MANDATORY MEDIATION OF CUSTODY DISPUTES: CRITICISM, LEGISLATION, AND SUPPORT

INTRODUCTION

Courts have seen a significant rise in divorce cases over the last forty years.[1] While most divorce agreements are settled privately, either between the individuals or with a lawyer's assistance, approximately ten to fifteen percent of the cases involve contested issues that are determined by judicial decree.[2] Of these contested issues, child custody is the most difficult question posed to the courts.[3] The rise of no-fault divorce denied the courts the ability to make custodial determinations based on the application of abstract principles of right and wrong.[4] The determinations of contested custody are not the kind of decisions courts make well.[5] As Nancy H. Rogers and Craig A. McEwen observed in their book, *Mediation Law Policy Practice*, "[c]ourts are ill-equipped to mandate particular visitation schedules and custodial arrangements, the wisdom of which depend on the situations of the parents and children rather than on legal rules."[6]

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1. U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 75 (1994).

2. Robert Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 530 (1984).

3. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 555 (1990); R. NEELY, THE DIVORCE DECISION 58 (1984).

4. Henry W. K. Daley & Susan Keilitz, *Court-Based Family Mediation Programs*, 16 STATE CT. J. 24 (1992).

5. *See infra* Part I.A.

6. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION LAW POLICY PRACTICE 230 (1989).

Mediation[7] is proposed by legal scholars, jurists, and mediation

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7. For the purposes of this Note, "mediation" refers to a negotiation process, facilitated by a neutral third party who has no ability to determine any resolution of the contested issues. A more complete description of mediation is provided by Rogers and McEwen:

> Mediation sessions typically occur in a conference room in a neutral setting. The mediator, who may or may not be a lawyer, invites the participants in and seats them, usually so that the parties are closest to the mediator. If attorneys are present . . . they sit further away. No robes, stenographers, court officers, news reporters, or public observers intrude upon the private session. Often lasting one to four hours, a mediation session tends to be guided by the mediator firmly but informally, without formal rules of evidence or procedure . . . . Mediation sessions frequently move between joint sessions with all parties present to separate caucuses between each party . . . and mediator. A session typically concludes with an agreement to schedule another session with a particular agenda and often some "homework" . . . . Of course, it may also conclude with the recognition that further mediation would be unproductive.
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> During this process, a mediator assists parties in discussing points of difference and agreement, in clarifying interests, in identifying alternative resolutions, and in accepting compromise, leaving to them the decision to accept or reject settlement. Although some mediators are more aggressive than others in suggesting outcomes, their strongest control is over the process.
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> Mediation typically involves several overlapping stages: introduction of the process by the mediator; presentation of view-points by each of the parties; expression of emotions by parties; caucusing to discuss confidential information; exploration of alternative resolutions; and forging an agreement, when possible.
> The mediator's major challenge in moving through these stages is to assist parties who are initially distrustful and locked emotionally in conflicting positions to reduce their antagonism and consider alternative positions. Most of the time the mediator focuses attention on the parties and their perceptions, concerns, and interests . . . .
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> In the session's early stages, mediators want to establish their integrity, competence, and concern for the parties. Like lawyers at an initial interview, mediators convey their concern in large part by listening "actively" (letting the speaker know the mediator has understood) and sympathetically to the "stories" that each party has to tell. Typically, the complainant speaks first and sets out his or her case without interruption, followed by questions from the mediator. It is then the respondent's turn. These presentations may be followed by joint discussions of an agenda, needed information, and acceptable substantiation of that information.
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> At some point in the process, many mediators ask to caucus separately with each of the parties. Because the mediator cannot bind the parties, the caucus does not raise the same ethical problems as an ex parte conference with a judge. Confidentiality is a concern in caucuses. At the close of the caucus the mediator asks the parties whether there is anything they have said which they want kept in confidence. If not, the mediator will make use of the contents of the caucus at his or her discretion.
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> The early caucuses serve to alert the mediator to concerns or facts not revealed in the joint session. In addition, the mediator may use the private sessions to challenge the interpretation or position of each party, to persuade a party to hear and understand the view of the other party, to separate one party from the threatening or disruptive conduct of the other, and to make clear the consequences of intransigence and non-settlement. In later caucuses, the mediator may suggest alternative settlements or test the parties' positions on proposals already on the table. Mediators expect parties to speak frankly in caucuses and may do so themselves in ways that would make that party hostile if done in a joint session.
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> Mediation can accommodate advocacy and hard negotiation . . . when the parties

practitioners as an alternative to judicial determination of custody and visitation disputes because it has the capability of flexibly responding to the unique needs of each family, allowing them to make their own determination of an acceptable resolution.[8] The impetus to send dissolution disputants to mediation is influenced by the idea that mediation can minimize the divisiveness of divorce, possibly having a beneficial effect on the children involved.[9] It has also been noted that there is a potential savings of judicial system time and money when mediation is used.[10] These are potent inducements to enact legislation in this area.

Originally, the mediation forum was thought to be more responsive to women's needs because of its relational context, in contrast to the male-dominated, hierarchically-oriented court system.[11]

> The mediation process involves a conflict resolution style that can be easily recognized as compatible with female values and goals. This is particularly apparent when mediation is compared with litigation, which incorporates predominantly male conflict resolution behavior. Gilligan's theory on gender differences in dealing with conflict supports this dichotomy. The male "abstracts the moral . . . problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute." The male perspective looks at conflict resolution by applying rights in a hierarchy and by abstracting the issues. For females, however, the "world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another . . . ." The disputants are not seen as "opponents in a contest of rights but as members of a network of relationships on whose

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persist in using this negotiation style. Nonetheless, mediators encourage cooperative bargaining and tend to emphasize common views and values at the same time that they try to clarify points of disagreement. In child custody mediation, for example, the mediator may place heavy emphasis on the children's best interests and the common concern of the father and mother for the children. Further, the mediator may translate parties' statements of positions into statements of interests . . . . The goal of these techniques is to help the parties to understand their own and the other party's interests, rather than to focus exclusively on defending positions or demands.

ROGERS & MCEWEN, *supra* note 6, at 7-10 (footnotes omitted).

8. *See generally* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); F. E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Janet Rifkin, *Mediation From a Feminist Perspective*, 2 LAW & INEQ. J. 21, 25 (1984).

9. John F. Wagner, Jr., Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. FED. 211, 212.

10. *Id.*

11. Nancy G. Maxwell, *The Feminist Dilemma in Mediation*, *in* INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY, 4 FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 67-68 (Nicholas Mercuro & Barbara Stark, eds. 1992).

continuation they all depend . . . . Consequently her solution to the dilemma lies in . . . strengthening rather than severing connections."[12]

While states experiment with the use of court-annexed mediation,[13] there is a rising concern that the mediation process is actually harming women, particularly when the mediation is mandatory.[14] Some commentators believe that it is not possible for women to succeed in mediation, where social and sexual characteristics will, they believe, favor men.[15] In particular, the plight of the battered woman, finally freeing herself from her battering spouse and then being forced by the state to sit down with him and work out a "fair" agreement in the presence of a mediator, brings an outcry of indignation from many observers and commentators.[16] The legislative response has been a general halt in the expansion of programs in this area and the addition of exceptions to mediation statutes that make the viability of mandatory mediation of custody disputes questionable.[17]

While there is considerable controversy about mandatory mediation programs in all areas,[18] this note deals exclusively with the use of mandatory mediation in contested custody and visitation proceedings. Part I compares the capabilities of the judicial process with mediation's capabilities.[19] Part II reviews the criticisms women's advocates have directed at court-annexed mediation programs.[20] Part III surveys the current legislation in this area.[21] Part IV analyzes women's advocates'

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12. *Id.* at 68 (quoting CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 26-63 (1982) (citations omitted)). Carol Gilligan is a professor of education at Harvard University. She theorizes that males and females have different styles of thought processes.

13. "Court-annexed mediation" refers to mediation programs that exist under the auspices of a court, as contrasted with mediators in private practice and with community mediation centers.

14. Rifkin, *supra* note 8, at 22; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Charlotte Germane et al., *Mandatory Custody Mediation and Joint Custody Orders in California: The Dangers for Victims of Domestic Violence*, 1 BERKELEY WOMEN'S L.J. 175, 188 (1985); Andree G. Gagnon, Note, *Ending Mandatory Divorce Mediation For Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992).

15. *See generally* Grillo, *supra* note 14; Bryan, *supra* note 14.

16. *Id.*

17. *See infra* Part III..

18. Mandatory mediation of criminal cases such as domestic violence are particularly controversial. *See* Linda Silberman & Andrew Schepard, *Consultants' Comments on the New York State Law Revision Commission Recommendations on the Child Custody Dispute Resolution Process*, 19 COLUM. J. L. & SOC. PROBS. 401, 408-409 (1985); Gagnon, *supra* note 14.

19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part III.

criticisms of mediation; exposes the weaknesses of their arguments and shows that the concerns expressed do not reflect the reality of women's experience in mediation.[22] Part V concludes that it is necessary to mandate mediation if it is to be effective in this area and that it is possible to implement mandatory mediation of custody disputes in ways that preserve the safety of the participants.[23] This note concludes that it is possible to implement mandatory mediation of custody disputes in ways that promote individual choice, while preserving the mental and physical safety of mediation participants. Appendix A provides a model statute which is responsive to legitimate concerns for abused persons' safety, while allowing mediation to be effective in divorce and custody dispute situations. Appendix B contains summaries of current legislation of court-annexed mediation programs.

I. THE CAPABILITIES OF JUDICIAL AND MEDIATION PROCESSES

A. *The Inadequacy of Judicial Determinations*

Historically, custody has been awarded on a gender preference basis.[24] First, it was the fathers who were invariably awarded custody.[25] Then, in the late 1800s, the preference shifted to mothers.[26] In either situation, questions of fault and fitness made the judicial determination less certain.[27] Under the maternal preference rule, the courts of the latter half of the twentieth century generally awarded custody to the mother and visitation to the father, unless the mother was found to be unfit or at fault in the divorce.[28] Barring questions of fault and fitness, there was an assumption that the mother was the primary care-giver, and that children, especially those of "tender years," should remain with her.[29]

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22. *See infra* Part IV.

23. *See infra* Part V.

24. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480 (1984).

25. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1535-36 (1994).

