IN DEFENSE OF MEDIATION

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Mediation has won praise from the bar, from numerous participants and practitioners and from scholars as a tremendous breakthrough in dispute resolution. It empowers the parties by enabling them to be the ultimate decisionmakers, and it allows the parties to reach agreements that take into account important facts that are often ignored in judicial decisionmaking. Mediated agreements are much more likely to satisfy the parties to a dispute than are court orders and are more likely to be followed than are court orders. Mediation also saves judicial resources and reduces court overloads.[1]

Of course, even the strongest advocates of mediation admit that the process does not solve all of society's problems. There is room for improvement of the process, there is a need for a degree of standardization and quality control, and some disputes and disputants are not amenable to any settlement, mediated or otherwise. We need to continue to experiment with, to study, to develop, and to improve upon all forms of alternative dispute resolution, especially those which have proven as helpful and as effective as mediation.[2]

In her recent article on mandatory mediation,[3] my colleague Trina Grillo[4] points out several pitfalls mediators should watch for and explains some ways in which court-annexed mediation can be improved. This effort is a good one and, I hope, will be welcomed by the mediation community. Nonetheless, I believe that a response is necessary; hence, this piece. Essentially, my response is motivated by three concerns: (1) Many of Professor Grillo's statements and stories do not represent what actually happens at a typical mediation session. Instead, they effectively capture and magnify only the worst possible abuses of the process. Because many potential users of mediation and many policymakers are either unfamiliar or only marginally familiar with mediation, it is dangerous to allow these misrepresentations and distortions to go unchallenged; (2) To the extent that mandatory mediation presents some real problems, society may be better served by attempting to correct those problems than by abandoning mandatory mediation in areas where it has already proved to be

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1. K. KRESSEL & D. PRUITT, MEDIATION RESEARCH 18 (1989).
2. J. FOLBERG & A. MILNE, DIVORCE MEDIATION 16-23 (1990).
3. Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).
4. Professor Grillo is my colleague in the best sense of the word. She introduced me to mediation and got me excited about the area. We have co-taught a course, and she has helped me teach the mediation clinic at USF Law School. She has taught me much about mediation, and she continues to do so.

very helpful. Although Professor Grillo does not adequately explore that possibility, many states that have mandatory mediation have already enacted legislation that addresses her concerns;[5] and (3) Professor Grillo's article suggests that mediation may be dangerous for women. While anything can be dangerous to anyone at some time, mandatory mediation is generally helpful both to women and to men, and an overwhelming number of the women and men who have been through mandatory mediation approve of it strongly.[6]

OVERVIEW

Professor Grillo's article paints a very effective and very dramatic picture of mediation as a misguided and destructive process. As both a teacher and a student of mediation, I have found that the process is supportive, empowering and enlightening to the participants. Helping parties to feel better about themselves and their interests is one of the most important and most valued of skills among mediators. Studies regularly show that people who go through mandatory mediation are pleased with the process.[7]

How does my colleague's picture of mediation as a monster emerge? Professor Grillo's article distorts the mediation process in four ways: (1) the article tells stories about mediation that are the equivalent of using a series of stories about physicians' rape of patients to paint a picture of the practice of medicine in this country; (2) the article subjects mediation to a series of double-binds, in which anything a mediator does is characterized as bad; (3) mediation is blamed for problems which existed long before mediation and which will continue with or without mandatory mediation; and (4) the article portrays mediation as being both more powerful and more dangerous than it really is.

While these points will emerge in full in the discussion that follows, a brief summary at this point may be helpful. Professor Grillo's stories tell about mediators who appallingly misapply family systems theory; mediators who dismiss as irrelevant important family history; mediators who make unsubstantiated assumptions that one parent is or is not an appropriate caretaker; mediators who make their own "determinations" and rulings rather than let the parties decide with respect to child custody; mediators who make parties feel guilty and bad about themselves; and mediators who are rude, insensitive, stupid and otherwise incompetent. I do not doubt that such mediators exist. Similarly, some physicians have raped and murdered their patients, judges have knowingly sentenced innocent men to death, presidents have lied and cheated, and schoolteachers have exhibited racial bias towards their students. Nonetheless, we require parents to subject their children to both school and medical care, and we are all required to live according to the rules established by politicians and courts. We do not judge these necessary aspects of our everyday lives by focusing only on various worst case scenarios. It would be unfortunate if we were to use that standard to judge mandatory mediation.

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5. *See* discussion *infra* notes 92, 117.

6. *See, e.g.*, K. KRESSEL & D. PRUITT, *supra* note 1, at 19-21; Duryee, *A Consumer Evaluation of a Court Mediation Service*, REPORT TO THE JUDICIAL COUNCIL OF THE STATE OF CALIFORNIA (1991).

7. Duryee, *supra* note 6, at 25.

Indeed, most of Professor Grillo's mediation horror stories are not from mediation at all. Instead, they involve mediation/evaluation, a process in which the "mediator" also functions as an evaluator and quasi-decisionmaker. This process is often more like an informal arbitration or settlement conference than like mediation, a process in which the mediator has no decision-making authority at all. An overwhelming percentage of the mandatory participants (especially the women)[8] prefer even mediation/evaluation to litigation. Nonetheless, it is significantly different from mediation.[9]

Unfortunately, while it is this hybrid mediation/arbitration process that produces most of Professor Grillo's stories, it is *all* kinds of mandatory mediation that bear the brunt of her criticism. Aside from being criticized for many events that occur only in this nonmediation process, regular mediation is subjected to a "damned if you do, damned if you don't" approach in numerous ways:[10] when formal equality is talked about as something bad, mediation has it; when formal equality is talked about as something good, all of a sudden mediation does not have it. If a mediator either prevents or allows the expression of anger, she has made a mistake. If a mediator either corrects or fails to correct a power imbalance between the parties, she has erred again. If a mediator either discusses or does not discuss the issue of fairness, she is wrong. Finally, if a mediator either asserts or does not assert societal values, it was the wrong thing to do.

In addition, Professor Grillo seems to hold mediation accountable for numerous "problems" for which, it is true, mediation offers no cure. The truth, however, is that mediation did not cause these "problems" and the elimination of mandatory mediation would not alleviate them. Among these "problems" are the elimination of fault-based divorce and child custody determinations; the adoption of no-fault divorce and child custody determinations based on the best interests of the child;[11] the fact that courts do not require fathers to stay with children if the fathers do not want to; societal constraints on women's expression of anger; and societal race and gender bias.

Professor Grillo suggests that so much about mediation is bad and dangerous because mediation is very powerful in an unconscious way. People in the midst of divorce are at an extremely vulnerable time of life. They are profoundly concerned about being seen as good, and will be significantly damaged if they do not receive approval. These people are likely to be even more sensitive in an unfamiliar setting. A mediator, goes the argument, carries enormous potential to do damage, so much so that, according to Professor Grillo, whatever the mediator does is likely to be damaging. Of course, if

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8. Duryee, *supra* note 6, at 27-29. In addition, the vast majority of women who have gone through this process report that it gave them an opportunity to express their views and increased their level of confidence in standing up for themselves. *Id.*

9. As Professor Grillo suggests, this process is permitted in California under CAL. CIV. CODE § 4607 (West Supp. 1991). Each county must decide whether to adopt a system of mediation or of mediation plus evaluation. *See infra* text accompanying notes 28-30. To the extent that Professor Grillo suggests that pure mediation is superior to the mediation/evaluation combination, I agree. To the extent that she suggests that mediation suffers from the same problems she finds in mediation/evaluation, I disagree strongly.

10. *See infra* text accompanying note 72.

11. Mediation is only a *process*, and one that would work as well with any substantive legal standard. *See infra* text accompanying notes 35-37.

people are subject to being damaged by exposure to unfamiliar settings, much in life has the potential to do great damage. The truth is that any person or program that has enough impact to do good has the potential to do harm. Unlike most other professionals, however, mediators are trained to be especially sensitive to and understanding of people's feelings and stress. Their entire training is geared towards helping people in conflict and distress.

Professor Grillo's criticisms of mediation can be made about any public service, or indeed any contact between the state and individuals going through a difficult period. Teachers in public schools, physicians, nurses and aides in public hospitals, workers in public benefit programs, employees in legal services programs, clerks at city hall and numerous other public service personnel all deal with individuals at particularly vulnerable times, and all have the ability to do great harm. Unlike a mediator, who has the ability to grant or withhold nothing other than her personal approval, all of these individuals have, additionally, the ability to grant or withhold important rights and benefits. I shudder to imagine the variety of true horror stories one could find about all of these programs, were one to make the effort. We should view mandatory mediation from the same kind of reasonably balanced perspective from which we examine these other public programs.

Rather than compare the worst harm that a grossly incompetent and insensitive mediator could cause with a distorted picture of the "benefits" of going to court, it would be more helpful to compare what a competent mediator would do with what might happen in a competently run court. If competent mandatory mediation, as it is currently practiced, is preferable, as I believe it is, we nonetheless ought to examine the process carefully. I suggest, though, that rather than question the process in order to *condemn* it, we ought to question it in order to *improve* it. Professor Grillo's article is valuable in suggesting ways to improve mandatory mediation. Indeed, other mediators, engaging in rigorous self-criticism aimed at self-improvement, have independently raised and addressed many of the same concerns. Between the time Professor Grillo wrote her article and the time it was published, California enacted legislation designed to solve some of the most difficult problems she raises within the mandatory mediation framework.[12]

SUMMARY OF PROFESSOR GRILLO'S POINTS

Basically, Professor Grillo suggests that mandatory mediation of child custody disputes is inappropriate both as a process and because of the substantive results it might produce. Her main process arguments are: (1) mediation can deprive a woman of an opportunity to have her perceptions validated by a judge, and, indirectly, by society; (2) the damaging influence of a mediator is subtle but powerful. The mediator is likely to make a mother feel guilty, selfish, and unacceptable as a human being unless the mother does just what the mediator wants; (3) the process of mediation may encourage undetected race or gender bias; and (4) the very act of attempting to come to an agreement with her former spouse may be intolerable for a woman who is in the midst of extricating herself from a relationship with that same man.

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12. *See, e.g.*, CAL. CIV. CODE § 4607(g).

On the substantive level, Professor Grillo suggests that: (1) the best interest of the child standard for custody determination in California is vague and unsatisfactory, and mediation is to blame; (2) a woman in mediation may be unable to stand up to her former spouse for what she thinks is best for herself or her children, so that requiring mediation may result in agreements that are both unfair and unhealthy; and (3) mediators are more likely than courts to engage in behavior that is race or gender biased.

I believe that an honest evaluation of mandatory mediation, even in light of Professor Grillo's criticisms, will reveal that: (1) the process of mediation is generally more validating of both the perceptions and the feelings of those participating in it than is litigation (and, perhaps more importantly, women going through mandatory mediation *feel* significantly more validated);[13] (2) whatever problems may exist with the substantive law of child custody are separate from a determination of what is the best procedure to implement that law. Complaints about the substantive standard do not translate into problems with a particular procedure; (3) bias against the economically disadvantaged, women and persons of color is more likely in a courtroom than it is in mediation, and even when present, race and gender biases are less likely to influence the outcome of mediation than they are to influence the outcome of litigation; (4) people of either gender are much more likely to find litigation intolerable than they are to find mediation intolerable; and (5) mediation actually helps participants clarify and stand up for what they want, and it is those who settle without the benefit of mediation who are more likely to sacrifice their own interests.[14]

In this response, I will briefly describe mediation and mandatory mediation, as generally practiced. I will summarize what some scientifically conducted studies of the participants in mandatory mediation reveal about the process and the participants' reactions. I will then analyze Professor Grillo's criticisms as applied to this process.

WHAT IS MANDATORY MEDIATION

Mediation is a third party's attempt to assist two or more disputing parties to reach an agreement. The mediator has no coercive power or authority to decide for the parties, or even to require them to reach an agreement. Instead, she works to improve communication and understanding between the parties and to help them creatively move towards an agreement of their own making.[15] While the use of mediation in general has a long, cross-cultural history,[16] professionals in this country (lawyers and psychotherapists) have become involved in mediating divorce disputes only relatively recently. This involvement resulted from an almost universal agreement that litigation of divorce cases is bad for the parents, worse for the children, and brings about re-

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13. *See, e.g.*, Duryee, *supra* note 6, at 27-29.
14. *Id. See also* K. KRESSEL & D. PRUITT, *supra* note 1, at 20.
15. P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 209-13 (1979). The involvement of a neutral third party without the power to make binding decisions has been a primary method of resolving disputes in Asian cultures, Native American cultures, European cultures, and African cultures. *Id.*
16. *Id.*

sults that are often both unfair to and ignored by the parties.[17] Unlike court hearings, mediation allows the parties to deal with all the issues brought up by the divorce, whether legal, practical or emotional. Unlike court orders, mediated agreements give parents the opportunity to participate in the decision-making regarding their children, and to fashion custody and visitation arrangements that take into account the parents' intimate knowledge of their children's interests, as well as the parents' own special needs and interests.

As divorcing couples began to mediate their divorces, they were generally very pleased with the results.[18] Nonetheless, knowledge about the process and the availability of mediation were not widespread. Attorneys who knew about mediation could be hesitant to recommend to their clients a process that might well eliminate the need for their own services in the case, and parties not represented by counsel had no way at all to learn about the process. California was among the first states to conclude that the best way to educate spouses about the benefits of mediation, as well as the best way to prevent one spouse from immediately forcing the entire family into litigation by refusing to mediate, was to mandate mediation prior to any court hearing for divorcing parents unable to reach agreement on their own concerning the custody and visitation of their minor children.[19] If the parties are unable to resolve their dispute in mediation, the mediation results remain confidential[20] and the judicial process continues.

