

# SAVING CHILDREN OR BLAMING PARENTS? LESSONS FROM MANDATED PARENTING CLASSES

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What should family law do about divorcing parents? “Teach them a lesson,” a legislative wave sweeping through the United States has answered.<sup>1</sup> As a result of the legislation, growing numbers of divorcing parents are required to attend “parent education programs,”<sup>2</sup> turning these

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<sup>1</sup> ARIZ. REV. STAT. ANN. §§ 25-351–25-353, 25–355 (2009); ARK. CODE ANN. § 9-12-322 (2009); COLO. REV. STAT. § 14-10-123.7 (2009); CONN. GEN. STAT. § 46b-69b (2008); DEL. CODE ANN. tit. 13, § 1507(h) (2009); FLA. STAT. ANN. § 61.21 (West 2009); 750 ILL. COMP. STAT. ANN. 5/404.1 (West 2009); IOWA CODE § 598.15 (2008); KAN. STAT. ANN. § 60-1626(4)(b) (2007); LA. REV. STAT. ANN. § 9:306 (2009); MD. CODE ANN. FAM. LAW § 7-103.2 (West 2009); MINN. STAT. § 518.157 (2009); MO. REV. STAT. § 452.600 (2009); MONT. CODE ANN. § 40-4-226 (2007); 2007 Neb. Laws 554 § 9 (2009); N.H. REV. STAT. ANN. § 458-D: 1–9 (2009); N.J. STAT. ANN. § 2A:34-12.1–2A:34-12.8 (2009); OKLA. STAT. tit. 43 § 107.2 (2009); OR. REV. STAT. § 3.425 (2007); TENN. CODE ANN. § 36-6-408 (2009); TEX. FAM. CODE ANN. § 105.009 (Vernon 2009); UTAH CODE ANN. § 30-3-11.3 (2009); VA. CODE ANN. § 16.1-278.15 (2009); W. VA. CODE ANN. § 48-9-104 (2009); WIS. STAT. § 767.401 (2009). Recently, several senators in Wyoming introduced a bill that would authorize judges across the state to order divorcing parents’ participation in parenting classes. 2007 WLNR 1098778, WY SB 130, S.F. 130. In Alaska, California, Georgia, Indiana, Kentucky, Michigan, New Mexico, New York, Pennsylvania, Washington, and Wyoming programs are mandated by court rules. See *infra* note 10 and accompanying text.

<sup>2</sup> I use the term “parent education program” to refer to legally sanctioned and often mandatory short programs. The term is used interchangeably with “parenting classes” and “parenting seminars,” two terms lawmakers and practitioners frequently use to refer to these programs.

programs from a fad in family courts into an established and mandatory stop on parents' path to divorce. This legislation mandates informational classes that focus on the harm children suffer as a consequence of divorce and on behaviors parents should change in order to reduce the damage. This Article is the first to analyze the enactment discussions accompanying the legislation and to explore judges' extensive role in promoting and securing its passage. It demonstrates that despite its child-oriented goals, the legislation is preoccupied with casting a negative judgment on parents' decision to separate and with blaming parents for the negative effects of divorce.<sup>3</sup> This Article argues that this preoccupation with blaming parents has resulted in laws that do little to help children and much to belittle the tangible negative implications that divorce holds for parents, especially mothers. Doing so, the legislation downplays the role that legal, social and economic forces play in producing the undesired behaviors that classes currently try to eradicate.<sup>4</sup> Moreover, by laying the full responsibility for possible harm to children of divorce in individual parents' laps, states have also shirked their responsibility for these children.

Parenting class mandates are of further interest because they embody two often conflicting trends in family law.<sup>5</sup> One is a shift to

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<sup>3</sup> In sociological terms, the enactment process, and the content and design of the mandated classes show that the legislation was a culmination of a moral regulation campaign. Moral regulation occurs when social agents identify the conduct, values, or culture of a group as grounds to impose regulation on this group so that its members change their behavior and ethical subjectivity. ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* ix, 17 (1999); Chas Critcher, *Widening the Focus: Moral Panics as Moral Regulation*, 49 *BRIT. J. CRIMINOLOGY* 17, 26 (2009). The "moral" component in "moral regulation" pertains to the normative judgment that the identified conduct is intrinsically bad, wrong, or immoral. HUNT, *supra*, at 7. The fact that the law prohibits an act does not in itself constitute a moral regulation. Only a law that expresses "a kind of 'community verdict' on the sort of person who commits acts prohibited by it" and challenges this person to change herself has a moral regulatory aspect to it. Hannu Rounavaara, *Moral Regulation: A Reformulation*, 15 *SOC. THEORY* 277, 287 (1997).

<sup>4</sup> I set aside the question of the programs' constitutionality. An Establishment Clause challenge to a Kentucky court's general order requiring all divorcing parents to take parenting classes run by an agency of the Catholic Church has already failed. *See* *Kagin v. Kopowski*, 10 F. Supp. 2d 756 (1998). Scholars have suggested that the First Amendment includes a right against compelled listening, defined as a right not to be subjected as captive audience to a governmental message. It is possible to claim that mandatory parenting classes are unconstitutional unless they pass strict scrutiny since they require viewpoint-based compelled listening. *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 *B.U. L. REV.* 141, 141-45 (2009).

<sup>5</sup> Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 *STAN. L. REV.* 225, 238-40 (1997) (characterizing the first approach as putting less emphasis on family structure

consider ties between parents and children, rather than relationships between adults, as the core sources of legal obligation.<sup>6</sup> The second is a lingering adherence to the autonomous nuclear family ideal.<sup>7</sup> Unlike contemporaneous suggestions for anti-divorce measures, such as waiting periods and covenant marriage, parenting class mandates were not designed to create an impediment to divorce. Nevertheless, despite the legislation's focus on the parent-child relationship, it still reflects an underlying conviction that it is wrong for parents to break up the marital family unit.<sup>8</sup>

In this Article, Part I explores the characteristics of legally mandated parent education programs. The programs are generally short, educational interventions and their main goal is to improve children's well-

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and more on care ties and arguing that "responsible parenthood does not only depend on the presence of a second parent, but also on greater public support, reformed workplaces that accommodate men's and women's caretaking needs, and better support for child care." *Id.* at 240. The second approach, in contrast, assumes that "responsible parenthood requires the presence of both a mother and a father who marry, raise their children, and stay married; that families should be financially self-sufficient; and that parents should be willing to sacrifice their own well-being for the benefit of their children, even if such sacrifice might increase the inequalities between individual parents and for women systematically." *Id.* at 238.

<sup>6</sup> June Carbone refers to this shift as "from partners to parents," arguing that "the code of family responsibility is being rewritten in terms of the only ties left—the ones to children." JUNE CARBONE, *FROM PARTNERS TO PARENTS* AT xii (2000). *See also* Katharine B. Silbaugh, *Accounting for Family Change*, 89 *GEO. L.J.* 923 (2001) (arguing that the need to regulate horizontal adult relationships has diminished as law increasingly relies on private ordering); Martha Albertson Fineman, *Why Marriage?*, 9 *VA. J. SOC. POL'Y & L.* 239, 245–46 (2001) (asserting that, today, caretaker-dependent relationships and not marriage connections present the most pressing challenges to legal policy); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 *U. PITT. L. REV.* 1111, 1115 (1999) (claiming that family law most especially emphasizes emotional and financial commitment to children).

<sup>7</sup> Melissa E. Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 *VA. L. REV.* 385, 387 (2008); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 *MO. L. REV.* 527 (2001). Historians have convincingly argued that the emphasis on the nuclear family is a relatively recent phenomenon. *See* STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2000).

<sup>8</sup> That lawmakers were especially interested in the marital unit is evident from the fact that legislators, judges, and educators talked exclusively about divorcing parents in their discussions of the proposed legislation, even though in many states the legislation applies in all custody litigation and sometimes also in paternity disputes. *See, e.g.*, *ARIZ. REV. STAT. ANN.* §§ 25-352 (2009); *IOWA CODE* § 598.15.1 (2008); *W. VA. CODE ANN.* § 48-9-104 (2009).

being during and after a divorce by teaching parents how to better interact with children and with each other. This Part argues that the literature documents programs' scant success in achieving their stated goals. The Article then makes a brief interlude, in Part II, to contend that although mandatory parenting classes appeal to common sense, we ought to challenge such a reaction in order to allow for a critical analysis of the legislation.

Drawing on previously unexplored legislative materials, Part III explores judges' and lawmakers' inflated estimation of the harm caused by divorce and analyzes its influence on the resulting legislation. This Part relies on substantial empirical work, gathering and analyzing detailed minutes and recordings of committee meetings, public hearings, and floor presentations and votes. The choice of states for this study was therefore influenced by the availability of these primary sources. Still, the information represents diverse states and the analysis shows patterns common to all of them. The primary source data is complemented by public reports, news reports and papers written by key players in the enactment process: judges, parent educators, and lawyers.

Part III.A highlights the extraordinary involvement of judges in the legislative process, a fact largely unnoticed in earlier studies. It shows that judicial discontent with divorce litigation, combined with an exaggerated judicial view of the harm caused by divorce, has been the motivating force behind the legislation. Part III.B examines legislators' perspective that divorce is a threat to society's moral order and challenges their assumptions. Part III.C exposes the substantial gap between lawmakers' goals for parent education legislation and the rather limited means they provided to achieve them. It argues that notions of divorce, analyzed in Parts III.A and III.B, were instrumental in concealing this gap, and constituted one factor leading to legislation that is largely ill-equipped to serve its goals.

Part IV shifts the focus of the inquiry from lawmakers' estimation of the magnitude of divorce's harm to their understanding of its causes. Part IV.A shows that legislators perceive harm to children as arising from personal flaws or failures of divorcing parents, as evidenced by the parents' decision to divorce—specifically, parents' selfishness or self-involvement. This Part goes on to argue that legislators' interest in confronting divorcing parents with the results of their allegedly detrimental actions has severely undermined the potential of these mandates to achieve their declared goal of helping children. Part IV.B develops further the claim that parent education mandates downplay the extent to which social, economic and legal conditions shape parents' behavior after divorce, especially gender roles

and gender inequality. To conclude, this Article argues that judges and lawmakers should see divorce as no different from other stressful life events. If we want interventions targeting individuals, we should focus them on helping parents make the transition from married to divorced, as rapidly and painlessly as possible by preparing them to the structural problems they are likely to face upon separation. More importantly, this Article suggests that lawmakers should focus on changing these structural conditions instead of denying them through parent-blaming.

### I. LEGALLY-MANDATED PARENTING CLASSES

Forty-six states now offer parent education programs.<sup>9</sup> In most states, at least some parents seeking a divorce or involved in custody proceedings are legally required to attend these classes, either by state statute (twenty-seven states), by judicial rules (six states), by county and district based mandates (five states), or by individual judges' decrees (three states).<sup>10</sup> In eighteen states the mandate is universal and all divorcing parents, and sometimes all parties to custody or paternity suits, are required to attend classes. In addition, in some of the states where the statutory language is permissive, courts have created a *de facto* universal mandate by ordering all parents in their districts to take the classes.<sup>11</sup> The universal mandates signal a clear departure from the few voluntary court-affiliated parent educational programs that have existed in some states since the 1970s.<sup>12</sup> Courts around the country take compliance very seriously and

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<sup>9</sup> See *supra* note 1.

<sup>10</sup> Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375 (2008).

<sup>11</sup> See, e.g., Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (the testifying judge telling senators that judges in Denver, at their own initiative, ordered all divorcing parents to attend parent education, even before Colorado's universal mandate had been instated) (audio tape on file with author); Editorial, *Helping Kids Cope with Divorce*, CHI. TRIBUNE, Aug. 17, 1994, at 20 (noting a legal controversy in Cook County after the circuit court set a mandate for all divorcing parents based on permissive legislation). Only Louisiana requires courts to make an affirmative finding that the circumstances warrant an order to attend a class before they issue it. LA. REV. STAT. ANN. § 9:306.A (2009). Virginia limits orders in uncontested divorces to court finding of good cause. VA. CODE ANN. § 16.1-278.15.A (2009).

<sup>12</sup> For previous court-affiliated programs, see REPORT OF THE NEW YORK STATE PARENT EDUCATION ADVISORY BOARD, PROPOSED GUIDELINES, STANDARDS AND REQUIREMENTS FOR PARENT EDUCATION PROGRAMS 2 (2003), available at <http://www.nysl.nysed.gov/scandoclinks/ocm60883194.htm>.

failure to attend can cost parents their visitation rights,<sup>13</sup> influence custody decisions,<sup>14</sup> or even—in rare cases—land a parent in jail.<sup>15</sup>

This Part examines the structure and content of parent education programs and assesses their accomplishments. While some variation exists in programs throughout the United States, they tend to share goals and features. It then includes a review of existing evaluations of program effectiveness. After examining the possible grounds for the stark gap between positive and negative evaluations, the Part concludes that the literature documents programs' scant success in achieving their desired goals.

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<sup>13</sup> E.C.M. v. R.J., Del. Fam. Ct. No. CN02-06024, 2003 WL 22267131 (Del. Fam. Ct. Apr. 2, 2003) (conditioning father's visitation on his completion of a parent education program); Caldwell v. Caldwell, 858 N.E.2d 695 (Ind. Ct. App. 2006) (remanding for consideration of whether a parenting class could be taken via correspondence when a father was denied visitation after failing to complete a class because he was incarcerated); Nelson v. Nelson 954 P.2d 1219, 1222, 1226 (Okla. 1998) (reversing trial court's decision to deny visitation to a father who failed to complete a parenting class, but agreeing that failure to participate can be "a factor in determining the best interest of the child" in custody and visitation decisions).

<sup>14</sup> Schoonover v. Schoonover, No. 0554-99-3, 1999 WL 1134518 (Va. Ct. App. Sept. 7, 1999) (affirming change of custody because father did not respond to child's teachers' requests despite child's problems in school and refused to undertake a parent education program when directed by the court); Barry v. Barry, 862 N.E.2d 143, 147-48 (Ohio 2006) (finding that the trial court abused its discretion by awarding father legal custody and making him sole residential parent despite his failure to attend a mandatory parenting class).