26. *Id.*

27. Fineman, *supra* note 25, at 738, 742; Federle, *supra* note 25, at 1537.

28. Fineman, *supra* note 25, at 738, 742; Federle, *supra* note 25, at 1536-37.

29. Fineman, *supra* note 25, at 738.

With the advent of no-fault divorce, a judicial standard has been increasingly difficult to articulate and administer.[30] The standard in effect in some form in most states is "the best interests of the child."[31] This standard has been soundly criticized as being no standard at all.[32] Professor R. H. Mnookin has said that it is a standard that encourages litigation, promotes divisiveness, and leaves the door open to adjudicator bias.[33] It offers the judges little more on which to base a determination than their own ideas of what might be best for a child they probably have never met.[34] Homer H. Clark has said of the "best interest standard":

> A little reflection is enough to reveal, however, that this is not a legal principle in the usual sense but merely a statement that when the child's welfare seems to conflict with the claims of one or both parents, the child's welfare must prevail. It would be an odd legal system indeed which would announce that custody would *not* be awarded with regard to the child's best interests. But having made the statement, few if any experienced judges or lawyers think that it goes very far toward deciding cases. That can only be done by considering the facts of the individual case against the background of factors held to be relevant in earlier cases, and most importantly, with an awareness of the biases which the judge brings to his deliberations. Biases are the product of training and experience and can no more be eliminated in these cases than in any other litigation.[35]

Even when the court has resources such as court social workers and guardians ad litem on which to rely in making this determination, the evaluations are generally based on one or two observations of the child and the parents.[36] In addition, these observations are made during a very stressful time in all of the participants' lives.[37] As Robert Chambers has

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See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 411 (1988); Fineman, *supra* note 25, at 740.

31. *See* Freed & Walker, *supra* note 3, at 555-57.

32. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975); Susan Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733, 747-48 (1984); Chambers, *supra* note 24, at 478.

33. Mnookin, *supra* note 32, at 226. Robert H. Mnookin is a Stanford Law School professor who specializes in the study of dispute resolution processes.

34. *See* Chambers, *supra* note 24, at 482-83.

35. CLARK, *supra* note 30, at § 19.1.

36. Chambers, *supra* note 24, at 483.

37. In one study, between forty and sixty percent of the parents of children who received a court ordered custody evaluation "felt dissatisfied with the service and perceived it to be unfair." Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, *in* DIVORCE MEDIATION: THEORY

observed, "[e]ven if more resources for advisors could be made available, a more fundamental question persists. That question is whether it is possible for anyone to make reliable observations of parent-child relationships during the divorce period. The period shortly after separation, when most struggles over custody occur, is abnormally stressful."[38]

The courts may talk of "the best interests of the child," but in practice it has generally amounted to the same assumptions being made and the same outcome occurring: the mother gets custody and the father gets visitation.[39] More recently, with fathers' rights groups becoming more vocal, joint physical custody and joint legal custody have been increasingly recognized as being the "best" alternative for the children, sometimes implemented through a legislative preference.[40] Commentators have approved of the participants having the choice of joint custody, but it is another matter when the court is foisting it on unwilling parents each of whom wants sole custody.[41] While it may ease the court out of the position of ordering a win-lose custody placement, this is a singularly inappropriate resolution for a divorcing couple who have shown that they cannot cooperatively reach an agreement on this very issue.[42]

Another problem arises with the breakdown of certainty in custody outcomes. It allows some parents, typically fathers, to use that uncertainty as a bargaining tool in their negotiations.[43] In some cases this takes the form of a parent threatening to contest custody in order to gain financial concessions from the party who wants sole custody.[44] One study found that while some attorneys involved see these maneuvers as tactical "hot air," the women involved do not.[45] One woman commented:

AND PRACTICE, 443, 447 (Jay Folberg & Ann Milne eds. 1988) [hereinafter *Research Results*].

38. Chambers, *supra* note 24, at 483-84.

39. CLARK, *supra* note 30, at § 19.2.

40. *See, e.g.*, N.M. STAT. ANN. § 40-4-9.1 (Michie 1994); CLARK, *supra* note 30, at § 19.5; Fineman, *supra* note 25, at 738-39.

41. CLARK, *supra* note 30, at § 19.5; Federle, *supra* note 25, 1538-39; Chambers, *supra* note 24, at 479.

42. *See* Federle, *supra* note 25, at 1538-39; Chambers, *supra* note 24, at 479.

43. CLARK, *supra* note 30, at §§ 18.2, 19.1, 19.5; Grillo, *supra* note 14, at 1595; Federle, *supra* note 25, at § IV.

44. CLARK, *supra* note 30, at § 19.1; Grillo, *supra* note 14, at 1595.

45. Lenore J. Weitzman, *Gender Differences in Custody Bargaining in the United States*, *in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE 396 (Lenore J. Weitzman & Mavis Maclean eds., 1992).

> One day he told me [that a friend of his had] told him to take the kids instead of turning all that money over to me. I knew he didn't want them, but it didn't matter . . . . He had me—I wouldn't take any risks—I wanted to get that agreement signed.[46]

It was noted that women reported their ex-husbands used this ploy in thirty-three percent of the divorces studied.[47]

Even though there has been increased use of the court's resources to try to determine what will be best for the children, the court is an outside party to these relationships and any decision that is made is hampered by its objective view.[48] Because the court has limits as to what it can order and what patterns of parenting are viewed as acceptable, parental relationships are bureaucratized. A Vermont case from 1986 illustrates this point. In *Barbour v. Barbour*, a divorcing couple having reached a mutually acceptable arrangement with the help of a divorce mediator, found themselves having to appeal a trial court's determination that joint custody was unacceptable under Vermont law.[49] While the Vermont Supreme Court clarified its position that joint custody was acceptable in this case, the couple lost considerable time and money in the process.

Professors Maccoby and Mnookin provide other examples of judges substituting their opinion for that of the parent.[50] In their study of 1100 California families undergoing divorce, Maccoby and Mnookin found that 705 divorces were uncontested regarding custody of the children.[51] When the mother was the designated sole custodian, the courts respected that decision ninety percent of the time.[52] When the father was the designated sole custodian, the courts awarded the father sole physical custody only seventy-five percent of the time.[53]

It is frequently noted that judges are uncomfortable making custody determinations.[54] While sometimes stated disparagingly, as if judges are shirking their duty,[55] their dislike for the task is understandable. When

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46. *Id.* at 397.

47. *Id.* at 396.

48. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664-65 (1985).

49. 146 Vt. 506, 505 A.2d 1217 (1986).

50. E. E. MACCOBY & R. H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 13 (1992).

51. *Id.* at 13, 103.

52. *Id.* at 103.

53. *Id.*

54. Fineman, *supra* note 25, at 740, 759; Bryan, *supra* note 14, at 514.

55. Bryan, *supra* note 14, at 513-14.

custody is contested, the judges are asked to make a Solomonic decision that will necessarily cause a great deal of anguish on the part of the losing parent, and they are asked to make the decision with only a vague standard for guidance.[56] Accusations of sexism and arbitrariness follow any decision and, as the judge well knows, the unhappy parents are likely to relitigate the custody issue.[57] The litigation and relitigation of these issues impede the efficient functioning of courts. Mediation offers an alternative response to problems inherent in judicial decision-making.

B. The Mediation Alternative

Mediation is a process that allows individuals to make their own determinations of an acceptable outcome to the conflict.[58] The mediator acts as a facilitator, providing a safe, neutral context for the negotiation.[59] The mediator helps the parties define the issues, generate potential solutions, validate feelings, and, in some cases, confront reality.[60] In contrast to a judge, the mediator has no power to make a determination of what is right; the problem and its solution belong to the participants.[61]

Mediation offers the parties flexibility, both in subject matter for discussion and negotiation and in potential resolutions.[62] These are attributes the court lacks.[63] Part of the reason for continuing relitigation is that the underlying issues are not addressed in court.[64] Rather than confining the discussion to legal issues, mediation allows the participants' emotions and relational context to be discussed, leading to a whole and more satisfactory resolution.[65] Mediation asks the participants to stretch and grow, rather than allowing them to hide behind intractable positions.[66]

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56. *See* Federle, *supra* note 25, at 1533.

57. Chambers, *supra* note 24, at 481. One study found that when minor children are involved in a divorce, the case is much more likely to involve relitigation. Kathy T. Graham, *Dispute Resolution in Dissolution Cases: A Marion County Profile*, 21 WILLAMETTE L. REV. 551, 559 (1985).

58. KENNETH KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 179-80 (1985).

59. *Id.*

60. *Id.* at 180.

61. *Id.* at 179.

62. *See* Rifkin, *supra* note 8, at 24-27.

63. Frank E.A. Sander, *Family Mediation: Problems and Prospects*, 2 MEDIATION Q. 3, 6 (1983); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 795-801 (1984).

64. Sander, *supra* note 63, at 7; *See* Menkel-Meadow, *supra* note 63.

65. Sander, *supra* note 63; Menkel-Meadow, *supra* note 63, at 795.

66. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 10-11, 17 (1989-90).

In mediation, "settlement is neither an avoidance mechanism nor a truce. Settlement is a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation."[67]

When minor children are involved in a divorce the parents will necessarily have continuing contact, if only over transportation of the children between homes.

> Parents can experience a rude shock in working out these matters. In many people's minds, the image of divorce is one of a "clean break." The fateful demand "I want a divorce!" implies, to many people, "I want you out of my life." However, parents quickly discover that if both parents want to remain involved in the children's lives, the image of a clean break is an illusion. As Emery has said: "Ironically, having just decided that they can no longer remain married, parents must attempt to cooperate with each other over the children."[68]

The confrontation of mediation may be a vital step in the healing process for the parents, enabling them to address conflicts and move on. This has been shown by one study to be vital to the children involved: "Of particular importance to children's post-divorce adjustment is continuity in the quality of parenting and cooperation in the ongoing relationship between divorced parents."[69]

Most importantly, the decision of what happens with the children is made not by outside professionals but by the people who know them best: their parents. As Judge Donald King, a strong advocate of California's implementation of mediation in family court, said, "mediation can teach parents to accept the responsibilities for resolving their differences, especially about what is best for their children. After all, who knows better than the parents what is in the best interests of their children?"[70]

Since the 1970s, mediation has been increasingly proposed as an alternative to the adversarial judicial process.[71] Proponents believed that its use in contested divorce cases would allow the disputants to negotiate

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67. McThenia & Shaffer, *supra* note 48, at 1664.

68. MACCOBY & MNOOKIN, *supra* note 50, at 2 (quoting R.E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 109 (1988)).

69. Robert Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 24 MEDIATION Q. 3, 4 (1989) [hereinafter *Charlottesville*] (citing Emery's study reported in Robert E. Emery, Marriage, Divorce and Children's Adjustment (1988)).