The results of studies of mandatory mediation have pleased the process' proponents. Parents who participate in mandatory mediation of child custody disputes are twice as likely to be satisfied with both the process and the results as are parents who go to court without mediation.[21] Mediated agreements are more likely to be complied with than are court orders.[22] A vast majority of parents who participate in mandatory mediation of child custody disputes believe that mediation also helps them focus attention on the needs of the children and helps them feel better about themselves.[23] Mediation is twice as likely as court to improve relationships between the parties.[24] Mandatory mediation saves money for both the parties and the state over court hearings, while also allowing the parties significantly more time to address their

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17. K. KRESSEL & D. PRUITT, *supra* note 1, at 10-25.
18. *Id.*
19. CAL. CIV. CODE § 4607. Actually, the history of mediation in Alameda County, California, began with one probation department employee. He learned that by bringing the parties into a room together for only a few moments on their way into court for a hearing, the need for many of those imminent hearings disappeared. It turned out that frequently the parties, whether or not represented by counsel, had simply never even communicated about what they wanted. The employee never conducted prolonged sessions, and was not a trained mediator, but he found that merely having the chance to talk to each other resulted in settlement for a substantial number of spouses. Where issues were not resolved briefly, the employee simply let the hearing remain on the calendar as originally scheduled.
20. In jurisdictions where the mediator is called upon to make recommendations, there can be, of course, no confidentiality. *Cf.* CAL. CIV. CODE § 4607. That particular process is not the subject of this paper.
21. K. KRESSEL & D. PRUITT, *supra* note 1, at ch. 1; Duryee, *supra* note 6 at 10-27.
22. *See* Duryee, *supra* note 6, at 16.
23. *Id.*
24. *Id.*

problems.[25] In addition, requiring parents to mediate prior to allowing them to invoke the power of the court is thought to be consistent with the societal view that, to the extent possible, parents, rather than the state, should make parenting decisions.[26]

Of course, mandatory mediation is not perfect. Some have complained that abused spouses may be unable to hold their own during the process, and that, in any event, requiring victims of abuse to negotiate head-to-head with their abusers may be inappropriate. As a result, in any case where a restraining order is in effect because of actual or threatened spousal abuse, the mediator is directed to see the parties separately, in a kind of shuttle diplomacy.[27] Courts are instructed to develop local rules to respond to requests for a change of mediator or to general problems relating to mediation,[28] and several counties permit spouses who allege abuse to bring a support person to be with them at the mediation.[29]

California law also permits courts to enact local rules requiring mediators to make recommendations to the court regarding custody in the event that mediation is not successful;[30] and some counties have enacted such rules. The grant of this quasi-coercive power results in a mediation/evaluation process that differs substantially from mediation. This process allows the mediator to encourage and reward cooperation, and it may also tempt the mediator to be less patient with and understanding of the parties, because she has at her disposal other ways of "helping" the parties reach what she considers to be the right result. In addition, if the mediator's recommendation holds sway with the judge, the parties may view the mediator as an arm of the court and be guarded in what they reveal in the process.

Research indicates that parties to mandatory mediation/evaluation, including those who would have opted out if given the opportunity, significantly prefer that process over court, both because of the substantive results and because the process was more supportive and helpful.[31] Nonetheless, I personally believe that mediation is preferable to mediation/evaluation. In this paper, I defend only mandatory mediation rather than mediation/evaluation. I do so because the mediation/evaluation process is entirely defensible in its own right, while it is a very different process from "pure" mandatory mediation, and confusion of the two might do justice to neither.

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25. The time spent in mediation varies from couple to couple and from county to county. Recent reports indicate an average of 2.5 sessions and 3.2 hours. *Id.*

26. Where one or more of the parents is abusive or acts in some other way that contravenes public policy, the public interest in preventing that abuse or other undesirable behavior supersedes the public interest in allowing parents to decide how to raise their children. This is true whether the parents are divorcing or the family is intact. As a result, states make every effort to detect child abuse regardless of the wishes of the parents. These efforts are continuous. They are not dependent on the parents' marital status or on whether the parents seek state intervention in parenting determinations. *See, e.g.*, CAL. PEN. CODE § 2739 (West Supp. 1991).

27. *See* CAL. CIV. CODE § 4607.2 (West Supp. 1991).

28. *See* CAL. CIV. CODE § 4607(g).

29. Interview with Mary Duryee, Director, Alameda Family Court Services (June 2, 1991).

30. CAL. CIV. CODE § 4607.

31. *See* Duryee, *supra* note 6, at 10-20.

Next, I analyze Professor Grillo's criticisms of mandatory mediation as applied to the process explained above.

RIGHTS AND BLAMING

Professor Grillo's first major criticism of mediation stems from her suggestion that many women going through a divorce need to be told by a higher authority that they are right and that their husbands are wrong. They need "vindication" from a third party who can tell them that they are morally superior to their husbands. Unlike courts, mediators may attempt to "orient the parties towards reasonableness and compromise, rather than moral vindication," thereby denying women the court's imprimatur on the blame they seek to attach to their husbands.[32]

It is probably true that many people going through a difficult divorce (or just getting out of a difficult marriage) can use some affirmation. It is also true that mediators, at least in California, generally focus not on the parties' relative moral rectitude, but on the interests of the parents and the future best interests of the child. If the parties end up in court rather than in mediation, the substantive legal standard the court will apply in determining child custody is also "the best interests of the child."[33] In determining which parent should have primary responsibility for parenting, the substantive law directs the court to take into account factors such as each parent's willingness to allow substantial visitation to the other parent,[34] but it specifically does not take into account the moral superiority of one parent over the other.[35] The "best interests of the child" standard was in effect prior to the adoption of mandatory mediation, and it has been adopted by many states that still do not have mandatory mediation. As a result, to the extent that a woman seeks to have either a mediator *or* a court tell her husband "what sort of behavior is not to be tolerated," she is simply barking up the wrong tree. Absent some sort of emotional or physical abuse or other behavior affirmatively detrimental to the child,[36] that kind of determination is not within the purview of child custody courts.[37] Perhaps in the days of "fault" divorce, a woman could rely on the divorce court to punish her evil husband. Today, if he is not in violation of the criminal law, she may simply have to live with her own moral evaluation.

Aside from the fact that the child custody courts are not in the business of making moral pronouncements, if a woman nonetheless wants to *ask* the court to make those judgments, mandatory mediation does not stand in her way. The

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32. Grillo, *supra* note 3, at 1560, 1578.
33. CAL. CIV. CODE §§ 4600, 4608 (West Supp. 1991).
34. CAL. CIV. CODE § 4600(b)(1).
35. *Id.*
36. *Id. See also* CAL. CIV. CODE § 4608.
37. Professor Grillo suggests that in mediation, unlike in court, "undeserving" fathers may emerge with full rights. One answer to this suggestion is that the law looks to the best interests of the child rather than to the father's moral worth. Another is that in mediation no one is given any substantive rights by the state. The mediator attempts to help the parties reach an agreement between themselves. As is the case with all contracts or settlements, the only "rights" to come out of a mediation session are the "rights" that one party *agrees* to give to the other. To the extent that the problem is that a woman in mediation may be more lenient with her bad husband than a court might be, see discussion *infra* notes 103-04.

statute requires only that the parents *participate* in mediation.[38] California law imposes no penalties for participating badly or for participating only briefly.[39] The person who is determined to use the court for her own personal vindication may simply refuse to reach an agreement in mediation, and the courtroom door will swing wide open. Once in court, the person looking for personal vindication is likely to be both sorely disappointed by the results and severely chided for having made the effort. In addition, if the court does engage in moral judgments, there is no guarantee what it will decide. The woman is as likely to be told that she is bad for being uncooperative as she is to have the court affirm her own tentative judgment that her former husband is the bad one. These results are neither the fault nor the province of mandatory mediation.

It is, of course, possible to change the substantive law to focus more on vindication of one of the parents and less on the best interests of the child. It is not clear whether such a change would be helpful. Clearly, the well-being of children is, to a large extent, dependent on the well-being of their parents, and parents may want the approval of the state as much as children want the approval of their parents. Nonetheless, in recent years we have chosen to avoid intrusion into the moral judgments of parents as much as possible, absent some indication of child abuse.[40] If that policy is to be changed, it ought to be only after thoughtful examination and deliberation.[41] The more important point for now, however, is that if the substantive law *were* changed, for example, to a presumption of custody to the primary caretaker and one day per week visitation to the other parent, mandatory mediation would continue to work well as an alternative to court enforcement of that new substantive standard. Rather than have a judge assign a day for visitation, mediation might allow the parties themselves to determine which day would work best, when and how transportation ought to be arranged, how to take vacations, etc., into account, and whether some different schedule might work better for them. Confusion of mandatory mediation with a particular substantive legal standard is misleading.

Professor Grillo also implies that there is something inherent in the mediation process that necessarily makes mediation less affirming to a woman than is litigation. The problem, she suggests, is that the family systems approach used by some mediators "imposes a value-free universe," with the result that "a person who has been a victim of violence can be seen as deserving her fate because of self-defeating patterns of behavior."[42] The implication appears to be

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38. CAL. CIV. CODE § 4607(a) (West Supp. 1991).

39. This assumes that the mediator is not empowered to make a custody recommendation to the court based on a parent's poor participation in mediation.

40. *See, e.g.*, CAL. CIV. CODE §§ 4600(b)(1), 4600.1(e), 4608 (West Supp. 1991).

41. If courts begin to see themselves as judges of the moral superiority of different parents, there would appear to be no reason why they should await divorce before intruding into family child-rearing practices. Disputes in this area arise in intact families every day, and the courts refrain from intruding because of a conscious choice to avoid setting themselves up as moral judges of different parenting styles. Many would be sad to see courts reverse this stance.

One can argue that divorce is somehow different because one of the parents has asked the court to intervene, but this asserted distinction lacks substance. If parents in intact families *could* secure court intervention merely for the asking, it is unlikely that they would uniformly refrain from doing so. *See infra* text accompanying notes 101-12.

42. Grillo, *supra* note 3, at 1561-62.

that mediators do not really refrain from "blaming," but that they simply blame the wrong party.

This reveals an unfortunate and dangerous misunderstanding of family systems theory. Family systems theory does indeed suggest that people react to each other and to their overall environment, and that if individuals are made aware of the effects of their actions and of alternative ways they can act, they will be capable of acting in ways more likely to achieve their desired results.[43] Thus, the family systems-oriented mediator who sees a pattern of spousal abuse followed by blaming of the abusing spouse may seek to determine whether that blaming is helpful in controlling the abuse.. If it is, no change in behavior would appear to be needed. If the blaming is not successful in controlling the abuse, the abused spouse might be encouraged to consider other kinds of reactions, such as requiring the abuser to get into treatment, seeking restraining orders, or moving out altogether. The family systems-oriented mediator would not be likely to "blame" either spouse in this example, simply because she sees herself not as a judge of morality, but only as a helper of people. A key to understanding family systems theory is to understand that the family systems mediator does not condemn blaming, but that she is continually searching for potential ways to help people help themselves. If blaming works, so be it. If it does not work (as determined by the *client*, not by the mediator), she may help the client find something else, or something in addition, that does work.

Professor Grillo points out that this value-free perspective "can deprive a divorcing spouse of the opportunity to appear virtuous in society's eyes and her own."[44] This conclusion seems to rest on the following assumptions: (1) a court will, in fact, blame the husband and praise the woman; (2) having a court blame her husband and praise the woman will be an effective means of helping the woman; and (3) a mediator will not act in a way that will allow the woman to feel good about herself. The first of these assumptions has been addressed above. The others are also inaccurate.

Having a mediator side with a mother in blaming the father is neither necessary nor necessarily helpful to the parent who needs affirmation. Instead, such a response is more likely to sidetrack the angry woman and raise the resistance of the man than it is to either help anyone feel better or facilitate a parenting agreement. It is important to note that a mediator's role is to assist the parties in working with each other to reach agreement. Because the mediator has no actual or threatened external force to employ to change the parties' behavior, she relies on earning the parties' trust and respect as the primary tool to enable her to gain some influence. To the extent that the mediator tells one of the parties that he is blameworthy and bad, she is not likely to win that party's confidence, and is not likely to be effective in helping to change that party's behavior. In addition, every mediator knows that the best way to help people to resolve disputes is to first help them understand what the dispute is about. Until a party feels that her perceptions, feelings and interests are understood and acknowledged, she will probably not feel ready to decide

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43. *See* R. CORSINI & D. WEDDING, CURRENT PSYCHOTHERAPIES 454-59 (4th ed. 1990).

44. Grillo, *supra* note 3, at 1562.

how to act on those perceptions, feelings and interests, and the dispute is not likely to be resolved.

But what if one parent really is bad and wrong? If one parent abuses the children or threatens their physical or emotional health, should such behavior escape comment and be treated with the same respect accorded the kind, nurturing parent's actions? While mediators do not hold themselves out as arbiters of morality, they do not treat all behavior similarly. When one or both parents engage in dangerous or illegal behavior with children, a mediator will explore that behavior. She will do her best to see to it that both parents understand the possible emotional, physical, and legal consequences for the parent and the child. If the child is abused, she will notify the appropriate state agency without delay. She will explore whether the parents understand the consequences of the behavior, and if so, whether they are willing to accept those consequences or whether they are willing to change the behavior. The mediator is not likely, however, to tell one parent that he is "bad," because such accusations are likely to bring nothing but defensive counter-attacks. The mediator *is* likely to act in ways that will be effective in bringing about more appropriate behavior.