<sup>15</sup> Kline v. Kline, 708 A.2d 503 (Pa. Super. Ct. 1998). The mother's jail sentence was later reversed on appeal, because the local rule had not been promulgated properly and the court abused its discretion by ordering the parents to attend a parenting class even though there was no pending action. Yet, the appellate court found the goal of the order "a laudable one." *Id.* at 506; Church v. Church, No. 02A01-9312-CH-00266, 1994 WL 34177 (Tenn. Ct. App. Feb. 3, 1994) (reversing, because of reliance on a court rule, the trial court's holding the father in contempt and sentencing him to one day in jail and a fifty-dollar fine). After this case was decided, the Tennessee legislature mandated participation in parent education programs for parties in any action where a parenting plan will be created. TENN. CODE ANN. § 36-6-408 (2009). The constitutional arguments in both cases were discussed in Russell Fowler, *Courts, Courses and Controversies: The Constitutional and Procedural Challenges to Rules of Courts Requiring Attendance at Parenting Seminars*, 37 NEW ENG. L. REV. 25 (2002). See also Rust v. Gerbman, No. 01A01-9608-CH-00361, 1997 WL 266844 at \*2 (Tenn. Ct. App. May 21, 1997) (discussing trial court's sentencing father to four days in jail for failing to pay child support and attend a parent education program).

### A. Class Contents: Child-Focused Information

As their name suggests, parenting classes provide education, not therapy.<sup>16</sup> While some have rigid curricula and require training sessions and licensing for presenters, programs are more typically created through local initiative, using materials developed by experts in the field.<sup>17</sup> Program presenters are overwhelmingly mental health specialists and social workers, though some programs also rely on lawyers, court administrators, and judges.<sup>18</sup> Most are paid, though some volunteer.<sup>19</sup>

#### *1. Parenting classes provide information, especially child-focused information.*

Most of the statutes mandating parent education in cases of divorce share, at minimum, the goal of educating parents about the impact of divorce on children and about children's reactions and needs during and after parental separation.<sup>20</sup> Past surveys have found that most programs emphasize the detrimental effects of exposing children to inter-parental

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<sup>16</sup> The legislation specifically calls for "education programs," "classes," "seminars," "information sessions," and "courses". Some states go further and clarify in the statutory language that the programs shall not be designed to provide therapy. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/404.1(a) (2010); TENN. CODE ANN. § 36-6-408(a) (2009); MONT. CODE ANN. § 40-4-226(1) (2009).

<sup>17</sup> Jack Arbuthnot, *A Call Unheeded: Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV. 371, 373 (2002). Geasler and Blaisure found that over forty-five percent of counties used materials from the same six programs and less than four percent of counties used exclusive materials. Margie J. Geasler & Karen R. Blaisure, *A Review of Divorce Education Program Materials*, 47 FAM. REL. 167, 169 (1998).

<sup>18</sup> Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36, 45 (1999).

<sup>19</sup> Andrew Schepard et al., *Preventing Trauma for the Children of Divorce through Parent Education and Professional Responsibility*, 16 NOVA L. REV. 767, 773 (1992) (describing volunteer work).

<sup>20</sup> ARIZ. REV. STAT. ANN. § 25-351 (2009); COLO. REV. STAT. § 14-10-123.7 (2009); CONN. GEN. STAT. § 46b-69b (2008); DEL. CODE ANN. tit 13 § 1507(h) (2009); FLA. STAT. ANN. § 61.21(2)(a) (2009); 750 ILL. COMP. STAT. ANN. 5/404.1(a) (2010); IOWA CODE § 598.15 (2008); LA. REV. STAT. ANN. § 9:306D (2009); MINN. STAT § 518.157 (2009); MO. REV. STAT § 452.600 (2009); N.J. STAT ANN. § 2A:34-12.3 (2009); N.H. REV. STAT ANN. § 458-D:3 (2009); OKLA. STAT. tit. 43 § 107.2 (2009); TENN. CODE ANN. § 36-6-408 (2009); TEX. FAM. CODE ANN. § 105.009 (2009); UTAH CODE ANN. § 30-3-11.3 (2009); VA. CODE ANN. § 16.1-278.15 (2009); WIS. STAT. 767.401 (2009); W. VA. CODE ANN. § 48-9-104 (2009).

conflict and most intensively explore topics like parental cooperation, “badmouthing,” and conflict resolution skills.<sup>21</sup> Frequently, programs also review the adult experience of divorce, reassuring parents that they are not alone in their struggle with post-separation hurdles and anxieties.<sup>22</sup>

### *2. Programs typically do not dwell on the legal aspects of divorce.*

Some programs provide information about the legal process and the resources at parents’ disposal to resolve their disputes.<sup>23</sup> However, a review of program course materials indicates that content focused on the legal process is relatively rare, whereas child-focused and parent-focused materials are by far the most common.<sup>24</sup> A nationwide survey of court-connected classes has found that, on average, programs dedicated about forty-one minutes to children’s reactions to divorce and thirty-four minutes to parental response to these reactions.<sup>25</sup> Custody issues or parenting plans were discussed infrequently. When classes did discuss these subjects, they spent an average of twenty minutes on either topic.<sup>26</sup>

### *3. Few programs touch on financial outcomes of divorce.*

Some programs do remind parents of their financial obligations to their children, though only six states statutorily require that programs do so.<sup>27</sup> Generally, financial issues, even when mandated, receive only minimal

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<sup>21</sup> Pollet & Lombreglia, *supra* note 10, at 377.

<sup>22</sup> See, e.g., Hon. Sondra Miller, *Parent Education and Custody Effectiveness (P.E.A.C.E.): A Preliminary Report to the New York Legal Community*, 68-FEB N.Y. ST. B.J. 42 (1996) (unpaginated). In 1998 Geasler and Blaisure reported that forty-one percent of the programs they surveyed discussed adults’ emotional aspects of divorce and forty-nine percent described a grief/loss cycle that adults go through when their marriages fall apart. Geasler & Blaisure, *supra* note 17, at 170, tbl. 2.

<sup>23</sup> Matthew Goodman et al., *Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce*, 42 FAM. CT. REV. 263, 269 (2004).

<sup>24</sup> Geasler & Blaisure, *supra* note 17, at 170.

<sup>25</sup> Geasler & Blaisure, *supra* note 18, at 51.

<sup>26</sup> *Id.*

<sup>27</sup> They are Florida, Iowa, Louisiana, New Jersey, Texas, and Virginia. In addition, Delaware’s classes also “touch on issues of finance.” Laura Ungar, *Shattering the Marriage, Not the Child*, NEW J. (Wilmington, DE), Jan. 23, 2001, at 1D.



coverage. One survey found that while child-support obligations might be mentioned, support calculations, for example, received no coverage by almost eighty percent of programs. Programs that did touch on the subject did so relatively briefly.<sup>28</sup> A later survey found that only five percent of programs discussed divorce's financial impact and only fourteen percent gave any consideration to child support issues.<sup>29</sup>

### B. Limited Interventions: Informational and Short

All mandatory and most voluntary parent education programs are what experts describe as short interventions. They usually consist of one or two sessions and last between one and six hours in total. Minnesota prescribes the longest mandatory program, requiring parents in contested custody or parenting time proceedings to attend eight hours of parent education.<sup>30</sup> However, the vast majority of mandatory programs last between two and four hours.<sup>31</sup> The most common teaching methods in mandatory parenting classes are in-class lectures, video screenings, and handouts. Some programs also use handbooks, group discussion, and role-playing.<sup>32</sup> Still fewer programs offer skill practice, usually in smaller groups.<sup>33</sup>

Although they share a name, these short intervention-style parent education programs differ from longer multi-session education programs.<sup>34</sup> The latter typically combine a substantial number of group sessions

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<sup>28</sup> Sanford L. Braver et al., *The Content of Divorce Education Programs: Results of a Survey*, 34 FAM. & CONCILIATION CTS. REV. 41, 50–51 (1996).

<sup>29</sup> Geasler & Blaisure, *supra* note 17, at 170.

<sup>30</sup> MINN. STAT. § 518.157 subd. 3 (2009). New York State's judicial order is a close second, mandating programs no less than six and no more than eight hours in duration. Pollet & Lombreglia, *supra* note 10, at Appendix A.

<sup>31</sup> Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 134–35 (2002); Geasler & Blaisure, *supra* note 18, at 49.

<sup>32</sup> Geasler & Blaisure, *supra* note 18, at 50.

<sup>33</sup> *Id.*

<sup>34</sup> Some such programs are "New Beginning," "Parenting through Change," and "Dads for Life." Sharlene A. Wolchik et al., *Programs for Promoting Parenting of Residential Parents: Moving from Efficacy to Effectiveness*, 43 FAM. CT. REV. 65, 67 (2005); Jeffrey T. Cookston et al., *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 2007 FAM. PROCESS, 123.

(between eight and fourteen) with a handful of one-on-one meetings and, sometimes, phone calls in between sessions.<sup>35</sup> Multi-session interventions are still in introductory stages and have so far shown some promise in preliminary efficacy trials.<sup>36</sup> So far, no state has mandated that divorcing parents undergo this type of longer intervention.

### C. Helping Children is the Primary Stated Purpose of Parenting Classes

The proponents of parent education programs aim to help the children of separating parents by improving parental behavior.<sup>37</sup> Legislators repeatedly state that their purpose is to shift the focus in divorce from parents to children.<sup>38</sup> Bill presentations typically open with statistics about child well-being to document the harsh toll of divorce on children and demonstrate its lasting effects.<sup>39</sup> The proponents' starting point is that divorce causes children to suffer maladjustment and psychological damage to various degrees. They argue that the main causes of suffering are exposure to inter-parental conflict and parental self-absorption. The guiding principle is that divorcing parents are generally unaware of the effects of the divorce on their children and typically lack the skills to avoid the pitfalls

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<sup>35</sup> Wolchik et al., *supra* note 34, at 68; Cookston et al., *supra* note 34. Each group session generally lasts about two hours, so even before individual sessions participants spend sixteen to twenty-eight hours in the program.

<sup>36</sup> Wolchik et al., *supra* note 34; Cookston et al., *supra* note 34.

<sup>37</sup> Braver et al., *supra* note 28, at 52 (conducting a national survey of programs and finding that "many providers clearly state that helping children is the overarching goal of their program").

<sup>38</sup> For example, Audio Recording of the Arizona Human Services Committee (Jan. 18, 1996) (Judge Schneider saying that the idea behind parenting classes is to make parents realize the pain they cause their children and change their behavior) (audio tape on file with author); Audio Recording of the: Colorado Senate Judiciary Committee (Feb. 2, 1996) (judge explaining that the legislation is meant to mitigate the harm to children in divorce—for example, by stopping parents from using children as pawns in the dispute) (audio tape on file with author); Audio recording of the Utah Senate Human Services Standing Committee (Jan. 27, 1994) (Senator Baird asserting that the purpose of the program is to lessen the impact of divorce on children) (audio tape on file with author). As one program provider put it, "[I]f they learn nothing else, it's 'Let's put the kids in the focus here'." Jeff Baron, *Learning to Quell Custody Quarrels; Va. Enrolls Parents in 4-Hour Course*, WASH. POST, July 30, 2001, at B1.

<sup>39</sup> See *infra* note 101.

divorce creates both for them and for their children.<sup>40</sup> Parent education programs, according to proponents' logic, can equip parents with information about the harms of divorce from children's point of view and with skills to ameliorate these harms, so that parents can change their behavior and damage their children less in the process of divorce.

#### **D. Do Mandatory Parenting Classes Actually Help Children?**

Despite recurrent efforts, so far no study has been able to convincingly show that short parent education programs have any effect on children's well-being.<sup>41</sup> Every review of the existing literature on the effectiveness of parent education programs finds that, as one group of scholars stated,

[T]here is not yet compelling and consistent evidence that participation in court-connected programs affect the outcomes that are their primary objectives, particularly fostering parent-

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<sup>40</sup> See *infra* Part IV.A.

<sup>41</sup> Goodman et al., *supra* note 23, at 273 ("there is no empirical evidence to suggest that short-term parenting programs improve children's well-being."); Jeffrey T. Cookston et al., *Prospects for Expanded Parent Education Services for Divorcing Families with Children*, 40 FAM. CT. REV. 190, 190-91 (2002) (enumerating the methodological failures of existing studies and concluding that there is no evidence that programs improve children's well-being); Wolchik et al., *supra* note 34, at 67 (exploring the methodological weaknesses of existing evaluations and concluding that "effects on child outcomes have yet to be demonstrated"); Kevin Kramer et al., *Effects of Skill-Based Versus Information-Based Divorce Education Programs on Domestic Violence and Parental Communication*, 36 FAM. & CONCILIATION CTS. REV. 9, 23 (1998) (conceding that "[n]o effects on child behavior due to the divorce education were observed"); Robert Hughes & Jacqueline J. Kirby, *Strengthening Evaluation Strategies for Divorcing Family Support Services: Perspectives of Parent Educators, Mediators, Attorneys, and Judges*, 49 FAM. REL. 53, 54-55 (2000) (finding that effectiveness studies report only "relatively few changes" in well-being and parents' behavior, and efficacy studies "conclude that most interventions make little difference in the lives of adults and children"); Cheryl Buehler et al., *Description and Evaluation of the Orientation for Divorcing Parents: Implications for Postdivorce Programs*, 41 FAM. REL. 154, 160 (1992) (reporting no difference between children of participants and non-participants in "behavior problems, social competence, environmental change, receipt of social support, physical health, and most of the problematic divorce-related beliefs," following a five weekly two hour parenting seminar for divorcing parents. The study also found no difference in parent psychoemotional well-being between treatment and control group).

child relations, reducing interparental conflict, and most of all, improving the well-being of children.<sup>42</sup>

Yet program directors, legislators, and court administrators all point to studies documenting the positive effects of these programs as support for their widespread proliferation. However, on closer examination, the majority of these studies are methodologically unsound. The most common method courts use to evaluate programs is by asking parents to fill in satisfaction surveys after class.<sup>43</sup> “Most overseers of programs apparently are content with client satisfaction surveys and the testimonials of facilitators or promoters.”<sup>44</sup> While surveys and anecdotal evidence indicate that many parents profess a high level of satisfaction with classes,<sup>45</sup> they do not attest to actual change in parental behavior or improvement in children’s lives. Academic studies of program effectiveness frequently lack rigor due to unavailability of control groups, pretesting, and other factors.<sup>46</sup>

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<sup>42</sup> Cookston et al., *supra* note 41, at 191.