70. Donald B. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, CAL. LAW., January 1982, at 40.

71. ROGERS & MCEWEN, *supra* note 6, at 34.

a fair agreement without unnecessary conflict, benefiting the children involved by reducing the stress of the breakup, while at the same time saving both the divorcing couple and the courts time and money.[72] Professors Mnookin and Kornhauser expressed this view of the ideal: "We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities."[73]

There has, however, been criticism of the use of mediation when civil rights are at issue because of the implications of privatizing public issues.[74] Mediation of divorce issues has been criticized for this as well. Some commentators believe that by removing the settlement of these cases from the public forum, we are losing a level of public scrutiny and source of change.[75] This criticism ignores the fact that a great majority of divorce cases are settled privately anyway, and that all agreements, whether mediated or reached by attorney negotiation, are subject to the scrutiny of the court.[76]

Custody and visitation disputes are particularly personal.[77] Because of their highly personal context, private ordering of the issues of custody and visitation are seemingly appropriate for mediation.[78] This, however, has not insulated custody mediation from criticism, as the discussion in Section II. demonstrates.

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72. *Id.* at 35, 40.

73. R.H. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950 (1979).

74. *See generally* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986). Professor Edwards expressed his concern this way:

> [I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values. In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication.

Id. at 676.

75. Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117, 119-20 (1989-1990); Rifkin, *supra* note 8, at 22.

76. Maxwell, *supra* note 11, at 78.

77. Throughout this discussion, it is assumed that the children involved are not victims of abuse. The public does have an interest in protecting children from abusive parents which would necessarily affect decisions of custody and visitation.

78. John P. McCrory, *Legal and Practical Issues in Divorce Mediation, in* THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS (Vermont Law School Dispute Resolution Project ed., 1987).

II. WOMEN'S ADVOCATES CRITICISM OF MANDATORY MEDIATION

Increased use of mediation in the courts has caused women's advocates to question whether mediation is serving the needs of women who are undergoing disputed divorces.[79] The concern is that in mediation, the woman, who has traditionally held the less powerful position in society and marriage, will not have the bargaining strength and negotiating skills necessary to get what she needs out of the mediation, and that in some instances, particularly when the mediation is mandated, the process is so coercive she may be forced to negotiate bad bargains.[80] While initial criticism focused on the use of mediation to resolve marital battery charges, the focus quickly widened to include any court-annexed use of mediation in the marital context, whether or not there was abuse in the relationship.[81] In reviewing these criticisms, this note will focus on two recent articles that exemplify the arguments put forward: *The Mediation Alternative: Process Dangers for Women* by Professor Trina Grillo and Professor Penelope Bryan's article *Killing Us Softly: Divorce Mediation and the Politics of Power*.[82]

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79. *See* Grillo, *supra* note 14; Bryan, *supra* note 14; Germane et al., *supra* note 14. For criticisms focused on the use of mediation when there has been domestic violence, see Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266 (1984); Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255 (1994); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993); Gagnon, *supra* note 14.

80. *See infra* Part II.

81. For a critical assessment of the use of mediation in wife abuse cases, see Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984). More recent criticisms include Grillo, *supra* note 14 and Bryan, *supra* note 14.

82. *See* Grillo, *supra* note 14; Bryan, *supra* note 14. Although Professor Grillo's work is used here, it is important to note her lack of recognition that the California mediation model on which she relies is different from the standard of mediation discussed earlier in this section. *See* Grillo, *supra* note 14, at 1551. In one particular way, it is distinguishable from all other state mediation models currently in use. Under California's laws, if a couple does not reach an agreement through mediation, local rule allows the mediator to report her opinion of what custody arrangement is in the child's best interest to the court. *See* Kuhn, *supra* note 32, at 770-76; Germane, *supra* note 14, at 188; Gagnon, *supra* note 14, at 290 (for criticism of this aspect of the California mediation system). This is allowed in half the counties of California. Grillo, *supra* note 14, at 1554-55. This adjudicatory-mediator function is crucially different from other mediation programs, as it changes the whole tenor of the mediation and may account for the coercion that Grillo reports. The women in Grillo's examples are in the position of disclosing information to the mediator that could then be used against them if the mediator makes a report to the court. They are also in a coercive situation because if they do not reach agreement and disagree with a potential solution offered by the mediator, the mediator may well offer this same suggestion to the court. The mediator under this system is not simply a facilitator of the negotiation process, but a person with considerable power to influence the final determination of

In her criticism of the California mandatory child-custody mediation process and its effect on women, Professor Trina Grillo points out that women may be put in a vulnerable position in mandatory mediation as a result of socialization processes.[83]

According to Grillo, the promise of mediation was that it would be more responsive to a woman's world view.[84] Instead of adjudicatory decision-making that is dominated by rights theory and general rules, emotions and individual context would provide a legitimate background for negotiations between divorcing couples.[85] Cooperation and understanding of the other's point of view would inform the decision-making, transforming marital dissolution from an adversarial process to a collaborative process.[86] Grillo believes that this promise has been perverted through the mandating of mediation.[87]

> 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 . . . mandatory mediation can be destructive to many women and some

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the court. Kuhn, *supra* note 32, at 770-71; Grillo, *supra* note 14, at 1554-55.

Grillo uses this unique model as the focus of her criticism of mediation as a whole, without acknowledging that its particular idiosyncratic approach of mediation biases the result. *Id.* at 1551. No other state uses this model, yet this is rarely noted in the frequent citations to this influential work. Westlaw shows that *Process Dangers for Women* has been cited over ninety times in the four years since it was published. Among the few citators that recognize the California context of the discussion is Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991). One example of the acceptance with which Grillo's work has met is illuminating as to the depth of the deception:

> In 1991, Trina Grillo, a law professor and mediator, published the first seething critique of mandatory mediation in relation to the inherently dangerous aspects of what she calls "process dangers" for women. The fact that her article appeared in the Yale Law Journal is important because of its visibility and prestige . . . . Grillo's paper is brilliant because it requires a certain openness and brightness of mind to grasp indirect control patterns and to articulate their functioning.

Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 11 (1993).

While acknowledging this problem, this note relies on Grillo's work in addition to Professor Bryan's. There are two reasons for this. First, as previously noted, Grillo's work is highly influential. Second, while she bases her criticisms on her experiences with California's system, they are considered as criticism of mediation in general. The duplication of the underlying themes of Grillo's articles in the work of Bryan shows that Grillo's criticisms, despite her context, are similar to those of the general population. For these reasons it is valuable to compare her findings with those of researchers evaluating programs both in California and in other areas of the country.

83. Grillo, *supra* note 14, at 1550.

84. *Id.* at 1603.

85. *Id.* at 1548, 1557-58, 1572-73.

86. *Id.* at 1548.

87. *See id.* at 1549, 1555-1600.

> men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be.[88]

Grillo believes that the application of California Civil Code Section 4607, which mandates mediation of custody and visitation disputes, does not allow for individual context or the expression of anger.[89] She states that mediators in this program routinely dissuade participants from bringing up the past, which undercuts the contextualization of the process.[90] This denial eliminates the support women have for their positions in the negotiations.[91] She concludes that in denying women the ability to express anger in the mediation context, women are denied the framework within which a traditionally unempowered group claims power by asserting rights.[92] The mediation process itself then preys on women's traditional sense of self as being relational, in order to achieve settlements that may not be in the women's best interest.[93] In Grillo's estimation the state, in mandating mediation, denies women the right of self-determination by denying them the choice of forum and mediator, as well as allowing the mediator the choice of whether to allow lawyers to be present.[94] She believes that mandatory mediation puts women in a potentially coercive situation that, because the meetings are private and no records are kept, allows for mediator bias to affect the outcomes.[95] Grillo goes so far as to identify mandatory mediation as institutionalized rape.[96]

> [F]orcing 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.[97]

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88. *Id.* at 1549-50.

89. *Id.* at 1563-64, 1574-76. CAL. CIV. CODE § 4607 was superseded in 1993 by CAL. FAM. CODE §§ 3170, 3175, 3177, 3178, 3180, 3182, 3183, 3186 which incorporate many of the features of § 4607.

90. Grillo, *supra* note 14, at 1563.

91. *Id.* at 1561-62.

92. *See id.* at 1558, 1564-67, 1572, 1574-80.

93. *See id.* at 1550, 1577-81, 1603.

94. *Id.* at 1581.

95. *Id.* at 1585, 1587, 1589.

96. *Id.* at 1605.

97. *Id.* at 1607.

Grillo has two opinions relating to whether the adjudicatory process serves women better than mediation. Her answer depends on whether the mediation process is voluntary or mandatory. She begins her article by stating: "[T]he 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."[98] With this view of the judicial system, it is not surprising that Grillo views mediation positively in some instances. She states that, if a woman's involvement in the mediation process is voluntary, it can be an empowering process in contrast to litigation.[99] She notes as one positive attribute that the participant has the ability to speak for herself, instead of passively allowing a lawyer to act for her.[100] She also states that the voluntary participant may have more control of her destiny than the victim of a judge's determination: "[I]n this very immediate way, mediation can challenge the hierarchical, professionalized way that family law is usually practiced."[101]

In direct contrast, she believes that if mediation is mandatory these benefits disappear.[102]

> 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 . . . . [I]t 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.[103]

When mediation is mandated, the disempowering, in-charge lawyer of the voluntary participant becomes a "protector of rights" and a "provider of insulation."[104] "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."[105]

98. *Id.* at 1547.
99. *Id.* at 1581.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1610.
104. *Id.* at 1597-99.
105. *Id.* at 1599.

Professor Bryan, in her article *Killing Us Softly: Divorce Mediation and the Politics of Power*, agrees with Grillo's premise that women are disadvantaged when they are forced to mediate.[106] She asserts that there are tangible[107] and intangible[108] resources which give men a distinct advantage in the mediation context. She does not believe that mediators can successfully right these power imbalances, even if they wished to.[109]

Bryan goes on to say that mediation in general further disempowers women by denying them the competitive power of their traditional strength in the parenting domain.[110] She states that, "[i]n divorce mediation the wife confronts a mental health mediator surrounded by an aura of professional expertise regarding the children's best interests . . . . The wife's legitimate authority over the children pales in the shadow of the professional's expert authority."[111] Bryan believes this occurs because many mediators have personal agendas which promote joint custody agreements,[112] and she believes the purpose of judicial and societal acceptance of mediation and joint custody is to enforce traditional male dominance of women.[113] She states her belief that

> [j]oint legal custody often perpetuates the preexisting patriarchal family structure by allocating the day-to-day care of the children to the mother, while solidifying the ex-husband's power over important child-related decisions. The mother can make decisions as long as they reflect her ex-husband's wishes. The moment, however, her opinion differs from his, he has veto power. This veto power, or the threat of its use, invades the ex-wife's consciousness and makes her ex-husband, and the male control he represents, an ever-present force with which to contend. The message is clear: she may escape the marriage but will remain subject to male domination. This implicit, yet powerful, message keeps women aware of their required submissiveness and thus strengthens patriarchy.[114]

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106. *See* Bryan, *supra* note 14.