Enabling the parties both to develop trust and to ultimately be willing to examine their behavior and its impact on themselves, their spouses and their children may be the best way to facilitate change in the "bad" spouse's behavior; but Professor Grillo's concern is that this approach will sacrifice the feelings and self respect of the "good" spouse.[45] The idea is that the woman needs to have someone agree with her judgments that her husband is bad in order to feel good about herself. This idea is only slightly off the mark. In order to help someone feel better about herself, her feelings and her perceptions, it is important that a third party understand, accept and appreciate those feelings and perceptions. Any semi-competent mediator knows that empathy and understanding of the parties' feelings and perceptions is essential.[46] For example, if a woman has sacrificed her career in order to be the primary caretaker, and is also angry at her husband for his past refusal to participate in the day-to-day care of the children, a mediator will acknowledge, accept, and understand the woman's anger and appreciate how the woman might well not trust that the husband will act differently. If the woman also wants to withhold the children from their father in order to punish him for his past behavior, a mediator will also understand, appreciate, and accept that feeling and desire. Indeed, the mediator might well point out that many women would feel the same way.[47] The mediator is not likely to join in the woman's judgment that her husband is therefore bad, nor is she likely to encourage the woman to actually use the child for her revenge. The mediator does not need to join in that

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45. *Id.* at 1561.

46. *See, e.g.*, C. MOORE, THE MEDIATION PROCESS 124-71 (1986); J. FOLBERG & A. TAYLOR, MEDIATION 112-15 (1984).

47. There is an important difference between validating the underlying feeling and desires, and supporting the proposed behavior. Surprisingly, often when a person feels that her feelings and desires are understood and appreciated, the person is able to examine her ideas about what to do in a new light. This reevaluation does not mean that she gives up her interests; instead, it means that she is able to re-examine her real interests, and often concludes that certain behavior would be self-defeating and is not worth pursuing.

judgment (or in the planning for revenge) in order for the woman to feel understood, accepted and validated.

Psychological[48] and legal[49] literature is replete with statements to the effect that accurate empathy, rather than sympathy, is necessary to help a person feel better about herself. While the difference between sympathy and empathy may seem minimal, it is a key aspect in the training of those in the helping professions. In light of its relevance to Professor Grillo's point, this difference is worth some exploration. Essentially, person A is sympathetic to person B if A sees things from a vantage point similar to B's — if she makes the same moral judgments and evaluations. Empathy, on the other hand, requires A to understand and appreciate B's perception of, and reaction to, the world. Rather than making the same judgments as does B, A suspends her own judgment and concentrates on understanding and accepting B.[50]

Of course, there probably are bad mediators, as there are bad judges. Some mediators, as judges, might lack empathy and might tell the parties to just be quiet and listen. Fortunately, these mediators are not likely to stay in business or to keep their jobs very long because they may never help parties reach agreement. Since judges can use coercive power to force people to act in certain ways, the bench is not subject to this effective process of screening for empathic responses. In addition, to the extent that a divorcing party has a self-assessment that is dependent on the view of a third party, he is much more likely to feel bad and guilty, as well as controlled, by another person's negative viewpoint when that third party is a judge whose opinions carry the weight of societal sanctions, rather than a mediator who has no control over the parties and is instead there to serve them.

A very real, but subtle, danger in Professor Grillo's argument on this point is that it seems to support the idea that women, and often women of color, somehow ought to rely on a family court judge for vindication of their moral values. First of all, it is just as likely that the judge will withhold the sought-

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48. *See, e.g.*, R. CORSINI & D. WEDDING, *supra* note 43, at 159.

49. *See, e.g.*, D. BINDER & C. PRICE, LEGAL INTERVIEWING AND COUNSELING 6-19, 20-37 (1977); R. BASTRESS & J. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION chs. 2-5 (1990).

50. The distinction was put especially well by Gerard Egan, a behaviorist, in THE SKILLED HELPER:

> For instance, there is something intrinsically human about feelings of sympathy (not to mention anger) that arise in a helper as she listens to a woman's story of marital abuse. But sympathy is a two edged sword that can blind a helper to nuances in the story that need to be understood if the client is to be helped.... Helping this client means helping her understand her part in the overall problem situation and helping her set problem-managing goals and choose goal-oriented means that are under her control. Sympathy has an unmistakable and ineradicable place in human transactions, but its "use" ... is limited in helping. It cannot take the place of empathy.

G. EGAN, THE SKILLED HELPER 92 (1986).

Of course, where the issue is spousal abuse, the legal system's role is much different from the therapist's. There is a strong public interest in preventing abuse, and it is up to the court, and not just the victim, to see to it that the abuse is terminated. *See infra* note 26 and *infra* note 108. My response to Professor Grillo's suggestion that the *process* of having a court sympathize with a woman and blame her husband is helpful *regardless* of the ultimate substantive result. While a sympathetic *ruling* by a court may well be necessary in some cases, an empathetic process is preferable in all cases.

after approval. More important, however, is the suggestion that it is good for women to ask for the approval of a (probably) white male judge so that they can feel morally adequate. The very process would seem to reinforce a woman's sense of herself as somehow morally inferior to, or at best morally less knowledgeable than, the judge.

Finally, Professor Grillo suggests that women may be both more in need of and more worthy of support around the time of divorce because they are more relational; they are willing to communicate and to engage in problem-solving, addressed to the concerns of the children, with the other parent.[51] It might, in fact, be helpful for the woman's self esteem if the court took the time to praise the parent who engages in this kind of behavior and to condemn the parent who does not. Study after study, however, has shown that the strongest support for a particular behavior is not the presence of a third party verbally praising that behavior, but the presence of a respected third party actually *modeling* that behavior in the presence of the affected person.[52] What this means is that the best way to support the person who wants to communicate and plan for the best interests of the child is for the state, or its representative, to actually engage with the parents in that kind of behavior. Such is the essence of mediation. It is, of course, quite different from criticizing or blaming people who do *not* engage in that behavior or who are very angry. In this same regard, to the extent that one is concerned with the impact of either litigation or mediation on women of color, who often are forced to bear the worst of society's burdens, it is well worth pointing out that the woman of color is much more likely to gain increased self-esteem if she sees other women of color, and not just white males, in positions of authority or importance. In Alameda, California, where I worked as a mediator, there are twenty-one mediators employed by the court. Thirteen are women, and six are persons of color. The family court judges are all white males.[53]

ANGER AND CONTEXT

Professor Grillo's next major criticism of mediation results from her observation that many mediators do their best to ultimately help parties focus on planning for future success rather than on assigning blame for past failures.[54] In an argument similar to that discussed above, Professor Grillo suggests that this focus prevents women from standing up for themselves, and, along the way, devalues and betrays women.[55] Essentially, the idea seems to be that there can be no assertion of rights without a corresponding assertion that the other party is wrong, and mediation fails to focus on those past wrongs. In addition,

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51. Professor Grillo also suggests that women's tendency to be relational may cause them to sacrifice more in negotiations. This point is addressed *infra* note 103.

52. *See, e.g.*, R. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969).

53. This is not to suggest that every effort should not be made to bring more women and minorities into the judiciary. It is only to acknowledge that in the recent past, and at present, there are more openings for mediators; women, tending to be more relational, may be more interested in being mediators; and the percentage of mediators that are women and minorities is substantially higher than the percentage of the judiciary that meet either of those descriptions.

54. Grillo, *supra* note 3, at 1561.

55. *Id.* at 1559-66.

because women in mediation will be encouraged not to blame and condemn their husbands, they will be forced to make decisions without any appropriate context; they will be prevented from ever asserting their rights; and they will be forced to blame themselves for their husbands' failures. Professor Grillo tells the story of an acquaintance who, having "been exposed to a discourse in which fault-finding was impermissible" ended up by finding fault with herself,[56] and suggests that by discouraging blaming and fault-finding, mediation creates a sense of disentitlement that will interfere with the perception and redress of injuries that have in fact occurred.

Just as divorce mediators are likely to avoid personally blaming or condemning either spouse, they are also likely to discourage participants from doing a lot of blaming of each other during the mediation process. One reason for this is that child custody determinations in California do not involve questions of parental blame (or parental rights), but instead revolve around an attempt to determine the best interests of the child. Another reason, as suggested earlier, is that when one party to a dispute finds herself being blamed and accused of somehow being bad or wrong, the natural human response is for that party to defend herself, and more likely than not, that self-defense takes the form of a counter-attack against the blaming party. In the kind of repeating cycle that typifies escalating conflict, each party begins to feel a need to defend herself by attacking the other. The conversation becomes focused on mutual recrimination; and joint problem solving, or even real communication, becomes impossible.[57] If the original conflict is to be resolved, each party's needs and interests ought to be presented and framed in a way that can be heard by the other party without resulting in unnecessary defensiveness.[58]

Of course, if fault-finding is necessary, the fact that it hinders mediation efforts may simply be proof that mediation is bad. The suggestion that conflict resolution is dependent upon finding fault with at least one of the parties to that conflict suffers from the same faulty analysis Professor Grillo earlier applied to family systems theory. Professor Grillo suggests that if you cannot find fault with the other, the fault must lie with yourself.[59] This misses the possibility that the very search for fault may itself not be helpful. Finding fault with another is neither a necessary nor a necessarily helpful step towards either improving one's own self-esteem or asserting one's own self-interest. For most people, blaming is not a catalyst for assertion. It is a direct impediment. The main problems with assigning fault as a step towards assertion are that: (1) blaming concentrates one's efforts on reconstructing the past rather than on acting with the future in mind; and (2) blaming another leads to the unconscious conclusion that, because the other was responsible for the initial problem, only that person is capable of taking the action necessary to either remedy the problem or see to it that the problem does not recur. This stance unconsciously affirms the blamer's sense of herself as ineffective and unable to act on her own

56. *Id.* at 1565.
57. *See* D. PRUITT & J. RUBIN, *The Escalation of Conflict*, in SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 156-87 (1986).
58. J. FOLBERG & A. TAYLOR, *supra* note 46, at 100.
59. Grillo, *supra* note 3, at 1559-66.

behalf, and thereby precludes the blamer from taking direct action on her own behalf.

The preferred alternative, and that encouraged by mediators, is for the party to realize that she does not like what has been done, that she is entitled to her feelings and perceptions, and that she can and will do something about it (such as standing up for herself and her children).[60] As mentioned earlier, a person's sense of self or of self-legitimacy simply does not depend on finding fault with someone else. Instead, a person's sense of self and of self-legitimacy depends on that person feeling self-worth, which in turn depends on feeling understood and accepted by another — an empathic response. People who need to develop a healthy sense of self and of entitlement specifically ought *not* to be taught to base that sense of entitlement on a belief that someone else is bad, wrong, or worthy of blame. They need to be helped to develop a sense that they themselves are worthy and valuable, so that their sense of self-worth does not depend on a belief that someone else is somehow inferior. In his seminal work on assertion of self, Boszormenyi-Nagy[61] pointed out the difference between "constructive entitlement," which is the sense of entitlement that individuals may have, independent of any need to attach fault or blame to others, and "destructive entitlement," which fosters a sense of self that is less secure, weaker, and both less healthy and less effective, than that fostered by constructive entitlement.

Fortunately, mediation generally works as intended. Available data indicate that both men and women who have gone through mandatory mediation felt that they had the opportunity to fully express their own views and that because of mediation they were more confident about standing up for themselves. Women felt this to be true even more strongly than did men.[62]

It is also important to emphasize that those mediators who do not focus on blaming do not thereby avoid focusing on relevant family history. Professor Grillo suggests that if women are not encouraged to blame their husbands, "context — in the sense of the relationship's history — is removed. The result is that we are left with neither principles nor context as a basis for decisionmaking."[63] Fortunately, the elimination of fault-finding does not require the elimination of context for decisionmaking. Perhaps the difference between the two can best be shown by an example. Assume that Mother (M) and Father (F) are divorcing and that F has a history of excessive drinking and of occasionally ignoring commitments to take responsibility for the children. M might well blame F by saying that he is a no good bum who is not concerned about his children and who deserves to be condemned and punished. A third party who believed that blaming was helpful might either agree with M or might add her own blame, suggesting that F was lazy and stupid. The third party and M might

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60. Of course, it may nonetheless be the case that, for some, blaming is a motivator to action. Even for those individuals, mediation is not problematical. A mediator may not want to use session time to focus on blaming, just as a judge may not want to use court time for that purpose. Neither procedure prevents a person from using her time and energy outside of the session in whatever way suits her best.

61. I. BOSZORMENYI-NAGY & J. SPARK, INVISIBLE LOYALTIES 106 (1973).

62. Duryee, *supra* note 6, at 29.

63. Grillo, *supra* note 3, at 1564.

then jointly conclude that F should be entitled to no visitation because he was no good.

On the other hand, a mediator who did not believe that blaming was helpful might elicit a full history of F's drinking and missed commitments, including the frequency, the circumstances and the results. The mediator would acknowledge, understand, and empathize with M's anger at F's missed commitments, as well as her concerns for the safety of the children. If there were specific circumstances under which those behaviors occurred, the mediator might help the parties arrange a schedule of visitation that provides for F not to be with the children when any of those circumstances are present. The mediator would help F to understand M's reluctance to leave the children with F for fear of his drinking and missed commitments. She might then focus on what F might do to help M overcome her fear and anger. Perhaps F might take part in an alcohol rehabilitation program, and perhaps he might see the children for briefer periods of time in safe circumstances, and then build up to longer visits as time passed and he was able to demonstrate to M that he could be trusted to adequately care for the children. By de-emphasizing blame, the mediator eliminates neither history nor context. Instead, she simply attempts to use both history and context in a constructive way.

Professor Grillo tells the story of Linda's husband, Jerry, who lied and ignored their child's well-being. In the story, the mediator blames Linda for being angry at her husband and concerned for her child.[64] A competent mediator might not blame either parent, but would surely allow both parents to discuss their concerns for the child and the basis for those fears, unlike the one in the story.

What Professor Grillo perceives as the elimination of context is instead an attempt to focus the discussion on that context which is important to that task. Professor Grillo quotes Dean Folberg as saying that what has happened between the parties is "only important in relation to the present or *as a basis for predicting future needs, intentions, abilities, and reactions to decisions.*"[65] She then suggests that this means that history is irrelevant in mediation. Indeed, Dean Folberg's above-quoted remark excludes only that part of the family history that has no significance in determining what will be in the best interests of the child.[66] To the extent that history is helpful as a basis for predicting

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64. *Id.* at 1563, 1594.

