

Articles

The Mediation Alternative: Process Dangers for Women

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I have received incalculable help from others. I thank Harlon Dalton, Richard Delgado, John Denvir, Dolores Donovan, Jay Folberg, Alan Freeman, Gary Friedman, Evelio M. Grillo, Michele Hermann, Marilyn L. Ray, Antoinette Sedilla-Lopez, Jean Stefancic, and Catharine Wells for their generous and thoughtful readings and suggestions. Thanks also to Eric Landis-Brenman, Phyllis Rosen, Sandra Schutz, and University of San Francisco Librarians Lee Ryan and Marian Shostrom for research assistance. I owe much gratitude to Catherine Grillo, my mother, who supported me with advice, concern, and childcare throughout the time I was writing this Article. Finally, I thank Paul Baum and Stephanie Wildman for their friendship, careful criticism, and constant encouragement.

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INTRODUCTION: THE PROMISE OF MEDIATION

The western concept of law is based on a patriarchal paradigm¹ characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person.² Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy.³ This objectivist paradigm is problematic in many circumstances, but never more so than in connection with a marital dissolution in which the custody of children is at issue, where the essential question for the court is what is to happen next in the family. The family court system, aspiring to the ideal of objectivity and operating as an adversary system, can be relied on neither to produce just results nor to treat those subject to it respectfully and humanely.

There is little doubt that divorce procedure needs to be reformed, but reformed how? Presumably, any alternative should be at least as just, and at least as humane, as the current system, particularly for those who are least powerful in society. Mediation has been put forward, with much fanfare, as such an alternative. The impetus of the mediation movement has been so strong that in some states couples disputing custody are required by statute or local rule to undergo a mandatory mediation process if they are unable to reach an agreement on their own.⁴ Mediation has been embraced for a number of

1. See Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50 (1985) ("[T]here is a tendency for the male-dominated or male-created forms and values to control [our present legal structures] . . ."); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294, 296 (D. Kairys ed. 1982) (discussing relationship of legal system to patriarchy); Rifkin, *Mediation from a Feminist Perspective: Promises and Problems*, 2 LAW & INEQUALITY 21, 22 (1984) (describing "the patriarchal paradigm of law as hierarchy, combat, and adversarialness") [hereinafter Rifkin, *Mediation*]; Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 87 (1980) (patriarchy will not be eliminated unless male paradigm of law is transformed) [hereinafter Rifkin, *Toward a Theory*].

2. See, e.g., Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 5-8 (1988); Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435 (1981). These articles suggest that, despite the change in terminology from "reasonable man" to "reasonable person," the standard was never intended to include women or members of minority groups, whether male or female. As Bender has said: "Our legal system . . . resolves problems through male inquiries formulated from distanced, abstract, and acontextual vantage points." Bender, *supra*, at 10-11; see also G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 26-28 (1985) (discussing race and gender implications of "reasonable person").

3. See C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 62-63 (1989) [hereinafter C. MACKINNON, TOWARD A FEMINIST THEORY]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 655-56 (1983) [hereinafter MacKinnon, *Feminism, Marxism*].

4. In some states mediation is a prerequisite to a judicial hearing. See CAL. CIV. CODE § 4607 (West 1983 & Supp. 1990); DEL. FAM. CT. C.R. (16)(a)(1); ME. REV. STAT. ANN. tit. 19, § 752 (West 1981 & Supp. 1990); N.C. GEN. STAT. § 50-13.1 (1989) (mediation required if custody or visitation issue involved); OR. REV. STAT. ANN. §§ 107.755-795 (Butterworths 1990). Other states permit the court to order mediation. See ALASKA STAT. § 25.24.060 (Michie 1983); FLA. STAT. ANN. § 44.101 (Harrison Supp. 1989); ILL. REV. STAT. ch. 40, ¶ 607.1(c)(4) (Smith-Hurd 1980 & Supp. 1990); IOWA CODE ANN. §§ 598.41, 679.1-14 (West 1987 & Supp. 1990); KAN. STAT. ANN. §§ 23-601 to -607 (1989); LA. REV. STAT. ANN. §§ 9:351-356 (West Supp. 1990); MICH. COMP. LAWS § 552.505 (West 1988 & Supp. 1990); MINN. STAT. ANN. § 518.619 (West 1990); N.H. REV. STAT. ANN. § 328-C (Butterworths Supp. 1989); N.M. STAT. ANN. § 40-

reasons. First, it rejects an objectivist approach to conflict resolution, and promises to consider disputes in terms of relationships and responsibility. Second, the mediation process is, at least in theory, cooperative and voluntary, not coercive. The mediator does not make a decision; rather, each party speaks for himself.⁵ Together they reach an agreement that meets the parties' mutual needs. In this manner, the process is said to enable the parties to exercise self-determination and eliminate the hierarchy of dominance that characterizes the judge/litigant and lawyer/client relationships. Third, since in mediation there are no rules of evidence or legalistic notions of relevancy, decisions supposedly may be informed by context rather than by abstract principle. Finally, in theory at least, emotions are recognized and incorporated into the mediation process. This conception of mediation has led some commentators to characterize it as a feminist alternative to the patriarchally inspired adversary system.⁶

Whether mandatory mediation, required as part of court proceedings, fulfills these aspirations, or instead substitutes another objectivist, patriarchal, and even more damaging form of conflict resolution for its adversarial counterpart, is the subject of this Article. Many divorcing couples seem pleased with their mediation experiences.⁷ Indeed, studies have shown that mediation clients are more

12-5 (1988); R.I. GEN. LAWS § 15-5-29 (1988); TEX. CIV. PRAC. & REM. CODE ANN. §§ 152.001-.004 (Vernon 1985); WASH. REV. CODE ANN. § 26.09.015 (West Supp. 1990); WIS. STAT. § 767.11(3) (West Supp. 1990).

5. I have made an effort in this Article to maintain gender neutrality in my use of pronouns. As the Article makes apparent, however, the sexes are not always affected the same way by certain flaws in mediation or adjudication. Where a party of one gender appears particularly likely to play a certain role, I have cast my description of that role in that gender. This Article is about how women are endangered by the mediation process. I should emphasize, however, that the flaws of mediation I discuss ultimately work to the detriment of *both* sexes. For, if either party is disadvantaged or silenced in the mediation process, the other party loses some of the most significant of mediation's potential benefits; he is deprived of the opportunity to gain an understanding of the other party, to learn to communicate honestly with her, and to work together to construct an agreement that creatively and precisely attends to their shared concerns.

6. See, e.g., Rifkin, *Mediation*, *supra* note 1, at 23. See also Menkel-Meadow, *supra* note 1, at 53, where she states that "an ethic of care and a heightened sense of empathy in women suggests that women lawyers may be particularly interested in mediation as an alternative to litigation as a method of resolving disputes." Menkel-Meadow, however, adds that "mediation as a process is not necessarily good or bad for women's interests; it depends on who the mediator is and what model of mediation is being used." *Id.* at 53 n.78. In any event, given its potentially profound implications for women's lives, the study of mediation introduces, and even requires, a feminist pedagogy—one that is fundamentally different from traditional legal pedagogy. See Rifkin, *Mediation*, *supra* note 1, at 24. But see Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 760-68 (1988) (arguing that "legal model" in custody cases is preferable to one in which "professional helpers" such as mediators influence decisions related to divorce).

7. For example, Jessica Pearson and Nancy Thoennes found that more than three-quarters of the mediation clients in their studies expressed satisfaction with the process and would recommend it to others. Pearson & Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH* 9, 19 (1989); see also J. PEARSON & N. THOENNES, FINAL REPORT OF THE DIVORCE MEDIATION PROJECT 1 (1984) [report as whole hereinafter J. PEARSON & N. THOENNES, FINAL REPORT] (submitted to the Children's Bureau, Administration for Children, Youth and Families, U.S. Dept. of Health and Human Services) (citing studies showing higher levels of participant satisfaction in divorce mediation than in conventional legal proceedings); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984) (although many refuse to mediate disputes, those who do mediate tend to be extremely pleased with results) [hereinafter Pearson & Thoennes, *Mediating and Litigating*].

satisfied with their divorce outcomes than persons using the adversary system.⁸ Although there are significant methodological problems with each of these studies,⁹ the existence of substantial client satisfaction with some models of mediation cannot be completely discounted.

Nonetheless, I conclude that mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises. In particular, quite apart from whether an acceptable result is reached, mandatory mediation can be destructive to many women and some men¹⁰ because it requires them to speak

8. Joan Kelly found that mediation clients were, on the whole, more satisfied with their divorce outcomes than persons using the adversary system, although her study was limited to persons voluntarily using a private mediation service to mediate integrated agreements not restricted to child custody. See Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, MEDIATION Q., Summer 1989, at 71, 77-87; see also Bautz, *Divorce Mediation: For Better or For Worse*, MEDIATION Q., Winter 1988, at 51, 56-59 (couples who used divorce mediation more satisfied with settlement than couples who contested their divorce; only 12 mediated cases were in the sample, however, and only 2 cases were referred by court); Irving & Benjamin, *A Study of Conciliation Counseling in the Family Court of Toronto: Implications for Socio-Legal Practice*, in THE RESOLUTION OF FAMILY CONFLICT 268 (1984) (discussing need for and appropriateness of conciliation counseling); Waldron, Roth, Fair, Mann & McDermott, *A Therapeutic Mediation Model for Child Custody Dispute Resolution*, MEDIATION Q., March 1984, at 5, 11-19 (child custody mediation by child therapists can enhance parents' ability to coparent and improve the mental health of their children). Some commentators have noted, however, that men were more satisfied with the mediation process than women. See Emery & Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, MEDIATION Q., Summer 1989, at 3, 10-17 (couples more satisfied with mediation than litigation, but men show greater satisfaction with mediation, and mothers more likely to feel they fared better in litigation); Emery & Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCHOLOGY 179, 183 (1987) (most of gains in satisfaction from mediation accrued to men).

Use of the mediation process does not necessarily improve communication between the parties. According to Kenneth Kressel, a large proportion of persons who have undergone mediation said that it had no effect on their ability to cooperate or communicate with the other parent, and a sizable minority (10%) said that it made things worse. Kressel, *Research on Divorce Mediation: A Summary and Critique of the Literature*, in THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS: A COMPARATIVE PERSPECTIVE 219, 220 (Vermont Law School Dispute Resolution Project ed. 1987) [article hereinafter Kressel, *Research*; volume as whole hereinafter THE ROLE OF MEDIATION] (discussing United States, Canada, and Great Britain); see also K. KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 226 (1985) (positive impact of mediation upon respondents dubious six months after mediation); cf. Pearson & Thoennes, *Mediation Versus the Courts in Child Custody Cases*, 1985 NEGOTIATION J. 235, 241 (1985) (only 30% of couples who reached agreement in mediation and 7% of those who did not credited process with improving relationship with spouse, while close to 15% of couples in mediation indicated that it hurt relationship; in general, however, respondents viewed mediation as less damaging than going to court).

9. In each of the studies, either the mediation involved was voluntary, or the sample of clients was small. The simple design used in these studies typically compares a mediation group with an adversary group, making it difficult to assess any placebo effects caused by the enthusiasm with which mediation is administered. See, e.g., Bautz, *supra* note 8, at 54-55. Moreover, preexisting differences between the mediating and adversarial couples are not addressed. Finally, neither "mediation" nor "the adversarial system" is a monolith; thus, neither group of clients is receiving homogeneous and absolutely distinct treatment. See Kressel, *Research*, *supra* note 8, at 219.

10. Although mandatory mediation harms some men in the same ways that it harms significant numbers of women, many more women than men share the emotional orientation, worldview, and economic circumstances I describe. In addition, women are often expected to act in a particular way because they are women. See Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813 n.61 (1989).

Carol Gilligan, in her pathbreaking work, *In A Different Voice*, has described two different, gendered modes of thought, a "male" mode and a "female" mode. She has observed that even though she is not

in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties' speaking with their authentic voices.

Moreover, people vary greatly in the extent to which their sense of self is "relational"—that is, defined in terms of connection to others. If two parties are forced to engage with one another, and one has a more relational sense of self than the other, that party may feel compelled to maintain her connection with the other, even to her own detriment. For this reason, the party with the more relational sense of self will be at a disadvantage in a mediated negotiation. Several prominent researchers have suggested that, as a general rule, women have a more relational sense of self than do men, although there is little agreement on what the origin of this difference might be.¹¹ Thus, rather than being a feminist alternative to the adversary system, mediation has the potential actively to harm women.

Some of the dangers of mandatory mediation apply to voluntary mediation as well. Voluntary mediation should not be abandoned, but should be recognized as a powerful process which should be used carefully and thoughtfully. Entering into such a process with one who has known you intimately and who now seems to threaten your whole life and being has great creative, but also enormous destructive, power. Nonetheless, it should be recognized that when two people themselves decide to mediate and then physically appear at the mediation sessions, that decision and their continued presence serve as a rough indication that it is not too painful or too dangerous for one or both of them to go on.¹²

Although this Article cautions against mediation's dangers, I should emphasize at this juncture that mediation is the work I most like to do. Few professional experiences can compare to the moment when the world of possibilities seems to expand for a couple, and hope and optimism coexist, at least tempo-

ascribing the male mode exclusively to men and the female mode exclusively to women, most women do appear to operate in the female mode. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24-63 (1982). See also *infra* notes 259-61 and accompanying text (discussion of male and female modes of thought).

Another essay could no doubt describe how mediation hurts particular groups of men; that is not my task. For a discussion of the claim that nonformal mechanisms, including mediation, injure the poor and disempowered generally, see Delgado, Dunn, Brown, Lee, & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360-61, 1375-91 [hereinafter Delgado, *Fairness and Formality*].

11. See, e.g., N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 176-80, 200 (1978); D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* 156 (1976); C. GILLIGAN, *supra* note 10, at 64-105; J. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* 83-89 (1976); A. SCHAEF, *WOMEN'S REALITY: AN EMERGING FEMALE SYSTEM IN WHITE MALE SOCIETY* 28-33 (1981).

12. The decision to enter mediation, however, may not be truly voluntary if dictated by an unequal power balance in the relationship as it existed prior to the mediation. Thus even voluntary mediation can be coercive.

rarily, with pain and anger. It is from my experiences mediating and listening to the stories of those who have been participants in the mediation process, and out of concern for the integrity of that process, that this Article has been written.¹³

Part I of this Article describes the rise of child custody mediation, focusing on the version currently required by California law. California has led the country in both the substance and procedure of divorce reform, beginning with no-fault divorce, continuing with the statutory embrace of joint custody, and, most recently, in legislating the use of divorce mediation.¹⁴ Part II describes the promises of mediation: reliance on context rather than exclusively on abstract rules; the inclusion of emotions along with rational self-interest; and the introduction of self-determination in the place of an outside decisionmaker. Part III discusses the particular dangers to women of mandatory mediation's requirement of direct engagement with their adversary. Part IV suggests alternatives to a system of mandatory mediation. While the focus of my discussion is mandatory mediation, many of the observations in the Article also have implications for voluntary mediation, which in many cases also fails to fulfill its promise to be a gentler alternative to the adversarial system.

I. THE RISE OF MANDATORY CUSTODY MEDIATION IN CALIFORNIA

The movement for voluntary mediation of divorce disputes began several decades ago as lawyers and therapists offered to help their clients settle their cases in a nonadversarial manner.¹⁵ Some clients reported that, by meeting together with a third party to help facilitate their communication, they were able

13. At various points in this Article there are descriptions of mediation sessions, and of the perspectives of mediators and parties in court-ordered mediations, which are denoted by blocked italic text. Because the mediation process and settlements that flow from it are not public, there are no transcripts and only limited records of settlements available. The descriptions of mediation sessions are therefore based on actual cases which have been related to me by the participants themselves, though the names and identifying details have been changed. The descriptions of participants' perspectives on mediation are composites, drawn from my observation of many mediation sessions. One of the descriptions of a mediation session (that of Joe and Elaine, see *infra* text accompanying note 194) is also a composite, combining the details of two cases.

14. See Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. DISPUTE RESOLUTION 149, 152 (1985) (understanding and analysis of California's mandatory mediation statutes important because many states expected to follow California's lead in this area, just as they did in area of no-fault divorce); Fineman, *supra* note 6, at 741 n. 59 ("California was a pioneer in no-fault legislation."); Folberg & Milne, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION, THEORY AND PRACTICE* 3, 5 (1988) (court personnel providing conciliation services in California probably first to offer mediation services).

Deis comments that "approximately eighteen states are using mediation to resolve these [child custody and visitation] disputes." Deis, *supra*, at 171 (citing Jenkins, *Divorce California Style*, 9 STUDENT L. 30 (1981)). She continues: "It is difficult to estimate how many other states allow mediation of child custody and visitation disputes because this has been accomplished in some states through a general provision giving judges the power to provide counseling or alternate means of decision making for the parties." *Id.*

15. Conversation with Gary Friedman, Center for the Development of Mediation in Law, Mill Valley, California (Dec. 14, 1988); see also O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENTS* at xv (1978) (structured mediation process developed in mid-1970's); Folberg & Milne, *supra* note 14, at 5 (handful of attorneys began offering nonadversarial legal services in early 1970's).

to reach agreements that met everyone's needs and leave their marriages without the acrimony and fear they had anticipated from the adversarial divorce process.

As mediation caught on, it began to be heralded as the cure for the various ills of adversary divorce. It was touted as a process in which the parties would voluntarily cooperate to find the best manner of continuing to parent their children. Consumers, however, were not embracing the mediation cure. Whether because of lack of familiarity with the process, the hostility of the organized bar, or some more considered reluctance, few divorcing couples chose to enter mediation.¹⁶ In order to bypass this consumer resistance, some state legislatures established court-annexed mediation programs, requiring that couples disputing custody mediate prior to going to court.¹⁷

As noted earlier, California law is the focus of this Article because California has been the trendsetter in both substantive and procedural divorce reform.¹⁸ California was the first state to enact a statute that required mediation of child custody and visitation disputes.¹⁹ California's mandatory mediation law, which first became effective in 1981, requires that all custody and visitation disputes be mediated prior to being considered by the county Superior Court.²⁰ The mediation is intended to "reduce acrimony" between the parties and lead to an agreement that assures the children "close and continuing contact with both parents."²¹ The court is required to appoint a mediator, who may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or some other person or agency

16. See Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 427 (1982). Pearson indicates that participation in mediation varies with program coercion. *Id.* at 428-29.

17. *Id.* at 428-29; see also Deis, *supra* note 14, at 151 n.21 (citing California and Delaware statutes requiring mediation for divorce disputes).

California's family mediation model was adopted in 1980, quite early in the trend toward mediation in court-annexed programs. When I describe mediation procedures, I will rely on the California model. For a review of other states' models, see ABA STANDING COMMITTEE ON DISPUTE RESOLUTION, LEGISLATION ON DISPUTE RESOLUTION 7-71 (1988).

18. See *supra* note 14 and accompanying text.

19. See Deis, *supra* note 14, at 149. Deis describes mediation as "flawed" but as more advantageous than the adversary system, and says that mediation fosters "privacy and self-determination." *Id.* at 151. For a discussion of how mediation, by suppressing the expression of anger, does not foster self-determination see *infra* section II.C.

20. The California statute provides:

In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested . . . the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. . . . The purpose of the mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute that is in the best interests of the child or children

CAL. CIV. CODE § 4607(a) (West Supp. 1990) (emphasis omitted). For a listing of other similar state laws, see *supra* note 4.

21. CAL. CIV. CODE § 4607(a) (West Supp. 1990).

the court decides is appropriate.²² Mediators must have a master's degree in psychology, social work, or another behavioral science; experience in counseling or psychotherapy; knowledge of the California court system and family law procedure; and knowledge of adult and child psychology, including the effects of divorce on children.²³

In practice, the qualifications of mediators provided by the California courts vary widely.²⁴ In some urban counties, there are large professional staffs of mediators, all of whom are experienced mental health professionals; in other counties, there may be only one mediator with little professional training.²⁵ Similarly, some counties have extensive office facilities in which to house their mediation program and provide the opportunity to have several meetings with the mediators; in others, mediation takes place in the twenty minutes before court in a hallway.²⁶ The California Judicial Council has prepared standards of practice for mediators which should increase uniformity among the counties.²⁷ Nonetheless, nine years after the introduction of mandatory mediation in California, the services offered are frequently inadequate at best, even from the perspective of proponents of mandatory mediation.²⁸

22. CAL. CIV. CODE § 4607(b) (West Supp. 1990).

23. CAL. CIV. CODE § 4607(b) (West Supp. 1990) provides that mediators must meet the requirements of CAL. CIV. PROC. CODE § 1745 (West Supp. 1990), which sets forth these requirements. State statutes that have similar requirements include: KAN. STAT. ANN. § 23-602 (1988); LA. REV. STAT. ANN. § 9:356(A) (West Supp. 1990) (additional requirements, including bar membership); MINN. STAT. ANN. § 518.619(4) (West Supp. 1990). State statutes with lesser or agency-created requirements include: MICH. COMP. LAWS § 552.513 (1988); W. VA. CODE § 48A-2-2 (Supp. 1990); WIS. STAT. § 767.11 (Supp. 1990). State statutes that empower the courts to set standards include: ALASKA STAT. § 25.24.060(b) (1983); CONN. GEN. STAT. § 46-53a (Supp. 1990); FLA. STAT. ANN. § 44.302(3) (West Supp. 1989); N.H. REV. STAT. ANN. § 328-C (Supp. 1989); N.M. STAT. ANN. § 40-12-5 (1989); N.C. GEN. STAT. § 7A-494(a) (1989); OKLA. STAT. tit. 42, § 109H (1989); OR. REV. STAT. § 107.755 (1989); WASH. REV. CODE ANN. § 26.09.015 (Supp. 1990). States whose statutes are silent on the requirements include Illinois, Iowa, Montana, Rhode Island, and South Dakota.

24. See Folberg & Milne, *supra* note 14, at 21; Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106, 118 (1988); Milne, *Divorce Mediation: The State of the Art*, MEDIATION Q., Sept. 1983, at 15, 21; D. Saposnek, Remarks at the Meeting of the Northern California Council for Mediation, San Francisco, California (Oct. 28, 1989). Donald Saposnek is one of several consultants hired by the California Family Court Services/Administrative Office of the Courts to study the mandatory mediation systems of the various counties and develop a mediation training manual for use throughout California. In his talk, attended by the author, Saposnek described findings from his survey of how mediation operates in California.