107. Bryan defines "tangible resources" as, for example, men's (on average) greater income and educational superiority. *Id.* at 450-51.

108. Bryan defines "intangible resources" as, for example, women's emotional reaction to divorce, women's greater propensity to depression, male status, male's greater self-esteem, and male's greater reward expectation. *Id.* at 457-76.

109. *See id.* at 498-513.

110. *See id.* at 490-98.

111. *Id.* at 490.

112. *Id.* at 491.

113. *Id.* at 494-95.

114. *Id.* at 495 (footnotes omitted).

Bryan believes that women are better off in court when the choice to enter into mediation is not theirs. Her premise is that mandatory mediation denies women the rights they have only recently won in the courts.[115]

III. COURT-ANNEXED MEDIATION PROGRAMS: LEGISLATIVE RESPONSE TO WOMEN'S ADVOCATES CRITICISM

At this time, twenty-two states have some form of legislated, court-annexed divorce mediation.[116] The forms vary, but they can be classified in one of three ways: 1) voluntary programs that are administered through the court system,[117] 2) programs where referral is at the discretion of the court,[118] and 3) mandatory mediation programs.[119]

Changes in these programs over the last few years reflect the concern expressed by women's advocates that mediation disserves women.[120] Increasingly, legislation requires judges to consider abuse as a factor in whether mediation is appropriate in both discretionary and mandatory programs.[121] Even in the programs where participation is purely at the discretion of the parties involved in the dispute, the potential for an abusive relationship to bias the process of the mediation is recognized and remedies are sought.

> Reflecting a bitter divergence of opinion on [the issue of divorce and custody mediation], several newer divorce or custody mediation mandates contain exceptions for cases involving domestic violence or more generally where mediation "would pose an undue hardship or would threaten health or safety."[122]

Three states, Michigan, Nevada, and New Hampshire, follow the voluntary model of court-annexed mediation.[123] These programs serve an

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115. *Id.* at 441-44.

116. *See infra* notes 123, 126, 131, Appendix B. The mediation programs cited here relate to any of the following: divorce, child custody, visitation, and determinations of the appropriateness of joint custody. *See* Appendix B.

117. *See infra* note 123, Appendix B.

118. *See infra* note 126, Appendix B.

119. *See infra* note 131, Appendix B.

120. *See infra* note 122 and accompanying text.

121. *See infra*, notes 127, 132 and accompanying text, Appendix B.

122. ROGERS & MCEWEN, *supra* note 6, at 45.

123. MICH. COMP. LAWS §§ 552.505, 552.513 (1994); NEV. REV. STAT. § 2904 (1993); N.H. REV. STAT. ANN. § 458:15-a (1992), § 458-D:3 (Butterworth Supp. 1993).

educational purpose only; there is no referral to mediation. Even though the courts have no ability to order the litigants to mediate, two of the programs, those of Nevada and New Hampshire, impose statutory restrictions on the voluntary use of the programs which shows concern over the use of mediation when there has been abuse in the relationship. Nevada shows this concern by mandating special training of mediators to help them recognize domestic violence.[124] New Hampshire goes further; under its statute, if the court or a mediator suspects that there has been abuse in the relationship, the court is obligated to stop the mediation unless the abused party requests that the mediation go on and the mediator is aware of the abusive relationship.[125]

Fifteen state programs allow the court discretion to refer the parties to mediation, making it the most extensive category of court-annexed mediation.[126] Five programs direct the court to consider abuse in the relationship before sending the disputants to mediation, with Louisiana and Montana having added their exceptions in the last few years.[127] For example, in Louisiana a party who "satisfies the court" that there has been spousal or child abuse by the other spouse will not be ordered to mediate.[128] In Montana, "the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party have been physically, sexually, or emotionally abused by the other party . . . ."[129] New Mexico's newly enacted discretionary program incorporates an exception for abusive relationships as well as mandating mediator training relating to abuse.[130]

Four states currently have mandatory mediation programs: California,

124. NEV. REV. STAT. § 2904.

125. N.H. REV. STAT. ANN. § 458:15-a.

126. ALASKA STAT. §§ 25.24.060, 25.20.080 (1994); COLO. REV. STAT. § 14-10-129.5 (1987); FLA. STAT. ANN. § 61.183 (West Supp. 1995); ILL. ANN. STAT. ch. 750, para. 5/602.1, ch. 750 para. 5/607.1 (Smith-Hurd Supp. 1995); IOWA CODE § 598.41 (West Supp. 1995); KAN. STAT. ANN. § 23-602 (1988); LA. REV. STAT. ANN. § 9:332 (West Supp. 1995); MINN. STAT. ANN. § 518.619 (West 1990); MONT. CODE ANN. § 40-4-301 (1993); N.M. STAT. ANN. §§ 40-4-8 (Michie 1994); N.D. CENT. CODE §§14-09.1-01 through 14-09.1-08 (1991); R.I. GEN. LAWS § 15-5-29 (1988); S.D. CODIFIED LAWS ANN. § 25-4-56 (Michie Supp. 1995); WASH. REV. CODE § 26.09.015 (West Supp. 1995); WIS. STAT. § 767.11(5)-(12) (1993).

127. ILL. ANN. STAT. ch. 750, para: 5/607.1 (Smith Hurd Supp. 1995); LA. REV. STAT. ANN. § 9:363 (West Supp. 1995); MINN. STAT ANN. § 518.619 (West 1990); MONT. CODE. ANN. § 40-4-301 (1993); N.D. CENT. CODE §§ 14-09.1-02 (1991). Additionally, Wisconsin makes it a duty of the mediator to terminate the mediation if there is evidence of child or spousal abuse. WIS. STAT. § 767.11(10)(e) (1993).

128. LA. REV STAT. ANN. § 9:363 (West Supp. 1995).

129. MONT. CODE. ANN. § 40-4-301 (1993).

130. N.M. STAT. ANN. § 40-4-8 (Michie 1994).

Maine, Oregon, and North Carolina.[131] In each of these states the form of the mediation varies somewhat, but it principally relates to the issues of contested custody or visitation. Three states' programs—Maine, Oregon, and North Carolina—allow for some form of waiver when there is an abusive relationship.[132] In the recently enacted North Carolina program, the court can waive mediation "for good cause shown."[133] In Maine, the courts may waive the mediation requirement for "extraordinary cause shown."[134] In Oregon the court can waive mediation if it finds it likely that a party will suffer "severe emotional distress."[135]

Of the mandatory programs, only California does not offer a waiver from participation.[136] The California statue, as amended in 1993, requires mediation in all contested custody and visitation matters, but allows for separate mediation sessions when there has been abuse.[137] An additional provision in the California law authorizes abused persons to attend mediation sessions with a support person.[138]

The trend toward recognizing an abusive relationship as a preclusion from mediation programs seems to reflect Grillo's belief, that as long as mediation is not mandated, it is unnecessary to deal with the criticism of mediation in a substantive manner.

Vermont's divorce mediation procedures show the effect of this type of thinking. In 1992, the Governor's Commission on Dispute Resolution (Commission) was created to inventory dispute resolution needs and resources, research other states' systems, and make recommendations for the use of dispute resolution processes.[139] One of the Commission's recommendations was that the "court system establish complementary dispute resolution processes to facilitate early settlement of appropriate cases that would otherwise go to trial."[140] The Commission also recommended that when "there is current or past abuse between the

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131. CAL. CIV. CODE § 4607 (1993); ME. REV. STAT. ANN. tit.19, §§ 665, 752 (West Supp. 1994); N.C. GEN. STAT. § 50-13.1 (Michie Supp. 1994); OR. REV. STAT. § 107.179 (1993).

132. ME. REV. STAT. ANN. tit.19, § 752 (West Supp. 1994); N.C. GEN. STAT. § 50-13.1 (Michie Supp. 1994); OR. REV. STAT. § 107.179 (1993).

133. N.C. GEN. STAT. § 50-13.1 (Michie Supp. 1994).

134. ME. REV. STAT. ANN. tit.19, § 752 (West Supp. 1994).

135. OR. REV. STAT. § 107.179 (1993).

136. CAL. CIV. CODE § 4607 (1994); KAN. STAT. ANN. § 23-701 (1988).

137. CAL. FAM. CODE § 3170 (1994).

138. CAL. CIV. CODE § 3181 (1994).

139. DISPUTE RESOLUTION IN VERMONT: FINDINGS AND RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION ON DISPUTE RESOLUTION 1 (1994).

140. *Id.* at 2.

parties, mediation not occur unless the victim affirmatively chooses to do so and proper protocols are followed."[141]

Despite the existence of a mediation program in the family court system that shows a very high consumer satisfaction rate and a very low incidence of use, the Commission did not recommend mandatory mediation in the divorce context.[142] One Commission member said that while mandatory mediation was not considered as a recommendation in any context, there was a particular "sensitivity" regarding its use in the area of divorce mediation.[143] This sensitivity may be explained by the perceptions of the Family Court Mediation Program state-wide director, Nina Swaim, in her discussion of difficulties with implementing domestic abuse protocols in the program:

> A major reason for the revisions on the Protocols has been a vocal and well organized advocacy group for battered women. Initially they were unwilling to accept that mediation was ever a useful or safe process for women, especially in family matters. After three years of dialogue with the group and with individual advocates, we have reached agreement that mediation may be appropriate even in certain kinds of situations where abuse exists.[144]

Ms. Swaim believes that the mediation program runs the double gauntlet of resistance from women's advocate groups and antagonism from the divorce bar.[145]

An example which shows the trade-offs being made in this area comes from a study of a multi-door courthouse program in Washington, D.C.[146] In that situation,

> the women's bar in D.C., most notably the Women's Defense Fund, objected to mediating domestic relations cases. Their concerns include

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141. *Id.* at 2, 24.

142. VERMONT FAMILY COURT MEDIATION PROGRAM, 1994 CONSUMER SURVEY (on file with the author).

143. Telephone Interview with Professor John McCrory (February 21, 1995).

144. Letter from Nina Swaim, State-wide Director of the Vermont Family Court Mediation Program, to Lynn C. Jacob, Chair of the Task Force on Spouse and Child Abuse, Academy of Family Mediators (November 8, 1994).