<sup>43</sup> *Id.* at 190 (“the primary evaluation tool that court-connected parent education courses use to determine the effectiveness of their programming is the customer satisfaction survey”); Geasler & Blaisure, *supra* note 18, at 54 (noting that of the relatively few courts that evaluated their programs, “the most commonly used evaluation activity was the parent satisfaction survey”). For examples of such studies, see JoAnne Pedro-Carroll et al., *Assisting Children Through Transition: Helping Parents Protect Their Children from the Toxic Effects of Ongoing Conflict in the Aftermath of Divorce*, 39 FAM. CT. REV. 377 (2001); Solveig Erickson & Nancy ver Steegh, *Mandatory Divorce Education Classes: What Do the Parents Say?*, 28 WM. MITCHELL L. REV. 889, 904–08 (2001) (using satisfaction surveys filled out by parents after attendance to evaluate a parent education program in Minnesota).

<sup>44</sup> Jack Arbutnot, *Courts’ Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV. 371, 381 n.7 (2002) (conceding also that outcome evaluation research of parenting classes has been limited).

<sup>45</sup> Denise J. Brandon, *Can Four Hours Make a Difference? Evaluation of a Parent Education Program for Divorcing Parents*, 45 J. DIVORCE & REMARRIAGE 171, 177 (2006); Rusty Marks, *Children of Divorce*, CHARLESTON GAZETTE & DAILY MAIL (W. VA) Jan. 30, 1999, at 1C (quoting a parent educator saying that though many parents still do not want to participate, once they are in the class they “begin to loosen up”); Kim Fitzsimons, *For the Kids; Required Parent Counseling Aims for Non-Combat Divorce*, CHI. TRIB., Jan. 16, 1994, at CN1 (citing a poll showing that though sixty-nine percent of parents initially resented participating in the Utah pilot program, eighty-nine percent of the participants said afterwards that the program was worthwhile); REPORT OF THE NEW YORK STATE PARENT EDUCATION ADVISORY BOARD, *supra* note 12.

<sup>46</sup> Wolchik et al., *supra* note 34, at 67 (pointing out the methodological shortcomings of several parent education program evaluations). Geasler & Blaisure, *supra* note 17, at 168 (noting that “[c]ontrol groups are necessary to document program effectiveness, but are difficult to arrange, since few counties are willing to mandate

Parenting classes are often required alongside other programs and evaluators cannot point to the exact measure that shaped their results.<sup>47</sup>

Additionally, most positive academic evaluations rely solely on parental reports. While parents may *report* changes in their attitudes and expectations, there is little evidence to suggest that parents participating in these programs *behave* differently from other parents; they generally do not have lower re-litigation rates, better parent-child relationships, or better records of coping with divorce.<sup>48</sup>

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attendance of a randomly selected sample of parents”). Audio Recording of the Tenn. Joint Committee on Children & Fam. Affairs (Apr. 28, 1999) (the representative of the evaluating organization reveals that they have no information about divorcing parents prior to the pilot project) (audio tape on file with author). For examples of studies with flawed or no control groups, see Brenda L. Bacon & Brad McKenzie, *Parent Education after Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes*, 42 FAM. CT. REV. 85 (2004); Cathleen Gray et al., *Making It Work: An Evaluation of Court-Mandated Parenting Workshops for Divorcing Families*, 35 FAM. & CONCILIATION CTS. REV. 280 (1997); Brandon, *supra* note 45, at 180.

<sup>47</sup> Audio Recording of the Utah Senate Human Services Standing Committee (Jan. 27 1994) (pilot program administrator testifying that because education and mediation were mandated together, they cannot tell which one influenced their results) (audio tape on file with author).

<sup>48</sup> Goodman et al., *supra* note 23, at 273 (“there is no evidence to suggest that short-term programs impact high-quality parenting or attitudinal conflict.”); Laurie Kramer & Amanda Kowal, *Long-Term Follow-Up of a Court-Based Intervention for Divorcing Parents*, 36 FAM. & CONCILIATION CTS. REV., 452, 459, 462–63 (1998) (comparing court records and finding that participants in a parent education program were “as likely to engage in divorce re-litigation as parents who did not attend a similar program,” but suggesting that “there is some indication” that programs may have affected high-conflict divorcing couples’ rates of litigation.); Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 FAM. & CONCILIATION CTS. REV. 195, 213 (1999) (reporting that a review of court files “revealed no significant differences in re-litigation patterns for parents exposed to parent education and those who were not”); Patrick C. McKenry et al., *Evaluation of a Parent Education Program for Divorcing Parents*, 48 FAM. REL. 129, 135 (1999) (finding no long term impact of P.E.A.C.E. program compared to control group); Paul R. Amato, *The Consequences of Divorce for Adults and Children*, in UNDERSTANDING FAMILIES IN THE NEW MILLENNIUM: A DECADE IN REVIEW 488, 500 (R.M. Milardo ed., 2001) (surveying 1990s literature regarding divorce implications and finding that it is unclear whether programs aimed at divorcing parents benefit children); Emily M. Douglas, *The Effectiveness of Divorce Education Program on Father Involvement*, 40 J. DIVORCE & REMARRIAGE 91, 98–99 (2004) (finding that participation in mandatory parenting class had “little, if any, impact” on divorced fathers’ relationships with their children, level of conflict, or payment of child support). *But see* Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. & CONCILIATION CTS. REV. 269 (1997) (finding that parents who attended a mandatory divorce education class in Athens, Ohio re-litigated half as much as parents in the control group did); Kelly Shifflett & E. Mark Cummings, *A Program for Educating Parents About the Effects of Divorce and Conflict on Children: An*

To understand how positive studies of parent education programs came to be, one needs to consider how most of the academic research on the efficacy of these programs was structured. Almost all evaluations used single-parent self-reports, usually conducted three to six months after attendance in the class.<sup>49</sup> Parents were asked to reflect on their behavior during that period.<sup>50</sup> This methodology risks producing favorably biased results. To understand why, imagine that you are a parent seeking a divorce in a state that mandates you to participate in a parenting class before you can attain one. You soon find yourself in a four-hour seminar. Whether initially curious or reluctant, the subject—your children’s well-being—is one close to your heart, and you listen with interest and mounting horror. You learn that by choosing to divorce your partner you have jeopardized your children’s chances to develop properly and have a functional happy life, even as adults. The lecturer might tell you that children feel “as if they’ve been subject to a drive-by shooting when they first learn that their parents are separating and/or divorcing.”<sup>51</sup> You learn that inter-parental conflict creates an extremely toxic environment for children, which is likely to cause them to suffer from severe psychological difficulties and erode your relationship with them.<sup>52</sup> Through lectures, role play, handbooks, and videos you are repeatedly told that it is up to *you*. It is *your* behavior that is the key to your children’s future happiness. You need to develop a business-like relationship with your former spouse; you need to use “I”

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*Initial Evaluation*, 48 FAM. REL. 79 1999 (finding significant difference between treatment and control group, though the study suffered from methodological shortcomings); *see also* Goodman et al., *supra* note 23, at 271.

<sup>49</sup> Geasler and Blaisure found this form of evaluation to be the second most common, after satisfaction surveys, when courts evaluate programs. Geasler & Blaisure, *supra* note 18, at 54.

<sup>50</sup> *See, e.g.*, Jack Arbuthnot & Donald A. Gordon, *Does Mandatory Divorce Education for Parents Work? A Six-Month Outcome Evaluation*, 34 FAM. & CONCILIATION CTS. REV. 60 (1996); Monte N. Criddle Jr. et al., *The Relationship Between Mandatory Divorce Education and Level of Post-Divorce Parental Conflict*, 39 J. DIVORCE & REMARRIAGE 99, 102 (2003) (using five- to seven-minute phone interviews); Brandon, *supra* note 45, at 180–81; Kelly Shifflett & E. Mark Cummings, *A Program for Educating Parents About the Effects of Divorce and Conflict on Children: An Initial Evaluation*, 48 FAM. REL. 79 1999; Michelle L. Toews & Patrick C. McKenry, *Court-Related Predictors of Parental Cooperation and Conflict After Divorce*, 35 J. DIVORCE & REMARRIAGE 57, 70 (2001).

<sup>51</sup> Richard S. Victor, *Protecting Children of Divorce Through Parent Education*, 79 MICH. B.J. 180 (2000) (unpaginated).

<sup>52</sup> Pedro-Carroll et al., *supra* note 43, at 379.

statements; you need to support your overwhelmed children. If you fail to do that, their long-term health and well-being will suffer devastating damage.<sup>53</sup>

Now imagine that a few months later you receive a phone call reminding you that you agreed to participate in research examining the effects of the parenting class you took, skills which you reported firm intentions of using in the post-program satisfaction survey.<sup>54</sup> The person on the line asks you to evaluate how frequently you have exposed your children during the previous months to conflict and whether you put them in the middle when squabbling with your former spouse. What will your answer be?

This is how many of the studies on the effect of short-term programs have been conducted. One study went so far as to directly test parents' memories by asking for the proper response to the scenarios discussed in the instructional video.<sup>55</sup> In other words, when taking the class, parents learn what outcomes they should achieve, and they are told that achieving these outcomes reflects directly on the quality of their parenting. Under these circumstances, evaluating program effectiveness using only retrospective parental report measures may produce a favorable bias in the results.<sup>56</sup> Social scientists refer to this phenomenon as "social desirability"—respondents are reluctant to give answers they perceive to be socially undesirable and may censure their answers as a result.<sup>57</sup> Scholars consider social desirability to be a major source of bias in responses to surveys, since the more desirable the respondents consider the behavior in question to be, the higher their tendency toward inaccurate reporting of their own actions.<sup>58</sup>

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<sup>53</sup> *Id.* at 382–83 (contents of *A.C.T.—For the Children*). See also Arbuthnot & Gordon, *supra* note 50, at 66 (contents of *Children in the Middle*); REPORT OF THE NEW YORK STATE PARENT EDUCATION ADVISORY BOARD, *supra* note 12; Baron, *supra* note 38, at B1 (contents of a Virginia parenting class).

<sup>54</sup> Pedro-Carroll et al., *supra* note 43, at 383.

<sup>55</sup> Arbuthnot & Gordon, *supra* note 50, at 71.

<sup>56</sup> Goodman et al., *supra* note 23, at 271; Arbuthnot & Gordon, *supra* note 50, at 78 (conceding that social desirability might affect parents' answers and cause biased parental reports).

<sup>57</sup> SEYMOR SUDMAN ET AL., THINKING ABOUT ANSWERS: THE APPLICATION OF COGNITIVE PROCESSES TO SURVEY METHODOLOGY 51 (1996).

<sup>58</sup> Theresa J. DeMaio, *Social Desirability and Survey Measurement: A Review*, in 2 SURVEYING SUBJECTIVE PHENOMENA 257, 271 (Charles F. Turner & Elizabeth Martin eds.,

In a sense, parenting classes serve as crash courses in the desirability of certain parental behaviors and undesirability of others. If the class is successful in persuading parents that certain actions have disastrous results, those parents are less likely to report that they continue to engage in such harmful conduct.<sup>59</sup> Indeed, even changing the methodology from phone interviews to self-administered questionnaires has often been enough to significantly change the results, with researchers finding “little evidence for the longer-term impact” of parent education program.<sup>60</sup> To date, studies have failed to employ additional data sources like teachers’ and children’s reports, diaries, or other timely and frequent self-reporting devices.<sup>61</sup> Nor have researchers included both parents in the survey so that a more accurate picture of conflict and cooperation could be drawn.

Relying on retrospective phone interviews as the sole source of information has led most studies to paint a rosy picture of improvement in children’s well-being with little grounding in reality. Despite repeated

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1984) (noting the consensus regarding social desirability bias and describing, for example, a study showing that respondents who rated “being aware to new media releases” as desirable were more likely to report that they have seen movies, or read books, that did not exist).

<sup>59</sup> Goodman et al., *supra* note 23, at 271 (explaining that the reliance on parent-only reports may positively bias the results “because parents may be aware of intended program effects and may respond in the direction that is desired by the program”).

<sup>60</sup> McKenry et al., *supra* note 48, at 135. *See also* Kramer et al., *supra* note 41, at 24, 135 (finding, from self-administered questionnaires, that both information-based and skills-based parent education programs had no effect on parental conflict and on child behavior, and suggesting that self-reporting is a misleading method); Laurie Kramer & Christine E. Washo, *Evaluation of a Court-Mandated Prevention Program for Divorcing Parents: The Children First Program*, 42 FAM. REL. 179, 184–85 (1993) (using self-administered questionnaires and finding that participation in the parenting class “was associated with relatively few beneficial effects for divorcing parents and their children,” though participating parents did report greater involvement in other community resources); Emily M. Douglas, *The Effectiveness of Divorce Education Program on Father Involvement*, 40 J. DIVORCE & REMARRIAGE 91, 98–99 (2004) (divorced fathers’ reports by mail show no difference from control group). *But see* Brandon, *supra* note 45, at 180–81 (parents reporting decrease in exposing children to conflict on self-administered follow up, though the author suspected nevertheless that the reports were influenced by social desirability and that the results were inconclusive due to the lack of a control group).

<sup>61</sup> The one study to contain interviews with children found that program participants’ children reported that their parents continued to engage in behaviors that put children in the middle of conflict. However, due to methodological shortcomings it is impossible to conclude from this study the program’s level of effectiveness. Jason D. Hans & Mark A. Fine, *Children of Divorce: Experiences of Children Whose Parents Attended a Divorce Education Program*, 36 J. DIVORCE & REMARRIAGE 1, 22 (2001).



efforts, no study to date has convincingly demonstrated that short parent education programs produce the desired effect on children's welfare. The methodological shortcomings and meager results of most studies have recently led a group of researchers to conclude that, despite great scholarly interest in interventions for divorcing families, "little success has been achieved and, heretofore, no success at all in rigorous experimental trial."<sup>62</sup> Another survey of the literature has reached a similar conclusion, stating that "there is no empirical evidence to suggest that short-term parenting programs improve children's well-being."<sup>63</sup>

## II. INTERLUDE: SUSPENDING COMMON SENSE

It is precisely the "spontaneous" quality of common sense, its transparency, its "naturalness," its refusal to examine the premises on which it is grounded, its resistance to correction, its quality of being instantly recognizable which makes common sense, at one and the same time, "lived," "spontaneous" and unconscious. We live in common sense—we do not think it.<sup>64</sup>

The assumption that the law should compel divorcing parents to learn about divorce's detrimental effect on children appeals to common sense. It seems natural that the way to reduce damage is to ensure that parents who make this choice are fully aware of its potentially harmful effects. Thus, challenging it is extremely difficult. As the author of the New York-based P.E.A.C.E parent education program put it, "[j]ust as the driver who drinks or speeds puts lives at risk, parents who divorce put their children at emotional risk. Both should learn how to prevent harm to others from reoccurring before being granted a privilege by the state."<sup>65</sup> It just "makes sense" that informing parents of the consequences of their actions is an effective and desirable way to prevent harmful behavior.