25. D. Saposnek, *supra* note 24.

26. *Id.* Saposnek stated that although some counties had well-run programs, others were providing very poor service. For example, in one county a single mediator typically handled 10 mediations in a morning. This is certainly not enough time for anything resembling the joint problem-solving that mediation advertises itself to be. In other counties, mediations were held in places where there was no privacy. Saposnek also stated that some mediators had little concern for confidentiality and/or an incomplete understanding of the statutory scheme for confidentiality. For the statutory language on confidentiality, see *infra* note 29 and accompanying text.

27. The California Civil Code required the Judicial Council to adopt standards and offer training on them by January 1, 1991. See CAL. CIV. CODE § 4607.1 (West Supp. 1990).

28. In arguing for mandatory mediation, proponents often assume the mediation services that are being provided resemble those of the larger counties, such as San Francisco, Santa Clara, Los Angeles, and Alameda, where mediators are for the most part well-trained and highly qualified. As this Article points out, however, there are serious problems with the mandatory system even in such counties. What is more,

In California, mediations are held in private and communications to the mediator from the parties are deemed "official information" protected from disclosure by the Evidence Code.²⁹ The mediator has discretion to exclude counsel from the mediation,³⁰ whether or not the parties wish to have them present.

Local courts have the option of requiring mediators to make a recommendation to the court regarding custody or visitation.³¹ If the parties do not reach

in many areas of the state, mediation services are poor by any standard. It is callous to expect parties to participate in these services in the hope that at some future date mediators will be properly trained.

29. CAL. CIV. CODE § 4607(c) (West 1983) provides: "Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code."

CAL. EVID. CODE § 1040(b) (West Supp. 1990) provides:

A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice

At least seven states other than California have enacted legislation specifically providing that mediation proceedings shall be confidential. *See* COLO. REV. STAT. ANN. § 13-22-307 (1986); CONN. GEN. STAT. ANN. § 46b-53 (West 1985); IOWA CODE ANN. § 679.12 (West 1987); MASS. GEN. LAWS ANN. ch. 233, § 23C (West 1986); N.Y. JUD. LAW § 849-b (Consol. 1983); OKLA. STAT. ANN. tit. 12, § 1805 (West 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 1991). Because these statutory approaches to confidentiality vary so greatly, however, there exists much uncertainty as to how they can best be applied. Other states rely on the limited privilege given to offers to compromise. For an illustration of this privilege, see FED. R. EVID. 408. A discussion of the limitations of the privilege is contained in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 127-32 (J. Wilkinson ed. 1989); *see also* L. FREDMAN, C. HAILE & H. BOOKSTAFF, CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 87-90 (1985) (discussing the ethical and legal duties that may compel a mediator to disclose confidential information); Folberg, *Confidentiality and Privilege in Divorce Mediation*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 319 (survey of statutory and common law regulations relating to confidentiality and privileged communications).

30. Under California law, the mediator can exclude counsel from mediation proceedings if the mediator deems this to be appropriate or necessary. CAL. CIV. CODE § 4607(d) (West Supp. 1990); *see also infra* note 246 (quoting statute). Different states, however, vary considerably in their rules as to whether attorneys may attend mediation sessions. There are states such as Kansas, which permit only the parties to attend mediation sessions. KAN. STAT. ANN. § 23-603(a)(6) (1988). Connecticut also prohibits attorneys from attending mediation over custody and visitation issues as a matter of court policy. *See* McCrory, *Legal and Practical Issues in Divorce Mediation: An American Perspective*, in *THE ROLE OF MEDIATION*, *supra* note 8, at 144, 152. Other states, such as Maine, actively encourage attorneys to attend the mediation sessions. Orbeton, *Domestic Relations Mediation in Maine*, in *THE ROLE OF MEDIATION*, *supra* note 8, at 52. In Florida some courts order attorneys to attend their clients' mediations. Talcott, *Court-Ordered Mediation in Florida*, *MEDIATION Q.*, Spring 1989, at 77, 80. Some states leave it up to the discretion or policy of the mediation services provider as to who should attend. *See, e.g.*, WIS. STAT. ANN. § 767.11(10)(a) (West Supp. 1990).

31. CAL. CIV. CODE § 4607(e) (West Supp. 1990) provides in pertinent part: "The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children . . ." Only Minnesota has a similar provision. MINN. STAT. § 518.619(1) (1990). For discussions of the impact of having the mediator make recommendations, see McIsaac, *Confidentiality: An Exploration of the Issues*, 23 CONCILIATION CTS. REV. 63 (1985); M. Duryee, *Open Mediation: A Systemic View passim* (Dec. 3, 1987) (paper presented at winter meeting of Association of Family and Conciliation Courts, Las Vegas, Nevada, on file with author); E. Kodituwakku, *Outcome Satisfaction in Mediation of Child Custody and Time Sharing as a Function of Confidentiality, Personality, and Family Dysfunction* 40-45 (1989) (unpublished dissertation abstract, University of New Mexico, on file with author).

an agreement, the mediator may also make a recommendation that an investigation be conducted or mutual restraining orders be issued.³² More than half of California counties have opted to require mediators to make such recommendations.³³ In these counties, a mediator meets with the parties and, having assured them of confidentiality, attempts to help them reach an agreement. Should they not reach an agreement, however, the mediator uses what happened in the mediation session to make a recommendation to the court. In some counties, I have observed that the recommendations of mediators are almost always accepted by the judge; indeed, some mediators disclose this fact in an effort to pressure the parties into reaching an agreement.

II. THE BETRAYAL OF MEDIATION'S PROMISES

A. *The Informal Law of Mediation*

The good woman: She comes into mediation ready to be cooperative. She does not deny her feelings, but does not shift them onto her children. She realizes her problems are her problems, that she should not use the children as a way of solving them, and that it is critically important that her husband stay involved in the lives of the children. She does not play victim, but realizes what she is entitled to and insists on it calmly. She is rational, not bitter or vengeful, and certainly not interested in hurting her husband. She understands that she played a role in whatever harms he inflicted on her, since in a family no one person is ever at fault.

The bad woman: She is bitter and wants revenge for things that have happened to her in the past. She fights over the most trivial, petty things. She is greedy and ready to sacrifice her children as a tool against her husband. She is irrational and unwilling to compromise. When a specific, focused response is called for, she responds by bringing up a completely unrelated matter. It is hard to keep her on track. She keeps venting her anger instead of negotiating constructively.³⁴

In even the most mundane settings there develops a type of informal law, shared expectations that there is a right way of acting, that departures from this way are wrong, and that an offender should be sanctioned.³⁵ The "law" that develops in these "microsocial" settings³⁶ is often both complex and necessary

32. CAL. CIV. CODE § 4607(e) (West Supp. 1990).

33. D. Saposnek, *supra* note 24.

34. For the origin of these descriptions, see *supra* note 13.

35. See Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DEN. J. INT. L. & POL'Y 165, 172 (1983); cf. Wildman, *Integration in the 1980's: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1669-70 (all institutions operate through informal and formal rules, which become incorporated into a group dynamic).

36. Microsocial settings are settings in which a small group of people, as a result of their physical or social proximity, have the opportunity to interact. See Reisman, *supra* note 35, at 172.

for human interaction to proceed. Where norms appropriate for a situation are not prescribed or made clear, interaction is impeded and perceived as awkward. The normative components of microsocial settings may be thought of as microlegal systems.³⁷

The norms that govern microlegal systems are unwritten and often not consciously perceived, but they are always present. Violation of these norms may produce strong reactions. What makes such norms distinguishable from the mere "shoulds" of daily conversation is the presence of sanctions: additional communications which accompany the "shoulds" and which punish the deviant or reward the conformist. Many of these sanctions might appear trivial at first glance—for example, laughing at or dismissing someone—but they are powerful nonetheless. According to Michael Reisman, an actor enforcing norms within a micro-legal system is often both unaware of the nature of the system and oblivious to his own functional role in it. It is not the actor's motive or self-awareness that renders his reaction a sanction, but the effect of the reaction on those sanctioned.³⁸

Persons in the midst of a divorce often experience what seems to them a threat to their very survival. Their self-concepts, financial well-being, moral values, confidence in their parenting abilities, and feelings of being worthy of love are all at risk. They are profoundly concerned about whether they are meeting their obligations and continuing to be seen as virtuous persons and respectable members of society. They are especially vulnerable to the responses they receive from any professional with whom they must deal. Against this backdrop, mediation must be seen as a relatively high-risk process. To begin with, for most people it is a new setting. Its norms are generally not understood by the parties in advance, with the result that the parties are extremely sensitive to cues as to how they are supposed to act; they will look to the mediator to provide these cues. Mediators are often quite willing to give such cues, to establish the normative components of the mediation, and to sanction departures from the unwritten rules. The informal sanctions applied by a mediator can be especially powerful, quite apart from whatever actual authority he might have.³⁹ These sanctions might be as simple as criticizing the client for not putting the children's needs first, or instructing her not to talk about a particular issue.⁴⁰ That these informal sanctions might appear trivial does not mean they will not be as influential in changing behavior as sanctions that might on their face appear more severe; "the microsancions of microlegal systems to which we are actually susceptible may be much more significant determinants of our

37. *See id.*

38. *See id.* at 174-75.

39. *See infra* notes 215-25 and accompanying text.

40. For an extensive description of the ways in which mediators control the mediation process and the substantive issues that are discussed, see Merry & Silbey, *Mediator Settlement Strategies*, 8 L. & POL'Y 7 (1986).

behavior than conventional macrosanctions which loom portentously, but in all likelihood will never be applied to us."⁴¹

In the following Section, I discuss the mediation process as a microlegal setting characterized by certain normative components. I examine the "law" of that setting with respect to the parties' relationship and emotions, and the informal sanctions that may be applied by the mediator for departures from the approved way of handling these issues.

B. *The Promise to Contextualize Decisionmaking*

1. *Principles Versus Context as the Basis for Decisionmaking*

Traditional western adjudication is often criticized for its reliance on abstract principles and rules rather than on subjective, contextualized experience.⁴² It "aspires to science: to the immanent generalization subsuming the emergent particularity, to prediction and control of social regularities and regulations."⁴³ It relies on rights, and adopts an abstract hierarchy of rules regulating the interaction of individuals.⁴⁴ This objectivist paradigm of law focuses on a specific moment in time—when a lawsuit was filed or when an act was done or injury incurred—and applies supposedly objective principles and rules to that moment to determine who was at fault: that is, who must pay and to whom payment is due.

Of course, under the common law some context, in the form of the facts of an individual case, is also to be considered. The concern for the particular facts of a dispute has been characterized as a feminine search for context, while the pursuit of applicable legal principles has been viewed as a masculine search for certainty and abstract rules.⁴⁵ To the extent that its issues are framed merely as questions of law, simply involving precedents and rights, the result in a case may be insensitive to the particular facts of the dispute. The invocation of *stare decisis* to establish the broad rules of a decision also serves to minimize the importance of the factual context to the resolution of a particular case. Finally, a primary focus on questions of law masks many underlying social and political questions.⁴⁶

Where child custody is being determined, a system that ostensibly brings context—*this* mother, *this* father, *these* children—into the process of dispute resolution, and renders a decision based on the lives of those actually involved in the dispute rather than on the basis of a general rule, has much to offer.

41. Reisman, *supra* note 35, at 177.

42. See Rifkin, *Toward a Theory*, *supra* note 1, at 87.

43. MacKinnon, *Feminism, Marxism*, *supra* note 3, at 655-56.

44. See Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 462.

45. See, e.g., Menkel-Meadow, *supra* note 1, at 49.

46. Rifkin, *Toward a Theory*, *supra* note 1, at 87.

There is, however, a cost to this change in emphasis; for although the language of legal rights may divert public consciousness away from the real roots of anger, the assertion of rights may also clarify and elucidate those roots. The process of claiming rights, by itself, can be empowering for people who have not shared societal power.⁴⁷ Thus the risk of mediation is that if principles are abandoned, and context is not effectively introduced, we end up with the worst of both worlds.

a. *Principles and Fault in the Adversary System*

A series of attempts has been made to make the court system more responsive to the actual situation of persons undergoing a divorce and to their children by deemphasizing claims of right and principle. The first of these attempts consisted of reduced reliance on the notion of fault.⁴⁸ Before this change, the principles shaping the legal process of divorce were not difficult to discern. In the absence of flagrant misconduct on the part of the spouse, one was to stay in one's marriage. One was not to engage in adultery. A man was to support his wife and children. A mother was to be the primary caretaker of her children.⁴⁹

Bright-line legal rules were based on these principles. At the time of divorce, a determination was made as to who was at fault, and this person could expect legal consequences to arise from his transgression. The injuries and indignities a party might have endured were recognized. In fact, a person who was not at fault could often halt the divorce.⁵⁰ A mother ordinarily received custody unless she was shown to be unfit. A man would be ordered to support his ex-wife indefinitely, assuming that the marriage had been of a reasonable duration.⁵¹

With the advent of "no-fault" divorce, these rules changed, signaling an as yet undefined departure from the principles upon which they had been based. It is now typical for states to allow divorce on grounds that do not require fault by either spouse.⁵² For the most part, one spouse need only show that the marital relationship is irreparable. These changes have increased the individual autonomy of married persons and given husbands and wives freedom to extri-

47. See *infra* note 90 and accompanying text. See generally the minority critiques of Critical Legal Studies compiled in 22 HARV. C.R.-C.L. L. REV. (1987). In particular, see Matsuda, *Looking to the Bottom: Critical Legal Studies & Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 340-41 (1987) (trust in Constitution has sustained Japanese-Americans in their struggle to transform society), and Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05 (1987) (criticizing Critical Legal Studies for ignoring the degree to which rights-assertion has benefitted Blacks).

48. See L. WEITZMAN, *THE DIVORCE REVOLUTION* 15-31 (1985).

49. See *id.*; see also Teitlebaum & DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1096 (1988) (noting that until the early 1970's, child custody disputes were subject to presumption that mother should receive custody).

50. See L. WEITZMAN, *supra* note 48, at 10.

51. See *id.* at 11.

52. See Freed & Walker, *Family Law in the Fifty States: An Overview*, 20 FAM. L.Q. 439, 460 (1987).

cate themselves from unhappy relationships. They have reduced the oppressiveness of principles which, although written into the law, did not fit the manner in which many persons choose to lead their lives.

But there have been other consequences of these changes. For example, results were once much more predictable than they are now, both in terms of the availability of support and the likelihood of the father's being able to obtain custody of the children.⁵³ This lack of predictability generally harms the party who has the lesser amount of power in the relationship, or who is most risk averse.⁵⁴ Moreover, to a certain extent community values have been eliminated from the process by which the state recognizes marriage and its end. While the principles that formerly controlled the process were outmoded and sexist and resulted in much unnecessary pain for persons whose marriages were ending, they were not replaced by different principles based on different values. Quite suddenly it became close to irrelevant whether one member of the couple had deceived, sexually or financially abused, or otherwise oppressed, the other.⁵⁵ As a result of these changes, it became much more difficult for persons to know whether they had complied with their societal responsibilities and to have their efforts to do so recognized.

Still, when people enter the adversary process they generally believe that they are entering an arena in which principles *are* at stake, and in which what transpires is at least partially a matter of right and justice.⁵⁶ In addition, the adversarial process itself aspires to a rule of law as its governing principle, a worthy aspiration for any decisionmaking process.⁵⁷

b. *Principles and Fault in Mediation*

The introduction of mediation into family court processes was another part of the effort to make the adversary system fit the realities of divorce more closely. Mediators stepped into the increasingly uncertain legal world of dissolution with a new process which minimized the role of principles and fault. Mediation appeared to provide the opportunity to bring the lessons of context and subjective experience to dissolution proceedings. In mediation, the parties'

53. See Teitlebaum & DuPaix, *supra* note 49, at 1098.

54. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978-80 (1979); Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177-79 (1984); Teitlebaum & DuPaix, *supra* note 49, at 1099-1100.

55. See L. WEITZMAN, *supra* note 48, at 24. In Weitzman's study, most respondents expressed discomfort with the norm, prevalent in the no-fault divorce context, that no consequences whatsoever—including financial sanctions or even courtroom embarrassment—are to be imposed on an adulterous spouse. *Id.*

56. See Merry & Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984); Teitlebaum & DuPaix, *supra* note 49, at 1126-27; see also S. MERRY, GETTING JUSTICE AND GETTING EVEN 37 (1990) (people who bring disputes to the courts usually do so with some sense of entitlement).

57. For some interesting recent reflections on the rule of law, see Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989); Massey, *The Rule of Law and the Age of Aquarius* (Book Review), 41 HAST. L.J. 757 (1990).

legal rights would not be central. Instead of relying solely on abstract principles and rules, parties and mediators could attend to the reality of complex relationships. Precedent, legal rules and a legalized formulation of the facts might be seen as irrelevant to the mediation process and an unnecessary constraint on the mediator.⁵⁸ Individuals could be seen in relation to one another, and morality treated as “a question of responsibilities to particular people in particular contexts.”⁵⁹

The informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context, be deemphasized or avoided. Mediators use informal sanctions to encourage the parties to replace the rhetoric of fault, principles, and values with the rhetoric of compromise and relationship.⁶⁰ For example, mediators typically suggest that the parties “eschew[] the language of individual rights in favor of the language of interdependent relationships.”⁶¹ They orient the parties toward reasonableness and compromise, rather than moral vindication. The conflict may be styled as a personal quarrel, in which there is no right and wrong, but simply two different, and equally true or untrue, views of the world.

(1) *Are All Agreements Equal?*

The reason for the lack of focus on values and principles in many models of mediation is, in part, simply practical. If the essence of mediation entails trading off interests and compromising, each person's interests are important, but which person violated societal values and why he did so, is not. To the extent that principles and faultfinding based on those principles enter into the discussion, reaching an agreement might be delayed or disrupted. Deemphasizing principles also might appear to be the sensible approach in a society that is increasingly pluralistic in terms of cultures, religions, and varieties of family structures.⁶² Where there are conflicting moral codes, as there often are when couples divorce, making the only standard for agreement be that it is accepted by both parties means that it will not be necessary for a third party to decide which moral code is superior.⁶³

58. See Rifkin, *Mediation*, *supra* note 1, at 27.

59. Karst, *supra* note 44, at 462.

60. See Fineman, *supra* note 6, at 731-34; Merry & Silbey, *supra* note 40, at 29.

61. Merry & Silbey, *supra* note 40, at 29.

62. Traditional nuclear families, that is, families with both a male and female parent who are married to each other and live with their children all under one roof, constitute less than half of U.S. households. As of 1988, U.S. Census Bureau statistics showed that 42.2% of households consisted of married couples with their own children under the age of 18 (the traditional nuclear family); 27.8% of households were married couples without their children under 18; 11.6% of households were headed by women with no spouse present; 3.3% were headed by men with no spouse present; and 13.1% were defined as “non-family.” U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 48 (110th ed.).

63. See Merry, *Anthropology and the Study of Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 277, 282 (1984).

Sometimes, however, all agreements are not equal. It may be important, from both a societal and an individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent.⁶⁴ Many see the courts as a place where they can obtain vindication and a ruling by a higher authority.⁶⁵ It is also important in some situations for society to send a clear message as to how children are to be treated, what the obligations of ex-spouses are to each other and to their children, and what sort of behavior will not be tolerated. Because the mediation movement tends to regard negotiated settlements as morally superior to adjudication, these functions of adjudication may easily be overlooked.⁶⁶

(2) *Conceptual Underpinnings: Family Systems and Circular Causality*

On a more theoretical level, the reluctance to discuss principles is based on the view, held by most mediators, that the family is a self-contained system. Under this view, all parts of the family are equally implicated in whatever happens within it. Each part of this system is simultaneously a cause for, and an effect of, all the other parts. Relationship problems represent "a mutually regulated dance between oppressor and oppressed."⁶⁷ Causality is circular; that is, "[n]o specific situation or person is considered the antecedent, cause, or effect of [the] problem."⁶⁸ Under this approach, "the mediator can view the interactional system between the husband and wife in such a way that each spouse's behavior appears perfectly complementary to that of the other spouse and the concepts of reasonable and unreasonable no longer apply."⁶⁹

Although this systems approach can be a useful one in understanding how families and other social organizations work, it has some serious shortcomings. Most critically, it obscures issues of unequal social power and sex role socialization. Structures within the nuclear family are viewed in isolation from outside social attitudes and forces. Thus, a person who has been a victim of violence can be seen as deserving her fate because of her self-defeating patterns

64. See J. AUERBACH, *JUSTICE WITHOUT LAW?* 136, 144-46 (1983); Abel, *The Contradiction of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* 267, 290-93 (R. Abel ed. 1982). Law also plays an important ideological role in our society, encompassing our aspiration to justice.

65. See Merry & Silbey, *supra* note 56, at 153.

66. See Walker, *Family Conciliation in Great Britain: From Research to Practice to Research*, *MEDIATION Q.*, Summer 1989, at 29, 46-51; see also Crouch, *Divorce Mediation and Legal Ethics*, 16 *FAM. L.Q.* 219, 243 (1982):

As it is taught today, mediation theory is characterized by the underlying assumption that all issues can and must be compromised. However, there can be cases imagined wherein this is simply irrational. It could be that the compromiser role requires that one make peace with oppression, suffer fools gladly, redefine black as white, and meet utter nonsense halfway.

67. Libow, Raskin & Caust, *Feminist and Family Systems Therapy: Are They Irreconcilable?*, 10 *AM. J. FAM. THERAPY* 3, 8 (1982).

68. Enns, *Dilemmas of Power and Equality in Marital and Family Counseling: Proposals for a Feminist Perspective*, 67 *J. COUNSELING & DEV.* 242, 243 (1988).

69. D. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 180 (1983).

of behavior and participation in cyclical negative interactions with her spouse.⁷⁰ In this manner, the family systems approach imposes a value-free universe. It does not leave room for the situation in which one parent is complying with the legitimate expectations of society and the other is not.⁷¹ Yet the family systems approach would suggest that both parents, as well as the children, are all somehow responsible for a family's ills.

In sum, the notion that people are jointly responsible for their interactions is only partly true. Moreover, an unrefined family systems perspective can deprive a divorcing spouse of the opportunity to appear virtuous in society's eyes and her own. No matter how much she struggles, her good works are for naught so long as she is connected to someone who is acting irresponsibly.⁷² To the extent mediation incorporates such a family systems perspective, the spouse who is doing "good work" must bear the burden of the other spouse's noncompliance.