145. Telephone Interview with Nina Swaim (February 22, 1995). Ms. Swaim also notes that the Vermont mediation community is cognizant of the issues surrounding mediating where there has been abuse in the relationship, and some family mediators are reluctant to consider mediating these cases. *Id.*

. MICHAEL FIX & PHILIP J. HARTER, HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (1992).

> the fates of minors and the fairness of child support agreements, the impact of prior physical abuse on the bargaining process and its outcomes, the equitability of the division of pension rights and the adequacy of mediator training. These concerns were met, in part, by an emphasis on the voluntariness of the process and a requirement that both parties to a domestic dispute must agree to mediate.[147]

Clearly, the concerns expressed by the women's bar go beyond those evident when custody is the only issue being mediated. This shows that rather than address the criticisms substantively, the women's advocates were willing to accept the concession of making the process voluntary rather than requiring substantive changes.

IV. Evaluation of Women's Advocates Criticism in Light of Recent Experimental Findings

Criticisms of mandatory custody mediation fall into four categories: 1) women's psychological characteristics (with a subset of the battered woman), 2) women as historically socially disadvantaged, 3) advocates as protective of the disempowered, and 4) courts as protectors of women's rights. Each of these concerns will be addressed in order, comparing the assertions with the results of surveys and studies in this area.

A. Women's Psychological Characteristics

One conclusion is that women share a relational world view that will hamper their success in negotiating. They will be willing to give up their positions in hopes of maintaining relationships.

It is true that one of the strengths of mediation is its ability to preserve relationships,[148] and that mediation, when compared to litigation, can be less damaging to the on-going relationship between divorcing parents.[149] It has also been shown that outcomes in custody dispute

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147. *Id.* at 36.

148. One observer concluded, "[the] main strength [of mediation] continues to be its humanizing force, its treatment of citizens with concern and dignity, and its satisfactory resolution of disputes while leaving relationships intact." Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, *in* MEDIATION RESEARCH 47 (Kenneth Kressel et al., eds. 1989).

149. *Research Results*, *supra* note 37, at 443. The work of Pearson and Thoennes and their colleagues is relied on extensively for three reasons: their studies focus on court-annexed mediation, they primarily relate to custody and visitation disputes, and they separate their findings by gender of the respondent.

The methodology of Pearson and Thoennes' work has been criticized, see Levy, *supra note 2*

mediations do not differ significantly from the determinations imposed by the courts.[150] This suggests that women are not bargaining away their legal positions to any great degree.

In contrast to Grillo's belief that women are denied the expression of emotion and relational context in mediation, one study found that a significant majority of participants felt that a major benefit of mediation was the opportunity it provided to "air grievances."[151] The same study points out that women report being angry much of the time in mediation and sometimes feeling pressured by their spouse.[152] However, a majority of these women also reported an overall high satisfaction with mediation and a majority recommend making mediation mandatory.[153] This suggests that as unpleasant as the experience may have been at the time, the women participants believe "the benefits outweigh the unpleasantness."[154] At least two mediation researchers espouse the view that "[t]he goal of mediation . . . should not be to eliminate anger, even when its expression may be unpleasant to all involved, including mediators."[155]

One conclusion that does receive some support from an objective study is that women who mediate may be more prone to depression than women who litigate.[156]

> [M]others and fathers completed structured questionnaires about parenting conflict, acceptance of marital termination, and depression . . . shortly after settlement. For the most part, no differences between groups were found on these measures . . . [with the exception that] [t]here was a tendency for women who went through litigation to report less depression.[157]

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and their response, Pearson & Thoennes, *Dialogue: A Reply to Professor Levy's Comment*, 17 FAM. L.Q. 535 (1984).

Other studies of court-annexed programs include: MANDATORY CHILD CUSTODY MEDIATION PROGRAM IN MECKLENBURG COUNTY: A STUDY AND EVALUATION (1987); WAYNE KOBBERVIG, MEDIATION IN CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION (1991); KARL D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT (1990); and FIX & HARTER, *supra* note 146.

150. *Charlottesville*, *supra* note 69, at 8.

151. *Research Results*, *supra* note 37, at 438.

152. *Id.* at 441.

153. *Id.*

154. *Id.*

155. Karen Somary & Robert E. Emery, *Emotional Anger and Grief in Divorce Mediation*, 8 MEDIATION Q. 185, 186 (1991).

156. Bryan, *supra* note 14, at 471; Grillo, *supra* note 14, at 1578-79; *Charlottesville*, *supra* note 69, at 16.

157. *Id.*

The researchers felt this was due to the vindication women feel at winning in court.[158] They feel that this is a temporary result that will erode as "the realities of post-divorce life are encountered . . . ."[159] They go on to say: "In fact, we hypothesize that in the follow-up study the mediation parents will report less conflict and depression and greater acceptance of the end of the marriage."[160]

Another conclusion is that battered women cannot successfully negotiate with their abusive ex-spouse. Research shows that it is true that women report feeling pressured by their spouses into agreements more often than men do.[161] However, the reported use of violence during the marriage did not correlate with women's feeling pressured.[162] Instead, it did correlate with a reported lack of capacity to clearly and calmly express oneself.[163]

In a study of a mandatory divorce mediation program in Virginia, women reported domestic violence in fifty-five percent of the cases.[164] The battered women rated many aspects of mediation comparably to women who did not report abuse.[165] The researchers state that

> [i]t is possible that the lack of real differences in the evaluations offered by women who had experienced domestic violence and those who had not was the result of categorizing all episodes of domestic violence together, regardless of the frequency or severity of the abuse. For a significant portion of the women reporting abuse, violence did not imply that the relationship between the parents was poor. For example, 60 percent of the abused women and 70 percent of the non-abused

158. *Id*

159. *Charlottesville*, *supra* note 69, at 16.

160. *Id.* Professor Grillo discusses this study and finds its conclusions "troublesome." Grillo, *supra* note 14, at 1578. She believes that the researchers dismissed the importance of the potential effect of depression on the outcome of mediation and challenges their "conflation" of sadness and depression. *Id.*

161. *Research Results*, supra note 37, at 441. Results of three studies show a reporting of feeling pressured in ten to twenty percent of the women participants. Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 283 (summarizing the results of the following sources: AFCC/RESEARCH UNIT, FINAL REPORT TO THE FEDERAL OFFICE OF CHILD SUPPORT ENFORCEMENT, THE CHILD CUSTODY AND CHILD SUPPORT PROJECT (1985); Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179 (1991); JESSICA PEARSON, FINAL REPORT TO THE STATE JUSTICE INSTITUTE, AN EVALUATION OF THE USE OF MANDATORY MEDIATION (1991)) [hereinafter *Ten Myths*].

162. *Research Results*, *supra* note 37, at 441.

163. *Id.*

164. NANCY THOENNES ET AL., EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION, 74 (1991) [hereinafter MANDATORY DIVORCE MEDIATION].

165. *Id.* at 75.

> women described their current relationship with their ex-husband as fairly cooperative. Similarly, approximately half of the women reporting domestic violence said the violence had not impaired her ability to communicate with her ex-spouse on an equal basis. Further, even reports that the violence had a detrimental effect on spousal communication did not correlate well with perceptions of an imbalance of bargaining power. Only about a third of the women who said the violence had lessened her ability to communicate with her ex-spouse also reported feeling they had less bargaining power than their ex-husbands during mediation.[166]

Significantly, the same study showed that while forty percent of the non-battered women agreed with the statement, "[m]ediation made me feel more capable of solving problems on my own," the women who reported domestic violence agreed with this statement forty-five percent of the time.[167] These figures lead to the conclusion that for a significant portion of women who are battered, mediation can be an empowering experience.

B. Women as Historically Socially Disadvantaged

Another argument is that an historic lack of power will allow women to be pushed into bad deals by men who have had more opportunity to become successful negotiators. Historic power differences can certainly be evident in individual relationships, but it is women who have held the power when it comes to children. In custody mediation, women may or may not have the negotiating skills of their counterparts, but, as the traditional care-givers, women have attained a level of expertise that can be difficult for men to challenge.[168] Also, this argument ignores the potential for the presence of the mediator to level the playing field.[169]

Another point is that in one study the majority of both women and men who described themselves as lacking power concluded their mandatory mediation without reaching an agreement.[170] This demonstrates that the problem of power imbalances may be self-correcting. Even without mediator intervention, the participants are not swayed by an opponent they see as more powerful; they typically opt out, and use the

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166. *Id.* at 76-77.

167. *Id.* at 75.

168. *Id.* at 68.

169. *See infra* Part V.A.1.

170. MANDATORY DIVORCE MEDIATION, *supra* note 164, at 83 (noting that 73% of the fathers and 78% of the mothers who reported a lack of power ended the mediation without reaching an agreement).

court to make the determination for them. Common sense dictates this result.

This highlights one of the significant threads that runs through Bryan and Grillo's articles — women are not given much credit for common sense or anything else. Women are shown to be the helpless victims of a cruel system. Grillo uses particular examples of a good-woman-done-wrong by mediation.[171] Why are these women's experiences shown as representative of the whole of women's experience? Grillo's use of these stories amounts to nothing more than the kind of horror story described by Martha Fineman as affecting divorce reform in Wisconsin:

> The image of the victimized housewife soon took the form of "horror stories," which symbolized and defined for the reformers the reform that was needed. These horror stories had as central characters a deserving but victimized wife, a villainous and selfish husband, and a legal system which closed not only the eyes, but the ears of justice in the name of property rights, leaving the wife and children destitute and abandoned . . . .
>
> The reformers represented certain information as facts. [However] [t]he process [of information collection] . . . tended to make the information they gathered inaccurate or incomplete.
>
> [Alone,] the housewife horror stories . . . presented an unbalanced picture. There was no explicit consideration of information on the circumstances of other groups of women . . . [which] would have allowed the reformers or their constituents to judge the overall fairness of the existing divorce procedure or to assess the range of possible reforms . . . .
>
> The stereotypical housewife horror story encouraged the reformers to argue that legal institutions were systematically biased against women in resolving the economic incidents of divorce.[172]

By highlighting the extreme case and referring to it as typical, Grillo takes the easy route to prove her thesis that women face special harms in mediation.

It is also interesting to note, that while mandatory mediation is assailed for not adequately protecting women, no concern is expressed in

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171. Grillo, *supra* note 14, at 1562, 1564, 1569, 1586, 1594, 1600.

172. Martha Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 854-64 (1983).

these articles about the protection of the women who are making divorce agreements outside the court or mediation process. Ninety percent of divorce dissolutions come about through private agreement. Why is there no concern for the dangers of these agreements? Women who are actively contesting the issues of their divorce could be seen to be more significantly in control and empowered than some of the women in the larger group who may be acquiescing to demands that are distinctly unfavorable to their interests, potentially without legal advice, or with legal advice that is affected by all the same private idiosyncratic prejudices that Professor Grillo and Professor Bryan are concerned with in mediators.