65. *Id.* at 1563 (quoting J. FOLBERG & A. TAYLOR, *supra* note 46, at 114) (emphasis added).

66. Included in Professor Grillo's discussion of the need for women to blame their husbands is a short story about a mediator who did terrible things to a woman and her child, including making threats that are beyond the power of a mediator to enforce. I refer to this story at intervals. This note summarizes the story that is interspersed throughout Professor Grillo's article and suggests how a typical mediator might deal with the situations posited by Professor Grillo.

Apparently, Jerry had a job with the railroad with an unpredictable schedule that took him out of town an average of three nights per week. Linda worked in a child care center so that she could have their son Kenny with her while she worked. When they divorced, Linda was the primary parent. Jerry saw their son only sporadically. A year and a half after the divorce, when Kenny was three and a half, Jerry moved a thousand miles away. He remarried and sought to spend substantial amounts of time with Kenny. He still worked for the railroad and maintained the same sporadic schedule.

future needs, intentions, abilities and reactions, that history is not simply tolerated, it is essential. Indeed, Dean Folberg goes on to say that "[b]efore good decisions can be reached, both participants must have equal information and both must fully understand what the issues are. Stage two of mediation is used to find out all the relevant facts" including underlying emotional conflicts.[67]

Finally, it is true that mediation of child custody disputes will not redress some injuries that women have suffered during marriage. Indeed, despite Professor Grillo's concern, to the extent that redress of parental grievances *does* become the focus of custody determinations, the child may suffer by being made the subject of the parents' disputes. If a parent needs to redress injuries, perhaps she ought to be encouraged to do so; but many would doubt that a child custody determination is the appropriate place for that redress.[68]

When Kenny went to his father's home for Thanksgiving, neither his father nor his stepmother was with him during the day. Instead, they sent Kenny to an unlicensed day care facility where he was regularly exposed to corporal punishment. In addition, rather than returning Kenny at the end of Thanksgiving, as had been planned, they did not return Kenny until Christmas.

The mediator did not listen to any of Linda's concerns. She was rude to Linda. The mediator decided that Kenny should spend every other month with his father. The mediator told Linda that if Linda did not agree with the mediator's suggestion, the mediator would recommend to the court that Jerry get sole custody of their son.

This story bears no resemblance to any kind of competent mediation. First of all, as noted in the text, mediation involves a neutral third party's attempts to facilitate communication and problem-solving between the parties. The story of the third party making substantive decisions and threatening the parties is a description of some other process. It is not a process that I defend.

Faced with the situation described by Professor Grillo, a mediator might help Linda express her concerns about Kenny in a way that Jerry could absorb. The mediator would do her best to help Jerry see things from Linda's point of view. She might ask Jerry how he thought Linda might react to future promises, given the way he dealt with the arrangements around Thanksgiving, and she might explore ways to allow Jerry to build up trust on Linda's part without subjecting Linda to the possibility of again being disappointed and mislead to such a great extent. She would also do her best to help Linda see things from Jerry's point of view. Perhaps most importantly, the mediator would help both parents to see things from their child's point of view.

The mediator might discuss with the parents the effects on the child of being separated from one of his parents for prolonged periods, and would also discuss the effects on the child of being sent back and forth to different households a thousand miles apart on a regular basis. In addition, the parents might discuss the likely consequences of going to court. If they both agreed on what those consequences might be, they could figure out solutions in which both parents and the child would come out better than they might in court. If the parents had different ideas about what might happen in court, discussion of those consequences might not prove fruitful.

It might be that mediation might help the parents reach an agreement in the child's best interest. It might be that mediation would be unsuccessful and the parties would end up going to court. Cases involving parents separated by long distances are often hard for the parents to resolve. What is important here is that a mediator would not impose a solution on the parties, but would work to help the parties come up with their own agreement where that is possible.

67. J. FOLBERG & A. TAYLOR, *supra* note 46, at 47-48.

68. At least in California, mediation is required only for child custody arrangements. To the extent that courtroom battles are necessary, financial arrangements may in fact be better suited to be the focus of those battles, leaving parents to fight about money and other assets whose destruction in the fight is of less concern to the state than the emotional destruction of children.

ANGER

Professor Grillo next suggests that mediation necessarily deals badly with women's anger.[69] Either mediators will encourage women to express their anger or they will not encourage them to express their anger, and either alternative is bad for women. If mediators do not encourage women's expression of anger, goes the argument, the mediator thereby "sends a message that anger is unacceptable, terrifying and dangerous.... This is a message that their worst fears are true: 'You are, indeed,' they are told, 'threatening your own children by expressing your anger.'"[70] Alternatively, if mediators encourage the expression of anger, that anger will be simply vented, and by being vented will lose its potential to teach and will become ineffective.[71] This is a classic double-bind.[72]

According to Professor Grillo, litigation apparently allows the parties to express their anger through their attorney surrogates, in a way that keeps that anger from being either delegitimated or denied expression.[73] The implication that the discovery process and court hearings somehow permit a legitimate expression of anger and thereby do not, as does mediation, impact badly on women, is farfetched. The party who goes into a court hearing angry is likely to come away from that hearing feeling humiliated, controlled, and furious. The issues addressed at the hearing may not be what she wants to discuss, but are likely to be the issues framed by the court and the attorneys. The party is permitted to speak only when spoken to, and to speak only enough to answer the specific questions put to her. She may be prevented from raising issues most relevant for her and required to answer questions she believes are irrelevant and designed only to embarrass or humiliate her. She may be treated abruptly by opposing counsel, as well as by the court, with no alternative but to accept it.

Essentially, the message that comes from the court is: "your wants and needs are irrelevant except to the extent that we say otherwise, and you are either too worthless or too dangerous for us to even let you speak for yourself." A woman's expression of anger may be met by judicial reprimands, intolerance, contempt, and, perhaps worst of all, a ruling against her on the merits.

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69. Grillo, *supra* note 3, at 1571-80.

70. *Id.* at 1572, 1578.

71. *Id.* at 1575. To a great extent, "blaming" is equated with "venting" of anger. In light of Professor Grillo's suggestion that mediation is bad because it does *not* encourage blaming, it is highly curious to hear her, in the same breath, condemn mediation because it may *encourage* that same behavior.

72. *See* Bateson, Jackson, Haley & Weakland, *Towards A Theory of Schizophrenia*, 1 BEHAV. SCI. 251, 251-54 (1956). The term was coined by Gregory Bateson to describe the kind of "damned if you do, damned if you don't" positions often taken by mothers of schizophrenic children, and was thought, at the time, to actually "drive them crazy." While we now know that there is a biological element of schizophrenia, the idea of the schizophrenogenic double-bind remains a useful and oft-cited description of the kind of response that tends to drive everyone, schizophrenic or not, a little crazy. The typical example of this type of behavior is the person who gives someone two sweaters as a gift. When the donee comes back wearing one of them, the donor says: "what's the matter, you didn't like the other one?"

73. Grillo, *supra* note 3, at 1573.

While Professor Grillo contemplates that the woman's lawyer will effectively act as a surrogate to express her anger, there is no evidence that a woman will feel relieved of her own anger by watching her lawyer participate in a judicial hearing. If Professor Grillo is nonetheless correct in her suggestion that, at least occasionally, watching her attorney participate in a hearing will provide a cathartic experience for an angry woman, the ultimate result is no less disturbing. The real message that comes out of this experience would be: "You are either incapable of handling your own anger, or you are too dangerous to be allowed to handle your own anger. The only way we will permit you to experience your anger is through a representative of the court (often a white male), and even then, that expression must be under the strict supervision of the court."

Of course, I do not doubt Professor Grillo's suggestion that some mediators may not do their jobs well. They may be afraid of anger, and that fear may lead them to discourage women from expressing anger in the mediation session, or they may simply believe that the direct expression of anger may be counterproductive to resolving child custody issues. The result may be unfortunate for some women, especially those who have a difficult time with their anger. Mediators ought to be alerted to these concerns. The conclusion that these women should go directly to court, however, is not rational. The differences between mediation and a court hearing are substantial. While mediators are thoroughly trained to accept and understand the party's feelings, judges are trained to expect proper courtroom decorum. In mediation, unlike the courtroom, the woman is permitted to frame the issues for herself, to speak for herself, and to be angry without the threat of judicial contempt and without the fear of alienating the judge, who is empowered to decide her fate as he sees fit.

Indeed, in explaining her condemnation of mediation, Professor Grillo refers to a commentator who "suggests that the mediator ask questions of the parties that will imply ... that elaboration of their feelings during conflicts with each other is 'irrelevant and counterproductive'...."[74] While this approach may be less than ideal for some participants, the judicial alternative is for the judge to tell the party that she is out of line and that if he hears one more angry outburst, he will hold the party in contempt. Somehow, by comparison, the mediators' questions and their corresponding implications seem somewhat less horrible.[75]

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74. *Id.* at 1574.

75. In all of the literature on mediation, Professor Grillo was able to find one study that indicated that a particular group of women who went through mediation of child custody disputes had higher scores on the Beck Depression Inventory in a single interview about four weeks after resolution of the dispute. *Id.* at 1578. The study did not relate to mandatory mediation. Emery & Weyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCH. 179 (1987), cited in Grillo, *supra* note 3, at 1578. In addition, the authors of the study themselves suggested that the results might be more likely to indicate transient demoralization than actual depression. Despite Professor Grillo's complaint that the scores indicate a condition that "might be dangerously disabling," there is no indication in the study in question or anywhere else in the psychological literature that such is the case. Grillo, *supra* note 3.

Instead, the study indicates that the women in mediation may have been troubled because they believed they gave up more than they had to. With regard to this aspect, see *infra* text accompanying notes 103-05. The study also indicated that both parents believed mediated settle-

Professor Grillo suggests that if a woman has trouble accepting or tolerating her own anger, and if that anger is dealt with improperly, it can be frightening and awful for the woman. The truth is that mediators, unlike judges, are trained to accept, tolerate and understand (if not to always encourage) the feelings of the people with whom they are dealing. If a mediator indicates that "elaboration of feelings in the mediation session is counterproductive,"[76] and a parent's response is to fill with terror and guilt, the parent has a problem, and it would be good if the parent received help with that problem. To blame mediation or the mediator for that problem, or for the parent's response, however, misses the mark. In reality, the problem is not what mediation does *to* the parent, but the fact that mediation does not always do more *for* the parent with respect to this problem. Blaming mediation for not fixing that which it is not intended to cure, but with which it deals far better than does a court, is simply not productive.

LACK OF MEDIATOR NEUTRALITY

In the next part of her article, Professor Grillo suggests that any particular mediator (1) may not be able to separate truth from lies, and (2) may be biased against one of the parents.[77] It is difficult to dispute either of these possibilities, but it is also difficult to conclude that these possibilities represent serious problems with mediation.[78]

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ments were better for the children, and mediation also tended to reduce acrimony between the parents. The authors suggested the likelihood that a follow-up after a longer term might reveal very different results for the mothers in mediation. Emery & Weyer, *supra*, at 184.

Interestingly, the results concerning depression have never been replicated. Other studies have shown both that mothers tend to be more satisfied after mandatory mediation than after litigation, and that children tend to do better after mediated settlements than after litigation. For discussion of a few of these studies, see K. KRESSEL, *supra* note 1, at ch. 12; J. FOLBERG & A. MILNE, *supra* note 2, at pts. 3, 6 (1988). *See also* Duryee, *supra* note 6, at 18.

76. Grillo, *supra* note 3, at 1574.

77. *Id.* at 1582-84, 1585-94. Professor Grillo also mentions, in this part, the facts that mediation may be inappropriate for spouses who have been abused and that some women may tend not to stand up for themselves in mediation. Because these issues are dealt with in more depth later on in her article, I will deal with them at a later point in my response. *See infra* text accompanying notes 101-37.

78. Professor Grillo suggests that, in any event, it is presumptuous for the state to assume that it is better suited to decide whether mediation will work than are the parties themselves. Grillo, *supra* note 3, at 1582. It seems to me, however, that the state is necessarily in the business of making determinations about what works best in cases where the public has an identifiable interest it wishes to assert. States often require people to not take certain drugs, to wear motorcycle helmets, to purchase insurance and to take countless other actions, despite the fact that many of the people subject to these requirements may believe that using drugs or engaging in other proscribed behaviors might work best for them. Where the legislature has spent many hours debating the utility of mandatory mediation, and where its decision is made after reviewing thousands of pages of literature and scientific studies, its decision to use that process seems anything but presumptuous. As for Professor Grillo's suggestion that a woman may know more about how mediation would work for her particular case than might the state, I do not doubt that such would, at times, be true. Nonetheless, in the vast majority of cases, parties to a divorce know very little, if anything, about mediation prior to their actual exposure. "Optional" mediation would give men an opportunity to reject a procedure that they know little about and that might have proven to be extremely helpful for their spouses and their children. *See infra* text accompanying notes 138-49.

It is true, as Professor Grillo suggests, that a mediator might believe one of the parties even if that party is a pathological liar. Unlike Professor Grillo, however, I believe that court, rather than mediation, would be the most dangerous arena for the woman married to the pathological, but highly believable, liar. If, as Professor Grillo assumes, only the wife knows the truth about her spouse, then allowing the wife to decide whether or not to go along with that spouse is immeasurably superior to a system in which a less knowledgeable third party (the judge) determines the credibility of the believable liar. While Professor Grillo suggests that the rules of evidence will help the woman to discredit her lying husband, the truth is closer to the opposite of that proposition. The rules of evidence narrowly confine the inquiries that can be made and can make it much easier to lie successfully.