2. *The Destroyers of Context: Prospectivity and Formal Equality*

a. *Prospectivity*

Kenny had spent ten days with his father Jerry and was scheduled to return to his mother on a flight arriving on Thanksgiving afternoon. That morning, Jerry called Linda and told her that flying was expensive, and that he was returning to his ex-wife's area at Christmas anyway. He said he intended to keep Kenny with him until then; Kenny's step-mother would care for Kenny at their home. Linda, her Thanksgiving dinner in the oven and relatives scheduled to arrive, thought of going

70. See Enns, *supra* note 68, at 243; see also Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U.L. REV. 17, 22-23 (1979) ("[B]oth parties may be culpable when an entire dispute or relationship is considered . . . Mediation/arbitration programs . . . emphasize the personal responsibility of each party rather than the narrow assessment of legal fault.").

71. See Kressel, Butler-DeFreitas, Forlenza & Wilcox, *Research in Contested Custody Mediations: An Illustration of the Case Study Method*, MEDIATION Q., Summer 1989, at 55 [hereinafter Kressel, *Custody Mediations*]. These authors measured parents for characteristics of a profile they labeled an "Interpersonally Dysfunctional Parent" (IDP). *Id.* at 59. Measures in this profile included narcissistic preoccupation, dismissiveness toward the other parent—particularly with respect to childcare arrangements—and general irresponsibility. *Id.* They found that often only one parent in a relationship fit the profile, and that in 8 of the 12 cases they studied, one parent (the father in all but one case) was therefore primarily responsible for the problems in the coparenting relationship. *Id.*

72. In the discussion of their findings, Kressel and his coauthors state that [a]lthough one can find occasional reference to the fact that some divorce conflicts are rooted in one spouse's highly disturbed behavior, it is far more typical for the causes of destructive divorce to be described as mutual to both husband and wife. The "equal blame" perspective is encouraged by family systems theory (in which divorce mediation has significant roots) *Id.* at 65. Although the authors expected to find support for the equal blame theory, they found the opposite. The use of equal blame theory in mediation causes the nondysfunctional partner (usually the mother) to share the responsibility for the dysfunctional partner's behavior in a way that adversely affects the mediation outcome for the nondysfunctional partner.

herself to pick up Kenny or going to court, but decided that the worst thing for Kenny would be a custody battle.

When Kenny returned at Christmas, his behavior was odd; for the first time in his life he was violent and aggressive toward other children. Upon questioning Kenny, Linda discovered that he had not been cared for by his stepmother during the day as promised, but had instead been sent to unlicensed daycare where the teacher had regularly used corporal punishment, to which Linda was passionately opposed and to which Kenny had never before been subjected.

In mediation, Linda asks that she be given primary custody of Kenny. She says that Jerry has been untruthful, unreliable, and has risked Kenny's emotional and physical well-being. She tries to argue that such a young child needs one home base, and that should be her home since she was effectively his sole parent for most of his first three years of life. The mediator does not allow her to make these points. Instead, she says that the past is not to be discussed; rather, they must plan together about the future. She says that whether Jerry participated in Kenny's life for his early years is irrelevant; he is here now. The Thanksgiving situation is past history, and she is sure that they both have complaints about the past. Blaming one another is counterproductive. The mediator tells Linda that she must recognize that the parent who has the child is responsible for choosing daycare. Linda must learn to give up control.⁷³

The chief means by which mediators eliminate the discussion of principles and fault is by making certain types of discussion "off-limits" in the mediation. Mediation experts Jay Folberg and Alison Taylor propose the following as one of the "shared propositions" upon which nearly all mediators agree:

Proposition 5. In mediation the past history of the participants is only important in relation to the present or as a basis for predicting future needs, intentions, abilities, and reactions to decisions.⁷⁴

It is typical for mediators to insist that parties waste no time complaining about past conduct of their spouse, eschew blaming each other, and focus only on the future. For example, one of the two essential ground rules mediator Donald Saposnek suggests a mediator give to the parties is the following:

There is little value in talking about the past, since it only leads to fighting and arguing, as I'm sure you both know Our focus will be on your children's needs for the future and on how you two can

73. For the origin of this mediation story, see *supra* note 13. After a year spent in a custody arrangement under which Kenny lived alternate months with Linda and with Jerry, and following a second mediation, Linda gave up physical custody of Kenny to Jerry. She believed that the schedule was traumatic to Kenny, and felt that the mediator would recommend in Jerry's favor in a custody battle anyway based on the friendly parent principle.

74. J. FOLBERG & A. TAYLOR, *MEDIATION* 14 (1984).

satisfy those needs. . . . [U]nless I specifically request it, we will talk about plans for the future.⁷⁵

Thus, while one of the principal justifications for introducing mediation into the divorce process is that context will be substituted for abstract principles, in fact, by eliminating discussion of the past, context—in the sense of the relationship's history—is removed. The result is that we are left with neither principles nor context as a basis for decisionmaking.

In Linda's case, the questions of whether Jerry had been remiss in not returning Kenny or in secretly placing Kenny in an inadequate childcare situation were ruled irrelevant by the mediator. The mediator did not permit discussion of these issues because reaching an agreement was paramount, and because, under family systems theory as interpreted by the mediator, Jerry could not be at fault—Linda and Jerry were equally responsible for everything. That Jerry had virtually disappeared, leaving Linda to struggle to raise her son alone, and that Jerry had not kept his word about returning Kenny after his visit were simply not proper subjects of discussion. There was nothing Linda could say to introduce these concerns into the dialogue. Further, she could not refer to the past to demonstrate she was a responsible and loving parent. Her attempts to protect her son were labelled as controlling.

b. *Prospectivity and the Assertion of Rights*

A woman I knew only vaguely from my daughter's school called me, her voice shaking, and asked me if I could mediate her case. I said that I could not, but would be glad to talk to her and refer her to other mediators. She told me that her husband had told her two days previously that he was leaving her and intended to marry someone else. He told her he wanted to have the divorce mediated and wanted joint custody of the children. He told her she would have to start looking for a job right away. He also told his wife that it would hurt the children if he and she were angry at each other, and that he wanted to retain a friendly, cordial relationship and have a rational, peaceful divorce. She cried into the phone that she felt terrible that she was unable to be rational, and that although she was trying hard to be mature, she still had these angry feelings. She still wanted to blame him, although she realized, she said, that nothing is ever black and white, and no one is at fault when a marriage breaks up.⁷⁶

Felstiner, Abel and Sarat note that some people are apparently able to tolerate substantial amounts of distress and injustice.⁷⁷ This "tolerance," they

75. D. SAPOSNEK, *supra* note 69, at 70.

76. For the origin of this story, see *supra* note 13.

77. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & Soc'y REV. 631, 633 (1980-81).

posit, comes from a failure to perceive that they have been injured. They describe a three-step process by which (1) injurious experiences are perceived (naming), (2) are transformed into grievances (blaming), and, (3) ultimately, become disputes (claiming).⁷⁸ "Naming" involves saying to oneself that a particular experience has been injurious.⁷⁹ The acquaintance who called me could barely go this far. "Blaming" occurs when a person attributes fault to another (rather than to an impersonal force, such as luck or the weather). One cannot arrive at "claiming," that is, the assertion of rights, without passing through "blaming."⁸⁰ By making blaming off-limits, the process by which a dispute is fully developed—and rights are asserted—cannot be completed. Short-circuiting the blaming process may fall most heavily on those who are already at a disadvantage in society. Whether people "perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted . . . [is a function of] their *social position* as well as their individual characteristics."⁸¹

The cultural commitment to access to justice⁸² has focused on the last stage of disputing—claiming. The more critical place at which inequality is manifested, however, is before experiences are transformed into disputes,⁸³ that is, at the naming and blaming stages. One adverse consequence of de-emphasizing discussion of principle and fault is that some persons may be discouraged from asserting their rights when they have been injured. Even more troubling, some persons may cease to perceive injuries when they have been injured, or will perceive injuries but those injuries will remain inarticulate, because the language to name them will not be easily available. My acquaintance whose husband had an affair and left her did not trust her sense that she had been injured, treated in a way that human beings ought not to deal with each other. She did not have the support of a clear set of legal principles to help her define her injury; rather, she had been exposed to a discourse in which faultfinding was impermissible, so that she ended up unable to hold her husband responsible for his actions, and instead felt compelled to share his fault. To the extent that there is something to be gained by the assertion of rights, especially for women and minorities,⁸⁴ this is unacceptable.

78. *Id.*

79. *Id.* at 635-36.

80. *Id.*; cf. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. L.F. 23, 38 (focusing on woman's psychological reaction to battering rather than on batterer's behavior makes it difficult for legal system to stop violence).

81. Felstiner, Abel & Sarat, *supra* note 77, at 636.

82. Some might dispute whether our society has a real commitment to access to justice. Nonetheless, from *Gideon v. Wainwright*, 372 U.S. 335 (1963), see generally A. LEWIS, *GIDEON'S TRUMPET* (1964), to the creation of the Legal Services Corporation, see *Washington Post*, Oct. 23, 1977, at C1, col. 3, at least lip service has been paid to the notion that the disadvantaged deserve legal representation.

83. Felstiner, Abel & Sarat, *supra* note 77, at 637.

84. See Williams, *supra* note 47, at 427-33.

Many writers have debated recently whether legal rights have some intrinsic value, especially in the context of rights that define the boundaries of state power.⁸⁵ Some Critical Legal Studies theorists have suggested that rights claims perpetuate dichotomies such as individual and community, self and other, and family and market, and thus do not promote social reconstruction.⁸⁶ They also criticize the “reification” of rights—that is, the conceptualizing of rights as real, or thing-like, resulting in the acceptance of the existing social order as an inevitable fact of life.⁸⁷ Feminist critiques of rights have been based on the characterization of rights claims as formal and hierarchical and, therefore, patriarchal.⁸⁸ Both critiques emphasize the ways in which discussion of rights can lead to increased alienation and passivity.

In recent years, a number of women and minority scholars have challenged these critiques of rights, suggesting that rights claims may in fact help enhance and develop individual and political growth.⁸⁹ Although the debate usually focuses on “rights” in a very different sense from those at stake when, for example, a mother wants sole rather than joint custody, the debate is useful in considering what the consequences might be of making discussion of principles and fault off-limits in the context of custody. In particular, the literature suggesting that the assertion of rights may have a transformative function applies in this context.⁹⁰

For example, Elizabeth Schneider has demonstrated that assertion of rights can aid in the development of individual and group consciousness among women.⁹¹ She notes that Carol Gilligan describes the developmental challenges

85. See, e.g., Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

86. See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1108 (1981); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 212-13 (1979); Sparer, *Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 516 (1984).

87. See, e.g., Gabel, *supra* note 85, at 1581; Gabel & Harris, *supra* note 85, at 373 n.10; Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 3-6 (1984).

88. See, e.g., C. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 3, at 46-47; MacKinnon, *Feminism, Marxism*, *supra* note 3, at 644-45; Polan, *supra* note 1, at 300; Rifkin, *Toward a Theory*, *supra* note 1, at 86. These writers are critical of rights, but do not suggest that rights claims be given up completely.

89. See, e.g., Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 441-47 (1987); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-22 (1987); Matsuda, *supra* note 47, at 363-99; Schneider, *The Dialectic of Rights and Politics: Perspectives from The Women's Movement*, 61 N.Y.U. L. REV. 589, 648-52 (1986); Williams, *supra* note 47, at 427-33.

90. Pat Williams has argued that the Critical Legal Studies movement has ignored the degree to which rights-assertion and the benefits of rights have helped Blacks, other minorities, and the poor. As Williams has put it: “[I]t is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights.” Williams, *supra* note 47, at 405.

91. See Schneider, *supra* note 89, 623-48.

of maturity as very different for men and for women. Men must learn connection and care for others; women must learn to care for themselves. The assertion of rights can aid women in this development, as "[t]he essential notion of rights [is] that the interests of the self can be considered legitimate."⁹² Thus, assertion of rights can help women distinguish self from other, and ultimately give them a sense of collective identity.⁹³

My acquaintance whose husband abandoned her was unable to view either her needs or her feelings as legitimate; as far as she was concerned, the important players in her own personal drama were her husband and children, but not herself. Both the current state of divorce law and the reigning model of mediation were operating to keep her in a position in which she tried not to blame others and, in the process, lost herself. Whatever the other limitations of Gilligan's work,⁹⁴ her suggestion that assertion of rights can be transformative for many women merits careful attention. To the extent that the mediation process makes it difficult to assert rights, the positive implications of rights-assertion for women, the poor, and minorities of either sex will be lost.

Rights assertion cannot take place in a context in which discussion of fault and the past are not permitted, for recognition and assertion of rights are ordinarily based on some perceived past grievance, as well as on some notion of right and wrong. From the point of view of the courts, minimizing conflict is always a good thing: less litigation means less expenditure of court time and resources. From the point of view of the individual, however, conflict sometimes must occur. Conflict may mean that the individual has realized he has been injured, and that he is appropriately resisting the continuation of that injury. The perception of injury arises from a sense of entitlement, which in turn is "a function of the prevailing ideology, of which law is simply a component."⁹⁵ If mediation creates a sense of disempowerment, it will interfere with the perception and redress of injuries in cases where they have in fact occurred.

c. *Formal Equality*

Context is also destroyed by a commitment to formal equality, that is, to the notion that members of mediating couples are, to the extent possible, to be treated exactly alike, without regard for general social patterns and with limited

92. *Id.* at 615 (quoting C. GILLIGAN, *supra* note 10, at 149).

93. Schneider suggests that rights can be "an essential way of understanding and experiencing self-in-other, a foundation for selfhood, and can be critical to the growth and development of any movement." Schneider, *supra* note 89, at 617 (footnote omitted). She argues that the assertion of rights in this manner links the individual to a broader social group, helping to transcend the dichotomy of individual and community. *Id.* at 617-18.

94. See *infra* notes 263-68 and accompanying text.

95. Felstiner, Abel & Sarat, *supra* note 77, at 643.

attention to even the history of the particular couples.⁹⁶ Thus, it becomes close to irrelevant in determining custody that the mother may have been home doing virtually all the caretaking of the children for years; she is to move into the labor market as quickly as possible.⁹⁷ It is assumed that the father is equally competent to care for the children. In fact, it frequently is said that one cannot assume that a father will not be as competent a caretaker as the mother just because he has not shown any interest previously:

Many women have told me, "He never did anything with the children. If he is given even part-time responsibility for them, he'll ignore them, he won't know what to do."

Research has shown, however, that little correlation exists between men's involvement with the children before and after divorce. . . . When they gain independent responsibility for the children, many men who were relatively uninvolved during the marriage become loving and responsive parents after divorce.⁹⁸

In mediation, insistence on this sort of formal equality results in a dismissal of the legitimate concerns of the parent who is, or considers herself to be, the more responsible parent. Such concerns are often minimized by characterizing them as evidence of some pathology on the part of the parent holding them.⁹⁹ The insistence of a mother that a young child not be permitted to stay overnight with an alcoholic father who smokes in bed might be characterized as the mother needing to stay in control.¹⁰⁰ Or the mediator might suggest that it is not legitimate for one party to assume that the other party will renege on her

96. The formal equality to which this discussion refers exists only between the two parties to a particular mediation. Some might argue that mediation lacks a commitment to formal equality, since abstract rights are not incorporated into mediation and people engaged in different mediation processes in similar positions might end up with different outcomes. Yet, mediation does evince a commitment to formal equality as between the participants, treating them as coequals regardless of their history.

This formal equality problem surfaces in the no-fault divorce arena as well, particularly with respect to alimony awards. As Weitzman explains:

No fault attempts to treat men and women equally—or *as if they were equal*—at the point of divorce. However, it ignores the structural inequality between men and women in the larger society. Divorced women and divorced men do not have the same opportunities: the women are more likely to face job and salary discrimination and more likely to be restricted by custodial responsibilities.

L. WEITZMAN, *supra* note 48, at 35. Weitzman notes that divorced women and their children experience a 73% decline in their standard of living while divorced men experience a 42% rise in their standard of living in the first year after divorce. *Id.* at xii.

97. *See id.* at 33. Although this represents a new expectation for middle- and upper-class women, working-class women, who comprise the majority of the divorcing population, ordinarily did not receive alimony even prior to the changes in the divorce laws. *Id.*

98. R. ADLER, *SHARING THE CHILDREN* 33 (1988).

99. *See* Fineman, *supra* note 6, at 766 (finding unsettling extent to which allegations of abusive or neglectful behavior by husbands toward their wives or children is trivialized by rhetoric that reduces to pathology mother's desire for custody or control of child); *see also* Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 *HARV. WOMEN'S L.J.* 57, 71-100 (1984) (discussing problems with mediation in context of cases involving wife abuse).

100. Bruch, *supra* note 24, at 119.

obligations, simply because she has done so in the past. In the example above,¹⁰¹ once Linda was in mediation, she was treated exactly equally with Jerry even though their past parental performance had been dramatically different. The point is not that mothers never inappropriately desire to stay in control, or that people who have not fulfilled their obligations once will continue to fail to do so, but rather that by defining the process as one in which both parties are situated equally, deep, heartfelt, and often accurate concerns either are not permitted to be expressed or are discounted.

Equating fairness in mediation with formal equality results in, at most, a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself. There is no room in such an approach for a discussion of the fairness of institutionalized societal inequality. For example, women do not have the earning power that men have, and therefore are not in an economically equal position in the world. All too often mediators stress the need for women to become economically independent without taking into account the very real dollar differences between the male and female experience in the labor market.¹⁰² While gaining independence might appear to be desirable, most jobs available for women, especially those who have been out of the labor market, are low paying, repetitious, and demeaning.¹⁰³ Studies show that women in such dead-end jobs do not experience the glories of independence, but rather show increased depression.¹⁰⁴

d. *Equal Control, Unequal Responsibility*

Linda had taken a low-paying job in a childcare center so that Kenny could be with her while she worked. Jerry continued to work the chaotic schedule required by the railroad. After determining that Linda and Jerry would share custody of Kenny, the mediator asked Jerry what schedule would work for him. Jerry said that he could not be tied down to a particular schedule because his job on the railroad required him to be available at short notice and out of town for long periods of time. When Linda protested that both she and Kenny needed a predictable schedule, and that she had spent her entire married life at the mercy

101. See *supra* text accompanying note 73.

102. See, e.g., Haynes, *Divorce Mediator: A New Role*, 23 SOC. WORK 5, 8 (1978). This is not to say that all men and all women have equivalent experiences. For example, the comparative positioning of Black women versus Black men in the labor market is very different from that of white women versus white men. See U.S. BUREAU OF THE CENSUS, *supra* note 62, at 454 (mean incomes in 1987 were: Black males, \$14,391; Black females, \$9,919; white males, \$23,643; white females, \$11,621); cf. E. SPELMAN, *INESSENTIAL WOMAN* 115-32 (1988) (Black men do not have authority over Black women that white men do over white women).

103. Enns, *supra* note 68, at 243.

104. See Belle, *Inequality and Mental Health: Low Income and Minority Women*, in *WOMEN AND MENTAL HEALTH POLICY* 135, 146 (L. Walker ed. 1984); Carmen, Russo & Miller, *Inequality and Mental Health: An Overview*, in *THE GENDER GAP IN PSYCHOTHERAPY* 17, 23-24 (1984).

*of the whims of his employer, the mediator smiled sympathetically and said, "I guess you didn't get to divorce the railroad after all."*¹⁰⁵

The notion of equality, used so effectively to remove control of children from women by treating men as equally entitled to custody regardless of their prior childcare responsibilities, is not nearly so effective when it comes to requiring men to assume responsibility for their children should they choose not to. One rarely hears of joint custody's being used to mandate that a father participate in the raising of his child although many women might desire that help.¹⁰⁶ But fathers who wish to participate even marginally in childrearing are given full rights, and even special privileges to enable them to do so.¹⁰⁷ These privileges are paid for by the mother in terms of inconvenience and instability in her own life. Fathers who do not want to be concerned with raising their children need only pay support, and many do not even do that.¹⁰⁸ Despite the presumption in favor of joint custody, it is assumed, by and large, that the mother will be available to care physically and emotionally for the children for as much or as little time as she is granted.¹⁰⁹

Western wage labor is based on the availability of an "ideal" worker with no childcare responsibilities.¹¹⁰ Joan Williams has written that in this system men are raised to believe they have the right and responsibility to perform as ideal workers. Women are raised to believe that they should be able to spend some time with their small children and, upon return to outside employment, must shape their work around the reality that they have continuing childcare responsibilities.¹¹¹

The laws governing custody are now, in theory, gender neutral.¹¹² Mediators, however, are as likely as others in society to assume that women's work commitments are secondary to those of men, and to give more credence to the work obligations and ambitions of fathers. Women may be encouraged in

105. For the origin of this mediation story, see *supra* note 13.

106. See L. WEITZMAN, *supra* note 48, at 370. Weitzman points out that there is no legal cause of action to compel fathers to see their children: "The implicit message is that joint parenting—and even parenting itself—is an 'optional' responsibility for fathers." *Id.*

107. See *id.* at 233 (though numbers of fathers requesting custody is small, nearly two-thirds of those who request it are awarded it).

108. See *id.* at 353-54 (data indicate that 25% of fathers make only some of payments required by child support orders, while nearly 30% do not comply at all.).

109. There are, however, occasional situations in which joint custody is settled upon because neither parent wants full custody of the children. See, e.g., J. HAYNES & G. HAYNES, *MEDIATING DIVORCE* 228-71 (1989).

110. See Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 56 (1979); Williams, *supra* note 10, at 822.

111. See Williams, *supra* note 10, at 823; see also *Business Forum: Women in the Work Force; The Mommy Track vs. the Fast Track*, N.Y. Times, May 21, 1989, § 3, at 2, col. 3 (discussing need for businesses to accommodate unique needs of female employees who wish to raise families).

112. This was not always the case. Courts in earlier years used the "tender years" doctrine to presume that children younger than seven should be placed with their mothers. See J. AREEN, *FAMILY LAW* 425-33 (1985); see also Fineman, *supra* note 6, at 738 (discussing successful challenges to tender years doctrine).

mediation not to think of themselves as ideal workers so that they will be able to take on primary responsibility for the children.¹¹³

The result of assuming that one parent will make herself available in this way is that disproportionately more attention is paid to ensuring the access of the parent without physical custody (usually the father) to his children than to meeting the needs of the parent who, in all likelihood, will bear the primary responsibility for these children.