C. *Advocates as Protectors of the Disempowered*

Another premise is that women are better served in the courts where their lesser power will be compensated for by an advocate who will speak for them. For many women this may be true, but the criticism ignores the reality of the incidence of the use of lawyers in divorce.

One study found that in roughly one-third of divorces involving minor children, there are no attorneys involved and that in another third only one party is represented by a lawyer.[173] This means that up to one-half of the divorcing mothers may not be represented. An informal survey in California of family law judges, battered women's shelters, and legal-aid societies put the estimate of *pro se* filings at sixty-five percent.[174] The reason cited for the increase in *pro se* filings is a "simple lack of money."[175]

Also of interest is a study that found that the majority of both women and men who described themselves as lacking power concluded their mandatory mediation without reaching an agreement.[176] These same individuals said that they felt their attorneys increased the conflict in the divorce.[177] This could mean that those disputants who do not feel strong enough to negotiate for themselves may have that feeling of inadequacy strengthened and reinforced by the actions of their attorneys. Another study found that attorneys reported the relationship between the divorcing couple to be significantly more bitter than the parties in the study as a

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173. *Ten Myths*, *supra* note 161, at 282 (quoting results reported in JESSICA PEARSON, CALIFORNIA JUDICIAL COUNCIL, THE JOINT CUSTODY VISITATION AND CHILD SUPPORT PROJECT (1993)).

174. Suzanne Northington, *Pro Per Behavior*, 14 May CAL. LAW. 29, (1994).

175. *Id.*

176. MANDATORY DIVORCE MEDIATION, *supra* note 164, at 83.

177. *Id.* at 84.

whole reported their relationships to be.[178] The authors of this study proffered three potential explanations for this: "parties who get representation have the most contentious cases; that the attorneys overstate the bitterness of the parties; or that attorneys, themselves, exacerbate relations between the parties."[179]

Between the lack of attorney involvement in many cases, the potential for attorney-induced acrimony, and particularly the complex issues between attorneys and their clients, it seems unwise to rely on attorney "protectors" rather than perfecting a system which empowers the individual.

D. *Courts as Protectors of Women's Rights*

Another criticism is that the move to mediation is a covert attempt to cut women off from the rights they have recently won in court.[180] Bryan is not alone in her espousal of this view. Earlier criticisms also speculated that this was the impetus behind the move to mediation in this area.[181]

This criticism ignores the reality of current trends in the courts and legislatures. The 1980s saw an increase in protection of women's rights as exemplified by the adoption of the Uniform Child Custody Jurisdiction Act in all states by 1983, and the Parental Kidnapping Prevention Act.[182] Although these were significant milestones, it cannot be ignored that, currently, fathers' rights groups have had greater impact, with joint custody increasingly being considered.[183] Women are not guaranteed any right to custody of their children under current laws.

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178. FIX & HARTER, *supra* note 146, at 47-48 (1992). This study focused on a voluntary court-annexed program in Washington, D.C. The program had many different components: divorce, small claims, and other civil disputes. *Id.* at 15-16. In all, 160 people participated in the divorce component in 1991. *Id.* at 16. Potential mediating parties were excluded if "one party ha[d] been seriously injured by the other; there [was] a history of violence; one party has brandished a weapon against the other; or there is a severe disparity in bargaining power." *Id.* The researchers were surprised to note that even with this screening process between twenty-seven and twenty-nine percent of the participants reported that there had been physical abuse between the parties. *Id.* at 48. The results were not reported by gender of respondent.

179. *Id.* at 48.

180. Bryan, *supra* note 14, at 441-45.

181. Lefcourt, *supra* note 79, at 267; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985).

182. CLARK, *supra* note 30, at § 18.3.

183. *Id.* at § 19.5

The idea that courts are protective of women also ignores the way battered women, in particular, have been treated in the courts.[184] Until recently, their claims of abuse have had very little impact in custody awards, and even now there are not always statutory guarantees that abuse must be taken into account when the determination is made.[185] For instance, Vermont, whose statute listed eight factors to be considered in awarding custody, only amended this list to include consideration of abuse in 1993.[186] Women charging abuse in an adversarial setting are not in an enviable position. One commentator noted, "[m]y experience . . . leads me to believe that the courtroom is the place where victims most often feel humiliated, embarrassed, controlled, and discredited . . . ."[187] In this circumstance, the women in Grillo's example who compare mediating with an ex-spouse to rape could not be expected to view the judicial system any differently.

A 1987 study showed that in comparison to litigation, mediation produced more joint legal custody agreements.[188] However, the physical custody and visitation agreements mirrored that of the court determinations.[189] Results such as these could support Bryan's criticism that mediation tends to reinforce a traditional sex role model where the woman is the caretaker and the man is the decision-maker. They could also, however, support the idea that in mediation each party's interest in a continuing relationship with his or her child is recognized and supported by the other party in the mediation. This idea is supported by another study which shows that mediated agreements give the parents without physical custody more visitation time than the courts typically do.[190] Also, the results, regarding joint legal custody, may be suspect now that the trend in the state legislatures is toward recognition of joint legal custody.[191] As courts more frequently award joint custody, the mediation results may look more similar to court outcomes.

V. MEDIATION: THE UNFAMILIAR FORUM

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184. Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need For Statutory Reform*, 13 HOFSTRA L. REV. 407, 407 (1985) (citing U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, at V (1982)).

185. *Id.* at 413-17, 426-30.

186. VT. STAT. ANN. tit. 15 § 665 (1993).

187. Knowlton, *supra* note 79, at 266.

188. *Charlottesville*, *supra* note 69, at 11.

189. *Id.*

190. *Research Results*, *supra* note 37, at 436.

191. Freed, *supra* note 3, at 557 (showing that 34 states have joint custody statutes).

Unless mediation is made mandatory, people do not use it. This is a bold statement, but experience supports it.[192] In Grillo's somewhat derisive view,

> [a]s mediation caught on, it began to be heralded as the cure for the various ills of adversary divorce. It was touted as the 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. 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.[193]

As Grillo states, many reasons have been put forward to explain why people do not voluntarily mediate. One reason is the lack of familiarity with the process.[194] "People in a crisis react in traditional ways, and the conventional wisdom is you must immediately go to an attorney."[195] We are deluged with images of lawyers, courts, and judges on television. There is no iconic mediator on network television to compare with the images of Judge Wapner, Perry Mason, and Ben Matlock. There is no "Mediation Session" to compare with "Divorce Court."[196]

If legislatures support a policy determination that the best decision-makers with regard to custody and visitation arrangements are the parents, they need to put the weight of mandatory mediation legislation behind that choice. If individuals and judges are allowed discretion in the use of

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192. Martha Brannigan, *Warring Couples Shun Divorce Mediators and Opt to Battle it Out in Court Instead*, WALL ST. J., March 27, 1990, at B1. Pearson and Theonnes' research results suggest that:

> low participation is tied to the attitudes of the legal community and public ignorance about the mediation alternative. As long as mediation remains an alien concept to the general population, it may be attractive only to better educated and higher income individuals who traditionally adopt innovations and new technologies.

Research Results, *supra* note 37, at 431.

193. Grillo, *supra* note 14, at 1552.

194. Brannigan, *supra* note 191.

195. *Id.* (quoting John Haynes, New York mediator and author of several books on mediation).

196. Another popular reason cited for the lack of use of mediation is obstruction from the divorce bar. There is a fear on the part of lawyers that mediators will take their custom away. This point of view has not held up in research findings, where mediation was not found to decrease attorneys fees if entered into late in the divorce process, or to decrease them only "modestly" in other situations. Jessica Pearson & Nancy Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26, 28, 32 (1982) [hereinafter *Mediation and Divorce*].

mediation, there will be insignificant increases in its use and, therefore, insignificant gains in court efficiency. More importantly, it will not foster the expectation that parents should make decisions regarding custody of their children.

In addition to the benefits of parental autonomy and court efficiency, two strategic advantages are created by mandating custody and visitation mediation. By institutionalizing the expectation that parents should resolve these issues for themselves, there is less potential for the threat of a custody battle to be used to intimidate a party to make concessions on money issues. Removing these issues from the court contest should decrease the use of children as pawns in the adversarial game.

Mandating mediation also removes another strategic maneuver: it removes the ability of one party to deny the other the opportunity to mediate. Two studies found that, when couples were offered free mediation to resolve their custody dispute, one-third to one-half declined the service.[197] Upon investigation it was discovered that usually only one party did not want to mediate. In the study where one-third rejected the opportunity to mediate, the women cited distrust of the other party and their desire to avoid the other party as their reason; men said they rejected mediation because they felt they would win in court or they did not think mediation would work.[198] That unilateral decision vetoed any ability the other party had to choose the mediation forum and forced the party into the increased expense and time of litigation.[199]

A. Substantive Improvements of the Mediation Process

Professor Nancy Maxwell suggests that instead of turning our backs on mediation, it would behoove women's advocates to recognize the strengths of mediation and work to improve mediation, rather than relying exclusively on an adjudicatory model.

> Mediation is the only form of conflict resolution that has as its underlying principles the values associated with the female traditions of staying connected, fostering relationships, and meeting needs rather than enforcing rights . . . . Consequently, feminist energy is better spent in molding and protecting mediation from patriarchal corruption

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197. MANDATORY DIVORCE MEDIATION, *supra* note 164, at i; *Mediation and Divorce, supra* note 196, at 28; Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH 13 (Kenneth Kressel et al. eds., 1989) [hereinafter *Decade of Research*].

198. *Decade of Research*, *supra* note 197, at 13.

199. *Mediation and Divorce, supra* note 196, at 28.

> than trying to infuse feminist values in conflict resolution models that are inherently incompatible with these values. Therefore, feminist activism should take on the role of developing mediation techniques and models that serve the interest of all the participants of the mediation rather than hoping to make a silk purse out of a pig's ear.[200]

Recognizing and addressing potential problem areas in mediation will strengthen mandatory programs and allow their implementation without harm to individuals. These areas are: 1) mediator training, 2) screening of the potential participants, 3) protective procedures, and 4) confidentiality. These subjects will be addressed in turn.