Worse than the lying husband, apparently, is the biased mediator. The mediator may be biased in two different ways: (1) with respect to issues; and (2) with respect to individuals. Issue bias may, in turn, arise in two ways: (1) mediators may be biased towards joint custody; or (2) mediators either will or will not tell the parties what they think is a "fair" result, and either choice is, apparently, wrong.[79]

With respect to a bias towards joint custody, Professor Grillo points with some dismay at the mediator who went so far as to tell parents that their refusal to request joint custody may result in an award of custody to the other spouse as the "friendlier parent." Regardless of the merits of basing custody in part on which parent is likely to allow the child frequent and continuing contact with the noncustodial parent, the fact that a mediator in California might advise the parties that a court may take that factor into account in making a custody award does not reflect on the merits of mandatory mediation. It is the *substantive* law of child custody, and not the process of mediation, that makes that factor relevant. In determining custody arrangements, *courts* are directed to take into account which parent is more likely to allow frequent and continuing contact with the children.[80] The fact that a mediator might explain to parties what the law directs a court to do is not a reason to condemn the process of mediation.

The next apparent problem with mediation is that a mediator might be asked what result is "fair." According to Professor Grillo, if the mediator responds that "fair" is what a court would do, she leaves no room for the parties to think of the court as unfair. If she responds that maybe what the court would do is not the most fair result, she leaves the parties without an "anchor" with which to steady their own perceptions — another classic double-bind for the mediator.

When I asked several court-appointed mediators what they would do if asked by the parties what result would be "fair," I received different kinds of answers, but none of them suffered from the problems suggested above. Instead, typical responses included: (1) "I can't really say what would be 'fair.' There just aren't any studies on that. I can talk to you about the possible effects of different arrangements on the children, and I can talk to you about the

79. Grillo, *supra* note 3, at 1590.
80. CAL. CIV. CODE §§ 4600-4608 (West Supp. 1991).

standards the law directs a court to look at, but you're in a better position than I am to decide what is 'fair' for your family."; (2) "I can't really tell you what would be fair, but it sounds like you're really concerned about being fair. Let's talk about what that means to you."; or (3) "Fair to whom? Yourself, your husband, or the children? I'm not sure there's really an answer that everyone would agree on, but I think it's important to see that there may in fact be several different questions you're asking." Any of these answers would provide helpful avenues for the parties to explore. They allow the parties to see that the issue of "fairness" is, indeed, not a simple one, and not necessarily one that corresponds to what a court might impose.[81]

Professor Grillo also raises the possibility that mediators may be biased against one or more of the parents. No one, she realizes, can ever be completely "neutral." Mediators, like all human beings, have their own conceptions of "reality," and those conceptions give rise to viewpoints and values that may differ from "objective" reality (if there is such a thing) and result in biases. As Professor Grillo acknowledges, "[t]he most salient feature of a good mediation process is that the failures of neutrality are not denied, but are recognized and addressed."[82] Indeed, that same feature is a part of *any* process in which a person attempts to at least ultimately approximate neutrality.

In pointing out that a good mediator should be on guard for her own biases, Professor Grillo makes a worthwhile contribution. In suggesting that a court hearing is therefore somehow superior, however, she goes too far. Unlike a mediator, whose job is to assist the parties, a judge sees her job as dispensing justice. She is, by the role thrust upon her by society, encouraged to see herself, and to represent herself, as both neutral and fair. While a judge suffers from the same biases that effect every human being, she has not historically been encouraged to search for and to acknowledge her biases. Instead, she is told, forcefully, that she should not have them — she needs only to find and follow the law. As a result, her biases may simply remain hidden behind the presumed rationality of law. Her effort to deny bias may lead not to its elimination, but only to its disguise. If anything, this can make bias even more dangerous.[83]

Not only is the possibility of a much more virulent form of bias present in the courtroom, but the presence of that bias can have a much more devastating impact on the parties. A judge, unlike a mediator or almost anyone else in

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81. In making her argument, Professor Grillo suggests that if a mediator were to suggest that a "fair" agreement is one that a court might impose, mediation would simply be a traumatic process that yielded nothing more than a court decision. Grillo, *supra* note 3, at 1593. The problem with this opinion is that mediation is far *less* traumatic than litigation for most people. In addition, even if it duplicates what a court might do, mediation is preferable to litigation because it is much more likely to result in a more functional long-term relationship between the parents (which necessarily benefits the children), and it allows for more creativity and is more empowering for the parties involved. Some people might prefer not to have *any* long-term relationship, functional or not; but since the parties share the same children, as long as both parents stay involved in the lives of their children, some on-going relationship may be unavoidable. Given the existence of *some* relationship, there is mutual benefit in a better one.

82. *Id.* at 1588.

83. Of course, many judges take great pains to fight against hidden bias, and judicial training encourages these attempts more now than it did in the past. Nonetheless, if both media-

our society, can impose her wishes on the parties with the full backing of the state. While a biased mediator might encourage the parties to agree to give custody to an undeserving father, a biased judge can *order* that custody be given to that same man. The difference is substantial.[84]

Nonetheless, Professor Grillo suggests that the courtroom may be less susceptible to bias because it is more formal than a mediation setting. "[J]udges sit apart from the parties. Ordinarily, they speak to the parties' attorneys rather than directly to the parties."[85] Indeed, it is true that judges sit apart from the parties. They are always looking *down* at the parties. Rules of court may lead the judge to essentially ignore the parties themselves, and to address only "officers of the court." Professor Grillo asserts that this formality tends to discourage, rather than encourage, bias on the part of the judge. She reaches this conclusion because evidence exists that people may exhibit increased prejudice in intimate settings.[86]

Human beings are undeniably influenced by their environment. As a result, an individual in an informal environment, surrounded by friends, may pay little attention to external societal rules that are routinely ignored by those friends (such as societal prohibitions against race or gender bias). Despite the temptation to conclude that intimacy thus causes increased bias, it is not the intimacy or informality, but the perception that one will be accepted despite, and perhaps even rewarded for, his biased behavior that encourages biased behavior. Indeed, recent studies of racially motivated attacks indicate that this kind of behavior tends to occur on the attackers' home turf and in situations in which the attackers greatly outnumber the individuals attacked. Being with a large group of supporters on their home turf tends to reinforce the group's biases and to encourage the attackers to pay less heed to societal constructs with which the group disagrees.[87]

When placed in an environment in which bias is affirmatively supported, individuals are more likely to act with bias, regardless of the setting's formality. The pre-Civil War South and the current-day KKK often operate with exquisite formality. It is not the presence of formality, but the norms and expectations of the formal group, that determine behavior. Similarly, when two individuals are placed together in a situation requiring joint effort, the environment is as intimate as they come. The result is not, however, likely to be an increase in bias, but instead, the situation is likely to generate an increase in cooperation. As individuals get to know each other better, they begin to know, and as a result to consider, much more than merely their colleague's gender or skin color.[88]

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tors and judges continually search for their own biases, the judge, by dint of societal expectations, has the much harder job.

84. Where the mediator is encouraged, or even permitted, to make recommendations to the court, this difference diminishes.

85. Grillo, *supra* note 3, at 1589.

86. *Id.* at 1590.

87. Several writers have described racially motivated attacks as "coward's crimes" for exactly these reasons. Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, at C1.

88. D. PRUITT & J. RUBIN, *supra* note 57, at 108.

It is true that formal judicial proceedings are recorded and are subject to review, and that overt race or gender bias is institutionally discouraged in a courtroom. It is also true, however, that the courtroom setting has significant elements similar to those that tend to facilitate actively biased behavior. First of all, it should be apparent that the discouragement of *overt* bias in the courtroom does not effectively discourage other kinds of bias. It is quite simple to act with bias without putting it on the record that one is doing so.[89] More importantly, while the courtroom setting will usually appear formal and even threatening to the parties, experienced attorneys find the courtroom familiar and comfortable, and to the judge it is like home, only better. The judge sits above everyone else, and, indeed, everyone else in the courtroom is there only to serve him and to see that he gets the respect and the information he needs and wants. Anyone who has spent much time litigating knows that making someone a judge can be a very effective way to bring out that person's least tolerant (and, for those appearing before her, least tolerable) characteristics. The judge and the attorneys, possibly friends with each other and almost always familiar with each other and with the setting, may tend to coalesce into the kind of mutually reinforcing clique that can be so dangerous. The procedures of the court tend to suggest a kind of caste system, with the judge on top, the attorneys next, and the parties and witnesses put in the role of uneducated outsiders. This, in turn, further separates the judges and lawyers from the parties and discourages empathic behavior.[90]

Mediators, on the other hand, have no power of enforcement over the parties. Instead, they must rely on their ability to assist the parties to understand and cooperate with each other. The mediator is outnumbered by the parties. If either party is unhappy with the mediator, she may simply leave and opt to continue the dispute in court. Mandatory mediation requires the parties to attempt mediation. At least in California, there is no required minimum stay.[91] If either party is unhappy with the mediator but wishes to continue the process of mediation, the parties may choose any private mediator, or, if they are so inclined, they may request the state to provide a different mediator, or a second mediator to work with the first.[92] Finally, at least in Alameda County, the mediators are, themselves, much more likely than are judges to be women,

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89. Or, indeed, without even being *aware* that one is doing so. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

90. This is *not* to suggest that most judges are biased and form cliques with attorneys to work against the clients. It is intended only to point out that the potential for such behavior exists, and that it is likely much harder for a judge to rid herself of bias than for others to do so. Fortunately, the judiciary almost always rises well above temptation, no matter how strong that temptation may be.

91. *See supra* text accompanying note 15.

92. All of the options I suggest are available in Alameda County, where I practiced, and they are all made known to parties in mediation as a matter of course. Recent legislation directs all California counties that do not presently have comparable options to develop them. CAL. CIV. CODE § 4607(g) (West 1991). If Professor Grillo's point is that mediation ought to be accompanied by all of these precautions, I agree strongly. However, since her main thrust is that mandatory mediation is bad per se, and not simply that there are potential problems that ought to be guarded against, I feel obliged to parry that main thrust rather than to elaborate on what might be done to assure the non-occurrence of that which Professor Grillo fears.

persons of color, or both.[93] This makes it less likely that they will be biased against women, or persons of color, and it creates an institutional norm of race and gender consciousness and respect. Because judicial appointments are much less frequent than appointments of mediators, it is likely to be quite some time before a similar mix finds its way to the bench.

TRANSFERENCE AND COUNTERTRANSFERENCE

But, says Professor Grillo, it is not enough to say that a party does not have to agree with a mediator, because of the problems of "transference and countertransference."[94] Individuals form a picture of the world and of the people in the world by putting together all of the many scenes they have been exposed to during their lives. That unconscious picture is necessarily both incomplete and inaccurate. Because important people in their lives acted a particular way, they may expect people in general to act that way. If their parents were all-loving, they will expect others to be all-loving, and will be unprepared for dealing with non-loving others. If their parents were mean, inattentive or abusive, they may, unconsciously, expect others to be the same. In psychoanalysis, the patient's distortions of the therapist are referred to as transference. The therapist's reaction to the patient's distortions is referred to as countertransference.

Professor Grillo suggests that both transference and countertransference may occur during mediation,[95] with the result that the mediator may act inappropriately towards a party, or vice versa. This suggestion is undoubtedly accurate. Indeed, transference "is an everyday phenomenon ... that appears in peoples' every act."[96] Some people may *feel* coerced to accept a mediator's bias, despite the lack of external coercion. We all know people who feel compelled to do things that are not in their best interests, and if we wish to speak psychoanalytically, we can attribute that unexplained compulsion to transference.[97] Labeling this behavior as transference does nothing to change the fact that the influences of bias are much more dangerous in a courtroom than in a mediation session. The person who is likely to have her competence undercut by the mediator's bias is that much more likely to be injured by the same bias coming from the supposedly all-powerful and all-knowing judge, who speaks with the full authority of the state. Professor Grillo suggests that a party to mediation may be more vulnerable to a mediator than to a judge because the party believes, going into the mediation, that the mediator is on her side. It is doubtful, however, that a woman going into mandatory mediation with her ex- (or soon to be ex-) spouse is likely to let her guard too far down in anticipation of a friendly experience.

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93. *See supra* text accompanying note 53.
94. Grillo, *supra* note 3, at 1591.
95. *Id.*
96. G. WEINBERG, THE HEART OF PSYCHOTHERAPY 134-57 (1984).
97. We can see clear examples of transference every time we see different people react differently to the same human stimulus. For example, assume that A, B, and C are all equally wealthy and all eat at restaurant X and are served by waitress Z, who acts the same with all of them. A thinks Z is very kind and gentle and leaves a big tip. B thinks Z is patronizing and leaves no tip. C thinks Z is deliberately slow in serving the meal and leaves a small tip. All three can be characterized as having acted on transference.

Professor Grillo states that in mediation "there may not be the time, the commitment, or the expertise" to study the transference and what it reveals about the clients' personality structures.[98] Indeed, resolution of transference issues can take more than ten years of daily analysis. To say that the work of psychoanalysis is not accomplished in a few mediation sessions does not speak too badly of the process. Mediation is a fairly short process with specific and limited goals. While one might be convinced to view this as a shortcoming of the process, such criticism ought to be taken with several grains of salt.

Professor Grillo suggests that voluntary mediation is a preferable alternative,[99] but that process offers no more protection against bias than does mandatory mediation. It is true that in voluntary mediation the parties can choose their own mediator, but the same can be true of mandatory mediation. All that is mandated is the mediation, not any particular mediator. In addition, to the extent that mediator bias is subtle and, as Professor Grillo suggests, unconscious, no party can really learn about that bias until she gets to know the mediator quite well. Most people do not know mediators, and have little available guidance in choosing mediators, whether the decision to mediate is one they make for themselves or is made by the state. To the extent that parties feel compelled to accept the mediator's pronouncements because of transference, the problem is likely to be most severe when the mediation is voluntary and the mediator is one the parties have chosen themselves.[100]

GIVING IN

Another criticism of mediation stems from Professor Grillo's assertion that women are more "relational" than men.[101] In essence, Professor Grillo asserts that women are more concerned with relating to and working with people, while men are often more concerned with dominating other people. Indeed, while Professor Grillo talks about psychological history as a basis for this difference, there is also biological evidence to support the proposition that some of men's tendencies towards dominance and aggression are hormonal.[102] The truth of this proposition, however, does not lead, directly or indirectly, to the conclusion that mandatory mediation should be abandoned.

