the settlement, then there are lawyers down the street who would love to help you and you'll send their child to university—not yours.'").

239. Since the 1960s, economists have applied economic theories to family law issues. Singer, *supra* note 4, at 1523 (citing scholars such as Gary Becker). There are differences in how feminists articulate those benefits and how, for example, a contract scholar or economist would. See Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 9, 14, 25 (1996) (demonstrating that contract principles increasingly influence family law and that private agreements can be wealth maximizing).

240. Bryan, *supra* note 24, at 1016.

their settlements.<sup>241</sup> And, as noted, it is not clear how many formerly-collaborating spouses return to court to renegotiate their financial and custody arrangements.

Collaborative divorce's reputational approach also potentially minimizes women's bargaining power, particularly for women with resources at their disposal.<sup>242</sup> The studies cited in this Section—as well as the scholarship on women's post-divorce poverty—begin with the premise that women are disadvantaged in negotiations, either because of financial inequities or because of spousal bullying. Taking the latter, some scholars contend that wives are psychologically and economically vulnerable by virtue of the inequalities that characterize all, or almost all, marriages.<sup>243</sup> These arguments underpin feminist assertions that marriage, to oversimplify, is an institution designed to subordinate women.<sup>244</sup> The paradigmatic example of women's lack of agency in family life or in marital relationships is domestic or intimate partner violence.<sup>245</sup> Some feminist scholars, however, note that certain forms

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241. Maldonado, *supra* note 90, at 473. One estimate is that up to twenty-five percent of couples remain in high conflict after settlement or trial. *Id.* at 453 n.50.

242. Bryan, *supra* note 24, at 1008–10 (presuming that fathers earn higher incomes and have higher educational levels than mothers, who, according to Bryan, are more likely to live in poverty after divorce).

243. Bennett Woodhouse, *supra* note 147, at 2552 (“Feminists might blame marriage, the wage structure, and other economic and cultural factors that encourage female dependency, but, nevertheless, no-fault ideology exacerbates a very real vulnerability.”); *see also* Bryan, *supra* note 24, at 1003 n.7 (explaining the power disparities between wives and husbands because of “masculine substantive law” and wives’ financial dependency, “naïve trust of [their] husband,” socialization, “greater likelihood of depression and low self-esteem,” and lower expectations). *But see* Aviel, *supra* note 34, at 1141 (“A wife whose nonfinancial contributions to the marriage render her economically vulnerable cannot plausibly share an attorney with a husband who views his earning capacity as the result of individual effort . . .”).

244. *See, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 6 (2012) (“Although its positive attributes were acknowledged, marriage also was understood to include gendered obligations and responsibilities that deprived spouses of certain liberties and channeled them into a disciplined way of life.”); *see also* Rosenbury, *supra* note 159, at 193 (describing marriage as a vehicle that supported women’s and children’s dependency).

245. *See generally* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE xiii (2008); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 2 (2012); JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 4 (2009); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 789 (2007).

of legal protection, particularly when offered through criminal law enforcement,<sup>246</sup> presuppose what women should value when ending an abusive relationship—safety over financial independence, for instance.<sup>247</sup> This raises the question of what types of conflict resolution a collaborative process should include, which is an issue relevant to vetting clients for abusive histories, discussed in Part I. Excluding from collaborative divorce those who may have been subjected to intimate partner violence excludes some women who might want what collaboration has to offer, such as resolving conflict or a continuing relationship with their former spouse.<sup>248</sup> Parties that are ready to move on from the relationship and to seek closure may not need collaboration, much less a team of professionals. Collaboration might be more useful to couples in various forms of conflict, subject to the particularities of the relationships and the couples' history.

Addressing women's financial disadvantage, June Carbone and Naomi Cahn paint a picture of marriage that complicates assumptions about women's vulnerability and weaker bargaining position. They note that between fifty-eight and seventy-five percent of married women are in the workforce, and now women who chose to marry are typically older, educated at the college level and beyond, with moderate to high incomes.<sup>249</sup> Carbone and Cahn demonstrate that marriage for this subset of women looks egalitarian, with partners sharing gains and losses over the course of a relationship and at the relationship's end.<sup>250</sup>

Coupled with this demographic information is the fact that collaborative divorce is available only to those with the resources to afford it. Parties (or at least one party) to a collaborative divorce must be able to pay the fees of two lawyers and a team of experts. This is an increasingly privileged group

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246. See Gruber, *supra* note 173, at 1349. Gruber noted:

Because [of grand narratives of women's subordination,] the theories seek to describe an overarching inequality between men and women, they have a tendency to reject or ignore nuance and multiple axes of subordination and instead adhere to reductionist notions of good and bad . . . . In the dominance feminist mindset, bad is men dominating women through sex, and good is the eradication of such domination.