1. Mediator Training

Jessica Pearson, one of the most well-known researchers in mediation summarized the importance of the mediator experience and training mediator this way:

> Our research shows that while more recent and less intense conflicts are most apt to be resolved in mediation, the process was often effective with entrenched disputes and high conflict couples. The best predictors of successful mediation outcomes and client willingness to recommend mediation to others had to do with the skill and behavior of the mediator, particularly their perceived facility in promoting communication, empathy and self-insight.
>
> . The results argue for recruiting and producing talented mediators who are trained in the dynamics of domestic violence and know when to avoid or terminate mediation, as well as to pursue it.[201]

Because mediator capability plays such an important role in the process and outcome of the mediation, it is important that mediator qualifications for court-annexed programs be set by statute. Minimum qualifications of education, experience, and specialized training can help assure the realization of the goal of mediation as a safe, neutral process.

Mediators are trained to recognize that a good outcome cannot be reached if one party is in a disadvantaged power position.[202] It is essential that mediators are trained in methods that equalize power imbalances. A

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200. Maxwell, *supra* note 11, at 79.

201. *Ten Myths*, *supra* note 161, at 289 (citations omitted).

202. JOHN M. HAYNES & GRETCHEN L. HAYNES, MEDIATING DIVORCE 17 (1989).

mediator's ability to remain neutral has been questioned.[203] How can a mediator profess to be neutral and at the same time proceed to balance inequitable bargaining situations? Maxwell states that

> [i]f the mediator is neutral, then there is no protection for the weaker party in the mediation and the more competitive negotiator . . . will overpower the other party. Also, if the only goal of the mediation is to achieve a settlement, the neutral mediator does not have an obligation to review the agreement for overreaching because the parties have achieved the mediation goal of reaching the agreement.[204]

Perhaps part of the problem is the confusion of the words "neutral" and "impartial." The American Bar Association ("ABA") provides this response to the dilemma:

> III. The mediator has a duty to be impartial . . . .
>
> C. The mediator shall disclose to the participants any biases relating to the issues to be mediated both in the orientation session and also before those issues are discussed in mediation.
> D. Impartiality is not the same as neutrality. While the mediator must be impartial as between the mediation participants, the mediator should be concerned with fairness. The mediator has an obligation to avoid an unreasonable result.[205]

A mediator can be impartial/neutral neither by taking sides nor by investing in a particular outcome, while at the same time recognizing and attempting to correct power imbalances. An example of how this occurs is the mediator's technique of actively listening to each party, subtly reinforcing the idea that each participant has worth and validity. Another is in the use of the technique of reframing. There the mediator takes a potentially hurtful statement made by one of the participants and rephrases it to repeat the message without the potentially offensive language. This technique can enable the other party to hear the underlying message.

Mediation training that covers essentials such as impartiality, power balancing, and reframing is merely the starting point. For mediators working in a court context, more training is necessary, particularly on the subjects of physical abuse and substance abuse. This would assure that the

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203. *See* Bryan, note 14, at 498-512.

204. Maxwell, *supra* note 11, at 72 (summarizing criticisms).

205. *ABA Standards of Practice for Family Mediators in Divorce*, 17 FAM. L.Q. 455, 457 (1984) [hereinafter *ABA Standards*].

mediators working in this area are qualified to provide a safe and productive mediation experience or to recognize when one is not possible.

2. Screening by Mediators

Leaving the use of mediation to the discretion of the court is problematic. Judges do not typically have the expertise or information required to determine of whether mediation is appropriate. Relying on judicial ability and discretion to waive party participation creates two problems. First, it subjects the objecting party to the vagaries of the proof process. Second also allows those judges who do not support mediation to subvert the legislature's intent.[206] This is sometimes coupled with statutory requirements, creating the odd situation that Jessica Pearson reported:

> [d]ue to statutory criteria that excluded cases in which there had been an indication of domestic violence, *68 percent* of the parents requesting mediation were declared ineligible. In many of these cases, women objected to being barred from mediation because they did not expect the violence to continue or they believed that mediation would provide a safe context in which to work out their visitation problems.[207]

This result may be partly explained by lack of specificity in the definition of abuse.[208] Because of the extreme range of behaviors that could be called abuse, it may be more effective to question whether the abused spouse is afraid of the other spouse.

The ABA Standards of Practice for Family Mediators begins with the provision that mediators "shall conduct an orientation session to give an overview of the process and to assess the appropriateness of mediation for the participants."[209] It is also provided that: "The mediator shall assess the ability and willingness of the participants to mediate. The mediator shall also assess his or her own ability and willingness to undertake mediation with these particular participants and the issues to be mediated. This is a continuing duty."[210] In fact, mediation programs routinely employ screening systems that exclude participants the mediators believe will not

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206. MANDATORY DIVORCE MEDIATION, *supra* note 164, at i; A. Elizabeth Cauble et al., *A Case Study: Custody Resolution in Hennepin County, Minnesota, in* FINAL REPORT OF THE DIVORCE MEDIATION RESEARCH PROJECT 15 (1984).

207. *Ten Myths*, *supra* note 161, at 289 (emphasis added).

208. *See id.* at 288.

209. *ABA Standards*, *supra* note 204, at 455.

210. *Id.* at 456.

be able to mediate successfully.[211] In many programs this means that indications of spousal abuse or drug and alcohol abuse will exclude a couple from mediation. Screening is particularly appropriate when the mediators in a given program are not qualified to mediate in the presence of domestic abuse or alcohol/drug abuse. It is essential that screening interviews be conducted with each party separately, "so that a batterer does not directly influence the answers given by the victim."[212] In addition to the screening that takes place before any mediation sessions, statutes give mediators the right to discontinue mediation at any point where they believe that a party is physically at risk, or that there is danger of a bad bargain because of unequal bargaining strength.[213]

3. Protective Procedures

The Academy of Family Mediators states: "When safety is an issue, the mediator's obligation is to provide a safe environment for cooperative problem solving or, when this does not seem workable, to help the clients consider more appropriate alternatives."[214] Put in another way, "[a] mediator should not be 'neutral' about safety."[215]

A safe environment can be achieved in a number of ways. The setting of the mediation can play a role. For instance, having the mediation take place at a courthouse may feel safer for participants who fear abuse. Other precautions can be taken, such as asking the abused person to arrive early for the session, allowing her to leave earlier than the battering spouse, maintaining adequate space in the room where the mediation is to take place so that physical proximity is not necessary, and making it clear from the outset that if the abused person feels threatened, she may leave.[216] The Academy of Family Mediators believes that male/female mediator teams can help provide security for the mediating parties.[217]

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211. *See, e.g.*, WIS. STAT. § 767.11 (1993); NEV. REV. STAT. ch. 43 § 2904 (1993). Additionally, it is one of the standards of practice for the Academy of Family Mediators. ACADEMY OF FAMILY MEDIATORS, MEDIATION OF DISPUTES INVOLVING DOMESTIC VIOLENCE 4 (February 22, 1994) (draft) [hereinafter ACADEMY].

212. ZENA ZUMETA, DOMESTIC VIOLENCE AND MEDIATION 3 (1994).

See, e.g., ALASKA STAT. § 25.20.080 (1994); KAN. STAT. ANN. § 23-604 (1988); WIS. STAT. § 767.11 (1993).

214. ACADEMY, *supra* note 211, at 4.

215. ZUMETA, *supra* note 212, at 4.

216. *Id.* at 5.

217. ACADEMY, *supra* note 211, at 5.

Recently, California has allowed support people to attend the mediation sessions when the participants have an abusive relationship.[218] The mediator has the right, however, to exclude the support person if the mediator feels the support person is obstructing the mediation process.[219]

California has also instituted a provision that allows for a battered spouse to meet separately with the mediator, who then acts as a shuttle between the parties who never have to meet face-to-face.[220] There are no statistics available on the success of the California model yet. It is worth studying, however, both the views of the participants using this method and the results and content of the agreements.

4. Confidentiality

Another way to ensure lack of coercion in mediation is to deny the mediator any ability to make a recommendation to the court in the event that the mediation does not reach settlement. As previously noted, California's custody mediation statute allows this type of mediator evaluation.[221] The use of mediators in this dual role destroys the use of mediation as a forum outside the litigation arena where the parties can be honest about their needs and have an opportunity to achieve their own settlement. Instead, it puts the parties in a situation where they have to be very protective of the information they impart to the mediator, since it can potentially be used against them.

Confidentiality is an essential tool for mediation.[222] The parties do not have an incentive to make potentially harmful disclosures unless they know that those statements cannot be used against them. "Unlike a judge or an arbitrator, the mediator has no ability to coerce the parties. Therefore, the mediator must guarantee confidentiality to the parties so that they will be willing to reveal their true interest."[223] This promotion of honesty in the negotiation process is necessary in order to reach complete agreements.

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218. CAL. FAM. CODE § 3181 (West 1993).

219. CAL. FAM. CODE § 3182.

220. CAL. FAM. CODE § 3181.

221. CAL. FAM. CODE § 3183.

222. *See generally* John P. McCrory, *Confidentiality in Mediation of Matrimonial Disputes*, 51 MOD. L. REV. 442 (1988).

223. Cletus C. Hess, Note, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 DICK. L. REV. 601, 604 (1991).

CONCLUSION

It is important to acknowledge that mediation is not a perfect tool. As with any human experience, including litigation and adjudication, individuals can harm the process. Mediation can be affected by bias, lack of skill and experience on the part of the mediator, and lack of good faith dealing on the part of the participants. While these impediments can affect the mediation, *no one has to reach agreement through mediation.* If participants are unhappy with the process of their mediation, they can call a halt to it and go on to court. Having the threat of adjudication in the background can keep people at the negotiating table because they know that they have significantly more control of the outcome there.

In the context of relational decision-making, such as custody and visitation disputes, mediation should be seen as the first line of defense for those who are unable to reach agreement on their own or with the assistance of their attorneys. If it is used this way, a significant savings of courts' resources can be realized. Poorly grounded criticism should not be allowed to stunt the growth of this tool. Instead, by listening to the participants themselves, we can learn the weaknesses of individual programs and improve them by responding.

Maggie Vincent

APPENDIX A
Model Mediation Statute[*]

1. If it appears from the pleadings or at any point in the proceedings for divorce or legal separation that custody or visitation of a minor child is in question, the matter shall be referred to mediation on that issue.
2. When a matter is to be mediated, the mediation shall be set before or concurrent with the setting of the matter for hearing.
3. The mediation will cover issues of child custody and visitation. Issues of property division, spousal maintenance, and child support will not be mediated unless:
   a. both parties agree to meditate these issues, and
   b. both parties agree to have the stipulations reviewed by an attorney before submission to the court.
4. The court is directed to reject any stipulations not meeting the requirements of section three.
5. Parties referred to mediation will participate in individual screening sessions. During the screening, the process of mediation will be explained and they will be informed that in the event of a prior history of spousal or child abuse, the party claiming the abuse occurred will, with counseling from the mediator, choose to mediate in the standard manner, or choose from an array of alternatives available in the area. The alternatives shall include: use of a mediator experienced in the area of concern, designating the setting of the mediation to be at the courthouse, having a support person sit with the party during mediation (the support person may be a counselor, lawyer, or battered women's advocate), use of a man/woman mediating team, or having the mediator meet with each party individually in separate sessions. If the abused party states that these measures are not adequate to protect her safety, the mediator will discontinue any attempt to mediate and report the termination to the court.
6. If the mediator determines that the mediation will not be fairly resolved, she will terminate the mediation and report the termination to the court so that proceedings can be resumed.
7. All communication, whether verbal or written, between the mediating parties and the mediator shall be confidential, with the following exceptions:
   a. The mediator may inform the court that the mediation is concluded.