Custody decrees frequently specify joint legal or physical custody,¹¹⁴ or both, when in fact the children are with one parent—generally the mother—as much or more than children who are living under a sole custody arrangement.¹¹⁵ The result of such a discrepancy under a joint custody arrangement is that the caretaking parent may be subject to the control of the noncaretaking parent without being relieved of any sizeable amount of day-to-day responsibility for the children.

In Linda's case, her having taken a low-paying job to enable her to care for her son while Jerry had a job which took him away from his son was not considered pertinent in determining who would have physical custody of Kenny (although it might have been had Linda been the one who had taken the railroad job). In determining how the joint physical custody would work, however, the mediator expected Linda to be flexible and work around Jerry's schedule, even though the same flexibility was not required of Jerry. Thus, the

113. In a similar vein, studies of psychotherapists and counselors have shown that more female than male subjects are expected to compromise career ambitions, as well as make other concessions, to achieve satisfactory relationships. See Bowman, *An Analog Study With Beginning Therapists Suggesting Bias Against "Activity" in Women*, 19 *PSYCHOTHERAPY: THEORY, RES. & PRAC.* 318, 323 (1982); Enns, *supra* note 68, at 244-47. Moreover, studies have shown that men and women who deviate from traditional roles are seen by mental health professionals as suffering from mental illness. Goleman, *Stereotypes of the Sexes Persisting in Therapy*, N.Y. Times, Apr. 10, 1990, at C1, col. 1.

Deference to fathers may not be confined to the area of employment. Emery and Wyer, in noting that most of the increased satisfaction created by mediation was experienced by men, posited that "[b]ecause children are a continuing tie between divorced parents, perhaps the fathers' increased satisfaction will, over time, lead to increased satisfaction for the mothers as well." Emery & Wyer, *supra* note 8, at 185. In other words, it is evidently thought permissible for the mother, the children's primary caretaker, to obtain her satisfaction secondhand.

114. A parent who has physical custody of a child tends to make day-to-day decisions, such as what to feed the child. A parent who has legal custody has decisionmaking power over larger issues in the child's life, such as those involving education or religious upbringing.

115. See Emery & Wyer, *supra* note 8, at 185 (although more joint custody settlements were negotiated in mediation, joint legal custody agreements spelled out childcare arrangements resembling those found in traditional sole custody awards); see also L. WEITZMAN, *supra* note 48, at 361 ("Although joint custody laws hold the promise of men assuming equal responsibility for post divorce parenting, in practice these laws have given men equal authority, but not equal responsibility."); Koopman, Hunt & Stafford, *Child-Related Agreements in Mediated and Non-Mediated Divorce Settlements: A Preliminary Examination and Discussion of Implications*, 22 *CONCILIATION CTS. REV.* 19, 23-24 (1984) (maternal custody arrangements due primarily to societal traditions, not attorney influence); Pearson & Thoennes, *Mediating and Litigating*, *supra* note 7, at 504, 507 (1984) (many joint custody arrangements are more conventional than label implies; only 27% of agreements reviewed called for regular alternation of child between parents, while remainder typically delegated day-to-day care to mother); Schulman, *Who's Looking After the Children?*, 5 *FAM. ADVOC.*, Fall 1982, at 31, 36 ("Despite the perception that joint custody equalizes the responsibility of child raising between parents, women are still the primary caretakers of children, even after divorce.").

“equality” that prevailed to give Jerry equal control did not require equal responsibility of him.

C. The Promise to Include Emotion and the Suppression of Anger

Another criticism of the traditional adversary method of dispute resolution is that it does not provide a role for emotion. Decisions by adversarial parties are posited as rational, devoid of emotion, self-interested, and instrumental (result-oriented). Some proponents of mediation and other methods of alternative dispute resolution believe these characteristics should be retained in mediation to the extent they permit parties to serve their self-interests efficiently.¹¹⁶ Others have argued that mediation and other forms of alternative dispute resolution provide an opportunity to bring intuition and emotion into the legal process.¹¹⁷ This latter group of proponents points out that family conflicts in particular often involve a combination of emotional and legal complaints, so that the “real” issues are often obscured in the adversarial setting. Thus, “there may be a great need for an open-ended, unstructured process that permits the disputants to air their true sentiments.”¹¹⁸

Although mediation is claimed to be a setting in which feelings can be expressed, certain sentiments are often simply not welcome. In particular, expressions of anger are frequently overtly discouraged. This discouragement of anger sends a message that anger is unacceptable, terrifying and dangerous. For a person who has only recently found her anger, this can be a perilous message indeed. This suppression of anger poses a stark contrast to the image of mediation as a process which allows participants to express their emotions.

Women undergoing a divorce, especially ones from nondominant cultural groups, are particularly likely to be harmed by having their anger actively discouraged during the dissolution process. Women have been socialized not to express anger, and have often had their anger labelled “bad.”¹¹⁹ A woman in the throes of divorce may for the first time in her life have found a voice for her anger. As her early, undifferentiated, and sometimes inchoate expressions of anger emerge, the anger may seem as overwhelming to her as to persons outside of it.¹²⁰ And yet this anger may turn out to be the source of her energy, strength, and growth in the months and years ahead. An injunction

116. See, e.g., Merry, *Disputing Without Culture* (Book Review), 100 HARV. L. REV. 2057, 2062 (1987).

117. See, e.g., S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 313 (1985) (“Family disputes are also well suited to alternative forums because the conflicts often involve a complex interplay of emotional and legal complaints.”).

118. *Id.*

119. See generally H. LERNER, THE DANCE OF ANGER I (1985) (women have been discouraged from expressing their anger); A. LORDE, *The Uses of Anger: Women Responding to Racism*, in SISTER OUTSIDER 124 (1984) (suggesting that women need to use anger to fight racism and sexism).

120. See H. LERNER, *supra* note 119, at 3, 95.

from a person in power to suppress that anger because it is not sufficiently modulated may amount to nothing less than an act of violence.

1. *Anger in Adversary Adjudication*

People are necessarily angry at divorce, in two senses. First of all, anger is inevitable in ending a marriage; almost everyone who obtains a divorce becomes angry sooner or later.¹²¹ This anger may have many different causes: it may be a result of anticipated losses, wrongful treatment, or the myriad compromises of self that may have been made along the way to the marriage's end. Second, some anger is necessary for the disengagement which is essential to the completion of the divorce.¹²² It is thus critical that any system of marital dissolution take anger into consideration and establish a means by which it is permitted to enter into the divorce process.

Despite the rational pursuit of self-interest that underlies the adversary system in theory, in practice there is much room for the expression of anger in the adversarial context. Indeed, anger may be the raw material for the adversary fight, with the entire courtroom battle constituting an exercise in controlled anger. The parties' anger is expressed in a formal, contained way through the ritualized behavior of the lawyers. In *Richmond Newspapers, Inc. v. Virginia*,¹²³ the Supreme Court, in holding that criminal trials must be open to the public even when the prosecutor and defense wish otherwise, explained that "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion."¹²⁴ Barbara Babcock describes a primary function of criminal trials as community catharsis.¹²⁵ In the case of civil trials, and in particular in family law cases, the catharsis is individual, but it is catharsis nonetheless. Thus, in the adversary system, although the parties' anger is expressed through surrogates, it is neither delegitimated nor denied expression.

The manner in which anger is expressed in the adversary system is not, however, without its imperfections. Frequently it is not the party's actual anger that is being expressed, but rather the anger the party is expected to have. Lawyers handling dissolutions under the adversary system may exacerbate or even create conflicts, and fan the flames of anger—real or manufactured—that arise from them. Mediation has been put forth as an alternative forum in which parties can express their sentiments directly and ensure that only *their* sentiments are expressed.¹²⁶

121. See J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES* 6 (1989).

122. See Barsky, *Strategies and Techniques of Divorce Mediation*, 65 *SOC. CASEWORK* 102, 106 (1984).

123. 448 U.S. 555 (1980).

124. *Id.* at 571 (Burger, C.J., plurality opinion).

125. See Babcock, *Fair Play*, 34 *STAN. L. REV.* 1133, 1139-40 (1982).

126. See, e.g., Folberg & Milne, *supra* note 14, at 9.

2. *Anger in Mediation*

At a recent meeting of a mediation group, a nationally known mediator was a moderator at a round table discussion. In the course of the discussion, a participant stated that she thought one of the problems that divorcing couples had was that they had never learned to fight with each other in a productive way. Several of those present, including the moderator, objected to the word "fight." The speaker tried to make her point more palatable by substituting the words "handle conflict." But this modification was not enough. There was general agreement that we should talk instead about "problem-solving."¹²⁷

Some mediation literature suggests that mediators should proceed by discouraging the expression of anger.¹²⁸ This literature evinces a profound lack of respect for the anger that divorcing spouses feel. For example, Donald Saposnek suggests that "[i]n many ways, the mediator must act as a parent figure to the parents, since their struggles are often not unlike those of siblings squabbling over joint possessions."¹²⁹ Saposnek's depiction of divorcing parents suggests that their struggles are devoid of content. He characterizes their anger and conflict as "squabbling" rather than as arising from substantively important conflicts or as a necessary and important step in the divorce process.

Saposnek suggests that the mediator ask questions of the parties that will imply to them that elaboration of their feelings during conflicts with each other is "irrelevant and counterproductive" and that the mediator is "interested in . . . ideas for solutions to these problems."¹³⁰ Saposnek thus views the expression of feelings as antithetical to problem-solving; a mediator must choose one or the other.¹³¹

In a similar vein, an article by Susan Rogers and Claire Francy concerning the role of communication in mediation concludes that the amount of verbal communication between the parties during a mediation has little impact on the outcome of the mediation.¹³² In discussing their findings, they argue that communication in mediation should be circumscribed: "A complainant who dwells

127. Meeting of Northern California Council for Mediation, at Golden Gate University School of Law, San Francisco, California (Oct. 29, 1989).

128. See, e.g., Brown, *Divorce Mediation in a Mental Health Setting*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 127, 131-32; D. SAPOSNEK, *supra* note 69, at 176; Mumma, *Mediating Disputes*, 42 *PUB. WELFARE* 22, 26 (1984); see also Merry & Silbey, *supra* note 40, at 8 (two predominant styles adopted by mediators are bargaining, which discourages exploration of feelings, and therapeutic, which encourages exploration of feelings).

129. D. SAPOSNEK, *supra* note 69, at 176.

130. *Id.* at 177.

131. Saposnek's view of the parties' anger reveals his belief that his clients are not his equals but rather his subordinates, like infants.

132. See Rogers & Francy, *Communication in Mediation: Is More Necessarily Better?*, *MEDIATION Q.*, Winter 1988, at 39, 47. The study involved mediation in a large, court-affiliated, community dispute resolution center. *Id.* at 41.

on negative feelings caused by past events may find it hard to look toward a constructive relationship with the respondent in the future."¹³³

Even when mediation literature does approve of bringing anger into the process, it often recommends doing so in a way that subtly undercuts the legitimacy of the anger. Mediators are encouraged, where necessary, to permit parties to "vent" their anger, after which the parties can move on to discuss settlement.¹³⁴ This view does not take anger seriously enough. Because it treats expressed anger as having no long-range impact on the party who is exposed to it, it is not necessarily seen as objectionable to require one party to be present and endure the other party's "venting"—even where the party enduring the venting has been the subject of abuse in the marriage.¹³⁵ The effects of exposure to anger in such a case can be devastating.¹³⁶ If the privilege of expressing anger has not been distributed equally in the relationship prior to mediation, then the mediator should not grant that privilege equally during the mediation.

Second, and equally critically, the view of anger as something to be "vented" does not take anger seriously as a path to clarity and strength. Anger that is merely vented has lost its potential to teach, heal, and energize; it is ineffective anger, anger that "maintains rather than challenges" the status quo.¹³⁷

Not all writers suggest that anger be suppressed or vented in the service of eventual suppression.¹³⁸ Some mediators, however, especially those in mandatory settings,¹³⁹ do advocate that parties suppress their anger. The mediator's personal antagonism toward anger and conflict may lead her to urge clients to keep their angry feelings to themselves.

At the same time, there are other forces which may intensify this dynamic of suppression. Mediators working under time pressures recognize that it takes time to express anger, and its full expression might, indeed, jeopardize a quick settlement.¹⁴⁰ More significantly, there are substantial societal taboos against

133. *Id.* at 48.

134. *See, e.g.*, C. MOORE, *THE MEDIATION PROCESS* 129-31 (1986); Barsky, *supra* note 122, at 106.

135. For a discussion of subjecting abused spouses to mediation, see *infra* text accompanying notes 184-89.

136. The expressions of anger might be taken by the abused spouse to be further threats, and thus might frighten her and make her reluctant to express her views.

137. *See* H. LERNER, *supra* note 119, at 10.

138. Two commentators have stated that "anger in our society is hard to acknowledge and even harder to show in socially acceptable ways. Often the participants in mediation deemphasize their anger by calling it frustration." *See* J. FOLBERG & A. TAYLOR, *supra* note 74, at 89. The authors go on to suggest that the mediator describe the party's feelings precisely, "perhaps even setting the stage by normalizing the feelings." *Id.*

139. I was a trainer for a community mediation program in Oakland, California. Among the persons attending the training were two family court mediators from a local court. These mediators were aghast that we brought the expression of feelings into the structure of the process; they stated that they never let any hostile feelings be expressed because the parties would blow up and the chance for an agreement would be lost.

140. The success of a mediation program is often measured by the percentage of cases settled. *See* Bruch, *supra* note 24, at 119.

the expression of anger by women, taboos which have particular force when the disputant is a woman of color.¹⁴¹ For a woman who has just found her anger, anger which has enabled her to free herself from an oppressive relationship and involve herself and her family in a divorce proceeding, the suppression of the very force that has driven her forward is a devastating message.¹⁴²

3. *Societal Prohibitions Against Female Anger*

It is considered unfeminine to be angry, even angry with good reason: "From birth, the parent's awareness of the child's sex . . . organizes and directs that parent's response to the child's expression of anger, rebelliousness and protest. Despite changes brought about by the recent feminist movement, expressions of anger and aggression are still considered 'masculine' in men, and 'unfeminine' in women."¹⁴³

Women are not immune from the pervasive fear of female anger which is part of Western culture.¹⁴⁴ Thus, from the external, societal prohibition on our anger arises an even stronger set of internal prohibitions. These prohibitions make it difficult for women to be directly, clearly, self-assertively angry. We carry with us two powerful images of female ways of dealing with aggression. The first image is of the "nice lady" or peacemaker: a woman who, "[i]n situations that might realistically evoke anger or protest . . . stay[s] silent—or become[s] tearful, self-critical or 'hurt.'"¹⁴⁵ Women serving this image are vulnerable to victimization and "share deep unconscious anxieties about 'fighting' which interfere not only with their ability to express anger, but with their capacity to be adaptively self-assertive and competitive as well."¹⁴⁶ But under the "nice woman" exterior is much unconscious rage, which, because direct experience of it is forbidden to women, may be experienced as depression, hurt or guilt. "The amount of creative, intellectual and sexual energy that

141. See generally A. LORDE, *supra* note 119.

142. While individual men might also experience the suppression of their anger as devastating, the effect on men of the mediator's message is in general likely to be less for two reasons. First, because of cultural support for men's expression of anger, men ordinarily are far less susceptible than women to suggestions that their anger be suppressed. Harriet Lerner points out that, while there are many English terms for women who are angry at men—shrews, man-haters, castrators—there is not a single unflattering term for men who are angry at women. H. LERNER, *supra* note 119, at 2. Second, the mediator herself, as a product of this culture, may notice men's anger less and tolerate it more than women's.

There is one possible advantage to the suppression of anger in mediation: a woman who has been the victim of her husband's anger may be protected from that anger, however briefly, during the mediation session. On further inspection, however, this advantage is illusory; a mediation model that recognizes the usefulness and power of anger may help her both to express her own anger and protect herself from her husband's anger, during the session and long after it has ended.

143. See Lerner, *Internal Prohibitions Against Female Anger*, 40 AM. J. PSYCHOANALYSIS 137, 138 (1980). While Lerner discusses men as a homogeneous group, the societal reaction to the expression of anger or aggression in white males is very different from the reaction to the expression of anger or aggression in Black males, at least outside of the arena of sports. See *infra* notes 160-66 and accompanying text.

144. Indeed, I think we are especially sensitive to it.

145. H. LERNER, *supra* note 119, at 5.

146. Lerner, *supra* note 143, at 139.

is trapped by this need to repress anger and remain unaware of its sources is simply incalculable."¹⁴⁷

The second image imposed on women is that of the "bitch." Bitchiness, descriptive of women who express anger with ease, is characterized by "ineffective fighting, complaining, and blaming that leads to no constructive resolution."¹⁴⁸ This image is forced on women "when intra-psychic and cultural pressures combine to inhibit the direct and appropriate expression of legitimate anger and protest."¹⁴⁹ The alternative presented is not to express anger at all. The "bitch" is willing to experience her anger and communicate it in some sense, but may "get stuck in a pattern of ineffective fighting, complaining and blaming that only preserves the status quo"; she may "unwittingly protect others" at her own expense.¹⁵⁰

Neither of the alternatives traditionally available to women allows a woman to use her anger to clarify and strengthen herself and her relationships. Rather, both alternatives force her to deny, displace, internalize, or fear it.¹⁵¹

4. *Anger and Separateness*

In addition to society's prohibitions on female anger, many women have an additional reason to be threatened by their own anger: they find it difficult to see themselves as independent. Many women view themselves fundamentally in terms of their connections to other people; they long for such relationships and are fearful of being separate. The experience of anger is one that by its

147. H. LERNER, *supra* note 119, at 8.

148. *Id.* at 5, 7-10.

149. Lerner, *supra* note 143, at 138.

150. H. LERNER, *supra* note 119, at 9; see also Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539-40 (describing effective style of being Black "bitch").

151. Women are often correctly perceived as victims. Yet fear of female anger, on the part of both women and men, seems more intense than the fear of patriarchal anger. Some psychologists have located the origins of this fear in most infants' experiences of being raised by their mothers:

[T]he infant's and child's world is a matriarchal one in which power and authority are predominantly, if not exclusively, in the hands of women. It is mother who not only gratifies the child's impulses, but is also the first to forbid their expression Most important, it is mother who is the primary object of the child's dependency. It is with this woman that the child must move from the experience of a fused, undifferentiated symbiosis, in the direction of increasing individuation, separateness, and autonomy. The strength of this struggle with mother—i.e., the struggle between regressive dependent wishes and more autonomous strivings toward separation and autonomy—inevitably generates aggression and rage at the object of one's dependency. Because of the child's heavy reliance on primitive projection, one aspect of the early maternal imago which persists in the unconscious of even the most 'rational' adults is that of a vengeful, angry, possessive, all-powerful 'bad mother' who restricts her child's autonomy, freedom, and growth.

Lerner, *supra* note 143, at 139. We need not rely on the work of western psychologists alone to observe this fear of the omnipotently destructive woman; pictures of statuary from India portray the mother eating the head of her child. In mediation, women who are angry, or even those who define themselves clearly, may trigger this fear in the mediator, in their husbands, and even in themselves. They may be seen as "diminishing men [and] hurting children," Lerner, *Female Dependency in Context: Some Theoretical and Technical Considerations*, 53 AM. J. ORTHOPSYCHIATRY 697, 700 (1983), rather than as legitimately protecting their own interests and the interests of their children.

nature includes feelings of being separate and alone. According to psychologist Teresa Bernardez-Bonesatti, women may be afraid of temporary separateness from the object of their anger because of their fear of loss of connection.¹⁵² While not all women experience this fear,¹⁵³ it is enough for my present purposes to note that (1) the experience of anger is one of separateness, and (2) viewing oneself as separate and alone is difficult for many women.

Many women are thus afraid of their own anger, either because of a societal proscription on female anger or because it makes them feel cut off from others. Before their divorces, they may only rarely have experienced their anger directly, experiencing it instead as hurt or depression. To feel their anger directly now may be terrifying, and they may be afraid of the consequences of that anger. In addition, at the time of divorce, all women must cope to some degree with being alone, physically, economically, and for all to see, sometimes for the first time in their lives. They must deal with a painful and permanent loss of connection when, for some, the experience of connection has been the hallmark of their lives. At this vulnerable moment, they may be told in a child custody mediation that their anger is not legitimate. This is a message that their worst fears are true: "You are, indeed," they are told, "threatening your own children by expressing your anger."

The literature on mediation does not directly address the question of whether the delegitimation of anger harms women. A study by Robert Emery and Melissa Wyer, however, has shown that women who have participated in mediation are much more likely to be depressed than women who have used the adversary process.¹⁵⁴ In a later article, Emery and Jeanne Jackson explained this result as due to a temporary sense of vindication felt by women after winning in court.¹⁵⁵ They describe anger in the context of divorce as a temporary means of coping with sadness, and they hypothesize that the difference in rates of depression will not be found at longitudinal followup.¹⁵⁶

Emery and Jackson's conclusion is troublesome in two respects. First, even *temporary* depression of the magnitude noted at this critical time in a woman's life might be dangerously disabling, and should not be dismissed lightly. Second, the authors conflate depression with sadness. Clinical depression, the

152. Bernardez-Bonesatti, *Women and Anger: Conflicts With Aggression in Contemporary Women*, 33 J. AM. MED. WOMEN'S A. 215, 216 (1978). Harriet Lerner describes this as symptomatic of the girl's special difficulty of separating from her mother, and of a fear that the girl's separation would leave the mother "emptied out and depleted." Lerner, *supra* note 143, at 141; see also N. CHODOROW, *supra* note 11, at 109-10, 168-69 (describing tendency in women toward boundary confusion and lack of sense of separateness); D. DINNERSSTEIN, *supra* note 11, at 48-53, 107-08, 111-12, 192-95 (separating oneself from sense of continuity with mother is problem for every child, but is ordinarily much harder for daughter than son).