To challenge this common sense belief and tease out the problematic aspects of the legislative conclusion that law should mandate divorcing parents to acquire information about their children's needs during

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<sup>62</sup> Cookston et al., *supra* note 34.

<sup>63</sup> Goodman et al., *supra* note 23, at 273.

<sup>64</sup> Sean P. Hier, *Conceptualizing Moral Panic through a Moral Economy of Harm*, 28 CRITICAL SOC. 311, 319 (2002) (quoting Purvis & Hunt).

<sup>65</sup> Schepard et al., *supra* note 19, at 775.

and after a divorce, consider the following hypothetical. Suppose that one or both parents in an intact family, the Turmoils, lose their jobs, thus losing their main source of income. Mr. and Mrs. Turmoil might well experience, along with the sharp decline in economic means, a loss of stability, a high level of stress, and marital discord. In fact, studies show that:

[D]eclines in family income generate feelings of financial pressure, anxiety, and depression among husbands and wives. These feelings increase the frequency of hostile exchanges between spouses. . . . [T]hese studies strongly suggest that economic hardship affects children indirectly (rather than directly) by eroding the quality of family relations.<sup>66</sup>

The loss of income might precipitate other life-affecting changes, such as relocation, and the Turmoils' children are likely to react adversely to this period of anxiety and instability.<sup>67</sup> Depending on their ages, they might experience fear and anger at having their routine interrupted, as well as loss at having to leave friends and family behind. As the married Turmoils ponder their options—whether to relocate, change profession, return to training, move back with their own parents—do we think it imperative to mandate a four-hour course that would explain to them how bad their circumstances are for their children? Is it a high priority to teach them not to expose their children to the overwhelming stress that they are experiencing? Should the legal system deny them unemployment benefits until they take the course? Or, assuming that resources are scarce and that the Turmoils have enough to do, should we focus our efforts on helping them restructure their lives so that they can regain financial independence and reduce their level of stress?

There are two differences between the Turmoils and divorcing parents. The first is that unless the Turmoils opt into the welfare system, their family unit is not as exposed to legal intervention on any of these

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<sup>66</sup> Juliana M. Sobolewski & Paul R. Amato, *Economic Hardship in the Family of Origin and Children's Psychological Well-Being in Adulthood*, 67 J. MARRIAGE & FAM. 141, 142–43 (2005) (surveying existing literature regarding parental reaction to decrease in economic resources).

<sup>67</sup> *Id.* at 152 (finding that low level of economic resources is associated with parental perceptions of economic stress and these perceptions are, in turn, “related to greater marital discord and weaker parent-child relationship” which predicted children’s lower level of psychological well-being in adulthood); PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 18 (1997) (reviewing studies showing that economic hardship impacts children indirectly through a deterioration in the parent-child relationship).

matters as divorcing parents are. The second, more relevant difference is that we are less likely to think of people losing jobs as making a choice and thus as being morally blameworthy. The Turmoils are victims of harsh circumstances, whereas divorcing parents are making a still controversial choice to divorce. Hence the comparison, made by supporters of the legislation, to drunk drivers and drive-by shooters, both either carelessly or willfully choosing to engage in dangerous behaviors that are likely to result in casualties.<sup>68</sup> The step taken between comparing divorce to death—both traumatic, life-shattering and painful losses—and parents to criminals shows the negative moral judgment that has misguided this legislation.<sup>69</sup> That this judgment goes largely unchallenged speaks to the resilience of the view that divorce is morally wrong, far more powerful than the divorce rate and forty years of legal reform might imply.

Thus far, this Article has argued against assuming without critical inquiry that mandatory parenting classes are a good idea and demonstrated that there is little in the existing literature to suggest that classes are effective. Furthermore, it has pointed out that parents sometimes expose their children to inter-parental conflict and strife under circumstances other than divorce. The fact that we do not as easily think of these instances as requiring state intervention teaches us that there is something particular about divorce which requires further exploration. The next two Parts provide such exploration. Part III focuses on judges' and lawmakers' conceptions of the harm in divorce and analyzes their influence on the legislation. Part IV examines the notion that states should require divorcing parents to take classes about the harm in divorce and exposes its flaws. Finally, it suggests an altogether different approach to the causes of harm, where such exists, and a redesign of parenting classes to address these causes.

### III. SAVING CHILDREN?

This Part focuses on regulators' perception of the harm that parental separation causes both to children and to the social order. It demonstrates

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<sup>68</sup> For the comparison to drive-by shooters, see *supra* note 51 and accompanying text.

<sup>69</sup> For the comparison between divorce and death, see Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (clinical social worker explaining that there are grief and loss in the process of divorce; it represents the death of the marriage and the family) (audio tape on file with author). Many of the programs use a grief/loss perspective when explaining to parents what they and their children are likely to go through. Geasler & Blaisure, *supra* note 17, at 170, tbl. 2; McKenry et al., *supra* note 48, at 130.

that the parental education legislation was fueled by judicial discontent with divorcing parents and explores the origins of this dissatisfaction. The Part then argues that the crisis atmosphere pervading the legislative discussions was crucial in providing a rationale for the broad mandates. Finally, it shows that portraying harm in the most acute terms also allowed regulators to reconcile the discrepancy between the goals of the legislation and the restricted means it provided to accomplish them.

### A. Perceptions of Divorce and Inter-Parental Conflict

The legislation mandating parent education programs is largely a product of judicial frustration with divorce litigation and litigants, especially divorcing parents. The 1990s saw a flood of domestic relations cases—a seventy percent increase in the total number of cases between 1984 and 1995.<sup>70</sup> Over 4.9 million domestic relation cases were filed in 1995, accounting for a quarter of civil filings that year.<sup>71</sup> At the same time, the revolutionary family law reforms of the 1980s have committed judges to examining the minutiae of parents' daily life in order to determine the best interest of children or the identity of their primary caretaker.<sup>72</sup> Rethinking their roles in domestic law adjudication, domestic relations courts have joined the growing national movement toward alternative dispute resolution methods.<sup>73</sup> Alongside mediation, parenting classes have been part of courts' transformation into "dispute resolution centers."<sup>74</sup>

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<sup>70</sup> Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 399 (2000).

<sup>71</sup> *Id.* at 399. This trend continues today. Out of twenty-three million civil suits litigated in the United States in 2004, domestic relations cases accounted for more than a quarter. Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. LEGIS. 107, 108 (2008).

<sup>72</sup> Some judges have been decidedly pessimistic about these changes. Karen Nator Hill, *More Than 60 Percent of the Cases Taking Place in Chattanooga's Four Circuit Courts are Domestic-Related*, CHATTANOOGA FREE PRESS (Tenn.) Aug., 10, 1997, at M1 (interviewing former Circuit Court Judge William Brown, who left the bench because of having to deal primarily with domestic matters; he resigned two weeks after receiving four telephone calls on Christmas Day from custodial parents regarding the holiday schedule with the noncustodial parents); Michael Collins, *State Divorce Plan: Focus on Kids*, CINCINNATI POST, Nov. 30, 1999, at 1k (labeling the lack of judicial accountability due to vague standards "the most serious problem in child-custody cases").

<sup>73</sup> Schepard, *supra* note 70, at 407.

<sup>74</sup> *Id.* (quoting Frank Sander).

Judges' involvement has been crucial in creating mandatory parent education programs and they have shown a strong belief in program effectiveness.<sup>75</sup> In many states, judges had established mandatory classes in practice long before approaching the legislature for authorization.<sup>76</sup> Judges have initiated locally mandated programs, sought sponsors to introduce bills that would create state-wide mandates, testified before hesitant legislators, and harnessed court bureaucracy to make parent education the mass phenomenon that it has become.<sup>77</sup> For example, one judge testified before the Colorado Senate Judiciary Committee that judges had been mandating parent education for two years and supported legislation to ensure that they had authority to do so. He elaborated on the judges' collaboration with the sponsoring senator in drafting the legislation and added that the Denver judges had already made the program mandatory for all divorcing parents in

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<sup>75</sup> See Robert L. Fischer, *The Impact of an Educational Seminar for Divorcing Parents: Results from a National Survey of Family Court Judges*, in CHILD CUSTODY: LEGAL DECISIONS AND FAMILY OUTCOMES 35, 45-46 (Craig A. Everett ed., 1997) (finding that, among judges who had referred divorcing parents to a four-hour parent education program, the vast majority believed that the program led to "quicker resolution of custody matters" (eighty percent), "lessen[ed] the negative effects of divorce on children" (ninety-six percent), and benefited participants and their families in general (ninety-eight percent)); Hughes & Kirby, *supra* note 41, at 57-58 (Most judges rate programs very positively on overall usefulness and many of them estimate that program participation, to varying degrees, improves parental coping, reduces interparental arguments and re-litigation rates, and produces better adjusted children. On most measures, judges' ratings were closer to those given by parent educators than by attorneys. The latter were much less enthusiastic and reported some to little change on most measures.).

<sup>76</sup> See *infra* note 77.

<sup>77</sup> See, e.g., Audio Recording of the: Florida House Floor Debate (Mar. 30, 1994) (the bill's sponsor stating that judges have already been mandating the program and have asked him to promote the legislation to ensure they have the legal authority to do so) (audio tape on file with author); *Public Hearing Before the Senate Judiciary Comm.*, 160 Leg., 1st Sess., 1 (N.H. 2007) (statement of bill's sponsor, stating that he introduced the bill at the request of the Supreme Court); *Floor Debate*, 86<sup>th</sup> Leg., 24<sup>th</sup> Legislative Day, 25 (Ill. 1989) (Representative Flinn stating that the Illinois bill was proposed by Chief Judge Kern, who has established the practice of referring divorcing parents to parenting classes in the county court)(transcript on file with author); Audio Recording of the Arizona Human Services committee (Jan. 18, 1996) (judge as the main witness before the committee) (audio tape on file with author); Ingrid E. Slezak, *Parent Education: It Makes a Difference*, 57-NOV OR. ST. B. BULL. 70 (1996) (noting that in Oregon, the judiciary's plans to institute programs created the need for authorizing legislation Audio Recording of the Minnesota House Judiciary Committee (Apr. 3, 1995) (sponsor explaining that the bill "simply allows what has already pretty much been practiced by civil courts in Minnesota" and pointing out a supporting letter from the Chief Justice who was very involved and had reviewed the bill) (audio tape on file with author).

their district.<sup>78</sup> In New York, the Chief Judge initiated a plan ordering more parents to attend parent education programs and the judiciary was highly involved in developing and implementing the standards for mandating participation. New York judges also co-founded and actively promoted the local programs to lawyers and to the general public.<sup>79</sup> Similarly, in Tennessee, two judges testified at the House committee hearing in favor of the bill, and the program provider testified that all the circuit and chancery judges who heard divorce cases had been involved in developing, fine-tuning, and implementing the pilot.<sup>80</sup>

Throughout the legislative process, judges expressed pessimism about the system's ability to productively deal with the volume and volatility of divorce adjudication. As Judge Marie Williams, one of the program pioneers in Tennessee, stated, "I have been shocked, appalled and very dismayed to see not only the volume of divorces, but more importantly, what's happening to families during and after divorce . . . and we see families coming back again and again, embroiled in issues of visitation and money."<sup>81</sup> When asked about the pilot program's chances of working, she added that it had to—it could not get much worse.<sup>82</sup> Many

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<sup>78</sup> He also told the committee that the Colorado district judges met before the hearing and decided to send a representative to express their support for the bill. Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (audio tape on file with author). The same judge also testified before the House Judiciary Committee on March 15, 1996. In addition, Judge Anderson, a presiding domestic judge, has sent a committee member a letter supporting the program Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (audio tape on file with author).

<sup>79</sup> Stephen W. Schlissel, *Board Developing Standards on Parent Education Programs*, 10/7/2003 N.Y.L.J. 16 (dating the first institutionalization of parenting classes in New York to the 2001 order of a chief administrative judge order); Jeffery P. Wittmann, *Divorcing Parents Go to School* 5 No. 4 N.Y. FAM. L. MONTHLY 3 (2004) (noting that Chief Judge Judith Kaye initiated a plan for judges to order more parents to attend parent education programs).

<sup>80</sup> Audio Recording of the Tennessee House Children & Family Affairs Committee (Apr. 28, 1999) (audio tape on file with author).

<sup>81</sup> Judge Marie Williams, quoted in Becky Marby, *Project Seeks to Ease Divorce for Children*, CHATTANOOGA TIMES (Tenn.), Oct. 13, 1997, at A1. See also Nator Hill, *supra* note 72, at M1 (quoting Judge Neil Thomas: "The program is preventive medicine . . . [s]o often one spouse will yank the other back to court over and over. If we do preventive maintenance at the front end, then people don't have to come back to court—no post trial bickering and, hopefully, everyone will be a little more educated.").

<sup>82</sup> *Id.* See also *Public Hearing Before the Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 9–10 (N.H. 1993) (recounting a conversation with Judge Dalianis from South Carolina

judges and lawmakers have professed their hope that parenting classes would reduce the volume of domestic cases and free judges from replacing parents in everyday decision-making.<sup>83</sup>

It is probable that judges get a distorted picture of how acrimonious divorce is and how unreasonable and self-involved parents are because the worst cases are the ones that they get to hear. Studies suggest that a substantial majority of divorcing parents experience “little if any conflict over the terms of the divorce decree.”<sup>84</sup> The vast majority of domestic relations cases are uncontested or settled before trial so litigants appear in court only for the granting of the final decree or for the pre-trial and final decree.<sup>85</sup> Thus, uncontested and settled divorces take little time in

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who said that courts do not have good tools to protect children and added that it appeared that court mandated parenting classes could be one such tool); Tamar Lewin, *Divorcing Sensibly; Courts Are Requiring Classes so Marital Breakups Won't Tear Children Apart*, CHI. TRIBUNE, May 7, 1995 (quoting a judge whose opinion on divorcing parents was formed by hearing a lot of divorce cases “with terrible tugs of war” as saying. “[t]he grownups would act childish and really hurt their kids. I didn't have any special training to help them, but it was clear that a lot of them needed help.”).