First, Professor Grillo suggests that women's relational sense may cause them to compromise more in negotiations or in mediation. No evidence exists

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98. Grillo, *supra* note 3, at 1591.

99. *Id.* at 1596.

100. Indeed, transference is the *key* to psychoanalysis, and psychoanalysis is almost exclusively voluntary. I do not make this point in order to persuade people that voluntary mediation ought to be illegal. I make it instead to demonstrate that *no* process is perfect, but that the state must nonetheless adopt some imperfect path.

Of course, an important difference between voluntary mediation and some forms of mandatory mediation is that in some areas the mediator also functions as a factfinder and decisionmaker for the judge. *See supra* text accompanying note 30. Where this is the case, the mediator has a great deal of potential coercive power over the parties that most mediators do not have. Parties may be less trusting. For the same reason, they are likely to be less open and vulnerable to the mediator. Essentially, as the mediator gains power, the parties are likely to better defend themselves against the mediator.

101. Grillo, *supra* note 3, at 1601.

102. *See* Goleman, *Aggression in Men: Hormone Levels are A Key*, N.Y. Times, July 17, 1990, at C1.

that women, as a group, tend to fare poorer in negotiations as a result of their greater interest in cooperation and relationships. Indeed, in one of the first major studies of negotiations among lawyers, cooperative lawyers were found, on the whole, to do as well or better than competitive ones.[103]

Nonetheless, to the extent Professor Grillo suggests that, regardless of whether it is the man or the woman, when two parties negotiate (with or without a mediator), one of the parties is likely to be a "better" negotiator and to do better than the other party; her point is well taken. Just as no mediator can be entirely neutral, it is hard to imagine how any settlement, mediated or not, can be entirely neutral. One (or, hopefully both) of the parties is likely to do better than she might do in court. Since we can never know what a court would decide in a particular case, we can never know, in any particular case, which party (or parties) actually fared better in negotiation or mediation; however, we can safely assume that the results of the mediation will never exactly mirror what the result of litigation would have been.

If one party is likely to be "stronger" and get more of what she wants than the other party, goes the argument, shouldn't the state step in to even things out? Shouldn't the state make every possible effort to see that justice is done, especially when such important things are at stake? Unfortunately, the argument goes too far.

While it is true that one parent may do "better" than the other in mediation, it is equally true that the same parent is likely to do better in non-mediated settlements.[104] Indeed, it is likely that during the entire marriage that spouse got things his or her way to a greater extent. Of course, the same reasoning is not limited to marriage. We all know some people who are more strong-willed and who seem able to get what they want; and we know others who, though perhaps equally or more capable, and perhaps more worthy, seem always to just miss getting what they want. Several surveys indicate that negotiating success correlates more highly with certain personality constructs (usually referred to as those that make someone "strong-willed") than it does with intelligence.[105] It was suggested long ago that life is not fair, but it is more fair for those who stand up for what they want.

While it may not be news to suggest that life is not fair, it is no answer to Professor Grillo to suggest that the state should, as a result, be content to sit by and let things proceed unfairly. The state has an undeniably strong interest in intervening to change pre-existing power imbalances (indeed, that is what the state does every time it acts). An action between divorcing spouses engaged in child custody determinations, therefore, might simply be one of many occasions when state intervention is appropriate. An objective analysis of the situation, however, would indicate that it is not. In all relationships, and, as a result, in

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103. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 51-52 (1983). This was a study of negotiators unassisted by mediators. In fairness to Professor Grillo's concern for the person who is too relational, the study referred to above did find that, although it was a small group, the very worst group of negotiators were those who were cooperative as well as ineffective. *Id.* On the other hand, it is not at all clear that this group tended to include more women than men. Instead, it may be that what distinguished this group was what the pop psychology trend now labels as co-dependency.

104. J. FOLBERG & A. MILNE, *supra* note 2, at 17.

105. *See* R. LEWICKI & J. LITTERER, NEGOTIATION 259-78 (1985).

all marriages, there is, to a greater or lesser extent, some power imbalance caused solely by personality differences (in addition to whatever situation-specific external power imbalances might also exist). These imbalances are often most dramatic in intact marriages, because the very filing for divorce is often a sign of change in the power imbalance, and it often acts to drastically realign relationships even more. Despite the relatively high divorce rate of recent years, many people go through years or an entire lifetime feeling stuck in relationships they find oppressive. Either because of feared financial hardship,[106] or because they are afraid of what else might happen if they leave their spouses, people often endure relationships which give them little of what they want or need, and in which they feel at the mercy of their spouses. This kind of relationship is both intolerable for the person and potentially harmful for children of the marriage.

People who remain in these relationships need more assistance in asserting themselves than do people who are leaving them, or than people who are divorcing for other reasons.[107] Unfortunately, this same lack of assertiveness, combined with a lack of understanding of its true roots and consequences, prevents those individuals most in need of assistance from obtaining it. Absent actual or threatened physical abuse, the state does not even consider intervening to help in these cases, where help may be most needed.

Nor does the state intervene in cases where parents divorce, but in which the post-divorce family is still controlled by the same parent who controlled the family when it was intact. For many couples, even when the marriage ends, the relationship continues much as it had been during the marriage, albeit in separate residences. In these kinds of cases, one spouse will give in to the other even while divorcing. She may settle for both less financial assistance and less time with the children than she would be entitled to were the matter litigated. Again, the state opts not to intervene at all in these cases. Absent a history of physical abuse, if the parties settle on some mutually agreeable financial and/or custodial arrangement, there are few courts that would consider seriously evaluating whether the interests of both spouses are adequately protected by the agreement.

Those who are required to mediate child custody arrangements consist only of individuals who are able to leave relationships and who have resisted giving in to spousal demands prior to mediation.[108] If the state's goal is to protect people who might otherwise tend to give in to their spouses, the group that now undergoes mandatory mediation is the group least in need of that protection. In addition, to the extent that protection of these women is still a

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106. Divorce puts a substantial financial strain on women in this country. On average, while divorced men experience a 42% rise in their standard of living in the first year after divorce, divorced women experience a 73% decline in their standard of living. L.WEITZMAN, THE DIVORCE REVOLUTION xii (1985). *See also* Grillo, *supra* note 3, at 1568, n.96.

107. It is not at all clear that most people who feel dominated in a marriage eventually get divorced, or that most divorces involve people who are involved in an excessively one-sided relationship. It may well be that most of the worst relationships, in this particular sense, remain intact.

108. This is the class of people who are divorcing and who have not simply acceded to the other spouse's demands in a way that eliminates any state involvement.

concern, that concern can be addressed well short of eliminating mandatory mediation. Instead, parties to mediation are told that they should consider any agreement reached in mediation as only tentative; they should consult with their lawyers during and/or after the mediation, and with friends if they so choose. They should think about the process and its results, and should get back to the mediator if any tentative agreement is unacceptable in whole or in part.[109] In California, mediated custody arrangements are not final until entered by the court.

Professor Grillo asserts that some people will nonetheless feel compelled to abide by a tentative agreement. If so, it is only because the mediator does not adequately explain the party's options and the mediator's expectation that the party will take care to evaluate the tentative agreement outside of the mediation session. Concern that a mediator make that expectation clear is appropriate and helpful. To suggest that mandatory mediation ought to be eliminated because a mediator might not do so is too drastic a remedy.

Professor Grillo suggests that some women may, nonetheless, resist mediation because they fear that they will give in. These women need protection because once in mediation, they will feel obligated to reach an agreement, and once having reached an agreement, they will feel obligated to stick to it regardless of whether or not it is actually binding at that point. In fact, those who become aware prior to mediation of a self-defeating tendency to acquiesce become less likely to actually capitulate once in the mediation. Anyone who is sufficiently aware of her tendency to give in so that she would, if given the opportunity, refuse to participate in mediation, is unlikely to feel compelled to adhere to an admittedly tentative agreement when she is directly advised that she ought to consider the agreement only tentative. This may happen on rare occasions, but to eliminate mandatory mediation would be to take drastic action that effects numerous individuals, to provide only limited benefit for a very small number of individuals who likely need assistance in many areas.

One might argue that in divorce mediation, unlike in other areas, the state is taking affirmative action to require the parties to attempt to deal with each other. This differs from simply leaving the parties to their own devices, and the state ought to be especially cautious in those situations where it chooses to intervene. Logical as this sounds, this hypothetical response stems from a fundamentally misguided understanding of state intervention. To illustrate, assume that M and F live in a state that has no laws whatsoever concerning child custody or family matters, and that M and F disagree about the raising of their child, C. If M is to have her way, she has no choice but to deal with F. Because the state will do nothing, M must either assert herself with F or give in to F. If M and F were to divorce in this same state, M would have the same choices at divorce — either assert herself or abandon her interests. On the other hand, the state that does choose to intervene in disputes between divorced families might just as easily intervene in disputes between intact families. Disputing parents might resolve those disputes by petitioning the court of child discipline, or, if the state believed that the issues were sufficiently significant, it

109. Indeed, if people who enter into certain written contracts are given three days to void them because of our fear that they might otherwise be taken advantage of, it seems only appropriate to give people that long to repudiate a tentative agreement reached in mediation.

might not leave state intervention up to the choice of one or more of the parents, but might go about dispensing justice even absent a petition being filed by a parent.[110] In all these cases, the question is the same: when does the state intervene to act, essentially, *in loco parentis*? To the extent that the state chooses not to act *in loco parentis*, it leaves the parties to take responsibility for themselves. They must either assert themselves or lose out. A complete absence of state involvement would require the divorcing parents to deal with each other directly without a judge, a mediator, or even any substantive law. Next to an absence of state involvement, the minimal state involvement imaginable would seem to be a direction to the parties to work things out on their own, followed by a process that provides a person whose job it is to assist those parties in working things out on their own. Essentially, Professor Grillo complains that mandatory mediation provides for *forced* engagement with the other party. Engagement with a co-parent is a necessary consequence of bearing a child with that other person and continuing to take an interest in the rearing of that child. While the state may intrude into the co-parenting relationship in order to *prevent* engagement (i.e. by preempting all decisions regarding custody from the parents), it is not the state that *forces* engagement.[111]

Finally, even if mediation were impermissible, there would be no guarantee that a court would order a more fair or just result in court. Court determinations on a given set of facts depend on the particular judge and on the quality of the attorney representing each party. Since there is as much fluctuation in the quality and the negotiating ability of attorneys as there is among non-attorneys, judicial results are subject to the same kinds of variation that result from bargaining between the parties.[112]

FORCED ENGAGEMENT AS HORROR

Professor Grillo's final criticism of mandatory mediation is that the very experience of sitting in a room with her former husband may be awful for some women, and the state ought not to require women to go through that experience.[113] Women would have to negotiate with their husbands over the future of their children even in the absence of state intervention, but they might not otherwise have to come in close physical proximity to them in a setting in which they are encouraged to be open and honest, so that mandatory mediation does, in this respect, affirmatively create a problem for some women. The problem, suggests Professor Grillo, is that women are expected to sit across from their husbands, expose their desires, needs and feelings, and listen to the desires, needs and feelings of their husbands. They are also expected to absorb

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110. I do not advocate such a procedure. I only suggest that it follows from the idea that the state ought to intervene in family decisionmaking.

111. I know of no party in California who has been punished for not attending mediation. It may be that in situations where the mediator also acts as an evaluator, a party who does not attend mediation may stand a lesser chance of gaining custody. That, of course, may be seen as punishment. The problem, then, is not the mediation, but the recommendation. In any event, an important point is that, absent any state involvement, the party who does not stand up for herself does no better (probably worse).

112. *See* J. FOLBERG & A. MILNE, *supra* note 2, at 20.

113. Grillo, *supra* note 3, at 1600-01.

an assortment of judgments from their husbands and the mediator about their ways of being inside and outside the mediation process.[114]

Indeed, goes the argument, some women will find mediation traumatic and will experience it as being as terrible as rape: "That many reportedly find mediation helpful does not mean everyone does. Consensual sex may take place in a certain setting in one instance, but that does not make all sex in that setting consensual; sometimes it is rape."[115] The analogy of mandatory mediation to rape is somewhat less than compelling.[116]

First of all, while mandatory mediation may require a woman to sit in the same room as her husband, it cannot be merely the physical proximity that makes the session feel like rape. If it were, a judicial hearing with the parties present would have the same result.[117] What makes the situation so oppressive, according to Professor Grillo, is that the woman may subject herself to listening to and absorbing her husband's concerns and may feel guilty about standing up for her own desires.[118] The choices available to the woman, according to Professor Grillo, are to either stand up for herself and feel intolerably guilty, or to give in and thereby give up what is most important to her — another classic double-bind. Fortunately, much more appealing alternatives are not only available, but are likely. The woman who cooperates for the good of the children is likely to feel good about herself for being concerned with her children and their best interests. She may, for the first time in her life, find

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114. *Id.*

115. *Id.* at 1606.

116. The question is nonetheless somewhat difficult for a white male to address. If I state that rape is like having to sit in a mediation setting with a person you dislike and distrust, some could rightly complain that I was minimizing the horror of rape. On the other hand, if I suggest that rape is worse than having to sit in a mediation session, one might complain that I, a white male, could never know. While I have never been raped and never had to mediate with a former husband, I have at least seen several victims of both. Without doubt, the rape victims seemed to me to have been subjected to the more horrible experience.