153. See E. SPELMAN, *supra* note 102, at 62-66.

154. Emery & Wyer, *supra* note 8, at 184. This study found that mothers in mediation had a mean score of 11.37, with a standard deviation of 2.57, on the Beck depression inventory. Mothers in litigation showed much less depression, with a mean score of 5.32 and a standard deviation of 1.24. *Id.*

155. See Emery & Jackson, *supra* note 8, at 3, 16.

156. *Id.*

condition measured by the instrument they used, is not "sadness," but, rather, a whole complex of symptoms including poor appetite, loss of energy, sleep disturbance, and a loss of pleasure or interest in usual activities.¹⁵⁷ Moreover, many psychologists believe that suppressed anger *is* related to depression.¹⁵⁸ The classical psychoanalytical literature has conceptualized depression as anger turned against the self. More recently, feminist psychologists have viewed depression as a psychological consequence of internal and cultural prohibitions against female anger.¹⁵⁹ Emery and Jackson's explanation for the results is apparently that all women are "sad" at divorce, but that the adversary experience permits some women to use anger to replace temporarily or avoid that sadness. A more accurate analysis may be that all women are angry at divorce, but that the mediation process may require that anger to be suppressed (or at least not to be attended to) or to be directed at themselves, resulting in increased evidence of clinical depression.

5. *Effect on Black Women of Prohibitions Against Anger*

Compounding the fear of feminine anger is the societal fear of anger on the part of racial minorities, especially Blacks.¹⁶⁰ This fear is endemic, shared by sympathetic whites as well as unsympathetic whites, and often by Blacks ourselves. Free-floating hostility toward persons of color¹⁶¹ may be one form in which this fear manifests itself, as may dehumanizing characterizations of Blacks as animals,¹⁶² or overreactions to aggression by Blacks.¹⁶³ In its equally frequent, but arguably more dangerous, manifestation, this fear takes the form of delegitimizing anger expressed by Blacks.

Examples of this delegitimation are numerous. In a class in constitutional law, the weariness, discomfort, and scorn is evident in some of the white students' eyes and voices every time a Black student argues for affirmative

157. See A. BECK, *DEPRESSION* 189 (1967); D. PAPALOS & J. PAPALOS, *OVERCOMING DEPRESSION* 6-7 (1987).

158. See H. LERNER, *WOMEN IN THERAPY* 220 (1988); Freud, *Mourning and Melancholia*, in 4 *COLLECTED PAPERS* 152, 158, 162-63 (E. Jones ed. 1953).

159. See H. LERNER, *supra* note 158, at 221; Bernardez-Bonesatti, *supra* note 152, at 215.

160. The special problems confronted by those who are multiply burdened may be viewed in terms of an "intersectional" experience, which is greater than the sum of racism and sexism. The intersectional experience cannot be understood as the combination of claims arising from discrete sources of discrimination. For three analyses of this insight, see Austin, *supra* note 150, at 554-74; Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152-57; Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

161. See Williams, *Spirit Murdering the Messenger: The Discourse of Fingerprinting as Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 150-55 (1987); see also B. HOOKS, *AIN'T I A WOMAN* 65-72 (1981) (describing complex system of negative myths and stereotypes which socialize white men to regard Black women as unsuitable marriage partners).

162. See Dexter, *Looting and Liberal Racism*, COMMENTARY, Sept. 1977, at 48, 49.

163. See Lawrence, *Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 627, 632 (1986); Williams, *supra* note 161, at 130-32. Of course, these acts of racism do not arise merely from fear of Black anger; such fear is only one piece of the racism puzzle, albeit a significant piece.

action based on historical oppression: "Do we have to talk about that again? That's history, why are Blacks still carrying on and asking for special recognition?"¹⁶⁴ Publicly, the recent opinions of the United States Supreme Court seem to be proceeding as if racial discrimination were just a distant memory.¹⁶⁵ Blacks who dare to mention societal discrimination, express their anger, and expect some form of redress, are implicitly characterized as ungrateful and greedy. As Justice Blackmun commented recently in his dissent in *Wards Cove Packing Co. v. Atonio*: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."¹⁶⁶ The combination of the cultural edicts that it is unfeminine to be angry and that the anger of Blacks is both dangerous and illegitimate leaves Black women in an impossible position. That part of a Black woman's anger that is directed at racism is delegitimated, feared, and used by white men and women as an excuse for locating the "race problem" outside themselves. Audre Lorde tells of "a white academic welcom[ing] the appearance of a collection by nonBlack women of color. 'It allows me to deal with racism without dealing with the harshness of Black women,'" the academic explained.¹⁶⁷ On the other hand, that part of a Black woman's anger that is directed at men may be considered illegitimate by Black men. They may criticize and dismiss her, or, worse, abandon her, for expressing that anger.

Anger as a woman, or as a particular woman in a particular struggle at a particular time, and anger as a person marginalized because of race or color, may be impossible to separate. While the experiences may be indivisible, however, they are often described separately. As a result, the specific and particular concerns of Black women may be left out of many analyses:

Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the intersection of race and gender Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.¹⁶⁸

164. In seven years of teaching constitutional law, I have observed this reaction many times.

165. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting scope of 42 U.S.C. § 1981 to making and enforcing of contracts); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (reformulating order of proof and weight of parties' burdens in disparate impact cases); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (city minority set-aside programs must demonstrate compelling public interest based on prior discrimination by city and must be narrowly tailored to remedy effects of prior discrimination).

166. 490 U.S. at 662 (Blackmun, J., dissenting).

167. A. LORDE, *supra* note 119, at 126 (citation omitted). The collection referred to is *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (1984). Most, but not all, of the writings in the collection are by non-Black women of color.

168. Crenshaw, *supra* note 160, at 140.

Ultimately, when placed in a position in which they must identify with Black men or white women, Black women have chosen Black men;¹⁶⁹ indeed, exposure of conflicts within the community has been regarded by Black people as a sign of disloyalty.¹⁷⁰ In sum, for Black women, the experience of having anger at their mate delegitimated is beset with complications, all of which can lead to paralysis, self-hatred, and a sense of being split off from themselves.¹⁷¹ To the extent that the mediation process delivers a message that anger is not legitimate, it is thus especially damaging to Black women. Because such a message carries echoes of other cultural messages, from other times and other places,¹⁷² it can be particularly disempowering and disabling.

D. *Mandatory Mediation and the Promise of Self-Determination*

Mediation permits persons to speak for themselves and make their own decisions. This self-determination can be empowering. Patterns of domination characteristic of adversary adjudication are challenged in two ways: no outside decisionmaker is present, and the client need not be the passive recipient of a lawyer's advice and decisionmaking. Instead, he can explore alternatives, create options, and make decisions. In private, voluntary mediation, I have found that many say that they have chosen mediation so that they, and not a lawyer, will be in charge of their own destinies. In this very immediate way, mediation can challenge the hierarchical, professionalized way that family law is usually practiced.¹⁷³

This dynamic is fundamentally altered when mediation is imposed rather than sought or offered. When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory. First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to decide themselves how much their lawyers should participate, but instead are deprived of whatever protection their lawyers have to offer. Finally, they are not permitted to choose the mediator,

169. See Gillespie, *My Gloves Are Off, Sisters: Power, Racism, and that "Domination Thing,"* Ms., Apr. 1987, 19, 19-20 (discussing author's frustration with white women's movement). In response to the dilemma of women of color, Kim Crenshaw has commented: "If any real efforts are to be made to free Black people of the constraints and conditions that characterize racial subordination, then theories and strategies purporting to reflect the Black community's needs must include an analysis of sexism and patriarchy." Crenshaw, *supra* note 160, at 166.

170. The controversy over the movie *The Color Purple* (Warner Bros. 1985) demonstrates this problem. There was much sentiment that by depicting domestic abuse in a Black family, the movie confirmed negative stereotypes of Black men. Thus, the issue of sexism in the Black community was obscured by the debate over whether such an image should be presented on the screen. See Crenshaw, *supra* note 160, at 163.

171. This discussion assumes that the couple consists of a Black man and a Black woman; if the man were white, an entirely different, but equally complex, dynamic would be created.

172. Charles Lawrence has described this phenomenon as a cultural chorus: a message that might to an outsider seem easy to dismiss or ignore can become a source of much pain to the recipient if it takes on the resonances of other similar, and perhaps more overtly violent, messages. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech*, 1990 DUKE L.J. 431, 452-76.

173. See Menkel-Meadow, *supra* note 1, at 56; Rifkin, *Mediation*, *supra* note 1, at 30.

and they often cannot leave without endangering their legal position even if they believe the mediator is biased against them.¹⁷⁴

1. *Choice of Process*

Several writers have noted that most clients do not understand what mediation is and, therefore, absent coercion, are reluctant to enter into it.¹⁷⁵ For example, mediation is almost never represented in the popular culture, whereas television shows which represent the court system are numerous.¹⁷⁶ It has been argued that because of the general ignorance that surrounds mediation, it makes sense to require people to try mediation before their case is heard by the court, so that they can see whether it works for them: "No law is mandating an agreement, but it is requiring a process, however extensive or minimal it may turn out to be in a particular instance."¹⁷⁷ Proponents of this view seldom recognize that, even though an agreement might not be required, a person might agree to something because of the pressures of the situation; or that, even if no agreement is reached, the process itself might be traumatic.¹⁷⁸

It is presumptuous to assume that the state has a better idea than the parties themselves about whether mediation will work in their particular case. A party may know something the mediator does not: that her spouse is a pathological, but convincing, liar; that years of living with a man have resulted in a pattern in which the woman consistently accommodates him, even when she does not want to; that the woman will lose sight of her own needs in the attempt to appear a cooperative female; or that the woman will sacrifice many of her interests in order to end what may be a psychologically painful process. In sum, there may be an internal wisdom, one that needs to be honored, that mediation is inappropriate in a particular situation.¹⁷⁹ It is true that mandatory mediation

174. In more than half of the California counties, a person who leaves mediation assumes the risk that the mediator will make a recommendation to the court that goes against that person's interests. In some counties, such recommendations are routinely followed by the judge. D. Saposnek, *supra* note 24.

175. See Pearson, *supra* note 16, at 428; see also Pearson, Thoennes & Vanderkooi, *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issues*, J. DIVORCE, Fall/Winter 1982, at 17, 20-21, 32 (noting "curious lack of spontaneous demand for mediation services from the general public"); *Warring Couples Shun Divorce Mediation and Opt to Battle It Out in Court Instead*, Wall St. J., Mar. 27, 1990, at B11, col. 3 (quoting family court director in Connecticut as saying, "Basically, you've got to be shoved into it."); S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 117, at 504 (most Americans ultimately turn to courts).

176. From *Perry Mason* and *The Defenders* in the 1960's to *L.A. Law* and *The People's Court* today, the adversary process has captured the public imagination.

177. Ferrick, *Three Crucial Questions*, MEDIATION Q., Fall 1986, at 61, 65; see also S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 117, at 504 ("[C]oercion into mediation does not seem objectionable, as long as there is no coercion in mediation to accept a particular outcome, and as long as unsuccessful mediation does not serve as a barrier to adjudication.").

178. See *infra* notes 276-85 and accompanying text.

179. States vary in the extent to which parties are permitted to withdraw from the mediation proceedings. In Alaska and Wisconsin, either party may withdraw after the first session. ALASKA STAT. § 25.24.060(d) (1983); WIS. STAT. ANN. § 767-11(8) (West Supp. 1990). In Kansas, a party is permitted to terminate after the second session, and the mediator is required to terminate after the second session under

may serve the interests of women who do not wish to enter the adversary process; if opting out of mediation is permitted, some women (as well as some men) will be forced to litigate when their preference would have been to mediate. There is no way around this unfortunate situation. Either some women will be forced to litigate against their will, or some women will be forced to mediate against their will. Mediation poses such substantial dangers, and provides so few benefits to unwilling female participants, however, that to my mind it is indefensible to require mediation, notwithstanding that such a requirement would help women who do want to mediate. In addition, the woman who participates in the mediation process with a reluctant spouse may have gained little.

Often, the time allotted to a mandatory mediation is short.¹⁸⁰ Frequently, an entire mediation is expected to take place in an hour or less. Some take place in the hallways of the courthouse.¹⁸¹ Given these conditions, it is impossible for the state to ensure that an adequate process is being offered even in cases in which people have chosen it. Where the process is inadequate, its imposition is even more troubling.

Moreover, a person married to a liar or con artist knows that that person is often more persuasive than someone telling the truth. In a relationship in which the wife has been abused, for example, the abuser will often appear dominant, charming, agreeable, and socially facile in comparison to his less assertive wife.¹⁸² In studying the court mediation process in California, Donald Saposnek found pathological liars who fooled everybody into believing that

certain circumstances. KAN. STAT. ANN. § 23-604 (1988). In Maine, the court may waive the mediation requirement if extraordinary cause is shown; in all other cases, if the parties do not reach an agreement on an issue, the court is required to determine that they made a good faith effort to do so prior to proceeding with a hearing. Sanctions can be imposed for failing to mediate in good faith. ME. REV. STAT. ANN. tit. 19, § 752(4) (Supp. 1990). In Oregon and North Carolina, the parties may petition the court to waive the requirement of mediation. In North Carolina, the court must hold a hearing and determine if there is good cause for the waiver. N.C. GEN. STAT. § 50-13.1(c) (Supp. 1990). In Oregon, the waiver must be based on a finding that severe emotional distress would result from the mediation. OR. REV. STAT. § 107.179(3) (1989). In Minnesota, mediation is mandatory unless the court determines that a child or one of the spouses has been a victim of physical or sexual abuse. MINN. STAT. ANN. § 518.619(2) (West Supp. 1991). The remainder of the states with mediation statutes are silent on this issue. See *supra* note 4 for a list of these states and their statutory provisions.

180. A study of the Connecticut, Los Angeles, and Minneapolis court-related custody mediation systems showed that cases averaged 1.5 sessions and 2.3 hours in Connecticut, 1.7 and 3.0 hours in Los Angeles, and 3.3 sessions and 4.3 hours in Minneapolis. Many respondents reported attending only one session. Cauble, Thoennes, Pearson & Appleford, *A Case Study: Custody Resolution Counseling in Hennepin County, Minnesota*, in J. PEARSON & N. THOENNES, FINAL REPORT, *supra* note 7, at 12; Pearson, Thoennes & Hodges, *The Effect of Divorce Mediation and Adjudication Procedures on Children*, in J. PEARSON & N. THOENNES, FINAL REPORT, *supra* note 7, at 24-25. In Maine, mediations usually are held in a single session. See Orbeton, *supra* note 30, at 51, 53. In Florida, the mediator usually has 2-4 hours in which to help the parties resolve their dispute. Talcott, *supra* note 30, at 82. Donald Saposnek has also acknowledged the brevity of mandatory mediation sessions in California. D. Saposnek, *supra* note 24. In contrast to court-ordered mediations, voluntary integrated mediations (mediations involving all aspects of the dispute, not just the child custody issue) studied by Joan Kelly averaged ten sessions. Kelly, *supra* note 8, at 74.

181. See *supra* note 26 and accompanying text.

182. See Germane, Johnson & Lemon, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 188 (1985).

they were reasonable people and wonderful parents.¹⁸³ When such a person is believed, the person disagreeing with him may look hysterical, irrational, or silly. Of course, liars show up in court, too; but in an informal process where nothing they say can be disproved, they are in a much stronger position. In sum, a person might decide against mediation because she knows the spouse is not capable of working honestly and productively within the process. Forcing mediation can produce a situation in which the parent with the fewest scruples wins.

A substantial proportion of women who file for divorce state that they do so, at least in part, because they have been the victims of domestic violence.¹⁸⁴ Many mediators agree that mediation is not appropriate in such cases. Others, however, disagree. Some writers suggest that a mediator can discover that abuse has occurred and modify the mediation process accordingly: "The mediator, by carefully directing the process, will make the mediation room a safe place and provide the abused party with a nonthreatening context in which to consider alternatives and come to a personal decision."¹⁸⁵

Mediation where abuse has occurred is troubling even when mediation is voluntary.¹⁸⁶ Mandatory mediation programs, however, do not always permit abused parties to opt out.¹⁸⁷ Moreover, even where such an exception to the mediation requirement exists, the abused spouse might have trouble showing she is entitled to it; to be relieved from participating in mediation in some

183. D. Saposnek, *supra* note 24.

184. See Littleton, *supra* note 80, at 27-28 (while exact figures are difficult to obtain, 50% figure is one many experts subscribe to); Shattuck, *Mandatory Mediation*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 191, 206 (domestic violence had occurred in 32% of families in court mediation sample); cf. J. WALLERSTEIN & S. BLAKESLEE, *supra* note 121, at 8 (over half of all children of marriages which end in divorce witness violence between the natural parents); Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 *CANADIAN J. WOMEN & L.* 134, 138 n.19 (1989) (Canadian study shows physical violence given as reason for marital separation by 50-75% of women).

185. Ferrick, *supra* note 177, at 66; see also Marthaler, *Successful Mediation with Abusive Couples*, *MEDIATION Q.*, Spring 1989, at 53, 65 (special procedures can address concerns of those who claim mediation is inappropriate for couples with history of abuse).

186. See Lerman, *supra* note 99, at 73-76; see also National Center on Women and Family Law, *Women, Mediation and Family Law*, 18 *CLEARINGHOUSE REV.* 266, 269 (1984) (mediation unfair because of unequal financial and social power of men and women); Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 *CLEARINGHOUSE REV.* 431, 435 (1985) (protection of one's physical safety too important to entrust to anything other than legal system).

187. Some states do permit a party to opt out, but only under limited circumstances. CAL. CIV. CODE § 4607.2 (West Supp. 1990) requires that where there is a history of domestic violence and a court order is in effect protecting one of the parties, the mediator must meet with the parties separately at the request of the party protected by the order. In Maine, the court may waive mediation for extraordinary cause. ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1989). The Florida statute provides an exception for "cases where there is any history of domestic violence." FLA. STAT. ANN. § 44.302(c) (West Supp. 1989). In Minnesota, the statute requires that the court "shall not require" mediation where it determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused. MINN. STAT. ANN. § 518.619(2) (West 1990 & Supp. 1991). This provision, however, was interpreted in at least one county to permit the court to order the couple into mediation so long as they were permitted later to discontinue the mediation. Despite the clear language of the statute, the abused party was not permitted to forgo mediation altogether. See Marthaler, *supra* note 185, at 53-54.

jurisdictions, a woman must come forward with more than her word.¹⁸⁸ In some jurisdictions, then, a woman who has been subject to abuse may finally attempt to take a stand against it, have her word doubted, and then be required to meet face to face with the abuser to decide child custody.¹⁸⁹

Finally, a person might not want to participate in mediation because the timing is wrong. She might be willing to mediate in the future, but might feel for the present too vulnerable, angry, hurt or fragile to use anything but a formal process with built-in distancing mechanisms. Mandatory mediation takes this crucial decision out of her hands.

2. *Choice of Mediator: Partiality and Unacknowledged Perspective*

Typically in mandatory mediation, the participants cannot choose their mediator or, at best, have a very limited choice of mediators.¹⁹⁰ Some agencies have policies which make it difficult to change mediators when one or both of the parties are dissatisfied with the mediator's handling of the case.¹⁹¹ Mediators, however, exert a great deal of power. When two people are in conflict, having a third, purportedly neutral person take the viewpoint of one or the other results in a palpable shift of power to the party with whom the mediator agrees. The mediator also can set the rules regarding who talks, when they may speak, and what may be said.¹⁹² The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. This can make the parties feel less, not more,

188. In California some counties routinely hold separate mediation sessions whenever either party has alleged domestic violence. Others require a restraining order against the alleged abuser to have been issued before separate mediation sessions will be held. Telephone interviews with Emily Hancock, Mediator, Alameda County (Jan. 9, 1991); B.J. Herran, Mediator, San Francisco County (Jan. 10, 1991); Dellah Moreno, Mediator, Santa Clara County (Jan. 10, 1991); and David Bradford, Mediator, Los Angeles County (Jan. 10, 1991); see also Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation* 90 MICH. L. REV. (forthcoming Oct. 1991). Mahoney demonstrates that it is difficult for women to self-identify—let alone identify themselves to others—as “battered,” even when that is the case, because of their correct perception of themselves as strong.

On a related note, see Littleton, *supra* note 80, at 38-42, who discusses battering from the perspective of the women involved. Littleton demonstrates that if battered women are taken at their word, as they should be, they do not always have the option of leaving their husbands; some women can continue to love the persons who batter them, and hope that their partners will change.

189. See Germane, Johnson & Lemon, *supra* note 182, at 188-89. I would be hesitant to say that battered women should never be permitted to mediate, but they certainly should never be penalized for refusing to do so.

190. In California, the court appoints a mediator. See *supra* note 22 and accompanying text. In Alaska, each party has one peremptory challenge of a court-appointed mediator. ALASKA STAT. § 25.24.060 (1983). In Ramsey County, Minnesota, the parties may have the mediator (who is assigned from a court-maintained panel) removed. McCrory, *supra* note 30, at 149.

191. In one California county, the party is required to discuss her dissatisfaction with the mediator, who then may approve or disapprove a change. If the mediator thinks a change is not necessary, the party is required to discuss her objections with the mediator's supervisor. If the problem is still not resolved, the party may approach the Director of Family Court Services and, ultimately, a judge. Interview with Emily Hancock, Mediator, Alameda County (June 9, 1991). For a discussion of mediation practice in various California counties, see Deis, *supra* note 14, at 157-16.

192. See Merry & Silbey, *supra* note 40, at 14-18.

in control of the process and its consequences for their lives. There is much room for, but little acknowledgment of, the possibility of the mediator's exhibiting partiality or imposing a hidden agenda on the parties.¹⁹³

a. *The Problem of Prejudice*

George, a Black man, is in the process of divorcing Michelle, a white woman. During the course of the mediation, the mediator asks a number of times whether there is a history of domestic violence. She seems not to believe George or his wife when each insists that although Michelle occasionally has attacked George, he has never fought back.

Elaine is a Black woman, who has worked herself up in the ranks of the local telephone company from an entry level position to her new job, in which she supervises a number of employees. She handles herself with calm and poise, but also a certain coolness. Joe, her husband, who is also Black, is a friendly, gregarious man who has not been reliable in meeting his support obligations or in taking regular responsibility for their two sons. In mediation, Elaine immediately senses that the mediator favors her husband and does not like her. This intuition is confirmed when the mediator permits her husband to interrupt her constantly, but quickly stops her with a sharp lecture when she tries to interrupt him. At one point, the mediator turns to her and says, "I was a single parent too, and I did not have the luxury of an ex-husband who was willing to help me with the children." Five minutes later, the mediator repeats the same statement. When Elaine mentions her debilitating health problems, the mediator laughs and says, "You don't have to act sick to get what you want."¹⁹⁴

George and Elaine are encountering extreme examples of what is, to some degree, a troublesome aspect of any mediation: the process introduces a third party who is held out to be, but is not, impartial. George's mediator is racially prejudiced; she has some preconceived ideas, sturdy enough to withstand mutual denials, about the likelihood that a Black husband has battered a white wife. Elaine's mediator is clearly partial to Elaine's husband. Whether this partiality is based on racial prejudice, Elaine will never know.¹⁹⁵ Elaine's mediator has also projected¹⁹⁶ some of her own conflicts onto Elaine. Because the mediator feels that her own situation as a single parent was so difficult, it is hard for her to empathize with a woman who has a seemingly lighter burden, but who is still not appreciative.