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[*] The thorny issue of payment for this program is beyond the scope of this note. States have dealt with this issue in various ways. *See* Appendix B.

b. The parties may agree to waive confidentiality as to any agreement reached in the course of the mediation.

8. The disputants are required to participate in an individual screening session with the mediator. If the screening shows that mediation is appropriate, the parties are required to attend one mediation session. After that commitment is fulfilled, the participants may decline to attend any further mediation sessions and their divorce proceedings will be resumed.

9. Any mediator participating in this program must:

a. have a minimum of two years education in a human service field or four years experience working in human services.

b. have a minimum of forty hours of mediation training from a program accredited by the Academy of Family Mediators or a national equivalent,

c. have a minimum of twenty hours of specialized training on the issues of divorce mediation,

d. have a minimum of twenty hours of specialized training on the issues of substance abuse and domestic abuse,

e. have a minimum of two years experience as a practicing mediator, and

f. meet a continuing education requirement of ten hours of additional training in mediation each year.

APPENDIX B

ALASKA STAT. § 25.24.060 (1994) (the court may order parties in divorce action to mediate; the court appoints the mediator; counsel can't be excluded; only one session is necessary before parties can withdraw).

§ 25.20.080 (1994) (the court may order parties to a contested custody action to mediate; the court appoints the mediator with one peremptory challenge for each participant; the mediator may terminate the mediation if efforts are unsuccessful; the court determines which party bears the costs).

COLO. REV. STAT. § 14-10-129.5 (1987) (the court may order parties to mediate if there is a dispute regarding compliance with visitation orders; there is a user fee for the mediation service).

CAL. FAM. CODE § 3170 (1994) (contested custody or visitation cases shall be set for mediation).

§ 3163 (1994) (courts shall develop local rules regarding requests for a change of mediator or for general problems relating to the mediation).

§ 3181 (1994) (if a domestic violence prevention order has been issued, a support person may accompany the protected party; the intake form must provide this information).

§ 3182 (1994) (mediator may exclude counsel or the domestic violence support person).

§ 3183 (1994) (mediator may, "consistent with local court rules," make a recommendation to the court as to the custody or visitation; if the parties do not reach an agreement the mediator may recommend an investigation; the mediator may recommend restraining orders to protect the well-being of the child involved).

FLA. STAT. ANN. § 61.183 (West Supp. 1995) (in any case of contested custody, question of primary residence or visitation, the court may order the parties to mediate; the court approves the mediator; the process is confidential).

ILL. ANN. STAT. ch. 750, para. 5/602.1 (Smith-Hurd Supp. 1995) (the court may order parties to mediate the terms of a Joint Parenting Agreement and to determine the appropriateness of joint custody).

ch. 750 para. 5/607.1 (Smith-Hurd Supp. 1995) (the court may order parties to mediate disputes regarding enforcement of visitation provisions; there is an exception where "there is evidence of domestic violence").

IOWA CODE § 598.41 (West Supp. 1995) (the court may order parties to mediate to determine whether joint custody is appropriate; the court may compel children's attendance; there is a user fee for the program).

KAN. STAT. ANN. § 23-602 (1988) (in cases of contested child custody or visitation, the court may order mediation; the mediator is appointed by the court).

§ 23-604 (1988) (either party may terminate the mediation after two sessions; the mediator may terminate if there would be harm or prejudice to the parties or children, or if any party is not able or willing to negotiate in good faith; the mediator reports the termination of the mediation to the court, but doesn't state the reason for the termination unless it is due to conflict of interest or bias on the part of the mediator).

§ 23-605 (1988) (the mediator must treat all information as confidential, except as necessary for the conduct of the mediation or as required by law).

LA. REV STAT. ANN. § 9:332 (West Supp. 1995) (in cases of contested custody or visitation the court may order the parties to mediate; there is a user fee for the mediation service; the mediator is chosen by the parties unless they cannot agree, then the court makes the selection; the court has the discretion to order the parties to pay $150 toward a study of the dispute by HHR).

§ 9:363 (West Supp. 1995) ("Notwithstanding any other provision or law to the contrary, in any [family] proceeding, no spouse or parent who satisfies the court that he or she, or any of the children, has been the victim of family violence perpetrated by the other spouse or parent shall be court ordered to participate in mediation").

ME. REV. STAT. ANN. tit.19, § 752 (West Supp. 1994) (the court shall refer contested parenting and support cases to mediation unless good cause is shown to give temporary relief, or the court may waive the mediation for extraordinary cause shown; when agreement is not reached the court must find a good faith effort was made before the matter proceeds to hearing; if the court finds that either party did not participate in good faith it can order the parties back to mediation, dismiss the action or any part of it, render a decision or judgment by default, assess attorney's fees and costs or any other appropriate sanction, including sanctions for failing to appear at mediation without good cause).

MICH. COMP. LAWS §§ 552.505, 552.513 (1994) (prior to a domestic relations adjudication, the office of Friend of the Court shall provide a

pamphlet that (in part) describes mediation and informs the parties of the availability of mediation if child custody or visitation is disputed; domestic relations disputes are defined as including child custody or visitation; the Court provides mediation; parties shall not be required to meet with mediator).

MINN. STAT ANN. § 518.619 (West 1990) (the court may order parties to mediate where custody is contested; the court will not require mediation when there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by the other party; the mediator is appointed by the court; records of the mediation are confidential and cannot be used in court; if the parties do not reach an agreement the mediator may recommend an investigation, mutual restraining orders).

MONT. CODE. ANN. § 40-4-301 (1993) (in any family law matter the court may order mediation; "the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party;" the court appoints the mediator or the mediator may be selected by agreement of the parties; the mediation is confidential; the mediator may with permission of the parties make recommendations to the court).

NEV. REV. STAT. ch. 43 § 2904 (1993) (in contested custody or visitation cases the parties receive information on mediation and its availability; "mediators shall be trained to recognized domestic violence;" the state court administrator will devise screening guidelines and safety procedures for child and spousal abuse; both parties must agree to participate).

N.H. REV. STAT. ANN. ch. 458:15-a (1992) (in cases of voluntary marital mediation, the court "shall not allow or shall suspend" mediation if either the court or the mediator suspects abuse, or a party asserts abuse has occurred; the court may allow mediation if the alleged victim requests it and the mediator is aware of the abuse);

ch. 458-D:3 (Butterworth Supp. 1993) (seminar explains divorce options including mediation).

N.M. STAT. ANN. § 40-4-8 (Michie 1994) (in cases where custody is contested the court may order mediation unless: a party asserts or the court has reason to believe that spousal or child abuse has occurred, then the court is to suspend the mediation unless three conditions are satisfied: the mediator has substantial training in the effects of abuse on its victims,

the victim is capable of effectively negotiating with the other party (support is an option), and the mediation process protects the party from any imbalance of power caused by the abuse; or if the abuse was spousal, the victim requests mediation and the mediator is informed of the abuse)

§ 40-4-9.1 G (Michie 1994) (in contested custody cases the court may refer the parties to mediation "if feasible").

§ 40-4-9.1 J (Michie 1994) (an award of joint custody requires that decisions about major changes in the child's life may be decided by requiring mediation (among other options)).

N.C. GEN. STAT. § 50-13.1 (Michie Supp. 1994) (where child custody is contested the case "shall be set for mediation of the unresolved issues" of custody and visitation; economic issues may not be sent to mediation; "for good cause" either the court or a party may move to waive mediation; good cause examples include: hardship to a party, an agreement to mediate voluntarily, allegations of alcoholism, drug abuse or spouse abuse, abuse or neglect of minor child, allegations of severe psychological, psychiatric, or emotional problems, geographical distance of more than fifty miles).

N.D. CENT. CODE §§ 14-09.1-01 through 14-09.1-08 (1991) (the court may order parties to mediate in contested custody or visitation disputes but may not make such orders if the custody, support or visitation issue involves or may involve physical or sexual abuse of any party or the child of any party; there is a user fee for the program; the court appoints the mediator, the process is confidential; the mediator may recommend a full hearing on the matter if agreement is not reached, but may not make substantive recommendations to the court).

OR. REV. STAT. § 107.179 (1993) (in contested joint custody proceedings, the court "shall direct the parties to participate in mediation," unless a party objects to mediation due to severe emotional distress and the court so finds, in which case the court will waive mediation; the court appoints the mediator or the parties may choose by private agreement; the court determines cost distribution; if no agreement is reached after 90 days the court will determine custody).

R.I. GEN. LAWS § 15-5-29 (1988) (in cases with issues of contested custody and visitation, the court may direct the parties to mediate).

S.D. CODIFIED LAWS ANN. § 25-4-56 (Michie Supp. 1995) (in cases of contested custody, the court may order the parties to mediate, unless the court "deems it inappropriate;" costs are divided between the parties).

WASH. REV. CODE § 26.09.015 (West Supp. 1995) (in any domestic relations case where there are contested issues, the court may order the parties to mediate; the court appoints the mediator; the process is confidential; the mediator assesses the needs and interests of the child).

WIS. STAT. § 767.11(5)-(12) (1993) (in "any action affecting the family" where it appears that custody or physical placement is contested, the court shall refer to the director of family court counseling services for possible mediation of the contested issues; there is no confidentiality when the mediator conducts a custody or placement study; when joint custody is contested a party can request assistance including mediation; the court appoints the mediator, but, parties may contract with a private mediator; but in any event must attend at least one session (screening and evaluation) if referred by the court, unless the court finds attendance at the session will cause undue hardship or endanger the health or safety of one of the parties; court appointed mediators cannot help on issues of property division, maintenance, or child support unless the issue is directly related to custody or physical placement and the couple agrees in writing to consider the issue; the mediator shall be guided by the best interests of the child; mediator may terminate sessions if there is evidence of child abuse, spousal abuse, drug abuse, or there is other evidence that one of the parties' health or safety is jeopardized; process is confidential but can be waived by the parties and does not apply to child abuse or other information that is required to be disclosed).