117. The state does not require a woman to mediate in the presence of her husband if there is a history of abuse, if there is a restraining order in effect against the husband, or if the woman has a fear of physical violence. *See supra* text accompanying notes 27-29. In at least some areas, parties fearful of abuse are permitted to bring a support person with them to the mediation. In addition, the woman who is required to mediate is likely to run into her husband at other times and in other places, including the courthouse parking lots and halls, in addition to the courtroom. In those other situations, there is likely to be no third party present whose job includes seeing to it that the parties are, to the extent possible, protected emotionally as well as physically.

118. Professor Grillo also points out that a woman "may begin to think of herself as unfeminine, or simply bad, if she puts her own needs forward. [She] may feel the need to couch every proposal she makes in terms of the needs of her children. In sum, if she articulates her needs accurately, she may end up feeling guilty, selfish, confused and embarrassed." Grillo, *supra* note 3, at 1604. The need to couch proposals in terms of the needs of her children is not, however, related at all to the procedure used to attempt to resolve custody disputes. The best interests of the child is the *substantive* standard which *courts* are directed to use in determining custody. A court will look to this standard if the parties do not reach an agreement on their own. The standard is relevant in mediation to the extent that it may give the parties a glimpse of what will happen if they do not agree and that it can provide a helpful focus for discussion. Because decisions reached in mediation are reached *by* the parties rather than *for* the parties, the parent in mediation need not frame her interests in any terms that do not suit her. It is only when mediation fails that she must begin to disguise her own real interests as the best interest of the child. To blame the guilt that such a standard might engender on the *process* of mediation seems entirely inappropriate.

her more relational stance being validated and even adopted, and her husband's competitive and noncommunicative stance being rejected by the mediator, a representative of the state. She may be encouraged, for the first time in her life, to stand up to her husband for the good of herself and her children. Her assertion (as opposed to watching someone else attempt to stand up for her) may be a transformative experience. Indeed, if the mediator is any good, the woman will find that she can stand up for herself *and* have her relational stance validated at the same time. If the mother is angry, the mediation is likely to allow her to feel justified in being angry[119] and to encourage her to protect herself in the future.

Even if the mediation session is a complete disaster, and the woman leaves feeling that she gave in too much[120] or feels guilty for not giving in even more, the comparison of the mediation session to rape goes too far. Mediation differs substantially from forced sexual activity. Mediation does not involve physical coercion and invasion. If, after the mediation session, the woman is unhappy with the tentative agreement that has been reached, she may, either on her own or after consultation with friends or her lawyer, repudiate that agreement. In other arenas, that option may, unfortunately, be unavailable. Additionally, our society has long distinguished between verbal and sexual contact. If a man talks angrily at an innocent woman without her permission, he has committed no crime.[121] If he touches her sexually, he has.

Nonetheless, suggests Professor Grillo, a woman may experience a mediation session as rape because women are more physically and emotionally connected to other people than are men, and are more subject to being "penetrated" both physically and emotionally, than are men.[122] The suggestion

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119. This is true even if she is not encouraged to focus on venting her anger and blaming her husband within the context of the mediation session.

120. Of course, if a woman really does believe she gave in too much, she may reject the proposed agreement. Presumably, once she leaves the mediation, consults with her attorney, and has some time to reconsider, she will not choose to give away the best interests of her children. *See supra* text accompanying note 108-09.

121. Of course, certain kinds of threatening or abusive statements may be criminal. If these same statements are made during a mediation session, they are no less criminal. Indeed, the presence of a third party is likely to deter rather than encourage that kind of statement. If the mere presence of the mediator does not discourage that behavior, the mediator by her actions will make certain that it is quickly curtailed.

122. According to Professor Grillo, some think that this difference is to be welcomed. Others think it cause for distress. While the asserted difference between men and women is of interest, it does not tend to argue against mandatory mediation. *See supra* text accompanying note 103. Nonetheless, as Professor Grillo suggested, since some mediators adopt a family systems approach, it is interesting to look at how that theory would view these differences.

Essentially, all people exist both as individuals and as parts of larger systems. Just as a single human cell is, in an important way, separate from all other cells (and, we now know, contains the genetic coding to allow us to reproduce every other cell in the same body), every person is separate from every other person. On the other hand, each cell is also an integral part of a particular organ (a "system"), and each organ (and each cell within each organ) is an integral part of the entire body (a larger system). Similarly, each person may also be an integral part of a family (a relatively small system), a company (a larger system), a state, country, world, universe, etc..

Whether one sees a person as essentially connected with others or as essentially disconnected depends on one's perspective. To continue the analogy, from the perspective of our naked eye, we see a wooden block as a separate individual item. Examined closely, the block would reveal countless electrons, protons, etc., each separated by distances that are quite large

that, as a result, mandatory mediation is somehow bad, remains, however, both untenable and unrelated to the proposition put forward to support it. To the extent that someone feels bad in the presence of her own guilt and another person's anger, she is likely to feel much worse being required to tolerate discovery and a court hearing than a mediation session. Professor Grillo laments the fact that mediation "is a *forced* engagement, ordinarily without attorneys or even friends or supporters present ... [at which women will be] forced to speak for themselves."[123] At least in California, parties who allege abuse *are* entitled to bring a support person into the mediation session, and, in addition, upon request they will be seen separately from the abusing spouse during the entire session. Professor Grillo's attitude also minimizes the significance of certain facts: depositions necessarily allow no friends or supporters; court hearings are generally held during the day when friends and supporters are unavailable (and even if they were present, they could not sit with or near the party); court hearings, unlike mediation sessions, are completely controlled by others and place a woman in an unfamiliar and often devastatingly intimidating environment by requiring her to answer questions put to her under threat of contempt instead of merely under threat of feeling guilty; and court hearings do not allow the woman to speak either for herself or for her children except when spoken to and when given the court's blessing to do so. In addition, both opposing attorneys and judges can be rude and degrading, and a woman in a court hearing undergoes the truest form of potential judicial violence — the threat of having someone else take her children away against her will. Indeed, Professor Grillo takes a study of gender bias *in the courts* and uses it to criticize mediation.[124] Mediation can represent a woman's last opportunity to escape those courts, and the gender bias that exists in the judicial system in California is often absent from the systems set up to mediate divorce cases.[125]

Professor Grillo suggests that, at least in court, each party expects that the proceedings will be rough. Each party is therefore likely to have her guard up and be less vulnerable to the judicial violence. In a mediation session, however, the expectation is of cooperation. There, the woman is more likely to be hit with her defenses down. Of course, the woman who is getting divorced

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relative to the particles' actual size. Viewed from afar, the block might be perceived only as part of a single, larger structure. In the same way, people may be viewed as essentially connected or essentially individual, depending on one's perspective.

Let us assume for the sake of argument that women tend to define themselves, primarily, by their relationship to their families. One might conclude that by taking this perspective they, at least, see themselves as primarily a part of some larger system (i.e., they see themselves as primarily "connected"). If men tend to define themselves primarily by their relationship to work, one would be hard pressed to say that they do not thereby see themselves as part of a larger system and thereby essentially "connected." Instead, the level at which they see their primary connection is simply somewhat broader. While it may be possible for some people to define themselves without reference to any other people (i.e., not by reference to some larger human system), few of us have ever come across such individuals, and if we did happen to see one, we would doubtless think them either crazy or from another planet.

As to whether connection is good or bad, a systems theorist would not presume to judge. She might, instead, ask whether the particular system she is analyzing at the time is functioning in homeostasis, and whether the members of that system themselves would like to see change.

123. Grillo, *supra* note 3, at 1606.

124. *See id.* at 1589.

125. As noted earlier, at least in Alameda County, there are 21 mediators, of whom 13 are women and 6 are persons of color. *See supra* note 53 and accompanying text.

and fighting with her husband about child custody is less than likely to go into any kind of session aimed at resolving custody disputes expecting only cooperation and pleasantness. Hopefully, the mediator will be able to de-escalate conflict and allow cooperation to emerge in time. However, neither party is likely be surprised to confront a spouse who is hostile in the beginning of the session, or even a spouse who remains hostile throughout.

Admittedly, one significant difference between court hearings and most mediation sessions is the presence of attorneys at one and not the other. The attorney's presence in court, claims Professor Grillo, protects the woman from the psychological damage that a mediation session might cause.[126] Initially, it is important to note that the role of an attorney is limited in a hearing. While she can object to certain questions from the other side, she can do so only for the reasons provided in the rules of evidence, not simply because the questions may cause some psychological harm to her client.[127] Indeed, if anything, the mediator is generally more aware of the parties' psychological states than is a judge. The mediator is trained to attend to that state rather than to the rules of evidence in determining how far to allow questioning to go.

Nor is the presence of an attorney always a good thing for the person who habitually accommodates herself to the wishes of others. The woman who would accommodate the former husband who now opposes her is even more likely to accommodate the wishes of the attorney who is represented as her savior. If the attorney is exceptionally skilled, she will take steps to see that this does not occur, just as the properly trained mediator will take steps to avert too much accommodation by one of the parties. The mediator, however, is more likely to pay attention to such matters than is the average attorney. In addition, in a negotiation session attended by the parties and their lawyers, the woman is likely to be up against two people rather than one, and the lawyers' presence may tend to interfere with the parties' abilities to engage in helpful problem solving. Because the attorney is an advocate for her client, she may feel obliged to continually assert her client's original position in the face of new information. She may fear that to the extent she takes that new information and arrives at creative solutions, all that will be apparent to her client is that she seems to be abandoning the client's previously stated position. As a result, she may be reluctant to explore helpful and creative solutions. Possibilities that might help both parties could be permanently lost.

On the other hand, the best of both worlds exists when the parties can better negotiate with help from a third party, who sees her role as both protecting the parties and facilitating creative problem-solving, and can also consult with their attorneys prior to making any commitments. This process allows the parties to explore solutions, and to adequately consider those proposed solutions before committing to them.[128]

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126. Grillo, *supra* note 3, at 1597-1600.

127. Of course, an attorney can object to questions that are badgering or abusive, but these same questions would be objected to by a mediator in a mediation session.

128. In extolling the virtues of attorneys, Professor Grillo suggests that "the words 'don't call me, call my lawyer' are sometimes the most empowering words imaginable." Grillo, *supra* note 3, at 1599. While I would doubt that these words could actually be as empowering as a straightforward "No!", it would appear that mandatory mediation does not interfere with a

The location of the mediation session visits further supposed indignities upon parties. Apparently, some of these sessions take place in the halls outside the courtroom. I am unaware of where this happens, and I believe that such sessions are no more to be condoned than are court sessions that take place in the hall. Nonetheless, even these sessions do not seem so much affirmatively dangerous as they do insensitive, inadequate and sloppy. Indeed, in these cases, mediation seems little different from what might happen in the normal course of events.

Even where the sessions are conducted with a little more formality than hallway meetings, Professor Grillo suggests that if the sessions are conducted in the court building, the parties might feel constrained by the power of the court to make concessions with which they will later be unhappy: "having the mediation take place on court premises with a mediator who might or might not inject her prejudices into the process may make it unlikely that the disputants' view will control."[129] Clearly, the disputants' views are significantly more likely to control the outcome of mediation than they are to control the orders of a court. It is likely that the disputants may be influenced by the knowledge that if they fail to reach an agreement, their case will proceed to trial, and, ultimately, the judge's view will determine the outcome for their children. To the extent that the parties will be influenced by fears of what a judge might do, the fault would seem to lie not in the fact that the parties are asked to attempt to resolve their own dispute, but in the fact that if they do not do so, a court will do it for (or to) them. While those with a weak case may fear the consequences of a court hearing, those with a strong case will be bolstered by the consequences they expect.[130] The same necessarily holds true for any dispute that may be brought to court in the absence of a negotiated agreement. Despite Professor Grillo's suggestion that this requires women to participate in their own demise, the truth is only that it encourages them to make choices for themselves and their children with an understanding of some of the potential consequences of their actions.

Most people who might find mediation to be an uncomfortable experience will find the courtroom to be worse. On the other hand, there will be some for whom the experience of mediation will be worse than a courtroom hearing might be. For the vast majority of people, neither experience will have disastrous long-term effects (other than a court hearing making some people

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party's ability to refer questions to her lawyer. The mediation process requires the parties to meet one time, and they may meet more frequently if the results of that initial session seem positive. Mandatory mediation does not prevent a party from interposing her attorney at all other times. It would, however, be less costly, both financially and emotionally, for both the parents and the children, if the parties could learn alternative ways of communicating that do not involve attorneys to the extent that they must communicate in order to raise the children.

129. Grillo, *supra* note 3, at 1606.

130. The parties will also, of course, be influenced in their negotiation stance by the extent to which each is risk-averse. Parties who are more risk-averse will be less likely to want to take the chance of losing in court. Risk-aversion necessarily plays a part in every negotiation in which all alternatives to a negotiated agreement are not known in advance. There is no evidence that this factor falls more heavily on either sex.

abhor the judicial system). For a very small number of people, either experience might be as bad as rape.[131]

Professor Grillo claims that the fact that many people experience mediation as helpful is, at best, only marginally relevant to the question of whether mandatory mediation is appropriate. On that issue I again disagree. Apparently, Professor Grillo believes that in determining whether or not to mandate mediation, we ought to act to protect the very small minority of people who may be traumatized by the process.[132] Unfortunately, it is difficult to do that without creating a situation that will allow one party who does not want mediation to dictate to his spouse that there will be no mediation and that the case will proceed directly to trial. It is likely that allowing one spouse to force the case directly to trial would traumatize more people than does mandatory mediation. Indeed, forcing a party to go through discovery and trial may be the most effective way to traumatize an ex-spouse, both emotionally and financially. Put simply, the problem is that the absence of mandatory mediation does not result in the presence of voluntary mediation. It results, instead, in the process being governed by whichever spouse decides to choose that process which has caused so many problems in the past. Nonetheless, at least two states with mandatory mediation allow a party to petition the court to be excused from that process. Many courts will grant waivers if the party shows that severe emotional distress is likely, or if other good cause is shown.[133] Perhaps other states can adopt this concept. Others have suggested a limited exception from mandatory mediation in cases of spousal abuse.[134] Clearly, the complete elimination of mandatory mediation is unnecessary to protect even those about whom Professor Grillo is most concerned.