193. See D. SAPOSNEK, *supra* note 69, at 26-27.

194. For the origin of this mediation story, see *supra* note 13.

195. Although Elaine's husband is also Black, it is frequently the case that prejudice takes on a particular sharpness with respect to one sex.

196. Projection is "[t]he process whereby an unconscious quality or characteristic of one's own is perceived or reacted to in an outer object or person." S. PERERA, *THE SCAPEGOAT COMPLEX: TOWARD A MYTHOLOGY OF SHADOW AND GUILT* 118 (1986).

Partiality comes in many forms. In its most virulent form it results from prejudice in favor of or against a person because of his race, gender, sexual orientation, disability, religion, or class. It may also arise, however, from a personal disposition to favor certain outcomes or even from a positive or negative reaction to a particular personality. It is no surprise that mediators are not completely impartial, for, in a very fundamental way, impartiality is a myth. It cannot exist in anything approaching a pure form, although we would like it to, and often we pretend that it does.¹⁹⁷ The concept of impartiality is based on the notion of an observer without a perspective. But any observer inevitably sees from a particular perspective, whether that perspective is acknowledged or not.¹⁹⁸ Mediators, like all other human beings, have biases, values, and points of view. They have all had experiences in their lives that influence how they react to others, independent of anything the others might do. The proper role of these attitudes in mediation is and should be a subject of debate: should a mediator try to keep her own attitudes out of the mediation entirely, or should those attitudes be disclosed? When does disclosure become intrusive; that is, when is it something done to protect the mediator rather than to benefit the parties?

A mediator's attempt to remain neutral is to some extent always doomed to failure, but it is an important effort nonetheless.¹⁹⁹ Neutrality in some form (although not the dispassionate, bloodless neutrality that can give that word a bad name) can remain an aspiration, even if it is one that may never be reached.²⁰⁰ But aspirations aside, allowances must be made for the inevitable

197. See Delgado, *Fairness and Formality*, *supra* note 10, at 1387-91 (discussing how mediation may allow expression of racial and ethnic prejudice); Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 L. & SOC. INQUIRY 145, 151-54 (1988) (alternative dispute resolution may expose disputants to higher risk of prejudice) [hereinafter Delgado, *ADR and The Dispossessed*]; Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987) (law refuses to recognize existence of unconscious racism); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1903-05 (1988) (widespread institutional discrimination has been documented but judges continue to speak as if aspirations of impartiality are being met).

198. See Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45-50 (1987); Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1728, 1743-44 (1990).

199. Cf. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988) (discussing need to separate "good" from "bad" bias); Resnik, *supra* note 197, at 1943-44 (feminist perspectives can provide values for role of judging).

200. The shape that neutrality might take is discussed, in the context of judging, in Cain, *supra* note 199, and Resnik, *supra* note 197. Judith Resnik quotes from Learned Hand:

You must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible for human beings to do so absolutely, but just so far as you can, not to interject your own personal interests, even your own preconceived assumptions and beliefs.

Resnik, *supra* note 197, at 1943-44 (quoting L. HAND, *THE SPIRIT OF LIBERTY*, 309-10 (I. Dillard ed. 1958)). Resnik explains that, to Hand, there were two possibilities: "to cease to be in order to hear another's claims, or to be, and then to be impermissibly interested." *Id.* at 1944. She then suggests a third possibility, in which a judge can have an interest—without being corrupted by self-interest—so that "the ordinariness of much that is judging need not be obscured in an effort to privilege the impersonal." *Id.* Pat Cain further suggests that the Hand quote should be interpreted to mean that a judge should transcend his sense of self to listen, and then decide "as a new self . . . for having experienced the story of the other." Cain, *supra*

failures of neutrality. While none of us is neutral, we differ in the degree to which we recognize and are willing to take account of this fact. The most salient feature of a good mediation process is that the failures of neutrality are not denied, but are recognized and addressed.

Various forms have arisen in the adversarial adjudicatory system to take into account, to some extent, the predictable failures of neutrality.²⁰¹ Because mediation does not have these forms, its failures must be addressed in a different way. Although there may be many ways in which to do so, giving the parties the choice of whether or not to mediate, and with whom, is surely an indispensable beginning.

b. *Mediators and Judges: The Importance of Form*

Mediators are not supposed to be judges, at least in states that do not permit them to make recommendations to the court.²⁰² It is assumed, however, that mediators as well as judges can and should be impartial. In the context of judging, Judith Resnik has shown how impartiality among judges is an aspiration, not a reality.²⁰³ Rather, a demonstrable "picture of partiality, of prejudgment, of judges ready to translate racial and sexist views into law" emerges.²⁰⁴ Even among well-intentioned judges who try to be impartial, the twin

note 199, at 1955.

Kenneth Kressel, Frances Butler-DeFreitas, Samuel Forlenza, and Cynthia Wilcox have suggested that the traditional definitions of mediator impartiality need to be reconsidered; they advocate a "robust" mediator style in which, although the parties are treated evenhandedly, the mediator can have a point of view and will not attempt to be a "passive good Samaritan." Kressel, *Custody Mediations*, *supra* note 71, at 67.

201. See *infra* note 205 and accompanying text.

202. The difference between mediators and judges in their effective, as opposed to formal, decisionmaking power is sometimes remarkably little. Where mediators are permitted to make a recommendation to the court, and that recommendation is routinely followed, it is difficult to differentiate the mediator's authority from the judge's. See *In re Matthews*, 101 Cal. App. 3d 811, 817, 161 Cal. Rptr. 879, 882 (1980) (reversing order of family court judge giving Conciliation Department family counselors "authority of the court" to modify or amend visitation schedule). Martha Fineman has demonstrated how, in many states, mediators and other helping professionals have appropriated decisionmaking in child custody matters from the legal system. See Fineman, *supra* note 6, at 740-41 (as custody decisionmaking has become more complex, social workers have replaced judges as "final arbiters of child custody"). Simon Roberts has pointed out that "[m]eanings are . . . going to get muddled in the mind of disputants if processes over which they supposedly retain control are conflated with those which are essentially about externally imposed decision. The beauty of adjudication, if you can call it that, is that we know unambiguously what we are experiencing." Roberts, *The Location and Occasion of Mediation*, in *THE ROLE OF MEDIATION*, *supra* note 8, at 131, 131-32.

203. Resnik, *supra* note 197.

204. *Id.* at 1904. Several states have considered the issue of sex discrimination in the courts. Most recently, the California Judicial Council's Advisory Committee on Gender Bias in the Courts found widespread and pervasive gender bias at all levels of the California Court system. See JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS* § 2, at 1-9 (Draft Report 1990); see also *THE FIRST YEAR REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS* (1984) (investigating gender bias in the New Jersey judicial system); *THE SECOND REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS* (1986) (same); *Report of the New York Task Force on Women in the Courts*, 15 *FORDHAM URB. L.J.* 11, 15 (1986-87) ("[G]ender bias against women litigants, attorneys, and court employees is a pervasive problem with grave consequences.").

dangers of unacknowledged perspective and unrecognized partiality are always present.

These dangers, serious enough in the context of judging, are exacerbated in mediation. There are numerous restrictions on the way the decisionmaker ordinarily relates to parties in the adversarial setting that simply do not apply to mediation. For example, judges (and most other decisionmakers required to be neutral) generally keep both a physical and a psychological distance from the parties, a distance designed to preserve both actual impartiality and the appearance of impartiality. Many formalities of the judicial process serve to maintain this distance. At the most mundane level, judges sit apart from the parties.²⁰⁵ Ordinarily, they speak to the parties' attorneys rather than directly to the parties. When they do address the parties directly, it is often in a formal manner, and on the record. Judges also do not ordinarily communicate with one side separately, and if there is such communication, they are obligated to notify the opposing party of its substance. Finally, judges can consider only certain sorts of evidence.

By contrast, because the mediator views her role as one of understanding and helping the parties rather than judging them, judicial forms of distancing are dispensed with. Mediators sit close to the parties and speak directly to them. They frequently meet with the parties separately, often without subsequently telling the opposing party what transpired.²⁰⁶ The session with the mediator is rarely entered on the record or even informally recorded.²⁰⁷ Finally, no attempt is made to limit the sort of material that may be considered in the session on grounds of privilege or relevancy; something may be considered relevant for the purposes of mediation because it is emotionally—even though not logically—connected to the proceedings. In sum, a mediator establishes what may be a risky relationship of informality and apparent intimacy with the parties.²⁰⁸

The informal nature of the mediation setting may make it an environment in which prejudices can flourish. Richard Delgado and his coauthors have shown that people who hold prejudicial attitudes are most prone to act on those

205. See Delgado, *Fairness and Formality*, *supra* note 10, at 1387-88. Simple lack of physical distance can have a large effect on the interaction. For example, investigators in Germany found that where youthful offenders sat at the same table as the judge, they were much more likely to confess than when the judge was elevated and at some distance (as told to Professor Alan Freeman by Heino Kolbe, German lawyer-mediator who has studied extensively the impact of theatrical positioning and location on law).

206. Some states, however, do not permit family court mediators to meet separately with the parties except under unusual circumstances. See, e.g., CAL. CIV. CODE § 4607(c) (West 1983 & Supp. 1990).

207. Confidentiality is emphasized in the Model Standards of Practice for Family and Divorce Mediation by the Association of Family and Conciliation Courts: "A mediator shall foster the confidentiality of the process." Bishop, *Standards of Practice for Divorce Mediators*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 403, 422. "The mediator shall maintain confidentiality in the storage and disposal of records." *Id.* at 423.

208. This purported intimacy is necessarily limited by the goal of the mediator to achieve a result.

attitudes in an intimate setting.²⁰⁹ These authors assert that where prejudicial attitudes conflict with a humane creed, many resolve this conflict by resorting to "situational specificity," that is, by changing their expressed beliefs depending on the circumstances.²¹⁰ For example, the average white American exhibits increased prejudice in intimate, as opposed to formal or public settings.²¹¹ The consequence of this tendency is that prejudicial behavior will be discouraged in settings in which institutional expectations and rules of procedure check overt signs of prejudice.²¹² In sum, the forms that are required of judges provide some modest, albeit inadequate,²¹³ protection against bias. Because these forms are not available in mediation, the potential that bias will influence the outcome is increased.

c. *Forms of Partiality*

Most of Richard Delgado and his coauthors' discussion addresses racial and ethnic prejudice, which might be expected to arise as frequently in mediation as in other forms of dispute resolution: that is, frequently indeed.²¹⁴ Their basic assertion, however, also applies to other sorts of prejudices, such as those based on gender, social class, and even desired outcome. The very intimacy that renders mediation such a potentially constructive process may facilitate the mediator's projection²¹⁵ of her own conflicts onto the parties, and the possibilities and dangers of transference and countertransference.²¹⁶

In psychotherapy, a patient brings with him a view from his past which he then superimposes on the therapist. This superimposed view, referred to as transference,²¹⁷ sheds light on the patient's own view of the world in addition to his view of himself.²¹⁸ It was Freud who suggested that the patient's picture of the analyst allows great insight into the patient's own personality structure.²¹⁹ Freudian psychoanalysis, then, consists largely of studying, and eventually resolving, such transference. For example, a patient might expect to be criticized for even small mistakes, or to be ignored or scorned. On the other hand, he may idealize the therapist or believe he is in love with her. According to Freud, the patient's problems inevitably manifest themselves in the therapeutic

209. See Delgado, *Fairness and Formality*, *supra* note 10, at 1386; Delgado, *ADR and the Dispossessed*, *supra* note 197, at 152-54.

210. See Delgado, *Fairness and Formality*, *supra* note 10, at 1386.

211. *Id.* at 1386.

212. *Id.* at 1388.

213. See Resnik, *supra* note 197, at 1904-05.

214. See Delgado, *Fairness and Formality*, *supra* note 10, at 1375.

215. For a definition of projection, see *supra* note 196.

216. It is through projection that transference and countertransference take place. See S. PERERA, *supra* note 196, at 41-42.

217. See G. WEINBERG, *THE HEART OF PSYCHOTHERAPY* 134-36 (1984).

218. See *id.* at 134-50.

219. S. FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* 374, 384-86 (1935).

tic relationship;²²⁰ the relationship is a microcosm of the way in which the patient situates himself in the world. A distrustful transference will prepare a person "for a world of thieves but not for love."²²¹ An extremely trustful transference will make it hard to recognize people who are in reality selfish or cruel.²²²

In a complementary manner, a therapist's response to a patient always, to some degree, arises out of the therapist's own past experiences. That part of the reaction that comes out of the therapist's experience is referred to as countertransference.²²³ For instance, a therapist might feel rivalrous with or jealous of the patient, or might be able to see the patient only as a helpless victim. It is considered essential in therapy that the therapist identify and observe her own countertransference and attempt to overcome it.²²⁴

Countertransference and transference also occur in mediation.²²⁵ When transference occurs in mediation, however, there may not be the time, the commitment, or the expertise to study it and help the client learn what it reveals about her personality structure or orientation to the world. For this reason, a client in mediation might be far more influenced by what the mediator says than would be expected under the circumstances. It is not an answer to the problem of coercion in mediation, then, to say that the party does not have to agree with what the mediator says; she might not agree but go along with it anyway for reasons that are situated in her past and are quite beyond either her or the mediator's understanding. Such a dynamic is particularly troubling when the mediator makes statements that the client believes undercut her competence as a parent or as a human being. In another context, the client might be able to brush such statements off; because of the operation of transference, the particular setting, and what is at stake, however, the potency of the statements is likely to be increased many times.

Similarly, the countertransference that arises in mediation may cause the mediator to react negatively (or positively) to a client for reasons wholly apart from anything that actually happens in the session. Again, the mediator may have neither the time nor the inclination to examine his reaction. The client will have no idea what he has done to elicit the mediator's response, and will be powerless to change it since it arises out of the mediator's past rather than the present interaction. Without the ability to select a mediator or obtain a new one

220. *Id.*

221. G. WEINBERG, *supra* note 217, at 142.

222. *Id.* at 141.

223. *Id.* at 163.

224. *See id.* at 163-69.

225. While transference and countertransference can occur in a number of professional relationships—doctor-patient, lawyer-client, teacher-student—because mediation resembles the therapeutic setting in a number of ways, the likelihood of transference and countertransference reactions is greater. For example, both mediation and therapy are settings in which problems of one's personal life are to be solved through talking. In each process intense emotions are evoked, and the mediator or therapist provides professional listening, sympathy, and guidance.

if he is dissatisfied with the one he has, a client may be unable to avoid biased treatment.

Mediation literature has addressed the problem of unequal bargaining power between the parties by suggesting that the mediator use a variety of techniques to "balance the power."²²⁶ These techniques entail empowering or supporting the less powerful party or disempowering the more powerful party. For example, a mediator might provoke a conflict, forbid the discussion of certain issues, or advise a party who seems to be at an economic disadvantage to see a financial counselor. These suggestions share the premise that the mediator can recognize power disparities when they occur and intervene to lessen their impact. But, as I have attempted to show, benign intervention may not always be possible. When a mediator analyzes and attempts to correct a power imbalance, she can no longer claim to be simply a facilitator of the couple's process; rather, she is taking an active role in affecting the outcome of that process. But the mediator, due to her own internal processes, may not in fact have a sufficiently clear vision of the interaction between the divorcing spouses to make a considered decision about if and how the power needs to be balanced. The existence of partiality, countertransference, and projection on the part of mediators explains why mediators' attempts to redress imbalances cannot necessarily be relied upon to meet the problem of unequal bargaining power.²²⁷

d. *Implicit Agendas and Defining Fairness*

Apart from the particular dynamic that exists between a mediator and the parties in a given case, a mediator will always be influenced in her mediations by her own values. These values may be personal, or they may be derived from the mediator's professional training or the community in which she lives.²²⁸ The mediator may not disclose, or perhaps even recognize, her reliance on such

226. See J. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 49-53 (1981); J. HAYNES & G. HAYNES, *supra* note 109, at 17; Bernard, Folger, Weingarten & Zumeta, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, *MEDIATION Q.*, June 1984, at 61, 65; Haynes, *Power Balancing*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 277 (1988); see also Forester & Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, *NEGOTIATION J.*, July 1989, at 251, 256 (activist mediators must dispense with neutrality in order to balance information and participation); Laue & McCormick, *The Ethics of Intervention in Community Disputes*, in *THE ETHICS OF SOCIAL INTERVENTION* 205, 220 (1978) (intervenor in community dispute should not remain neutral and should help weaker parties to implement their power).

227. Mediators are also likely to share societal assumptions about what roles men and women will play in mediation. See, e.g., Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women*, *J. DIVORCE*, Spring/Summer 1985, at 49, 52-55, 59.

228. See M. Ray, *Women and Children After Divorce: Comparing Outcomes from Three Processes for Resolving Disputes* 31 (unpublished manuscript on file with author) (expectations of mediators influence custody arrangements).

values.²²⁹ It may appear to the mediator, as to any of us, that her perception of the world is objectively true.

When a mediator imposes an agenda, it is probably because it seems fair to her to do so. In introducing the parties to mediation, mediators frequently emphasize that the goal is a "fair" agreement.²³⁰ Thus, mediators often replace the struggle over legal rights with a struggle over what is "fair."²³¹ There are some mediators who define a fair agreement as one that closely resembles what the court would have ordered had the case gone to trial. This conception of fairness appears to have the virtue of clarity and permits parties to assert rights within the context of the mediation. But styling what a court would do as the "fair" result limits the room for a party to view the law itself as "unfair."²³² In such a case, it can no longer be said that that party is in control of the normative issues at stake in the mediation. Moreover, if this legalistic conception of fairness is accepted, the only reason to prefer mediation to the adversary system is because it might be less expensive. After all, the "fairest" agreement of all could be reached by going to court and having active settlement judges deal with lawyers, or, arguably, by feeding data about the family into a computer. If this is all mediation is about, then there is little justification for subjecting people to what may be a traumatic process in which their hopes, aspirations, and pain necessarily must enter. Nor is there much reason to tout the process as one of "healing," one in which there is "[c]aring, sharing, mental health, and concern for future functioning."²³³

On the other hand, some mediators regard law as irrelevant to fairness. Rather, they look for an intuitive conception of fairness shared by the parties and, at least to a limited extent, by the mediator. This assumes, of course, that the parties and mediator are able to share a vision of what is fair, and that they can, with the help of the mediator, apply it. Many mediators have had the experience of parties asking them, "Tell me, is this fair? I want to be fair." At such a juncture, the parties themselves are ready to either fall back on the law's definition of fairness, or defer to what the mediator believes to be fair; they are not actively considering their own values.

Finally, some mediators have a more complex view of the role of law in mediation: "[T]he mediator can help the parties consider law not primarily as a set of necessary applied rules, but as providing a relevant reference point, both in terms of a practical alternative and as an expression of societal norms and, perhaps, some underlying principles."²³⁴

229. See Teitelbaum & DuPaix, *supra* note 49, at 1125.

230. See *id.* at 1123-25; CENTER FOR DEVELOPMENT OF MEDIATION IN LAW, EXPLANATION OF MEDIATION PROCESS 1-3, 6, 8 (Aug. 1983) (training materials).

231. Teitelbaum & Dupaix, *supra* note 49, at 1123-25.

232. See Abel, *supra* note 64, at 267-310.

233. Fineman, *supra* note 6, at 757.

234. CENTER FOR DEVELOPMENT OF MEDIATION IN LAW, THE PLACE OF LAW IN MEDIATION 1 (Aug. 1983) (training materials).

The danger inherent in each of these approaches is that, because no community-wide view of fairness exists, the parties may be left with the desire to think of themselves as fair, but have no guiding precepts other than those that may be provided by the mediator to tell them they are behaving justly. Mediators are often far too willing to provide those very "principles."

3. Joint Custody

Linda and Jerry had been married for five years when Kenny was born. They separated when he was fourteen months old. Even before the separation, Linda had had almost complete responsibility for Kenny since Jerry's job with the railroad took him out of town at least three nights per week on a schedule that was constantly changing. When Jerry was in town, he tended to spend time with his friends rather than with Linda and Kenny. After the separation, Jerry saw Kenny in a sporadic fashion until, when Kenny was two, Jerry moved 1000 miles away to another state. Jerry then kept in only infrequent contact with Kenny and paid little support for him until Jerry moved in with his girlfriend, whom he married when Kenny was three and one-half. Once Jerry remarried, he was anxious to have Kenny with him, and Linda began to send Kenny to Jerry for short visits.