<sup>83</sup> Audio Recording of the Arizona Human Services Committee (Jan. 18, 1996) (audio tape on file with author) (Judge Schneider asserting that if the program is successful it will take courts out of micromanaging people's lives); *Hearing before Judiciary Comm.*, 101 Leg., 1st Sess., 21 (Neb. 2007); Audio Recording of the Colorado House Judiciary Committee (Mar. 15, 1996) (Judge Fullerton saying that “this class is lessening custody and parenting times disputes”) (audio tape on file with author); *Hearing Before the Joint Comm. on Children*, 1993 Leg., Regular Sess. 162 (Conn. 1993) (telling the committee that when courses are available parents use the courts less to fight over property or over issues with children); *Regular Session of the Connecticut House of Representatives*, 36 H.R. Proc. Pt. 27, 1993 Regular Sess. (Conn.) at 15, 19 (transcript on file with author).

<sup>84</sup> ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 159 (1992) (finding that seventy-five percent of the families they studied experienced a low-conflict divorce).

<sup>85</sup> Hon. Judith S. Kaye & Hon. Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 164 (1998); John C. Sheldon, *The Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 7, 11–12, 16 (1996) (describing uncontested divorce hearings where counsel asks one litigant to recite the agreement's contents and calling such hearings a waste of judges' time). *See also* Donald G. Tye et al., *Drafting and Answering the Complaint for Divorce or Filing a Joint Petition for Divorce*, DIV MA-CLE 4-1 § 4.2 (2007) (saying that in Massachusetts the vast majority of divorces are filed as contested, yet most settle before they get to trial); MACCOBY & MNOOKIN, *supra* note 84, at 159 (finding that about 1.5% of the divorce cases in their California sample involved formal adjudication); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 407 (1996) (asserting that judicial decisions in divorce cases are a rarity because the vast bulk of couples settle).

comparison with bitter custody or financial battles.<sup>86</sup> This is not to say that uncontested divorces are completely devoid of acrimony. My point is simply that the parents who can conquer their acrimony enough to reach an agreement and avoid litigation have minimal interaction with judges. The heavily contested divorces that fill up judges' schedules and stick in their minds are the ones which cement their negative view of parents. It is therefore probable that judges get an inflated sense of how unreasonable and self-involved parents are because these are the only cases that they hear.

Social psychologists call the process through which judges' frequent contact with misbehaving divorcees can bias their view of divorcees in general "the availability heuristic."<sup>87</sup> Since our cognitive capacities are limited, we rely on mental shortcuts, which allow us to draw conclusions quickly and with relatively little effort. However, heuristics can lead to systematic biases, which can be exacerbated given that we are normally unaware of them.<sup>88</sup> People use the availability heuristic to determine the likelihood or frequency of an event based on how quickly instances or associations come to mind.<sup>89</sup> The problem is that "[t]here are many factors uncorrelated with frequency . . . [that] can influence an event's immediate perceptual salience, the vividness or completeness with which it is recalled, or the ease with which it is imagined."<sup>90</sup>

Thus it is possible that when judges estimate the likelihood of divorce being so acrimonious that parents require intervention, their judgment is influenced by the availability of vivid recollections of worst-behaving litigating spouses. Since judges have been widely instrumental in promoting the codification of parent education programs, the availability heuristic might be partly responsible for the over-inclusiveness of statutes which make parenting seminars mandatory for *all* the parents who initiate a

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<sup>86</sup> Karen Hamilton, *Domestic Relations*, 22 GA. ST. U. L. REV. 65, 68 (2005) (noting that, before Georgia considered changing its waiting period, most uncontested divorces had taken 90 to 120 days to finalize).

<sup>87</sup> Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 40 (2004). A heuristic is a cognitive strategy people rely on when they make inferences.

<sup>88</sup> *Id.* at 39–40.

<sup>89</sup> *Id.* at 40.

<sup>90</sup> *Id.*



divorce or a custody proceeding, regardless of the level of conflict or harmful behavior they exhibit.

Moreover, in a legal regime of vague standards, mandatory participation in parent education programs provides judges with a clear-cut tool to discern parental dedication. Whereas the prevalent “best interests of the child” standard calls for a highly subjective scrutiny and the balancing of long lists of mostly vague parameters, the new statutes equip judges with an easy-to-implement test. While it does not replace the “best interest of the child” calculation, the legislation frequently authorizes judges to consider a parent’s failure to attend classes when deciding custody and visitation, and legislators discussed class attendance as a litmus test for parents’ seriousness and dedication to children.

## **B. Constituting a Threat to Moral and Social Order**

An acute crisis atmosphere pervaded the legislative discussions of parent education programs. The picture painted by judges, lawmakers, and program providers was not only bleak but also imbued with a deep sense of urgency. Lawmakers talked about instituting parent education to save children from child abuse and delinquency as if those were prevalent traits of divorce.<sup>91</sup> They often evoked the notion that it would be better to pay up front rather than forcing the state to pay for these “divorce kids” later when they filled up the prisons as adults.<sup>92</sup> They spoke of generations of broken children who would grow to become dysfunctional adults, with parent education as the finger in the dike. War imagery permeated the discussions.<sup>93</sup> Speakers talked about parents consumed in a “nuclear arms

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<sup>91</sup> *E.g.*, Audio Recording of the Florida House Judiciary Committee (Mar. 23 1994) (audio tape on file with author); Audio Recording of the Utah Senate Human Services Standing Committee (Jan. 27, 1994) (Senator Baird mentioning that one of the purposes of the legislation is to stop emotional and sometimes physical abuse of children of divorce) (audio tape on file with author); *Public Hearing Before the Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 9–10 (N.H. 1993) (attributing violence in schools, a type of child behavior which he thinks the program can alleviate, to divorce).

<sup>92</sup> *Hearings Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 215 (Conn. 1993) (testimony of Barbara Rhue); *Id.* at 1153 (testimony of Andrew Staunton).

<sup>93</sup> Audio Recording of the Arizona House Human Services Committee (Jan. 18, 1996) (Judge Schneider referring to divorcing parents’ warfare; Bruce Cohen, an attorney, talking about being in the trenches and about divorce as a nuclear bomb set on the family) (audio tape on file with author); *Hearings before Joint Comm. on Children*, 1993 Leg., Regular Sess., 217 (Conn. 1993) (stating that once parents get to court they’ve already been through a few wars).

race of bitterness and anger”<sup>94</sup> and engaged in a civil war.<sup>95</sup> Many referred to parents using children as pawns.<sup>96</sup>

Horror stories were one rhetorical device in legislative discussions of mandatory parenting classes. By using the term “horror stories,” this Article is not suggesting that the stories were used disingenuously by supporters of the legislation to provoke reluctant lawmakers—far from it. Instead, this Article argues that horror stories are sincere and betray the state of mind in which this legislative trend has been conceived. In Connecticut, a speaker told of a six-year-old who was murdered by his father and added that maybe the proposed legislation could prevent such tragedies.<sup>97</sup> The legislation sponsor in New Hampshire related an incident she had witnessed the previous week. At a day care center, the divorced parents of a four-year-old child had failed to pick her up due to a scheduling confusion. Though she made it clear that she thought it was her ex-husband’s responsibility, the angry mother showed up and, as they turned to leave, she said to the child, “You know, I’m going to get a gun and kill your father, just like I told you when I lived with him.”<sup>98</sup>

While this story is truly horrifying, there is no way to predict, as the representative herself conceded later in her presentation, whether a four-hour education seminar with no individual counseling component could substantially change this woman’s behavior.<sup>99</sup> Moreover, anyone would be hard-pressed to argue that this extreme conduct is representative of divorcing parents in general. If anything, the story demonstrates that a child can be exposed to detrimental parental attitudes regardless of divorce, as the

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<sup>94</sup> Andrew Shepard & Stephen Schlissel, *Planning for P.E.A.C.E.: The Development of Court-Connected Education Programs for Divorcing and Separating Families*, 23 HOFSTRA L. REV. 845, 857 (1995).

<sup>95</sup> *Public Hearing before Senate Judiciary Comm.*, 153rd Leg., 1st Sess. (N.H. 1993) (written Testimony of Bruce Friedman, Attorney).

<sup>96</sup> *Transcript of Nebraska Legislature Floor Debate*, 100<sup>th</sup> Leg. 1<sup>st</sup> Sess., May 16, 117 (Neb. 2007) (transcript on file with author); Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2 1996) (testimony of Judge Fullerton) (audio tape on file with author); *Hearing Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 197 (Conn. 1993).

<sup>97</sup> *Hearings Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 215 (Conn. 1993).

<sup>98</sup> *Public Hearing Before Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 2 (N.H. 1993).

<sup>99</sup> *Id.* at 5.

mother alluded to past remarks made when the parents had still been living together. But the story was presented not to show that some high-conflict marriages create substantial risk for children, or that high-conflict divorcing parents might need more than parenting classes to stop emotionally abusing their children. Rather, this outlier case was used as a tone-setting measure, providing a rationale for the need to mandate parents, even in low-conflict separations, to take parenting classes.

That “children of divorce” do not do as well as children raised in intact families is by now such a wide-spread notion that it is hardly surprising for proponents of parent education programs to start from the premise that divorce is detrimental to children’s well-being.<sup>100</sup> The judicial appetite for programs that would free them from micromanaging divorcing families and spare children the harsh outcomes of litigation coincided with a growing professional commitment to exploring and influencing the effects of divorce on children. The first longitudinal studies of divorce’s impact on children after the institution of no-fault divorce appeared in the 1980s. Sociologists and child psychologists investigated the detrimental effects of parental separation on children—their causes, duration, and possible mitigating factors. Their alarming findings, especially those in Judith Wallerstein’s long-term study, have informed the initial court-affiliated pilot programs and later the legislative process.<sup>101</sup>

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<sup>100</sup> Arbuthnot & Gordon, *supra* note 50, at 61; Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J. L. & FAM. 5, 9–10 (2002); Bacon & McKenzie, *supra* note 46, at 85; Erickson & Ver Steegh, *supra* note 43, at 891; Fischer, *supra* note 75, at 36; Marsha Garrison, *Promoting Cooperative Parenting: Programs and Prospects*, BROOK. L. SCH. RES. STUD. PAPERS (2008); JoAnne L. Pedro-Carroll, *Fostering Resilience in the Aftermath of Divorce: The Role of Evidence-Based Programs for Children*, 43 FAM. CT. REV. 52, 52 (2005); Pedro-Carroll et al., *supra* note 43, at 378–79; Pollet & Lombreglia, *supra* note 10, at 376; Peter Salem, *Education for Divorcing Parents: A New Direction for Family Courts*, 23 HOFSTRA L. REV. 837, 838 (1995); Schepard et al., *supra* note 19, at 769; Schepard & Schlissel, *supra* note 94, at 847; Slezak, *supra* note 77.

<sup>101</sup> Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (statement of the Director of “Parenting after Divorce—Denver” explaining the explosion in parent education programs as a result of the increase in divorce cases in the 1970s and the recent long term research about the impact of divorce on children) (audio tape on file with author); *Public Hearing before Senate Judiciary Comm.*, 153rd Leg, 1st Sess., 9 (N.H. 1993) (mentioning the newly-available body of research about the impact of divorce on children as proof of the need for parenting classes); *Hearings before Joint Comm. on Children*, 1993 Leg., Regular Sess., 161, 163 (Conn. 1993) (bill presentation opening with the findings of longitudinal studies about the impact of divorce on children and including the information that Wallerstein has offered to help the Connecticut commission with class curriculum); Audio Recording of the Minnesota House Judiciary Committee (Apr. 3, 1995) (seminar provider citing the results of the longitudinal studies as the reason to have parenting classes)

In state after state, the discussion of parent education programs dwelled on the grim future that divorce generally, and inter-parental conflict specifically, spelled for children. In Colorado, the preamble to the statute acknowledges the catalytic effect these findings had on the legislation:

The general assembly recognizes research that documents the negative impact divorce and separation can have on children when the parents continue the marital conflict, expose the children to this conflict, or place the children in the middle of the conflict or when one parent drops out of the child's life.<sup>102</sup>

However, the social science findings about the effects of divorce on children are far from clear-cut. A recent study argues that there is no evidence to support the claim that divorce causes an increase in child behavior problems.<sup>103</sup> Other studies suggested that while there was a measurable difference between children with divorced parents and children with married parents, the gap between the groups was small.<sup>104</sup> Even studies that connect divorce with poor outcomes for children maintain that stable income and a solid child-parent relationship can mitigate the difficulties created by divorce.<sup>105</sup> “Rather than concluding that parental divorce and

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(audio tape on file with author); Hamilton, *supra* note 86, at 68 (relating the floor debate in the Georgia Senate which started with the statistical evidence about the effects of divorce).

<sup>102</sup> COLO. REV. STAT. § 14-10-123.7(1) (2009).

<sup>103</sup> Jui-Chung Allen Li, *The Children are OK: Divorce and Children's Behavior Problems*, RAND LAB. & POPULATION WORKING PAPER SERIES, 36 (2007).

<sup>104</sup> Amato, *supra* note 48, at 497 (reviewing a decade of literature on divorce's implications and noting that studies from the 1990s showed small effect size similar to studies conducted in the 1980s); Robert M. Gordon, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1447 (1998) (concluding that divorce bears small effects on children both in terms of effect size and of the number of affected children); Bonnie L. Barber & David H. Demo, *The Kids Are Alright (at Least, Most of Them): Links Between Divorce and Dissolution and Child-Well-Being*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 291 (Mark A. Fine & John H. Harvey eds., 2006) (arguing that literature reviews and meta-analysis research consistently show that in the United States “on average, parental divorce and remarriage have only a small negative impact on the well-being of children”).