*Id.* (footnote omitted) (citing Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, in *FEMINIST LEGAL THEORY* 263, 272 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991)).

247. GOODMARK, *supra* note 245, at 5–6.

248. *Id.* (noting that essentializing women's experience of violence can ignore or undermine women who are survivors of intimate violence but want to maintain a relationship with a partner).

249. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 41, 99 (2014).

250. Carbone & Cahn, *supra* note 14, at 946. Cahn and Carbone found that marriage is less attractive to people without some amount of professional advancement and disposable income, and giving up work for childcare now corresponds to an increasingly elite set of couples in which one is a middle- to upper-income earner that can support the other spouse's reallocation of time to domestic duties or temporary exit from a profession. *Id.* at 939 n.100, 947–48.

of people. Generally, dispute resolution systems that are dependent on lawyers create a two-track system—one for families with resources and one for families without resources.<sup>251</sup> Nationally, only twenty percent of couples have two lawyers, and fifty percent have no lawyer at all.<sup>252</sup> Half of divorce cases in some states are *pro se*, and there has been a rise of self-directed divorce with the aid of paid and unpaid website tools.<sup>253</sup> Like marriage, the professional services of lawyers, therapists and accountants are accessible based on class and income.<sup>254</sup> So while wealthier people are overrepresented in the married population, low income married couples do not have the means to afford comparable professional services.<sup>255</sup>

Most parties that enter a collaborative process, as currently constructed, will not be economically vulnerable or at a substantial financial disadvantage to their partners. Some will benefit from the voluntary discovery of financial assets and an assessment by a shared financial neutral. Although collaboration threatens to expel any party who negotiates in bad faith or fails to disclose material information, the informal nature of the process could nonetheless result in incomplete disclosure or undetected abuse, especially when compared to discovery governed by statute and required by courts. Yet, collaborative divorce, drawing from literature discussed in this Section, might assume that women start at a bargaining disadvantage. And the introduction of gendered marital misconduct could inadvertently sustain stereotypes about women's agency, minimizing how wives might trade on their assumed vulnerability.

The point is not to advocate against alimony or an augmented share of marital money for women with wealth, and it is not to argue that those acting with strategic advantage should be shamed. This Article's argument is not normative; there may be good reasons to engage in relational accommodation with pay offs that one or both parties deeply value. The point is that parties' advantages in settlement negotiations may be difficult to assess within a therapeutic process. Gendered stereotypes and stock explanations of why marriages fail may defeat the contextual and client-centered goals of collaboration, offering an impoverished account of how power has been distributed in

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251. MURPHY & SINGER, *supra* note 4, at 56, 130–32; *see also infra* note 77 (describing the burdens of divorce on low-income parties).

252. Aviel, *supra* note 34, at 1109–11; *see also* MURPHY & SINGER, *supra* note 4, at 69 (noting that most divorcing couples cannot afford two lawyers or even one lawyer).

253. Lande, *supra* note 31, at 418–20.

254. Abrams, *supra* note 143, at 1004 n.9, 1020. Far fewer couples are getting married today; at present, fifty percent of the population is married. *Id.* Marriage rates have declined, particularly for low-income populations in the United States. *See generally* Carbone & Cahn, *supra* note 249, at 40–41.

255. MURPHY & SINGER, *supra* note 4, at 56, 130–32; *see also supra* note 77 (describing the burdens of divorce on low-income parties).

a couple's relationship.<sup>256</sup> Over time and in terms not defined by a divorce process, collaboration may equip parties to move forward with their post-divorce lives. But it may not. There may be little incentive to deal with an ex-spouse in the language of relationship building and doing so may cause, rather than prevent, conflict.

Thus, a final underexplored consequence of collaboration is that it may deepen the characterization of the family as the site for healing and altruism and undermine the family as a site of distribution and of contract.<sup>257</sup> Philomila Tsoukala notices the resistance to contractual values in family law, arguing "many feminist thinkers repeatedly returned to the idea that something about economic rationality makes it particularly inept at capturing the realities of family life, and some even suggested there is something inappropriate about the use of economics to describe family life or women's labor."<sup>258</sup> Likewise, descriptions of collaborative divorce do not include contractual explanations for parties' bargaining power, because how parties bear the risks of their exchanges is in the language of emotional stability and self-improvement.<sup>259</sup> Yet, the therapeutic aspects of collaborative divorce could be described in contract terms—a third-party auditor to assess the information and credibility of parties (a divorce coach) or exchanging risk in the face of uncertainty based on broad or self-enforcing terms (such as conflict

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256. See Cohen, *supra* note 16, at 126 ("The challenge for contemporary ADR critics and proponents, then, is as it always was: attention to distribution and power.").