Linda was willing for Jerry to have frequent contact with Kenny. She did not feel, however, that it would be good for Kenny to live in two different homes, 1000 miles apart. The mediator told Linda that the most important thing for Kenny's future development was to have frequent and continuing contact with both parents. She said Jerry was entitled to have his son half the time; the only question was which half. Although the mediator recognized the difficulty of arranging for frequent long-distance travel for Kenny, she nonetheless recommended that Kenny spend alternate months with each parent. When Linda protested that, because of Jerry's work schedule, Kenny would have frequent and continuing contact with neither parent when he was staying with Jerry, the mediator made it clear that if Linda did not agree to sharing custody on the terms she suggested, she would recommend to the court that Jerry get sole custody.²³⁵

Many mediators state unabashedly that they attempt to steer their clients toward joint custody, regardless of what the clients want.²³⁶ Some go so far

235. For the origin of this mediation story, see *supra* note 13.

236. Donald Saposnek suggests that, in general, "coparenting to the maximal degree possible is the goal towards which the mediator should strive." D. SAPOSNEK, *supra* note 69, at 81. He advises that parents be instructed on the benefits of coparenting, and on the dangers to children of failing to coparent. *Id.* at 69-70. Saposnek further states, however, that should joint custody not be feasible in a certain instance, the mediator should "not even mention it." *Id.* at 78. When the mediator favors coparenting, he may "preempt" a party's position to the contrary. Saposnek, *Aikido: A Systems Model for Maneuvering in Mediation*, *MEDIATION Q.*, Winter 1987/Spring 1988, at 119, 128-29. For example, faced with a woman who wants sole custody, Saposnek suggests that the mediator advise his clients as follows:

You both need to know that all our research and clinical experience to date lead us to conclude that children of divorce do best when they have regular contact with both parents and that even

as to tell a parent that her refusal to request joint custody may result in an award of custody to the other spouse as the "friendlier" parent.²³⁷ This position is justified on the ground that the mediator should be an advocate for the children. Mediators who take this view do so despite the lack of convincing evidence that joint custody is in fact better for children than sole custody.²³⁸ This position also ignores the disturbing reality that a father may request joint custody to obtain financial concessions from his wife in exchange for permitting her to have sole custody; in fact, some lawyers routinely recommend this tactic.²³⁹

An influential article by Judith Wallerstein and Joan Kelly²⁴⁰ helped to shape the views on joint custody held by many mediators. A remarkable leap was made, however, from the results of Wallerstein and Kelly's research to the determination that joint custody is the best of possible custody arrangements. Wallerstein and Kelly did not even study joint custody families; joint custody was barely discussed when they began their research in 1971. Their study simply found that children whose mothers had sole custody did better after divorce when the children had frequent and continuing contact with their fathers.²⁴¹ While Kelly has used this early study to endorse a presumption

a parent who was not very involved with the child during the marriage often becomes involved with the child after the divorce in an important and meaningful way.

Id. at 129. Saposnek explains his advice as follows: "Preempting . . . leaves the parent off balance and vulnerable to accepting the mediator's direction . . ." *Id.*

Robert Emery and Joanne Jackson state that "unlike many mediators, we do not advocate for joint physical custody. . . . Our mediated agreements resulted in more joint *legal* custody awards, but the number of days children were to spend with each parent did not differ for the mediation and litigation families." Emery & Jackson, *supra* note 8, at 8 (emphasis added). These researchers explicitly recognize that their bias against shared physical custody did affect the outcome of agreements. *Id.* In coming out in favor of joint legal custody, however, they do not address the problem of the noncustodial parent's exercising a veto power over the parent who is actually caring for the child or children. See *supra* notes 105-15 and accompanying text. *But see* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-39, 48-49 (1973) (custody should be granted to "psychological parent" and custodial parent should have complete decisionmaking power in relation to child).

237. Many court mediators routinely recommend that the parent who does not oppose joint custody be given sole custody where the parties cannot agree on joint custody. See, e.g., Mumma, *supra* note 128, at 30 ("[W]e may recommend custody be given to the parent who is most likely to allow the most frequent or flexible contact with the other parent . . ."); see also Fineman, *supra* note 6, at 751-52 (when choosing between parents, helping professionals prefer parent who most freely allows child access to other parent). Thus, the parent seeking sole custody, usually the mother, risks losing custody entirely if she does not "agree" to joint custody. Mediators who take this position sometimes rely on a "friendly parent" provision in state child custody law. For example, CAL. CIV. CODE § 4600 (West Supp. 1990) provides that in awarding custody, the court should "consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent." Alaska and Iowa are the two other states which have provisions similar to California's. See ALASKA STAT. § 25.20.090(E) (1983); IOWA CODE ANN. § 598.41(1) (West Supp. 1990).

238. See *infra* notes 241-45 and accompanying text.

239. See Bruch, *Parenting at and After Divorce: A Search for New Models* (Book Review), 79 MICH. L. REV. 708, 723 n.15 (1981).

240. Wallerstein & Kelly, *Children and Divorce: A Review*, 24 SOC. WORK 468 (1979).

241. Wallerstein and Kelly's research began in 1971. Follow-up research was performed at 18-month and 5-year intervals. *Id.* at 470. The study found that good father-child relationships were pivotal to the psychological well-being of children of divorce. *Id.* at 471. It also found, however, that the mother's emotional well-being was the single best indicator of the children's eventual psychological health. *Id.* at

of joint custody,²⁴² Wallerstein has cautioned that not enough is known about the effects of shared custody on children to treat it as a presumptively better arrangement.²⁴³

When Wallerstein some years later actually studied joint custody, she discovered that it does not minimize the negative impact of divorce on children, at least not during the early post-divorce years.²⁴⁴ Moreover, early studies of joint custody were based only on voluntary joint custody arrangements. When joint custody not based on voluntary agreements was studied, the results were unsettling. Children raised under joint custody arrangements resulting from court orders in cases where there had been significant conflict fared worse than children raised in comparable sole-custody homes.²⁴⁵ The hope of courts and mediators that joint custody would “force” parents to cooperate has not come to pass.

In the story above, Linda agreed to joint custody to avoid losing her child entirely; for all practical purposes, joint custody was imposed on her. This happened because the mediator was partial to a particular outcome. But even mediators who are careful not to steer their clients toward or away from a particular outcome almost surely have visions of how families are to be structured. Notably, in my reading of the mediation literature I have not come across any substantial discussion of variations in family structure in the United States.

The existence of different values and perspectives makes it dangerous to deprive the parties of the opportunity to choose whether or not to engage in mediation and with whom. Because there are so few formal protections for the clients in mediation, and because the relationship between the mediator and the clients may carry with it the risks that come with intimacy and implicit value-laden agendas, it is essential that the parties retain the right to choose not to participate.

470. Even to the extent that this research was relevant to joint custody, the demographics of the study should have given pause. The participants were almost entirely middle-class residents of a wealthy California county, comprising 60 families with 131 children. *Id.* at 470. Eighty-eight percent of the participants were white, 3% were Black, and 9% were interracial. J. WALLERSTEIN & S. BLAKESLEE, *supra* note 121, at 310. It cannot be assumed that the family structures that worked optimally for this group would also be optimal for others with different financial restrictions, values, and cultural backgrounds.

242. See Kelly, *Further Observations on Joint Custody*, 16 DAVIS L. REV. 762, 764-65 (1983).

243. See J. WALLERSTEIN & S. BLAKESLEE, *supra* note 121, at 258; see also Bruch, *supra* note 24, at 109 (noting that while Kelly has endorsed presumption of joint custody, Wallerstein has cautioned against applying research regarding benefits of frequent and continuing contact to arguments supporting joint control).

244. See J. WALLERSTEIN & S. BLAKESLEE, *supra* note 121, at 256-73; Kline, Tschann, Johnston & Wallerstein, *Children's Adjustment in Joint and Sole Custody Families*, 25 DEVELOPMENTAL PSYCHOLOGY 430, 437 (1989); see also Steinmann, Zimmelman & Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 561 (1985) (study of joint-custody families showed wide spectrum of outcomes; for some families joint custody was beneficial option, while for others it was stressful).

245. See Johnston, Kline & Tschann, *Ongoing Post-Divorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 J. AM. ORTHOPSYCHIATRY 576, 588, 590; cf. Bruch, *supra* note 239, at 723 (couples who agree on joint custody as compromise rather than as expression of shared conviction are greatly overrepresented in later custody litigation).

4. *Exclusion of Lawyers*

In California, lawyers typically are excluded from mediation sessions, and the parties are required to speak for themselves, whether or not they wish to do so.²⁴⁶ Some argue that exclusion of lawyers contributes to client empowerment.²⁴⁷ In evaluating whether their exclusion actually furthers client empowerment, it is useful to consider the reasons why a person engaged in a divorce might want the services of a lawyer. First, and most obviously, lawyers are hired for their expertise, particularly their expertise in protecting their clients' rights. Of equal importance, however, is the fact that lawyers are hired to provide a buffer, a layer of insulation, between the client and her spouse. Neither of these rationales for the presence of an attorney disappears in the context of mediation.

a. *Lawyers as Protectors of Rights*

A lawyer who is excluded from the mediation sessions may be hampered in protecting her client's rights, particularly if custody is ultimately to be litigated in court. For example, privileged or irrelevant material, which the lawyer does not believe should be disclosed, may mistakenly be revealed in mediation. Once such privileged information is disclosed, it is often impossible to keep it out of a later court proceeding.

In states with an evidentiary privilege protecting mediation,²⁴⁸ a party would not be able to use in court any documents obtained in mediation. In

246. CAL. CIV. CODE § 4607(d) (West 1983) provides in relevant part: "The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary." Cf. McCrory, *supra* note 30, at 150-51 (whether lawyers may participate in mediation varies from state to state and in some states is determined by scope of issues being mediated). Attorneys are normally excluded from mediation sessions in California. It is not until an agreement is reached by the parties that counsel become involved: "Any agreement reached by the parties as a result of mediation shall be reported to counsel for the parties by the mediator on the day set for mediation or as soon thereafter as practical, but prior to its being reported to the court . . ." CAL. CIV. CODE § 4807(e) (West Supp. 1990). For a discussion of other states' approaches to the inclusion of lawyers at mediation sessions, see *supra* note 30.

247. See S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 117, at 338 (if lawyers are kept out, parties can communicate directly and work out problems themselves); Jaffe, *Divorce Mediation: The Next Decade* in THE ROLE OF MEDIATION, *supra* note 8, at 284, 285 (participants in conference on mediation agreed that lawyers should not take part in mediation sessions). But see C. MOORE, *supra* note 134, at 108 (encouraging parties to mediation to consult with lawyer); Folberg, *Divorce Mediation—A Workable Alternative*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 11, 35-39 (1982) (refuting suggestion that attorneys are ill-equipped to serve as divorce mediators).

248. California is one state with such a privilege. See *supra* note 29 and accompanying text. In California, "official information" cannot be disclosed if an authorized official refuses disclosure pursuant to section 1040(b) of the California Evidence Code. See *supra* note 29. In *In re Marriage of Rosson*, 178 Cal. App. 3d 1094, 1098, 224 Cal. Rptr. 250, 253 (1986), the Court of Appeal held that the official information privilege belongs to the court rather than the parties, and that, by the adoption of local rules permitting a mediator to make a recommendation to the court as to custody or visitation, the court may waive the privilege. Such local rules are specifically authorized by section 4607(e) of the California Civil Code. See *supra* note 31.

many instances, however, he could obtain the documents in some other manner, once he knows of their existence. Moreover, even if the information is not introduced formally, it may nonetheless subtly influence the proceedings at a later date.

Nor does a provision for consulting with attorneys before an agreement is reached, or for stopping the mediation to allow consultation with an attorney, ensure that a client will be adequately protected. Apart from the possibility of harmful disclosure of information, a party may agree to something because he is nervous, intimidated, exhausted, or frightened. Even if the agreement is not final until it has been presented to the attorneys, it will be difficult for a disempowered party to disavow an agreement already tentatively reached. Moreover, the attorneys themselves may be reluctant to be perceived as sabotaging an agreement.

In jurisdictions in which mediators are permitted to make recommendations to the court, the problem of protecting disempowered parties is even more acute. Under California Civil Code section 4607(e), if no agreement is reached in mediation, a mediator "may, consistent with local court rules, render a recommendation to the court" based on information acquired during the mediation.²⁴⁹ Where such a recommendation is lawful, it may well seem a futile gesture to fail to "agree" to a proposal that the mediator favors or to disavow the agreement before it is approved by the court—especially in a jurisdiction where mediators' recommendations are almost always accepted. This is what happened to Linda in the example above, when the mediator told Linda that if she did not "agree" to the mediator's joint custody terms, the mediator would recommend to the court that Jerry be awarded sole custody.

Even where the judge will evaluate the mediator's recommendation more cautiously, there may be evidentiary problems that make a challenge to the mediator's opinion difficult to mount. In *McLaughlin v. Superior Court*,²⁵⁰ the California Court of Appeal held that parties must be granted the right to cross-examine a mediator regarding his recommendation. Upon cross-examination, however, some mediators may refuse to disclose the reasons for the recommendation, relying on the "official information" privilege set forth in the

249. More than half of California counties permit such recommendations to be made. *See supra* note 33 and accompanying text.

250. 140 Cal. App. 3d 473, 482-83, 189 Cal. Rptr. 479, 486 (1983). In *McLaughlin*, prior to mediation, counsel for the father had moved, in effect, for a "protective order" which would prohibit the mediator from making a recommendation to the court unless his client were guaranteed the right to cross-examine the mediator. The lower court had denied the motion on the ground that granting the order would violate the local court's policy that mediators not state the basis for their recommendations. *Id.* at 477, 189 Cal. Rptr. at 482. The Court of Appeal upheld the local court policy, reasoning that it was consistent with CAL. CIV. CODE § 4607(c) (West Supp. 1990), which states that mediation proceedings "shall be confidential." *Id.* at 482-83, 189 Cal. Rptr. at 486. But the Court of Appeal went on to hold that the parties must nonetheless be guaranteed the right to cross-examine the mediator in order for the court to receive a recommendation on contested issues, unless they have waived that right. *Id.* at 484, 189 Cal. Rptr. at 487; *cf.* *Ohmer v. Superior Court*, 148 Cal. App. 3d 661, 668, 196 Cal. Rptr. 224, 228 (1983) (parties found to have waived right to cross-examine court-appointed custody investigator).

Evidence Code.²⁵¹ *McLaughlin* did not address the question of whether a mediator can rightfully claim this privilege or refuse to answer specific questions about his recommendation.²⁵² There is no answer to this dilemma that adequately protects the parties: if the mediator is required to testify fully, the mediation is confidential only in the narrowest sense of that word, and the parties' need for full access to their attorneys *during* the mediation process is apparent. But if the mediator is permitted to limit his testimony, then the parties are deprived of their cross-examination rights just as effectively as if the mediator had never taken the stand.

b. *Lawyers as Providers of Insulation*

Lawyers serve another function in the divorce process, that of insulating the parties from the hand-to-hand combat and self-help that the rule of law is intended to avoid. The presence of a lawyer means that a party does not have to face his adversary directly if he does not wish to do so. Mediation is often put forward as a method of empowering the parties to a dispute, but the words "Don't call me, call my lawyer" are sometimes the most empowering words imaginable. Mandatory mediation, even absent the pressure to reach an agreement that exists when a recommendation to the court can be made, prevents lawyers from performing this protective function.

The usual view is that mediation is at its best where the parties have a close relationship, and one that is likely to continue in some form. The danger of being deprived of the insulation provided by a lawyer is at its greatest, however, under those precise circumstances. At the time of divorce, the hiring of an attorney can be the first step to disengagement, to seeing oneself as separate from one's spouse;²⁵³ the attorney can keep the party from experiencing directly the hostility, pain, or fear of the other party. An attorney may provide a further type of insulation as well. In mediation it is easy for a woman to feel she is being characterized as greedy, selfish, controlling, or unfeminine.²⁵⁴ Even if the mediator does not mean to do so, many women may be ready to hear those words, or worse, may be using them internally. An attorney can carry the banner for the proposition that there is nothing wrong with the client's wanting what she wants, and that she is entitled, at a minimum, to survive.²⁵⁵

It is interesting to contemplate why a mandatory system of mediation should encourage the exclusion of lawyers. Perhaps some believe that lawyers cannot

251. *McLaughlin*, 140 Cal. App. 3d 473, 480, 189 Cal. Rptr. 479, 485. For the relevant text of this provision of the California Evidence Code, see *supra* note 29.

252. See Note, *Mandatory Custody Mediation*, 26 SANTA CLARA L. REV. 745, 755 (1986).

253. For a discussion of women's difficulties in asserting a separate self at the time of divorce, see *infra* note 274 and accompanying text.

254. See *infra* notes 272-75 and accompanying text.

255. Cf. Swift, *Becoming a Plaintiff*, 4 BERKELEY WOMEN'S L.J. 245 (1989-90) (plaintiff's self-confidence crucial to pursuing and winning litigation).

be relied on to be cooperative and will disrupt the mediation process.²⁵⁶ In any event, the exclusion of lawyers renders the parties more vulnerable to the exercise of authority—often veiled authority—by the mediator.

III. MANDATORY MEDIATION AND THE DANGERS OF FORCED ENGAGEMENT

Emma has been in a marriage which in its early years seemed to be a good one for both Emma and her husband. She has been the primary caretaker of the children, and she is very committed to them. She has lived much of her life through her husband and her children, and has not worked outside her home. Increasingly, however, she has begun to feel that she and her husband have grown apart, and that he does not see her as a person but rather as a repository of various roles. After much agony, she has decided to end her marriage. Her departure from the marriage is a first step toward seeing her life as having separate dimensions from her husband's and children's, but her right to individuation does not seem clear to her; in fact, there are many times when it seems selfish and wrong. It is hard for her even to find the language to describe what is propelling her to turn her life, and her children's lives, upside down, but propelled she is. The marital separation was an early step toward defining her own physical and psychological boundaries. She now finds herself, however, feeling guilty, frightened, and unsure of how she will survive in the world alone.

Joan has been in a marriage in which she has been physically abused for ten years. She and her husband David have two children, whom David has never abused. She is afraid, however, that if she leaves David, he will begin to abuse the children whenever he is caring for them. Joan has been afraid to leave her marriage because David has threatened to harm her if she does so. When she separated briefly from him previously, he followed her and continually harassed her. Each time David beats Joan he shows great remorse afterwards and promises never to do it again. He is a man of considerable charm, and she has often believed him on these occasions. Nonetheless, Joan has finally decided to leave her husband. She is worried about what will happen, economically and physically, to her children and herself.²⁵⁷

It might be that mediation would help Emma's family disengage and discover new ways of relating to one another. Mediation could be useful, even transformative, during the divorce process. Significant possibilities of damage

256. Martha Fineman describes the image of the legal system held by persons in the helping professions as "adversarial, combative, and productive of divisions, misunderstandings, and hostility." Fineman, *supra* note 6, at 754. She states that those who view mediation as ideal "accuse lawyers and the adversary system of increasing trauma, escalating conflict, obstructing communication, failing to perceive the need for negotiation and counseling, and generally interfering with the development of a process that could help the parties." *Id.* at 754-55 (footnotes omitted); see, e.g., Haynes, *supra* note 102, at 5. Donald Saposnek suggests that clients be requested not to talk to their attorneys about custody or visitation issues during the mediation process. D. SAPOSNEK, *supra* note 69, at 61.

257. For the origin of these stories, see *supra* note 13.

to Emma also exist, however. For example, she might find herself traumatized by a forced engagement with her husband.²⁵⁸ Or, in the intimate mediation setting, she might find it difficult to withstand criticism of how she is conducting herself in life or in the mediation.

For Joan, the direct confrontation with her husband, with the safety of her children and herself at stake, would surely be psychologically traumatizing and might also put her in physical danger. Because of these possibilities, the chance—even the substantial one—of a beneficial result cannot justify the sort of intrusion by the state that occurs when mediation is mandatory.

While some of mandatory mediation's dangers affect men and women equally, others fall disproportionately on women. A study that compared people who chose to mediate with those who rejected the opportunity found that 44% of the reasons given by women who rejected mediation services offered to them centered around their mistrust of, fear of, or desire to avoid their ex-spouse. In contrast, those men who rejected mediation appeared to do so because they were skeptical of the mediation process or convinced they could win in court. Thus, the requirement of mandatory mediation that the parties meet personally with one another, usually without a lawyer present, presents troubling issues for women. Feminist analyses, looked at alone and together, clarify why this is so.

A. *The Ethic of Care in Mediation*

As discussed earlier, several feminist scholars have suggested that women have a more "relational" sense of self than do men. The most influential of these researchers, Carol Gilligan, describes two different, gendered modes of thought.²⁵⁹ The female mode is characterized by an "ethic of care" which emphasizes nurturance, connection with others, and contextual thinking. The male mode is characterized by an "ethic of justice" which emphasizes individualism, the use of rules to resolve moral dilemmas, and equality.²⁶⁰ Under Gilligan's view, the male mode leads one to strive for individualism and autonomy, while the female mode leads one to strive for connection with and

258. See Pearson, Thoennes & Vanderkooi, *supra* note 175, at 23.

259. Gilligan's work was a response to theories of developmental psychology that defined normal development for both sexes based on tests and observations performed on boys and men. Gilligan conducted interviews by presenting male and female subjects with a moral dilemma; she then compared the responses of women and girls to those of men and boys. See C. GILLIGAN, *supra* note 10, at 2-3. More recently, Gilligan has completed a five-year study of students at a private school for girls. C. GILLIGAN, N. LYONS & T. HANMER, *MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL* (1990). In that study she found that many girls around the age of 11 are "resisters" who are outspoken and believe in their own integrity; by age 15 or 16, however, they "go underground" and learn to doubt what they had known. *Id.* at 11-15.

260. See C. GILLIGAN, *supra* note 10, at 62-63; Dubois, Duchamp, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 47 (1985) [hereinafter Dubois, *A Conversation*].

caring for others.²⁶¹ Some writers, seeing a positive virtue in the ethic of care, have applied Gilligan's work to the legal system.²⁶² But her work has been criticized by others for its methodology,²⁶³ its conflation of biological sex with gender,²⁶⁴ and its failure to include race and class differences in its analysis.²⁶⁵ (Indeed, it is not likely that the male/female differences Gilligan notes are consistent across racial and class lines.²⁶⁶) The "ethic of care" has also been viewed as the manifestation of a system of gender domination.²⁶⁷ Nevertheless, it is clear that those who operate in a "female mode"—whether biologi-

261. Gilligan has noted that she is not ascribing the male mode to men and the female mode to women, but rather pointing out a distinction between two modes of thought. See Dubois, *A Conversation*, *supra* note 260, at 47. At times, however, she does seem to equate the male mode with men and boys and the female mode with women and girls. See C. GILLIGAN, *supra* note 10, *passim*. For the purposes of this Article, it makes little difference whether the distinction made is between males and females or "male" and "female" modes available to either sex, because the female mode is disproportionately used by women. See *id.* at 2.

262. See, e.g., Areen, *A Need for Caring* (Book Review), 86 MICH. L. REV. 1067, 1073 (1988); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1148 n.135 (1986); Karst, *supra* note 44, at 461-63; Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 507 (1987); Menkel-Meadow, *supra* note 1, at 44; Rifkin, *Mediation*, *supra* note 1, at 24-25; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1380 (1986); Schneider, *supra* note 89, at 597 n.39; Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339, 342-44 (1985).

263. See, e.g., Kerber, Greeno, Maccoby, Luria, Stack & Gilligan, *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304, 316 (1986) [hereinafter Kerber, *On In a Different Voice*].