<sup>105</sup> E. Mavis Hetherington, *Should We Stay Together for the Sake of the Children?*, in COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE 114 (E. Mavis Hetherington ed., 1999) (concluding that while parents and children might suffer some initial difficulties following a divorce, they can adapt well to the new situation if they do not encounter additional stress, if conflict levels are low, and if the custodial parent is able to sustain authoritative parenting); Amato, *supra* note 48, at 499 (citing a study conducted by Goldberg

remarriage are preludes to serious or pervasive adjustment problems in most children, it would be more accurate to conclude that family transitions place children at risk.”<sup>106</sup> In addition, children whose parents stay married despite a high-conflict relationship perform just as poorly as children in divorced families purportedly do.<sup>107</sup> There are more children in this situation than one might think. One set of longitudinal data suggests, for example, that the vast majority (78.3%) of high-conflict couples remained married five years later, even though sixty percent of them still reported high levels of conflict.<sup>108</sup>

In other words, targeting divorcing parents for parent education can be simultaneously over-inclusive and under-inclusive. The legislation requires parents who are able to provide their children with the necessary resources for healthy socio-emotional development to attend—and usually pay for—classes that they do not need.<sup>109</sup> At the same time, it fails to address the needs of children who might benefit from such parental education but whose parents do not initiate divorce or custody

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et al. which found that income stability, not total income amount, predicts children’s well-being).

<sup>106</sup> E. Mavis Hetherington & Margaret Stanley-Hagan, *Parenting in Divorced and Remarried Families*, in HANDBOOK OF PARENTING: BEING AND BECOMING A PARENT 309 (Marc H. Bornstein ed., vol. 3, 2002).

<sup>107</sup> Thomas L. Hanson, *Does Parental Conflict Explain Why Divorce Is Negatively Associated with Child Welfare?* 77 SOC. FORCES 1283, 1285 (1999). Studies also show that children whose parents divorce show adjustment problems many years before the divorce occurs. E. Mavis Hetherington & Margaret Stanley-Hagan, *The Adjustment of Children with Divorced Parents: A Risk and Resiliency Perspective*, 40 J. CHILD PSYCHOL. PSYCHIATRY 129, 133 (1999).

<sup>108</sup> Hanson, *supra* note 107, at 1296–98. In contrast for most couples conflict diminishes after divorce and only for about fifteen to twenty percent of divorced parents conflict remains elevated even after the two year transition period. *See* Hetherington, *supra* note 105, at 98. *But see*, Barber & Demo, *supra* note 104 at 295 (citing a study finding that sixty percent of couples were angry and highly conflictual during the first few years following divorce).

<sup>109</sup> This sentiment was echoed during the Connecticut discussion of parent education when a representative, who opposed mandating parent education in all cases of divorce involving children, said “why should the state be sticking its nose into a divorce case when the two parties involved are not fighting?” *Regular Session of the Connecticut House of Representatives*, 36 H.R. Proc. Pt. 27, 1993 Sess. at 21. Similarly, a separated couple who attended together the class in Kansas City complained about having to lose work and added “I just don’t see the point of making everyone come here. We’ve worked stuff out. We don’t need help.” Lewin, *supra* note 82, at S9.

proceedings.<sup>110</sup> This is a result of the assumption that parents' choice to dissolve their marital ties necessarily reflects poor parenting. As we shall see below, the mere decision to divorce was taken as *prima facie* evidence of parental inattentiveness to children's needs. Portraying children as generally suffering catastrophic results from divorce created not only the rationale for intervention but also the basis for the moral condemnation of parents.

### C. Resolving the Discrepancy between Harm and Remedy

The terminology of catastrophe served another important role by bridging the gap between the aspiration to substantially affect children's well-being and the restricted means prescribed to meet this lofty goal. Despite lawmakers' strong belief that divorce was extremely harmful to children and to the society in general, in the climate of the 1990s when many of these discussions took place, strong measures, such as denying couples the legal option of divorce, were no longer a viable option. However, because the situation had been described in the direst terms, the conclusion lawmakers reached was that they had to do something, *anything*, to change the existing order, if only to "save one child."<sup>111</sup>

This type of argument came in handy when the subject of program duration as a function of funding came to the fore. There was a recurring fear in the discussions about parenting classes that "four hours [was] too short to really gain much information on how to best deal with children and truly help them cope."<sup>112</sup> Nevertheless, while lawmakers were extremely

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<sup>110</sup> It also fails to require divorcing parents who experience high-conflict separations—and whose children face the highest risk—to attend longer, more thorough, hands-on interventions. The exception is Nebraska where courts are not only required to order all divorcing parents to attend a parenting class but also authorized to order parents who demonstrated continued conflict to attend a "second-level parenting education course subsequent to completion of the basic level course." NEB. REV. STAT. ANN. § 43-2928 (LexisNexis 2009).

<sup>111</sup> Audio Recording of the Tennessee House Judiciary Committee (May 18, 1999) (regarding a program that included both parent education and mediation) (audio tape on file with author). See also *Public Hearing Before Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 8 (N.H. 1993) (statement of a representative, arguing that the education program is not perfect but it is better than nothing); Marby, *supra* note 81, at A1 ("If we can reach even two people out of 100, we will have saved the children of that marriage. . . . It may be one child, it may be three or four, or more. But we will save them from being traumatized.").

<sup>112</sup> *Hearings Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 163 (Conn. 1993) (the Commission on Children recommending the seminar be expanded to three to six sessions). See also Carol Lawson, *Requiring Classes in Divorce*, N.Y. TIMES, Jan. 23,

enthusiastic about parenting classes, they were far less avid when it came to footing the bill. In most states, legislators expressed contradictory wishes. Since they worked within a parental responsibility framework, lawmakers generally wanted divorcing parents to cover the costs of their participation.<sup>113</sup> As a result, while funding is different from state to state, for most programs it comes from parents' fees.<sup>114</sup> On the other hand, legislators also wished to avoid costly barriers to divorce that would *de facto* impede parents' access to courts. The price per parent is usually modest—in most states the fee is less than a hundred dollars,<sup>115</sup> and in many states the fee caps are much lower still—but even short programs' costs can be substantial, requiring additional funding in the form of grants, divorce filing fees, marriage fees, and other county and court resources.<sup>116</sup> The lack of

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1992, at C1 (Judith Wallerstein expressing a preference for “more ambitious series of required seminars” over the existing four-hour model); *Hearing Before Judiciary Comm.*, 101 Leg., 1st Sess., 20 (Neb. 2007) (class provider noting that they have parents only for six hours which does not allow them to include all that they need to teach).

<sup>113</sup> Most states make exception for indigent parents and try to fund their participation by the general attendance fees, be they generated from other divorcing parents, from divorcing couples generally, from marrying couples, etc. However, in many states, speakers professed a strong preference for divorcing parents covering the cost. In Tennessee, for example, the legislation was held for a year over the disagreement about the sponsors' suggestion that the bill would be funded through the marriage license fee rather than through divorce filing fees. Unable to agree, the Senate and House moved the bill to a conference committee. The bill was adopted a year later and the statute leaves the fee collection to the private education providers. Audio Recording of the Tennessee Finance, held in Ways & Means Comm. (May 25, 1999) (audio tape on file with author); Audio Recording of the Tennessee House of Representatives (May 28, 1999) (audio tape on file with author); Audio Recording of the Tennessee Senate (May 28, 1999) (audio tape on file with author); Audio Recording of the Tennessee Senate (May 31, 2000) (audio tape on file with author).

<sup>114</sup> Geasler & Blaisure, *supra* note 18, at 49.

<sup>115</sup> The exception to the hundred dollars mark is Connecticut which capped participation fees at two hundred dollars per parent, and Maryland and Tennessee which did not set a fee at all and left it to program providers. Geasler and Blaisure reported one program fee of \$360. The survey has not mentioned whether the program was mandatory, and given the prevalence of statutory caps it is unlikely that it was. Geasler & Blaisure, *supra* note 18, at 49.

<sup>116</sup> Geasler & Blaisure, *supra* note 18, at 49. For example, Allen County in Ohio has recently approved more than \$35,000 in grant money for private organizations offering parent education programs. The money comes from divorce filings fees and from Birth and Death Records fees. Bart Mills, *Allen County Groups Get Grants for Parenting Education*, LIMA NEWS (OHIO), Mar. 21, 2007. In New York the P.E.A.C.E. programs has been able to expand at the pilot stage thanks to private donations and a federal grant. Hon. Miller et al., *supra* note 22, at 42.

funding proved the strongest impediment to implementing long multi-session interventions instead of short parenting classes.<sup>117</sup>

The solution was to adopt short and relatively cheap interventions, sometimes as short as a sixty-minute video screening. Framing the problem as a major crisis not only improved the legislation's chances of passing, it also created a mechanism to resolve the tension between the desire to help children and the reluctance to spend money on it. The crisis atmosphere justified making compromises about curricula and format because bill drafters "thought some is better than none so if [some counties] can afford a \$125 video that lasts an hour we prefer they do that than nothing."<sup>118</sup>

Finally, for some regulators the solution for the discrepancy between means and end was to assume that the legislation would achieve more than its official goals. Judges and legislators occasionally professed a wish that parenting classes would achieve reconciliation. Some went as far as asserting that it did, although no one even tried to back such claims with concrete evidence. For example, one judge's comment to the Colorado House Judiciary Committee:

It's a class. Not mediation, not anything to do with getting the parents back together, but we learned that one of the by-products is just that. Judge Phillips, who is the presiding judge this year in domestic relations court, has told me that he believes that a significant number of parents, after they've gone to this class and realize how hard it is to [sic] children, that they work out some of their problems and some of them have been getting back together.<sup>119</sup>

Similarly, a judge told the New York Times that one of the program's effects is that "[s]ome couples are compromising and are settling their cases without a bitter court fight because they realize it would hurt their child. . . . We don't have statistics to back this up, but we know it's happening."<sup>120</sup> In a way, this final sentence sums up nicely the entire

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<sup>117</sup> Cookston et al., *supra* note 41, at 196 (surveyed court personnel in counties that have short parents education programs most often gave funding as the reason for inability to implement longer programs).

<sup>118</sup> Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (one of the bill drafters explaining why bill does not specify the curriculum requirements) (audio tape on file with author).

<sup>119</sup> Audio Recording of the Colorado House Judiciary Committee (Mar. 15, 1996) (audio tape on file with author).

<sup>120</sup> Lawson, *supra* note 112, at C1.



process of enacting mandatory parent education programs: judges' frustration with divorce law and with divorce litigants; alarming social science findings, amplified and exaggerated by legislators; and a belief, so strong that it does not look for proof or evidence, that if we only told parents how horrifying divorce was for children, if we just explained to them that they should adopt a "business-like manner," they would change their behavior, reducing inter-parental conflict and children's exposure to it. To fully understand this belief and its roots, this Article now moves from lawmakers' estimation of the magnitude of the harm that parents' behavior during divorce poses to children and society to their understanding of the causes for such harmful parental conduct.

#### IV. BLAMING PARENTS

This Part examines the way legislators talked about divorcing parents as different from other parents and analyzes lawmakers' contention that divorcing parents were too selfish or self-involved to notice and care about the needs of their children. It asserts that the legislation is the result of a prevalent bias against parents who decide to dissolve the nuclear family unit. Finally, an argument is advanced that this bias caused legislators to overlook the conditions that are likely to impact parents' conduct during and after divorce. Specifically, it explores self-representation in divorce procedures and the steep decline in mothers' standards of living as two possible sources of inter-parental conflict, when it occurs. It concludes that the legal system should target the conditions, in which divorce takes place, rather than attacking parental choice and character.

##### A. Equating Nuclear Family Dissolution with Parental Malfunction

It would appear that parenting classes are a by-product of the shift away from judging the morality of the decision to divorce. In most states, promoting or achieving parental reconciliation is not an explicit goal of parenting classes. Parenting classes were part of a reform that ostensibly accepted the fact that parents sometimes split up and sought only to change the characteristics of parental separation. The notion that classes should not, and did not, criticize divorce itself was raised in many states.<sup>121</sup> As the

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<sup>121</sup> See, e.g., Audio Recording of the Colorado House Judiciary Committee (Mar. 15, 1996) (a parent education provider saying that the classes were not trying to influence parents not to divorce, only whether they would divorce well) (audio tape on file with author); *Public Hearing Before Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 1 (N.H. 1993) (explaining that preventing divorce is not one of the seminar's goals).

representative of the Commission on Children in Connecticut put it, “[t]he question here is not a moral one. The state should not be involved in whether or not parents are divorcing and does not have a right to be in that issue.”<sup>122</sup>

Yet, both class design and legislative histories reveal a moral condemnation of parents’ decision to dissolve the nuclear family. Generally, the law assumes that fit parents act in the best interest of their children and it shelters parental discretion through legal protections from interference.<sup>123</sup> In contrast, the legislation mandating parent education programs assumes that, though not legally unfit, divorcing parents are not entirely fit to parent. As we shall see below, some regulators treat the decision to divorce as *prima facie* evidence that parents do not give their children’s needs proper weight. Almost all the parties involved in the parent education project thought that divorcing parents’ behavior was always harmful and a sign that parents had stopped thinking about their children. Participants in legislative processes shared an assumption that, for a multitude of reasons, divorcing parents were oblivious to their children’s needs and pain during and after divorce.

Separating parents, in this view, do not understand the impact of their decision on their children, and they remain ignorant because they are so engrossed in their own feelings that they do not see their children nor consider their needs. Children become aggressive, depressed, or angry, and their parents do not notice.<sup>124</sup> “[A]dults are so involved in what is happening between their relationships that they often aren’t thinking about the children.”<sup>125</sup> Speakers in these discussions talked about children frequently lost and forgotten.<sup>126</sup> Class names, like “What about the

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<sup>122</sup> *Hearings Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 161 (Conn. 1993). One expert even suggested that under certain circumstances, e.g., when the marriage had been extremely acrimonious, conciliation was not desirable. Audio Recording of the Colorado House Judiciary Committee (Mar. 15, 1996) (Sue Waters, a parent education provider, saying: “[f]rankly as a child of a dysfunctional family which ended forty years later in divorce I’d rather have been a child of divorce that went well.”) (audio tape on file with author).

<sup>123</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>124</sup> *Hearings before Joint Comm. on Children*, 1993 Leg., Regular Sess., 161 (Conn. 1993).

<sup>125</sup> *Public Hearing Before Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 5 (N.H. 1993).