This is not to say that the public either will or should abandon those for whom mediation is painful. Society, however, ought not to abandon a much larger group in order to accommodate the wishes of a smaller group. One might analogize mandatory mediation to mandatory education. We require that children be educated, and we make public schools available for that purpose. Unfortunately, for some children school is an intolerable experience.[135] We do not simply ignore these children and, in the process, condemn them to lives of unbearable pain. Nor do we make significant alterations in the structures that otherwise seem to work in order to accommodate them. We make counseling available to them, and we allow them to opt out of participation in the public schools as long as they can find another way of acquiring an appropriate education, which is the real goal of the public school system. Eventually, even those students who learn nothing are free to go their own way.

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131. A person's emotional response to any experience ultimately depends as much on the person's particular psychological makeup as it does on the experience. It is impossible to say that there is a "correct" emotional response to any experience. All we can say is that most people may have a particular type of response to any given stimulus. It is possible that some people will feel worse about mediation than they will about being raped.

132. Grillo, *supra* note 3, at 1607.

133. *Id.* at 1584 n.187.

134. *See* Cole, A Proposed Exception To Mandatory Mediation in Cases of Spousal Abuse (September 1991) (unpublished manuscript).

135. Indeed, school phobia is one of the more common psychological problems encountered in children.

At the heart of mediation is the hope and expectation that the process will result in agreements that serve the interests of both the parents and the children,[136] and which are likely to be complied with by all of those involved. As with school, anyone who can accomplish the same results in an alternative setting is free to do so. No state requires mediation of cases that have already been resolved to the parties' satisfaction. Instead, any parties that reach agreement prior to mediation are free to continue that course. Additionally, any parties who choose to find their own mediator, as opposed to being assigned to a state-employed mediator, are free to take that step. Finally, after attempting mediation, the parties may abandon it and seek judicial intervention.[137] As with schools, the messages we intend to send concerning mediation are that: (1) we believe the goals are worthy; (2) this is the best way we currently know to accomplish those goals; and (3) if you cannot find a better way, we expect you to at least try our way. Those who find the experience extremely painful may cut the experience short and ought to be encouraged to receive counseling.

WHY MANDATORY

The vast majority of women who participate in mandatory mediation are satisfied with the experience and are glad that they have gone through mediation as opposed to a judicial hearing.[138] Nor is there any indication that these women are somehow being duped. They come out with agreements that they believe are good for themselves and for their children. Statistics indicate that court hearings are likely to bring about arrangements that are worse. Not only do fathers "win" contested cases as often as do women,[139] but also even those cases that women "win" are not as tailored or as personalized as are mediated agreements. In addition, mediated agreements are more likely to remain satisfactory to the parties and to continue to be respected and followed than are court-mandated arrangements.

But, goes the argument, if mediation is good, it should not have to be mandatory. All we need to do is tell people about it, or show them a videotape, and those for whom it is helpful will choose it. The unfortunate truth about human behavior, however, is that left to our own devices, we often choose to act in ways that are not profoundly wise. Some people would ride in cars, alone or with their children, without seatbelts. Others ride motorcycles without helmets. Still others would take dangerous drugs, or live in unsafe buildings, or otherwise expose themselves and the children who rely on them to danger. There are countless things that we do that are not the results of profound wisdom. We often act because we are used to acting in certain ways, or because we have fear or hesitation about the unknown. Studies indicate that the group

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136. To a significant extent, the very fact that an agreement is acceptable to the parents might well make that agreement good for the children. Assuming that neither parent engages in activities which are of public concern (such as abuse or neglect), the available research indicates that children do better when child custody agreements are acceptable to both parents. K. KRESSEL & D. PRUITT, *supra* note 1, at 21-23.

137. *See supra* text accompanying notes 15-31.

138. K. KRESSEL & D. PRUITT, *supra* note 1, at 27; J. FOLBERG & A. MILNE, *supra* note 2, at 431-49; Duryee, *supra* note 6, at 21.

139. 1988 OREGON STATE BAR FAMILY LAW NEWSLETTER.

of people who, given the option of mediation, tend to choose mediation over a court hearing, tends to mirror the group of people who are generally more willing to try something new (college educated, relatively high income and high status).[140] This does not indicate that either the group of those who do tend to try new things or the group of people who do not tend to try new things are more wise. It tends to indicate, instead, that important socioeconomic factors are at work.

In addition, the people on Madison Avenue know only too well that frequent exposure to certain ideas (or products) influences people to choose those products. The labels on the brand X product may clearly explain that the product contains exactly the same ingredients as the brand name product, but because of frequent exposure to the advertising for the one, people are not likely to switch to the other. Similarly, to suggest that viewing a videotape on mediation might be sufficient to counter a lifetime's exposure to the idea that controversies should be resolved by trials ignores the realities of human nature. Perhaps a few months of mandatory video education about mediation would be sufficient to offset the impressions of a lifetime about the role of courts. It is not clear, however, that most people would opt for such schooling. Alternatively, litigants might be required to attend an individual meeting with a mediator to learn about and to discuss mediation. If they chose to opt out of mediation after such a meeting they could do so.[141] This meeting might be less intrusive than an actual mediation session, but it would double the time and expense for both the litigants and the state, and it would serve no purpose for the vast majority of parties. Most people learn about mediation most efficiently and effectively by participating, and the vast majority are pleased with what they learn.

To the extent that people's views about mediation are subject to influence outside of the judicial system, it is not the educational media, but the opinions of their lawyers, that seems to impact most noticeably. Where mediation is not mandatory, it is likely to be chosen by those whose lawyers recommend it and likely to be rejected by those advised by their attorneys to do so.[142]

In addition, if mediation is not mandatory, it is not then voluntary in any real sense of the word. Instead, under a system of non-mandatory mediation, either parent could force the case to trial by refusing to mediate, regardless of the other party's preference. Evidence indicates that women would not be more likely than men to opt out of mediation. Instead, those most likely to reject mediation are those who are unfamiliar with the process and are generally hesitant to try anything new.[143] Whether those represented by attorneys are likely to accept or reject mediation seems to depend more on the attitudes of the local bar than on any insight on the parties' part.[144] Studies have shown that while in some areas one third of divorcing parents would reject mediation if

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140. *See* K. KRESSEL & D. PRUITT, *supra* note 1, at 406.

141. For an excellent discussion of a similar proposal for cases other than child custody disputes, see J. ROSENBERG, J. FOLBERG & R. BARRETT, USE OF ADR IN CALIFORNIA COURTS, FINDINGS AND PROPOSALS, REPORT TO THE JUDICIAL COUNCIL OF CALIFORNIA 55-60 (November 1991).

142. *Id.*

143. *Id. See also* Duryee, *supra* note 6.

144. *See* K. KRESSEL & D. PRUITT, *supra* note 1, at 406-35.

given the opportunity, when those parents are required to mediate, 75% to 80% of them are satisfied with the process and glad they were ordered to participate.[145] Courts satisfy about half that many.[146] Many people find custody mediation to be tense and unpleasant. These same people find court more tense and more unpleasant, and of those who find the mediation process unpleasant, over three-quarters nonetheless remain satisfied with the process.[147]

ALTERNATIVES

Professor Grillo suggests changes in the law that might be helpful, but these are not, in any real sense, substitutes for mandatory mediation.[148] She suggests changes in the substantive standard for courts faced with making custody determinations, and she suggests that courts might limit communications between judges and attorneys outside of the earshot of clients. Of course, changing the substantive standard does not eliminate the need for a procedure to implement that standard.[149] Furthermore, making some minor changes in courtroom procedure does little to ameliorate the problems with the procedure previously described. The other alternatives suggested are court-sponsored lectures on settlement, and negotiations attended by both parties and their lawyers. Court sponsored lectures may be helpful, at least to the extent that attorneys are not, in explaining settlement possibilities. Under current law parties may and should be encouraged to have group settlement negotiations with all the parties and their lawyers present. They are not, however, *substitutes* for, but preliminaries to, mandatory mediation. Mediation is mandatory only for those who cannot find a different way to reach agreement.

None of this refutes the contentions that (1) poorly conducted mediation, like any process done poorly, is not likely to be either helpful or effective, and (2) some people will find mediation extremely distasteful. Correspondingly, however, neither of these assertions refute the contention that mandatory mediation is beneficial.

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145. *Id.*

146. *Id.*

147. *Id.* Research does tend to indicate that where the parents are not on speaking terms and have been hostile towards each other for prolonged periods, mediation does little or nothing to improve outcomes, in terms of satisfaction or compliance, over court hearings. If we could isolate these kinds of couples beforehand, and if both parties chose not to mediate, the state might well choose not to mandate mediation for these people. Unfortunately, if the state announced that couples that meet these criteria will not be required to mediate, many couples for whom mediation would be likely to be helpful might falsely represent themselves as meeting these criteria in order to avoid mediation for what would prove to be the wrong reasons.

148. Grillo, *supra* note 3, at 1609.

149. Nonetheless, the idea of changing the substantive standard for child custody and visitation is of substantial interest in its own right. If we had a more well-defined standard, such as granting custody to the party who had spent the most time with the child during marriage, some of the post-marriage custody fights might be much more readily resolved, and the parties might become less embroiled in the kind of fighting that is only bad for the children. On the other hand, by defining a custody standard with specificity, we might encourage parents to change their behavior *during* the marriage in order to be in a better position to obtain custody upon the ending of the marriage. Without suggesting an answer, I would suggest only that the extent of pre-divorce behavioral change that might accompany a change in the post-divorce custody law is something worth looking into.

For mandatory mediation programs to work well, they must be adequately funded and administered, as they are in many areas of California. This result should not be surprising because well-run mandatory mediation programs cost the state less than equally well-run court programs. If some programs are inadequate, steps ought to be taken to improve them. This can certainly be done more easily in mediation programs than in courts.

While a small number of people might experience extreme discomfort in the mediation session, the unfortunate truth is that every law ever enacted changes some preexisting relationships and makes some people unhappy. Mandatory mediation appears to be worth keeping. It helps a far greater number of people of both genders than it hurts, and its repeal would hurt a far greater number of people than would its retention. Still, every effort should be made to identify problems with mandatory mediation, and to make the adjustments needed to correct those problems. The states that have adopted mandatory mediation seem to be doing just that.

EPILOGUE: A PARALLEL PROCESS

Upon rereading Professor Grillo's article and my response to that article, I am struck by the way that even this scholarly interchange demonstrates the differences between litigation and mediation. In a sense, Professor Grillo and I are submitting our ideas to the court of legal opinion. Professor Grillo's position is that mediation can lead to bad results for women, and that even being in mediation can be emotionally dangerous for women. My position is that mediation is generally helpful, and that, in any event, mediation usually results in better outcomes and less emotional harm to the participants than does litigation. The reader is implicitly asked to decide who is right, and to then determine, based on that decision, whether or not states ought to mandate mediation in child custody cases. This is basically how the litigation model works — each side presents a case in the most forceful way it can, and the decisionmaker decides who wins.

A mediator might look at the disagreements between myself and Professor Grillo in a much different light. Rather than deciding who wins and who loses, she would help us engage in creative problem-solving. Apparently, Professor Grillo and I agree that voluntary mediation can be very helpful if done reasonably well. We also agree that any mediation done poorly is not likely to be very helpful. Professor Grillo wants to make sure that people are alerted to, and take seriously, possible problems with mediation, whether mediation is voluntary or mandatory. She also wants people to be aware of other problems that can arise when the mediator is empowered to make recommendations to the court. Because of these potential problems with the mediation process, Professor Grillo also wants to ensure that the process is not forced upon unwilling women.

I am concerned primarily with making sure that people do not lose sight of the benefits of mediation, that any potential problems with the process are not exaggerated and are considered in the context of available alternatives (i.e., litigation), and that people not lose sight of the problems with that alternative. Because mediation has much to offer, I want to ensure that a husband cannot

opt out of mediation just to force a wife into a long and costly court battle, and I want to make certain that people do not reject mediation because of inaccurate or incomplete perceptions of what the process entails.

Professor Grillo and I have had an opportunity to "vent" our feelings and to set out our perspectives and what we consider to be the relevant history. To some extent, we have each had our feelings and perceptions validated by their publication. Rather than deciding which of us was right and which was wrong, a mediator might point out that despite our seeming differences, Professor Grillo and I have goals that are quite compatible. One can easily imagine a regime under which mediation is presumptively mandatory, but where certain individuals can opt out. Perhaps only those people for whom mediation may prove to be harmful in the ways suggested by Professor Grillo might be permitted to opt out. In order to guarantee that these people are actually afforded a meaningful opportunity to learn about and opt out of the process, a court might have a trained screener review custody cases filed to search out those who fit the profile of individuals who might have real problems with mediation. Alternatively, any party might be permitted to opt out as long as the state is satisfied that the party is not acting on inaccurate or incomplete information about mediation. In order to ensure that those who may choose to opt out of mediation are fully educated, any party who is considering opting out of mediation might be required to hear about mediation and discuss her situation with a mediator (not the person who would mediate their case should they eventually mediate) for an hour or so (i.e., long enough to learn about the process) prior to making any decision.

Perhaps Professor Grillo or I might feel good (and, correspondingly, have the other feel bad) if we were told by a third party that one of us was right and the other was wrong. Even with the help of a mediator, Professor Grillo and I might still retain our different perceptions about the benefits and burdens of mediation. Perhaps the only benefits to mediation of our disagreement would be that we could both feel satisfied and we could reach a solution which addressed all of our concerns and which improved the law. It seems to me that these possibilities make it worth trying.