264. See, e.g., Williams, *supra* note 10, at 800-01.

265. See, e.g., Auerbach, Blum, Smith & Williams, *Commentary on Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149, 156-159 (1985); Broughton, *Women's Rationality And Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597, 634 (1983).

266. See Williams, *supra* note 10, at 844.

267. The notion of the "different voice" can be seen as a means of romanticizing and exalting the consequences of oppression. See Hantzis, *Is Gender Justice A Completed Agenda?* (Book Review), 100 HARV. L. REV. 690, 698-71 (1987). Catharine MacKinnon describes the "different voice" as the "voice of the victim speaking without consciousness." Women may claim their identity in relationships because that is what they have been valued for, and because they have not been allowed to have a social identity on their own terms. See Dubois, *A Conversation*, *supra* note 260, at 27. In this exchange between Gilligan and MacKinnon, Gilligan indicated that she wished to assimilate the voice of Amy, her typical female, into the mainstream of society. MacKinnon, on the other hand, stated that her goal was to permit Amy to develop a new voice that "would articulate that [which] she cannot now, because [a male] foot is on her throat." *Id.* at 74-75. See also C. MACKINNON, *supra* note 3, at 51-52.

In a similar vein, Joan Williams has suggested that the "different voice" is a metaphor based on sex stereotypes, not a description of actual people. Williams, *supra* note 10, at 802-803. Williams identifies the ethic of care as composed of two elements, a critique of absolutes and a critique of possessive individualism. *Id.* at 799-800. She argues that the critique of absolutes did not come from women but was developed primarily by men such as Nietzsche, Heidegger, Wittgenstein, and the American pragmatists. *Id.* at 806.

The critique of possessive individualism, on the other hand, is tied in not only with women, but with the experience of exclusion: "Marginalized groups necessarily have maintained a more critical perspective on possessive individualism . . . than did white males who had most to gain by taking the culture's dominant ideology seriously." *Id.* at 844. Williams views the ethic of care as simply another expression of the gender system that requires women's social existence to be defined in terms of their husbands' need to eliminate their childcare responsibilities in order to function as ideal workers. *Id.* at 839.

cally male or female²⁶⁸—will respond more “selflessly” to the demands of mediation.

Whether the ethic of care is to be enshrined as a positive virtue, or criticized as a characteristic not belonging to all women and contributing to their oppression, one truth emerges: many women see themselves, and judge their own worth, primarily in terms of relationships.²⁶⁹ This perspective on themselves has consequences for how they function in mediation.

Carrie Menkel-Meadow has suggested that the ethic of care can and should be brought into the practice of law—that the world of lawyering would look very different from the perspective of that ethic.²⁷⁰ Some commentators have identified mediation as a way to incorporate the ethic of care into the legal system and thereby modify the harshness of the adversary process.²⁷¹ And, indeed, at first glance, mediation in the context of divorce might be seen as a way of bringing the woman-identified values of intimacy, nurturance, and care into a legal system that is concerned with the most fundamental aspects of women’s and men’s lives.

If mediation does not successfully introduce an ethic of care, however, but instead merely sells itself on that promise while delivering something coercive in its place, the consequences will be disastrous for a woman who embraces a relational sense of self. If she is easily persuaded to be cooperative, but her partner is not, she can only lose. If it is indeed her disposition to be caring and focused on relationships, and she has been rewarded for that focus and characterized as “unfeminine” when she departs from it, the language of relationship, caring, and cooperation will be appealing to her and make her vulnerable.²⁷²

268. A man who has adopted the female mode, or even part of it, will also be disadvantaged in mandatory mediation and, in light of his potential vulnerability, should not be required to participate in a forced engagement with his spouse. When a man who ordinarily operates in the female mode departs from it, however, he is not likely to be explicitly or implicitly criticized for not meeting the expectations associated with his gender identity, as a woman might be. *See* Littleton, *supra* note 80, at 47. Of course, to the extent he is not meeting societal expectations of males, he would be subject to criticism for that.

A particularly unfortunate aspect of this female mode/male mode paradigm is that men or women who depart from the traditional mode for their sex are “denied the dignity of being ‘real’ men or ‘real’ women.” Williams, *supra* note 10, at 813 n.61.

269. The titles of a number of popular psychology books reflect this fact. *See* R. NORWOOD, *WOMEN WHO LOVE TOO MUCH* (1985); P. RUSSIANOFF, *WHY DO I THINK I’M NOTHING WITHOUT A MAN?* (1981); S. FRIEDMAN, *MEN ARE JUST DESSERTS* (1983). It is hard to contemplate a bestseller entitled *Why Do I Think I’m Nothing Without A Woman?*, although surely there are men who harbor that feeling.

270. *See generally* Menkel-Meadow, *supra* note 1; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984).

271. *See* Menkel-Meadow, *supra* note 1, at 49. Menkel-Meadow recognizes, however, that whether mediation is beneficial for women depends on who the mediator is and the model of mediation being employed. *Id.* at 53 n.78. She also notes that some disputes need authoritative rulings to prevent the abuse of power disparities and to provide precedents. *Id.*

272. In a presentation at the Joint Meeting of the Property and the Women in Legal Education Sections of the American Association of Law Schools, San Francisco, California (Jan. 4, 1990), Carol Rose used examples from game theory to demonstrate that, in a negotiation in which cooperation benefits both parties, a person “with a taste for cooperation” will end up less well off relative to a person not disposed to cooperate. To demonstrate her point, Professor Rose relied on a version of the game theory hypothetical “The Tragedy of the Commons.” In this hypothetical, there is common grazing land. If both parties

Moreover, the intimation that she is not being cooperative and caring or that she is thinking of herself instead of thinking selflessly of the children can shatter her self-esteem and make her lose faith in herself. In short, in mediation, such a woman may be encouraged to repeat exactly those behaviors that have proven hazardous to her in the past.²⁷³

In the story above, Emma is asked to undergo a forced engagement with the very person from whom she is trying to differentiate herself at a difficult stage in her life. She may find it impossible to think of herself as a separate entity during mediation, while her husband may easily be able to act on behalf of his separate self. "When a separate self must be asserted, women have trouble asserting it. Women's separation from the other in adult life, and the tension between that separation and our fundamental state of connection, is felt most acutely when a woman must make choices, and when she must speak the truth."²⁷⁴

Emma will be asked to talk about her needs and feelings, and respond to her husband's needs and feelings. Although in the past her valuing relationships above all else may have worked to the detriment of her separate self, Emma will now be urged to work on the future relationship between herself and her ex-husband. Above all, she will be asked to put the well-being of the children before her own, as if she and her children's well-being were entirely separate.²⁷⁵ Her problem in addressing her future alone, however, may be that she reflexively puts her children before herself, even when she truly needs to take care of herself in order to take care of her children. For Emma, mediation may play on what are already her vulnerable spots, and put her at a disadvantage. She may begin to think of herself as unfeminine, or simply bad, if she puts her own needs forward. Emma may feel the need to couch every proposal she makes in terms of the needs of her children. In sum, if she articulates her needs accurately, she may end up feeling guilty, selfish, confused, and embarrassed; if she does not, she will be moving backwards to the unbounded self that is at the source of her difficulties.

overgraze the land, both will lose because the land will be depleted; if neither party overgrazes the land, both will be better off. If one party does not overgraze the land, however, and the other does, the latter will be much better off than the party who refrains from overgrazing. A person with a taste for cooperation, according to Professor Rose, might well agree to more restrictions on her grazing rights than will her neighbor because it will take less to convince her to cooperate. Although in so agreeing she will still be better off than if both parties overgrazed the land, she will be worse off in comparison with her less-cooperative neighbor. Thus, in such a negotiation, the gains from cooperation have not been distributed evenly; the cooperator will not end up as well situated as the person who was reluctant to cooperate. In her presentation, Professor Rose indicated that a taste for cooperation might be more characteristic of women than of men, but that whether or not that is true, there is still a cultural expectation that women will be more cooperative. This presumption influences how people behave toward a woman regardless of her individual stance.

273. In a similar vein, Harriet Lerner has remarked that often therapists encourage women clients to be assertive and self-directed *except with the therapists*, to whom they are supposed to defer. H. LERNER, *supra* note 158, at 135-36.

274. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 55 (1988).

275. See D. SAPOSNEK, *supra* note 69, at 63.

For Joan, the prescription of mediation might be disastrous. She has always been susceptible to her husband's charm, and has believed him when he has said that he would stop abusing her. She has also always been afraid of him. She is likely, in mediation, to be susceptible and afraid once again. She may continue to care for her husband, and to think that she was responsible for his behavior toward her. Joan, and not her husband, will be susceptible to any pressure to compromise, and to compromise in her situation might be very dangerous for both her and her children.

B. *Sexual Domination and Judicial Violence*

Women who have been through mandatory mediation often describe it as an experience of sexual domination, comparing mandatory mediation to rape.²⁷⁶ Catharine MacKinnon's work provides a basis for explaining why, for some women, this characterization is appropriate. MacKinnon has analyzed gender as a system of power relations, evidenced primarily with respect to the control of women's sexuality.²⁷⁷ While MacKinnon recognizes the sense in which women are fundamentally connected to others, she does not celebrate it.²⁷⁸ Rather, she sees the potential for connection as invasive and intrusive. It is precisely the potential for physical connection that permits invasion into the integrity of women's bodies. It is precisely the potential for emotional connection that permits intrusion into the integrity of women's lives.

Men do not experience this same fear of sexual domination, according to MacKinnon; they do not live in constant fear of having the very integrity of their lives intruded upon.²⁷⁹ Men may not comprehend their role in this system of sexual domination any more than women may be able to articulate the source of their feeling of disempowerment. Yet both of these dynamics are at work in the mediation setting. It may seem a large leap, from acts of physical violence and invasion to the apparently simple requirement that a woman sit in a room with her spouse working toward the resolution of an issue of mutual

276. I have been struck, in the course of conversations with women who have undergone the mandatory mediation process, by how often these women have said, "I felt as if I were raped." (I am aware that many women experience the adversary process similarly.)

277. See generally C. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 3; C. MACKINNON, FEMINISM UNMODIFIED (1987); MacKinnon, *Feminism, Marxism*, *supra* note 3.

278. See C. MACKINNON, *Difference and Dominance*, in FEMINISM UNMODIFIED, *supra* note 277, at 32, 39 ("Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.").

279. Because the existential and subjective experience of the world differs for men and women, it is sometimes difficult to explain, in legal language, the basis for attention to areas of law that are of particular interest to women such as rape, sexual harassment, and reproductive freedom. For example, rape might be characterized and treated as any other crime of violence if the underlying sexual domination of women by men is not taken into account. Once institutionalized sexual domination is seen as something the law should address, however, rape becomes a very particular harm unlike any other, a combination of violence and sexual domination. See C. MACKINNON, *Sex and Violence: A Perspective*, in FEMINISM UNMODIFIED, *supra* note 277, at 85, 86-87. For a discussion of the parallel problem in the realm of reproductive freedom, see West, *supra* note 274, at 69.

concern. But that which may be at stake in a court-ordered custody mediation—access to one's children—may be the main reason one has for living, as well as all one's hope for the future. And because mandatory mediation is a *forced* engagement, ordinarily without attorneys or even friends or supporters present, it may amount to a form of "psychic breaking and entering"²⁸⁰ or, put another way, psychic rape.

There is always the potential for violence in the legal system: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."²⁸¹

The reality of this background of judicial violence cannot be discounted when measuring the potential trauma of the mandatory mediation setting. Although the mediation system is purportedly designed in part to help participants *avoid* contact with the violence that must come from judicial decisions, in significant ways the violence of the contact is more direct. Since the parties are obliged to speak for themselves in a setting to which the culture has not introduced them and in which the rules are not clear (and in fact vary from mediator to mediator²⁸²), the potential violence of the legal result, combined with the invasiveness of the setting, may indeed end up feeling to the unwilling participant very much like a kind of rape. Moreover, in judging, it is understood that the critical view of the quarrel is that of the judge, the professional third party. Mediation is described as a form of intervention that reflects the *disputants'* view of the quarrel. But having the mediation take place on court premises with a mediator who might or might not inject her prejudices into the process may make it unlikely that the disputants' view will control. Thus, a further sense of violation may arise from having another person's view of the dispute characterized and treated as one's own.²⁸³

That many reportedly find mediation helpful does not mean everyone does.²⁸⁴ Consensual sex may take place in a certain setting in one instance but that does not make all sex in that setting consensual; sometimes it is rape. And sometimes it may only seem to be consensual because forced sex is considered par for the course—that is, it is all we know or can imagine.²⁸⁵

When I have suggested to mediators that even being forced to sit across the table and negotiate, unassisted, with a spouse might be traumatic, their reaction

280. Singer, Astrachan, Gould & Klein, *Boundary Management in Psychological Work with Groups*, in *EXPLORING INDIVIDUAL AND ORGANIZATIONAL BOUNDARIES: A TAVISTOCK OPEN SYSTEMS APPROACH* 21, 32 (D. Singer ed. 1979).

281. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

282. *Cf. supra* text accompanying notes 24-28 (qualifications of mediators vary widely).

283. *See* David, *The Halls of Justice and Justice in the Halls*, in *DIVORCE MEDIATION AND THE LEGAL PROCESS* 95, 101 (1988).

284. With at least some models of mediation, participant satisfaction has been high. *See supra* notes 7-8 and accompanying text.

285. MacKinnon, *Feminism, Marxism*, *supra* note 3, at 648-52.

has been almost uniformly dismissive. Some mediators have denied that this could possibly be the case. Even mediators who acknowledge the possibility of trauma have said, in effect, "So what?" A few hours of discomfort seems not so much to ask in return for a system that, to their mind, serves the courts and the children much better than the alternative. But a few hours of discomfort may not be all that is at stake; the trauma inflicted upon a vulnerable party during mediation can be as great as that which occurs in other psychologically violent confrontations. As such, it should not be minimized. People frequently take months or years to recover from physical or mental abuse, rape, and other traumatic events.²⁸⁶ Given the psychological vulnerability of people at the time of a divorce,²⁸⁷ it is likely that some people may be similarly debilitated by a mandatory mediation process.

Moreover, because the mandatory mediation system is more problematic for women than for men,²⁸⁸ forcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them, good for their children, or good for the system.

IV. ALTERNATIVES TO MANDATORY MEDIATION

It has been said that "[d]isputes are cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kinds of remedies are acceptable."²⁸⁹ The process by which a society resolves conflict is closely related to its social structure. Implicit in this choice is a message about what is respectable to do or want or say, what the obligations are of being a member of the society or of a particular group within it, and what it takes to be thought of as a good person leading a virtuous life. In the adversary system, it is acceptable to want to win. It is not only acceptable, but expected, that one will rely on a lawyer and advocate for oneself without looking out for the adversary. The judge, a third party obligated to be neutral and bound by certain formalities, bears the ultimate responsibility for deciding the outcome. To the extent that women are more likely than men to believe in communication as a mode of conflict resolution and to appreciate the importance of an adversary's interests, this system does not always suit their needs.²⁹⁰

286. See S. ESTRICH, *REAL RAPE* 1-3 (1987); Littleton, *supra* note 80, at 28-29.

287. See J. WALLERSTEIN & S. BLAKESLEE, *supra* note 121, at xi-xii; Shattuck, *Mandatory Mediation*, in *DIVORCE MEDIATION, THEORY AND PRACTICE*, *supra* note 14, at 191, 206 (in sample of mandatory mediation clients in San Francisco, 29% of parents showed marked evidence of serious psychopathology, such as poor reality contact, paranoid ideation, severe depression, and ego decompensation).

288. See *supra* notes 272-73 and accompanying text.

289. Merry & Silbey, *supra* note 56, at 157.

290. See Menkel-Meadow, *supra* note 1, at 53-55.

On the other hand, under a scheme of mediation, the standards of acceptable behavior and desires change fundamentally. Parties are to meet with each other, generally without their lawyers. They are encouraged to look at each other's needs and to reach a cooperative resolution based on compromise. Although there are few restrictions on her role in the process, the mediator bears no ultimate, formal responsibility for the outcome of the mediation. In sum, when mediation is the prototype for dispute resolution, the societal message is that a good person—a person following the rules—cooperates, communicates, and compromises.

The glories of cooperation, however, are easily exaggerated.²⁹¹ If one party appreciates cooperation more than the other, the parties might compromise unequally. Moreover, the self-disclosure that cooperation requires, when imposed and not sought by the parties, may feel and be invasive. Thus, rather than representing a change in the system to accommodate the "feminine voice," in actuality, mandatory mediation overrides real women's voices saying that cooperation might, at least for the time being, be detrimental to their lives and the lives of their children. Under a system of forced mediation, women are made to feel selfish for wanting to assert their own interests based on their need to survive.

There are, then, many good reasons why a party might choose not to mediate. While some argue that mediation should be required because potential participants lack the information about the process which would convince them to engage in it voluntarily, this is not a sufficient justification for requiring mediation. If the state were committed only to making sure that disputants become familiar with mediation, something less than mandatory mediation—such as viewing a videotaped mediation or attending an orientation program—could be required, and mediators would certainly not be permitted to make recommendations to the court.²⁹² That more than the simple receipt of information is required under a statutory mediation scheme demonstrates a profound disrespect for the parties' ability to determine the course of their own lives. Perhaps intrusion on the parties' lives might be justified if, in fact, children were demonstrably better off as a result of the process. There is no

291. See *supra* note 272.

292. Molly Knowles, Director of the Family Referral Conciliation Service in Kingston, Ontario, Canada, has suggested that the legal system should never play an initiating role in the process of mediation. Rather, mediation services should be available to all divorcing couples at the beginning of the separation process before they go to court. She further argues that the clients alone should decide which issues should be addressed by mediation. Knowles, *Court Annexed Mediation Programs in Canada: Whose Interests Do They Serve?*, in *THE ROLE OF MEDIATION*, *supra* note 8, at 56, 58-60.

credible evidence, however, that this is so.²⁹³ The legislative choice to make mediation mandatory has been a mistake.

The choice presented today in California and in some other states is between an adversary process with totally powerful legal actors, in which clients never speak for themselves (and often do not know what is going on), and a mediation process in which they are entirely on their own and unprotected. The adversary system admittedly works poorly for child custody cases in many respects. There are, however, some ways to avoid damaging custody battles under an adversary system, such as enacting presumptions that make outcomes reasonably clear in advance,²⁹⁴ court-sponsored lectures on settlement,²⁹⁵ and joint negotiation sessions with lawyers and clients present. When in court, lawyers could be held to higher standards with respect to communicating with their clients, and judges could refrain from speaking to lawyers when their clients are not present. (It is difficult to imagine how a client can know whether to trust his lawyer when significant parts of the proceedings take place out of earshot).

The only reason to prefer mediation to other, more obvious alternatives is that the parties may, through the mediation process, ultimately benefit themselves and their children by learning how to communicate and work together. Whether this will happen in the context of a particular mediation is something only the parties can judge.²⁹⁶

Any reform proposals, of the adversarial system or of a mediation alternative, should be rejected if they result in further disempowerment of the disempowered. Reform must operate on two simultaneous levels: first, by changing the institutions and rules that govern custody mediation, and second,

293. While mediation does seem to serve the courts, there is no evidence that it serves children. Research shows that children whose parents reach a settlement in mediation are no better adjusted following the divorce than children whose parents did not use mediation. See J. Pearson, N. Thoennes & W. Hodges, *The Effect of Divorce Mediation and Adjudication on Children 27* (1984) (unpublished manuscript on file with author); Kressel, *supra* note 8, at 220.

294. The primary caretaker presumption would in most circumstances result in custody to the parent who has performed the day-to-day care of the child. This rule would maintain the child's bond to the parent more directly involved in her care and make it evident that parenting during marriage, by either parent, is to be valued and rewarded. See L. WEITZMAN, *supra* note 48, at 240-45 (presumption decreases ambiguity and emphasizes caretaking ability); Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478-79, 537-38, 569 (1984) (presumption should be limited to preschool children); Fineman, *supra* note 6, at 771-72 (presumption should apply to all contested custody cases); Neely, *supra* note 54, at 180-86 (presumption should apply until child is old enough to decide for himself); Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241-43 (1982) (presumption desirable and more appropriate than maternal preference). But see Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985). In this last article, the author argues that post-divorce living arrangements should not reflect an intact family situation; one parent may have acted as the primary caretaker under the "marriage partnership," but that partnership is now dissolved. *Id.* at 724-26, 770-80. Demonstrating an astonishing lack of appreciation for what is involved in raising a child, Schepard goes on to say that "[i]n an increasing number of families, both parents work, and the child's primary caretaker may be a daycare center." *Id.* at 733.

295. See Kressel, *Comments*, in THE ROLE OF MEDIATION, *supra* note 8, at 80, 81.

296. See *supra* text accompanying note 179.

by encouraging the respect of each mediator for the struggles and lives of the individuals involved in mediation. Any reforms should evince a concern for the personhood of the mediation clients, a concern that is lacking under current mediation practices.

With respect to institutional changes, an adequate mediation scheme should not only be voluntary rather than mandatory, but should also allow people's emotions to be part of the process, allow their values and principles to matter in the discussion, allow parties' attorneys to participate if requested by the parties, allow parties to choose a mediator and the location for the mediation, allow parties to choose the issues to mediate, and require that divorcing couples be educated about the availability and logistics of mediation so as to enable them to make an intelligent choice as to whether to engage in it.²⁹⁷

The second aspect of reform represents more of a personal dynamic, one which is harder to institutionalize or to regulate. But the mediator must learn to respect each client's struggles, including her timing, anger, and resistance to having certain issues mediated, and also must learn to refrain, to the extent he is capable, from imposing his own substantive agenda on the mediation.

CONCLUSION

Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes like the patriarchal paradigm of law it is supposed to supplant. Seen in this light, mandatory mediation is especially harmful: its messages disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives.

Of course, subordinated people can go to court and lose; in fact, they usually do. But if mediation is to be introduced into the court system, it should provide a better alternative. It is not enough to say that the adversary system is so flawed that even a misguided, intrusive, and disempowering system of mediation should be embraced. If mediation as currently instituted constitutes a fundamentally flawed process in the way I have described, it is more, not less, disempowering than the adversary system—for it is then a process in which people are told they are being empowered, but in fact are being forced to acquiesce in their own oppression.

297. For a discussion of institutional concerns in a Canadian context, *see* Knowles, *supra* note 292, at 56.