<sup>126</sup> *Regular Session of the Connecticut House of Representatives*, 36 H.R. Proc. Pt. 27, 1993 Leg. Regular Sess., 23 (Conn. 1993); Audio Recording of the Tennessee Senate

Children?” and “They’re Still our Children,” are telling. As one family judge put it, “[m]any people never consider the impact divorce has on their children.”<sup>127</sup>

Some program proponents argued that parents recklessly endangered their children and reproached parents’ decision to divorce and their conduct during and after separation. For example, one judge explained parental behavior by saying that “the parents hate each other more than they love their children.”<sup>128</sup> A senator compared divorce education to teaching repetitive offenders how to drive safely and added that divorcing parents

[A]re certainly selfish in their thoughts, they are not thinking about the children, they are concerned with the divorce and very little else. . . . I think we need to tell these people who are so self-centered at this time that they need to buck up and shape up or ship out.<sup>129</sup>

Other legislators suggested that parents recklessly use their children to hurt each other. “It’s more about winning than about the children . . . it’s about winning and losing, and children become[] the pawns.”<sup>130</sup> One representative remarked that divorcing parents are “two very frequently contrary, obstinate, mad people” and another blamed divorce on parental immaturity.<sup>131</sup>

Alternatively, speakers contended that parents were so absorbed in the divorce and in their own pain that they did not notice their children and the harm that they were inflicting on them.<sup>132</sup> “[M]any divorcing parents are

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Judiciary Committee (May 27 1997) (Senator Harper saying that the bill is designed to make sure children are not lost in the dispute) (audio tape on file with author).

<sup>127</sup> Judge Cynthia J. Ayers, quoted in Lawson, *supra* note 112 at at C1.

<sup>128</sup> Audio Recording of the Arizona Human Services committee (Jan. 18 1996) (testimony of Judge Schneider, adding that in their desire to hurt and destroy each other parents lose sight of their children) (audio tape on file with author).

<sup>129</sup> *Id.*

<sup>130</sup> *Transcript of Nebraska Legislature Floor Debate*, 100<sup>th</sup> Leg. 1st Sess. May 16, 109 (Neb. 2007) (transcript on file with author).

<sup>131</sup> Audio Recording of the Tennessee House of Representatives (May 24, 1999) (audio tape on file with author); Audio Recording of the Tennessee House of Representatives (May 28, 1999) (audio tape on file with author).

<sup>132</sup> This idea is pervasive. For representative examples see *Public Hearing Before Senate Judiciary Comm.*, 153rd Leg., 1st Sess., 5 (N.H. 1993); Audio Recording of the

so caught up in their own pain, anger, sense of loss, anxiety about the future, that they overlook the needs of their children at a critical time.”<sup>133</sup> A lawyer in Arizona compared a parent going through divorce to a widower and added that parents are not evil, only so consumed by grief and pain that they cannot see or understand the impact of the divorce on their children.<sup>134</sup>

Two observations are noteworthy here. The first is that the presumption that parents act in the best interest of their children, which normally governs family law, was seriously questioned, if not outright dismissed, by these speakers. Parents’ decision to separate was in itself enough to cast doubt in lawmakers’ minds about parental priorities and awareness of—and *interest in*—children’s needs. The legislation does not wait for parents to demonstrate detrimental behavior; it assumes that such behavior is inevitable.<sup>135</sup> This Article argues that this is a mistake.<sup>136</sup> Moreover, this Author suggests that the contention that parents “have to go to parenting class to learn how to be parents after the separation”<sup>137</sup> is at the heart of the moral condemnation. Unlike the Turmoils, who have lost their livelihood but stayed married, divorcing parents lose their credibility as parents by virtue of their decision to separate.<sup>138</sup> So when faced with harsh circumstances that accompany their new situation, they do not enjoy the same legal assumption that the Turmoils—as well as severely ill parents,

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Tennessee House of Representatives (May 28, 1999) (audio tape on file with author); Audio Recording of the Colorado Senate Judiciary Committee (Feb. 2, 1996) (audio tape on file with author).

<sup>133</sup> *Hearings Before Joint Comm. on Children*, 1993 Leg., Regular Sess., 199 (Conn. 1993) (on file with author).

<sup>134</sup> Audio Recording of the Arizona Human Services Committee (Jan. 18, 1996) (testimony of Bruce Cohen) (audio tape on file with author).

<sup>135</sup> Note that the studies about divorce and inter-parental conflict and their implications for children do not support this conclusion. All these studies show is that having her parents divorce increases a child’s risk for bad outcomes, like behavior or academic problems, and that inter-parental conflict is one of the variables related to this increase.

<sup>136</sup> See *supra* notes 84–86 and accompanying text. See also Booth Moore, *New World Order; Divorce Needn’t Be Wholly Acrimony*, L.A. TIMES, Mar. 24, 1999, at E2 (describing collaborative divorce and the “no-court” divorce movement).

<sup>137</sup> *Transcript of Nebraska Legislature Floor Debate*, 100<sup>th</sup> Leg. 1<sup>st</sup> Sess. May 16, 110 (Neb. 2007) (on file with author).

<sup>138</sup> As one of the scarce opponents of the legislation said, “With all due respect, I don’t think that we should be presuming people aren’t going to be able to make good decisions.” *Hearing Before Judiciary Comm.*, 101 Leg., 1st Sess., 31 (Neb. 2007) (on file with author).

widowers, and other parents who find themselves in grave hardship—enjoy. On the contrary, the legal system is all too keen on informing them that while their situation is rough, people like them need reminders that it is rougher for children.

Second, the conclusion regulators draw from their assessment of the hurdles parents face after divorce is not that parents should be helped to stand back on their feet as quickly as possible. Rather, what programs are designed to do is confront parents with the supposedly devastating consequences of their actions. As the co-founder of a New York parent education program put it, “a required educational program for divorcing parents is a moral statement about the state’s priorities in resolving their family problems.”<sup>139</sup> The emphasis is on what parents are doing wrong and how they are not serving their children as they should. It is parents who have made a mess and it is up to them to clean it up.

This focus on individual choice and character blinds lawmakers and program supporters to the *contents* of inter-parental conflict when it exists. Nobody stops to wonder what divorcing parents are fighting *about*. Separating parents, especially custodial mothers, often face stress, economic hardship, an inter-parental gap in resources, greater demands on their time, the anxiety involved in tackling the legal system and vague legal standards, and job and housing instability. These factors all erode the quality of parent-child relationships and inflame inter-parental conflict. In the Part that follows, this Author suggests that the state should abandon parent-blaming and argues that family law should not “change the focus from parents to children” as current parent education legislation proclaim to do. Rather, if states want to promote child welfare, they should focus on helping parents change their situation so that these parents, and their children, make the transition from marriage to separation as quickly and as unscathed as possible.

## **B. Letting Go of Blame**

Lawmakers assume that separating parents fight, and continue to fight, because they do not see how much their children are suffering. Therefore their conclusion is that parents need to be told how bad their actions are for their children, either as an admonishment or as a reminder. However, that some divorcing parents’ behavior is problematic in and of

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<sup>139</sup> Schepard et al., *supra* note 19, at 775. *See also* Lawson, *supra* note 112, at C1 (quoting Judith Wallerstein as saying that while multi-session programs are preferable, “still, the four-hour course sends a morally important message to parents: your children are of concern to society, and divorce has consequences for them”).

itself does nothing to validate legislators' assumption that this behavior is primarily the result of parents' inattention, ignorance, or selfishness. Parent education mandates promote a seemingly obvious cause-and-effect scenario that tracks back social ills to an individual failure of conduct. By harnessing the law to require parents to become a captive audience to this message, that *they* ought to change *their* behavior and *their* relationships, the legal system makes a choice to downplay the role that the existing social structure, economic incentives, and the law itself play in creating the harmful effects of divorce generally, and in intensifying inter-parental conflict particularly. Specifically, parent education mandates downplay the extent to which gender roles and gender inequality shape the aftermath of divorce. In what follows this Article offers two examples of factors that shape parental behavior during and after the dissolution of inter-parental relationship and influence the existence, severity, and duration of conflict. They are by no means exhaustive; rather, the aim is to demonstrate how we could understand parental conduct in the aftermath of divorce once moral judgment is set aside.

### *1. First Example: Financial Implications of Divorce*

One of the main factors that potentially exacerbate post-separation parental conflict is the dramatic change in financial abilities and constraints many parents experience when the marriage dissolves.<sup>140</sup> In fact, "financial issues may be among the most intransigent issues parents face following divorce."<sup>141</sup> Economic instability and a decrease in economic resources contribute to parental stress and discord and adversely affect children.<sup>142</sup> Having to sustain two households on the means previously supporting one often results in severe deterioration of living standards. Separation is often accompanied by relocation and a reduction in direct parenting time since

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<sup>140</sup> Ronald L. Simons et al., *Explaining the Higher Incidence of Adjustment Problems Among Children of Divorce Compared with Those in Two-Parent Families*, 61 J. MARRIAGE & FAM. 1020, 1023 (1999).

<sup>141</sup> Brandon, *supra* note 45, at 181.

<sup>142</sup> SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 92 (1994) (finding that the decrease in income after divorce "plays a major role in explaining why children in single-parent families have lower achievement than children in two-parent families"); Amato, *supra* note 48, at 499 (reviewing ten years of research finding that post divorce economic hardship and economic instability are associated with negative outcomes for children); Hetherington & Stanley-Hagan, *supra* note 106 ("Concerns about financial settlements and child support can fuel ongoing conflict between ex-spouses.").

parents are forced to devote more time to employment.<sup>143</sup> Not surprisingly, the negative life events and economic strain associated with divorce are responsible for divorcing parents' greater tendency to become depressed.<sup>144</sup> Generally, it has been shown that the quality of parenting that custodial parents achieve depends in part on available resources.<sup>145</sup> The impact of the reduction in financial resources on children's well-being is dramatic: Many studies have found that after controlling for socioeconomic resources "the gap between children from divorced and first-marriage families is reduced sharply, often becoming nonsignificant."<sup>146</sup>

Not everyone comes out of the marriage in the same predicament. In fact, studies show a substantial gender disparity in post-divorce living standards. A recent, nuanced study suggests that men who provided more than eighty percent of the household income before the divorce have experienced a significant improvement (a seventeen percent increase) in their standards of living after separation.<sup>147</sup> In the 1990s, this group accounted for more than a third of partnerships.<sup>148</sup> Men who contributed between sixty percent and eighty percent of household income experienced little change in living standards, according to this study,<sup>149</sup> and men who contributed less than sixty percent experienced some decline in their living standards, although their losses had been attenuated three years after separation.<sup>150</sup> The authors of the study conclude by reminding readers that women's losses are far greater and that "most women would have to make

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<sup>143</sup> Amato, *supra* note 48, at 499; Simons et al., *supra* note 140, at 1023; Penelope E. Bryan, *Re-asking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 759 (2000) (noting that single parent families experience more residential mobility, especially immediately after divorce, which negatively affects children).

<sup>144</sup> Simons et al., *supra* note 140, at 1021.

<sup>145</sup> Hetherington & Stanley-Hagan, *supra* note 106, at 142.

<sup>146</sup> Barber & Demo, *supra* note 104, at 294.

<sup>147</sup> Patricia A. MacManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 AM. SOC. REV. 246, 257 (2001). Previous conservative findings suggested that men's mean standard of living increased by twenty percent after divorce. See Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996).

<sup>148</sup> MacManus & DiPrete, *supra* note 147, at 265.

<sup>149</sup> *Id.* at 256.

<sup>150</sup> *Id.* at 265.

heroic leaps in the labor (or marriage) market to keep their losses as small as the losses experienced by the men from whom they separate.”<sup>151</sup> Indeed, women’s standards of living typically decline by twenty-five percent after separation.<sup>152</sup>

Moreover, most children reside with custodial mothers, who commonly experience a twenty-five to forty-five percent drop in the family’s annual income.<sup>153</sup> Custodial mothers suffer from less job stability and lower earning powers, compared with custodial fathers, and newly divorced mothers are three times more likely to be unemployed, as well as more likely to lose their jobs when employed, than other mothers.<sup>154</sup> The gap between mothers and fathers is greater than the general gap between women and men. Most commonly, non-resident fathers’ levels of well-being are double those of their former wives and children.<sup>155</sup> To recap, divorce frequently creates a situation in which the custodial parent, typically the mother, suffers employment instability, reduced financial resources, and a decline in standards of living. This situation can have a negative impact on the levels of custodial parents’ stress and the quality of their parenting.<sup>156</sup> It could also have a negative effect on their perceptions of, and relationships with, their former spouses.<sup>157</sup>

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<sup>151</sup> *Id.* at 266.

<sup>152</sup> Peterson, *supra* note 147, at 534 (1996). See also Liana C. Sayer, *Economic aspects of Divorce and Relationship Dissolution*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 390 (Mark A. Fine & John H. Harvey eds., 2006) (stating that all of the studies she surveyed found that “women and children experience substantial decline in economic well-being” after marital dissolution).

<sup>153</sup> Hetherington & Stanley-Hagan, *supra* note 107, at 134. Simons et al. recite a thirty- to fifty-percent reduction in income following divorce. Ronald L. Simons et al., *Family Structure Difference in Stress and Behavioral Predispositions*, in UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES 46 (Simon & Associates eds., 1996).

<sup>154</sup> Hetherington & Stanley-Hagan, *supra* note 107, at 134.

<sup>155</sup> Suzanne M. Bianchi et al., *The Gender Gap in the Economic Well-Being of Nonresident Fathers and Custodial Mothers*, 36 DEMOGRAPHY 195, 201 (1999).

<sup>156</sup> E. Mavis Hetherington & Margaret Stanley-Hagan, *supra* note 106 (citing studies which found that in households headed by a divorced mother, financial decline was linked to less effective maternal discipline and monitoring of children, to children’s behavioral problems, and to mother and child depression).

<sup>157</sup> The word “could” is used because most studies correlating economic hardship and inter-parental discord focus on the pre-divorce family. Sobolewski & Amato, *supra* note 66, at 142–43 (surveying studies which strongly suggest that economic hardship generates



It should come as little surprise, then, that child support is by far the most common issue driving parents back to court.<sup>158</sup> Mothers' satisfaction with the amount of child support they receive is inversely related to the level of post-divorce conflict; the more satisfied mothers claimed to be, the lower the level of conflict they reported.<sup>159</sup> Moreover, satisfaction with financial child support has a significant relationship with post-divorce co-parenting quality.<sup>160</sup> Yet, this is by no means only mothers' problem, and it is not solely up to fathers to fix it. Individual fathers cannot compensate mothers for the lack of affordable child care, a healthcare system that conditions insurance on employment or marriage, and a job market channeling them to low paying jobs. Divorcing parents face a real, complex financial challenge upon separation. The benefits of the economy of scale conferred by a shared household may be taken for granted until one tries to sustain two households, complete with two sets of utility bills, houseware, taxes etc., with the means previously used to maintain one.<sup>161</sup> Under current conditions, unless parents can come up with a way to increase their overall income or decrease their spending, they are stuck in a zero-sum game, in which women and children are currently on the losing side.