257. Halley, *supra* note 142, at 288, 291; see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983); cf. Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 83 (2001) ("The status hierarchies in business models, however, are fundamentally different from those in the natural model. Status differences in family law reflect and perpetuate inequality, grounding that inequality in purportedly natural differences. Business analogies, in contrast, substitute functionalist reasoning for moral judgment.").

258. Tsoukala, *supra* note 168, at 361. Tsoukala concludes:

[M]any of the feminist objections to the adequacy or desirability of economics as a tool for capturing family life can be traced to feminist impulses that tend to entrench the male/female dichotomy in a number of ways. The goal is to highlight the insights that feminists can gain from developments in economic thought and reclaim the assumption of selfishness as a core part of "methodological individualism" and a useful and appropriate tool for feminists.

*Id.* at 362 (footnote omitted).

259. The early and well known work of Robert Mnookin and Lewis Kornhauser details the strategic behavior of negotiating spouses—to promise, to threaten, to bluff and to assess and value risk and transactional costs in agreeing to settlement terms. Compare Mnookin & Kornhauser, *supra* note 154, at 972, with Ertman, *supra* note 257, at 90 ("Business models offer an attractive alternative to naturalized constructions of intimate relations for at least two reasons. First, market rhetoric is rarely naturalized. Second, contracts do not require public or majoritarian approval to be enforced, and could, therefore, disrupt the hierarchical structure that naturalized understandings impose upon marginalized groups.").

resolution).<sup>260</sup> An out-of-court process for divorce might be the place for compromise and selflessness. But it is also the space for bargaining in one's self interest. That, too, is a feminist project worth advancing.<sup>261</sup>

#### CONCLUSION

Collaborative divorce incorporates marital misconduct into the dissolution process by guiding couples to express their emotions and to seek or to give forgiveness, and this works around the declining relevance of spousal behavior in the era of no-fault divorce. Indeed, collaborative divorce can help reduce gendered differences in bargaining and resist gender stereotypes—mental health professionals, for example, might as naturally encourage equality between ex-spouses as they might emphasize the vulnerability of one spouse at the hands of the other. Moreover, considering spousal misconduct as a part of the divorce process might help some parties resolve their conflicts and move forward in healthy post-divorce lives. But also worth considering are situations in which collaborative techniques exacerbate power differentials between spouses or entrench problematic stereotypes.

This Article is an attempt to map some of the unintended consequences of collaborative models without purporting to know the frequency with which those consequences occur. Future research could engage questions of how collaborative divorce is actually practiced.<sup>262</sup> Do ex-spouses resort to court after they reach a collaborative settlement? How do lawyers manage clients that fail to disclose material information? Is there a means to measure if collaboration is succeeding? What is the gap between how collaborative materials describe client communication and how professionals conduct client meetings? These are important questions this Article does not address, the answers to which certainly would shape its analysis and influence its conclusions. Rather, the purpose of this Article is to support collaborative divorce's

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260. Cf. Michael Klausner, *Deals: The Economic Structure of Business Transactions* (Mar. 5, 2014) (unpublished book proposal) (manuscript at 5) (on file with author) (proposing to provide a vocabulary of contract terms generalizable to most commercial or business deals that respond to economic challenges).

261. See, e.g., Tsoukala, *supra* note 168, at 410 (arguing for feminists to view women as “rational profit-maximizers” with “their own moves to play, giving up one thing to gain another” and acting with “agency even within the confines of institutional, societal, and personal constraints”).

262. For example, a future research project might examine how lawyers and their clients actually employ the work of mental health experts (and other professionals) in the collaborative process, and frame that work in the larger context of the privatization of legal services. As noted, there is a lack of research exploring the gap between what collaborative materials say and what collaborative professionals do.

capacity to upend the taken-for-granted scripts of marital wrongs and to incorporate a more complicated vision of divorcing women's agency as well as a more nuanced understanding of gender.<sup>263</sup>

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263. *See, e.g.*, Rosenbury, *supra* note 159, at 217 (arguing that the legal recognition of friendship, as well as a challenge to coupling as the lynchpin of intimacy, could “enhance the ability of women to experience more robust notions of agency and equality in everyday life”).