Moreover, the legal system is not an innocent bystander in this process. It is at least partially responsible for creating the financial asymmetry and constraints that divorcing parents experience. It plays an active role in determining the resource distribution and financial stability of divorcing parents. The dismantling of the safety net previously offered to poor single mothers<sup>162</sup> and child-support guidelines that directly link child

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discord in the marital relationship which in turn erodes the quality of parent-child relationship). See also Ronald L. Simons, *Theoretical and Policy Implications of the Findings*, in UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES 204 (Simons & Associates eds., 1996) (concluding that post-dissolution financial pressures increase children's chances of developmental difficulties).

<sup>158</sup> Arbuthnot et al., *supra* note 48, at 271; Kramer & Kowal, *supra* note 48, at 459.

<sup>159</sup> Debra A. Madden-Derdich & Joyce A. Arditti, *The Ties That Bind: Attachment between Former Spouses*, 48 FAM. REL. 243, 246 (1999).

<sup>160</sup> Kathryn Bonach, *Factors Contributing to Quality Coparenting: Implications for Family Policy*, 43 J. DIVORCE & REMARRIAGE 79, 97 (2005).

<sup>161</sup> Liana C. Sayer, *Economic Aspects of Divorce and Relationship Dissolution*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 385 (Mark A. Fine & John H. Harvey eds., 2006).

<sup>162</sup> In the same period that parent education programs have gained traction, welfare benefits were reconceived as temporary payments and focus shifted to beneficiaries' entrance into the workforce. With the move from Aid to Families with Dependent Children

welfare to the custodial parent's pre-support income<sup>163</sup> are but two examples. Focusing on parental choice and individual conduct, as parenting class mandates do, serves to obscure the role of law in creating the conditions that inflame post-divorce strife.

## **2. Second Example: Lack of Legal Representation and Information**

A significant majority of domestic relations cases involve *pro se* filings. Already in the early 1990s, only twenty-nine percent of all domestic relations cases in the United States involved two attorneys, and divorce court personnel cited difficulties related to self-represented parties as the second-most frequently noted problem.<sup>164</sup> This trend continues today. Recent surveys continue to find that about seventy percent of domestic relations cases involve at least one *pro se* party.<sup>165</sup> The phenomenon is so widespread in civil litigation that all fifty states and the District of Columbia have established centers to help *pro se* litigants.<sup>166</sup>

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(AFDC) to Temporary Assistance to Needy Families (TANF), the already dwindling safety net that the state offered to struggling parents has shrunk considerably. The reform resulted in substantial change to employment patterns of poor single parents but did little to lift children out of poverty. Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 368 (2007).

<sup>163</sup> Support calculations are skewed because states use a marginal definition of "child expenditure" so that noncustodial parents do not share in all expenditures that benefit children. If the custodial parent's income is significantly lower than the joint income of the intact family, as is often the case, the child will suffer, along with the custodial parent, a substantial decline in living standard. Ellman & O'Toole Ellman, *supra* note 71, at 108, 117, 127.

<sup>164</sup> Braver et al., *supra* note 28, at 42.

<sup>165</sup> REPORT OF NEW HAMPSHIRE SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTATION IN NEW HAMPSHIRE COURTS 2 (2004) (finding that seventy percent of domestic relations cases in Superior Court involved at least one *pro se* litigant); JUDICIAL COUNCIL OF CALIFORNIA TASK FORCE ON SELF-REPRESENTED LITIGANTS, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004) (finding that in sixty-seven percent of domestic cases generally, and seventy-two percent in large counties, one petitioner was self-represented at filing); THE PRO SE GROUP: A COMMITTEE OF THE OFFICE OF THE CHIEF JUSTICE OF THE WISCONSIN SUPREME COURT, PRO SE LITIGATION: MEETING THE CHALLENGE OF SELF-REPRESENTED LITIGANTS IN WISCONSIN 8 (2000) (showing that in an urban district, seventy percent of domestic relations suits involved *pro se* parties, and in other counties the percentage ranged from thirty to sixty-nine).

<sup>166</sup> Grant Schulte, *Self-Help Centers Spread Across the U.S.*, 34-SEP MONT. LAW. 33 (2008).

In the context of inter-parental conflict, it is important to acquaint parents with the intricate details and requirements of the legal process because of the significant role uncertainty plays in intensifying affective reactions. Specifically, psychologists have shown that uncertainty prolongs and exacerbates the negative feeling that a negative event provokes.<sup>167</sup> Adaptation relies in part on understanding; the better one understands an event, the quicker one is to adapt to it. “Thus, anything that impedes understanding, including uncertainty about the nature of the event, will prolong affective reaction to that event.”<sup>168</sup>

Many parents “are concerned and confused about their interactions with the legal system, and basic legal information can help them.”<sup>169</sup> The New York Parent Education Advisory Board noted parents’ apparent desire for more information about the legal process and observed that after discussions of legal topics parents “are often agitated and emotionally charged.”<sup>170</sup> Other studies have also found that parents are very interested in receiving substantial information on legal matters.<sup>171</sup> The availability of attorney’s technical support has been found to affect mothers’ psycho-emotional well-being after separation.<sup>172</sup>

Moreover, the “uncertainty study” mentioned above found that the affective reaction is influenced most by the feeling of not knowing—the subjective component of uncertainty—rather than by the actual knowledge the person possesses.<sup>173</sup> So even if the information is available for parents to

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<sup>167</sup> Yoav Bar-Anan, Timothy D. Wilson & Daniel Gilbert, *The Feeling of Uncertainty Intensifies Affective Reactions*, 9 EMOTIONS 123 (2009).

<sup>168</sup> *Id.*

<sup>169</sup> Braver et al., *supra* note 28, at 53.

<sup>170</sup> Though the issue is clearly on parents’ minds, the board concluded that given the program’s primary focus on parenting and child well-being, presenters should make sure they limit the legal component in programs to no more than fifteen percent of the total program time. The guidelines further advised presenters on how to schedule this discussion to best subdue parents’ tendency to dwell on legal aspects of divorce. PROPOSED GUIDELINES, STANDARDS AND REQUIREMENTS FOR PARENT EDUCATION PROGRAMS, REPORT OF NEW YORK STATE PARENT EDUCATION ADVISORY BOARD 42–43 (2003).

<sup>171</sup> Buehler et al., *supra* note 41, at 159.

<sup>172</sup> Cheryl Buehler & Bobbie H. Legg, *Mothers’ Receipt of Social Support and their Psychological Well-Being Following Marital Separation*, 10 J. SOC. & PERSONAL RELATIONSHIPS 21, 35 (1993) (finding that attorney’s technical support was positively and directly related to mothers’ psychoemotional well-being after separation).

<sup>173</sup> Ben-Anan, *supra* note 165, at 126.

find, they might still benefit much from an opportunity to practice and repeat the information until they are assured of their knowledge. Significantly, the more parents feel that they have control over the divorce process, the more satisfied they are and the more likely they are to report cooperative co-parental relationships.<sup>174</sup>

If the legal system is concerned with children's well-being after parental separation, it should target these and other conditions, within which divorcing parents operate. The law should focus on supporting parents' adjustment to post-divorce reality. The best way to do that is not through individual-targeted interventions but through systemic changes.

What then should become of parenting classes? There are several ways to change parent education programs to focus on parents and their situation. One way would be to abolish universal mandates and short interventions and instead target only high-conflict couples offering them significantly expanded multi-session interventions, like "forgiveness interventions" or the hands-on small-group conflict resolution programs mentioned above.<sup>175</sup> However, cost constraints make it highly unlikely that states will take this path. Lawmakers have been very reluctant to subsidize even the shorter interventions for divorcing parents and there is little reason to think they would react differently to longer interventions that serve a smaller number of parents. On the other hand, making parents pay bigger sums for longer interventions would create a considerable, and for some even prohibitive, barrier to the legal service of divorce, an option that many lawmakers rightfully find unacceptable.

Assuming that lawmakers do not want to abolish mandatory parent education altogether, they could still give up on the blame component of the legislation and come up with different content for parent education programs. Specifically, they could be dedicating these classes to some of the issues that incite and intensify conflict, rather than telling parents how to behave in the company of their children or their former spouses.<sup>176</sup> In

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<sup>174</sup> Kari Adamsons & Kay Pasley, *Coparenting Following Divorce and Relationship Dissolution*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 252 (Mark A. Fine & John H. Harvey eds., 2006).

<sup>175</sup> For forgiveness interventions, see Solangel Maldonado, *Cultivating Forgiveness, Reducing Hostility and Conflict after Divorce*, 43 WAKE FOREST L. REV. 441, 489-94 (2008). For longer parent education interventions, see *supra* notes 34-35 and accompanying text.

<sup>176</sup> This suggestion is inspired by the critical realism school of thought and its emphasis on situationism. Generally speaking, critical realists criticize the human tendency, and legal projects informed by this tendency, to overstate the role of individual disposition and understate the role of situation when explaining human behavior. Jon Hanson & David

doing so, they could help parents address some of the sources of conflict, thus reducing conflict by treating the conditions that fuel it.<sup>177</sup> Classes do not necessarily have to abandon the information about children completely, especially the practical advice on how to answer children's questions about divorce and what constitutes exposing children to conflict. However, it would be useful to design interventions with the goal of reducing underlying grounds for conflict rather than its manifestations. As of now, for example, parent education programs spend only minimal effort, if any, to help parents transition into their new post-divorce financial reality. The vast majority of programs do not address the financial impact of divorce and those that do dwell on the subject briefly.<sup>178</sup> Most programs also choose not to provide practical information such as how to calculate child support<sup>179</sup> and never use accountants or financial advisors as presenters.<sup>180</sup> Moreover, despite parents' need for legal assistance and information, legal issues do not form a substantial component of programs and only a small minority of parent education programs provide presentations by judges, lawyers, or other legal professionals.<sup>181</sup> Rather than mandate *parenting* classes, to tell parents that their actions as parents are wrong and their choice to divorce detrimental, if we are to have universal individual-targeted interventions, they should focus on supporting parents' adjustment to post-divorce reality.

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Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 6 (2004).

<sup>177</sup> Such interventions might be beneficial to divorcing couples in general. However, since the state's interest in children's well-being is the impetus for the legislation, this Article will continue to refer only to parents, as the statutes do.

<sup>178</sup> Geasler & Blaisure, *supra* note 17, at 170 (finding that only five percent of surveyed programs discussed the financial impact of divorce and only fourteen percent of programs discussed child support).

<sup>179</sup> Braver et al., *supra* note 28, at 50–51 (finding that seventy-eight percent of programs did not address child support calculation at all and the twenty-two percent which did provided only minimal coverage).

<sup>180</sup> Geasler & Blaisure recorded no financial services presenter among the hundreds of programs they have surveyed. Geasler & Blaisure, *supra* note 18, at 44–45. Many states require that presenters hold mental health licenses.

<sup>181</sup> Braver et al., *supra* note 28, at 46.

## V. CONCLUSION

This Article analyzed a judicial and legislative trend mandating divorcing parents to take parenting classes that teach them about the effects of divorce and inter-parental conflict on children. Studying the enactment processes that led to the legislation revealed two interrelated themes. First, the trend to mandate parenting classes exposes a pervasive negative moral judgment of parents' decision to divorce. Second, this moral judgment caused legislators to focus on parental choice and conduct rather than on the structural causes of inter-parental conflict. The resulting statutes thus demand that parents change their interactions with their former spouses and children and fail to address any of the underlying causes of harmful parental conduct when it exists. Mandatory parenting classes, as a result, do little to improve children's lives and much to ignore the detrimental effects of divorce on women.

The meteoric rise in legislation requiring divorcing parents to take parenting classes exemplifies several intersecting tensions in contemporary family law: the frustration of the judiciary with domestic relations litigation, exacerbated by a deeply felt sense of urgency as judges are incessantly exposed to the most acrimonious divorces; an emphasis on individual responsibility while concurrently authorizing state intervention into parenting practices; and the enduring underlying belief that while adults enjoy more individual freedom in choosing family structure, it is still wrong to divorce, at least when minor children are involved.

The Article began its analysis of the legislative process by asking readers to reject the notion that it is simply "common sense" that parents need to be told of the potential detrimental effects of their behavior on their children and that the legislation, therefore, is intuitively right. Instead, it argues that there are many other circumstances under which families experience similar strife and turmoil, yet these circumstances appear not to provoke a similar "we have to tell them to stop" reaction. Instead of taking for granted that divorce creates a unique damage which requires intervention, we should ask what it is about divorce that lends itself to this almost reflexive reaction. The Article argued that this special treatment of divorcing parents derives, at least partially, from the fact that lawmakers make a moral judgment about the decision to divorce. Unlike other parents facing similar hardships, divorcing parents are deemed blameworthy and therefore require different treatment.

The Article then turned to the enactment process of parenting class mandates and demonstrated that judges have been the driving force behind the legislation. It reasoned that their extensive exposure to high-conflict divorces and lack of effective tools to adjudicate them might explain

judges' active involvement. It showed that supporters of the legislation created an atmosphere of acute crisis in their discussions of the negative consequences of divorce, supposedly affecting not only innocent children but also the social order. Convinced that "something must be done," lawmakers have produced legislation that targets the wrong set of parents and provides inadequate means to achieve its lofty goals.

Finally, the Article explored the way legislators perceive divorcing parents. It criticized lawmakers' assertions that divorcing parents were unaware of and uninterested in the needs of their children. This misconception was attributed to lawmakers' negative attitude towards parents who choose to dissolve the marital unit. This Article argued that the focus on blame and on ensuring that parents realized they had to "shape up or ship out"<sup>182</sup> has derailed the legislation. Identifying parental conduct as the sole source of problems for children of divorce, legislators ignore the structural causes of inter-parental conflict inherent to divorce, and the harsh price divorce exacts on parents, most crucially on mothers. Financial strain and the lack of representation in legal procedures, to name two examples, are influential stress factors that accompany divorce.

This Article argues that state intervention should focus on helping parents adjust to the post-divorce reality instead of reminding them how detrimental their choice to divorce has been for their children's well-being. More importantly, this Article argues that instead of attributing parental conduct to individual choice and flaws, lawmakers should explore the structural conditions that shape inter-parental relationships after divorce and strive to reduce inter-parental conflict by altering these conditions.

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<sup>182</sup> See *supra* note 129 and accompanying text.