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Killing Us Softly: Divorce Mediation and the Politics of Power

PENELOPE E. BRYAN*

DIVORCE mediation's seductive marketing rhetoric¹ masks a political agenda: entrenchment. Recently reformed divorce law confers

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1. Proponents market divorce mediation to judicial administrators by employing efficiency rhetoric that emphasizes mediation's ability to clear congested court dockets and save disputants time and money. See generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 122-27 (1983); CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 73-77 (1985) (discussing the political nature of dispute resolution resource allocations); Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 267, 273-75, 279 (Richard L. Abel ed., 1982) [hereinafter *INFORMAL JUSTICE*]; Leonard L. Riskin, *Mediation and Lawyers*, 43 *OHIO ST. L.J.* 29, 31 (1982); Neil Vidmar, *The Mediation of Small Claims Court Disputes: A Critical Perspective*, in 1 *RESEARCH ON NEGOTIATION IN ORGANIZATIONS* 187, 188 (Roy J. Lewicki et al. eds., 1986) [hereinafter *RESEARCH ON NEGOTIATION*].

However some suggest that the overwhelming majority of divorcing couples privately resolve the distributional aspects of their divorce disputes and enter the court simply to secure the judicial imprimatur necessary for formal dissolution. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 951 (1979) (citing LEON C. MARSHALL & GEOFFREY MAY, 1 *THE DIVORCE COURT* 199 (1932); *Id.* at vol. 2, p. 292; Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *LAW & SOC'Y REV.* 267, 270, 280-96 (1976)). See also Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 *MEDIATION Q.* 179, 180 (1991) (study indicating that couples using third-party assistance to resolve their divorce disputes still resolved 40% of the issues themselves). If filed divorce cases do not consume judicial time, mediation's promise to alleviate congested court dockets seems tenuous.

Nor does mediation seem particularly efficient for divorcing parties. Studies indicate that, when compared to more traditional forms of dispute processing, divorce mediation results in only modest time and cost savings for the divorcing couple. See KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 189 (1985). *Contra* Pearson, *supra*, at 193. Even then these modestly supportive findings come from studies with severe methodological flaws. *Id.* at 184; KRESSEL, *supra*, at 189-202. The studies' infirmities and unremarkable findings, however, have not influenced the rhetoric of divorce mediation proponents. *Id.* at 184-85. Undoubtedly aware that the continued existence of court affiliated divorce mediation

greater economic rights upon divorcing women.² Custody law also fa-

programs depends upon mediation's fulfilling its efficiency promise, proponents continue to advance the fiction of divorce mediation's efficiency.

Mediation's marketing rhetoric extends beyond efficiency concerns. Proponents also claim that, compared to other dispute resolution processes, mediation produces more flexible agreements, less hostile post-divorce relationships, problem solving and communication skills, more rapid emotional recovery from divorce, agreements with which the parties will comply, and better adjusted children of divorce. *See, e.g., id.* at 184-85; Elizabeth J. Koopman, *Family Mediation: A Developmental Perspective on the Field*, in CONFLICT MANAGEMENT AND PROBLEM SOLVING: INTER-PERSONAL TO INTERNATIONAL APPLICATIONS 119, 120-21 (Dennis Sandole & Ingrid Sandole-Staroste eds., 1987) [hereinafter CONFLICT MANAGEMENT]; Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 51, 54 (Howard Davidson et al. eds., 1982) [hereinafter ALTERNATIVE MEANS]. In practice, however, this rhetoric rings hollow.

While the seductiveness of divorce mediation's rhetoric, as well as its consistency with liberal ideology's focus on procedure, discourages criticism, *see* Abel, *supra*, at 294-95, an increasing number of commentators express concern about mediation's ability to produce quality agreements. *See, e.g., Mandatory Mediation of Child Custody and Child Support Disputes: Interim Hearings on A.7135/S.5127 Before the Standing Committee on the Judiciary of the N.Y. Assembly*, November 7, 1985, (prepared statement of Carol S. Bruch, Professor of Law, Graduate Group in Child Development at the University of California, Davis) (available from the National Center on Women & Family Law, Inc., 799 Broadway, Room 402, New York, New York 10003); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Robert J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525 (1984). Even Professor Mnookin, an enthusiastic proponent of divorce mediation, now recognizes that unequal bargaining power between spouses justifies some limitations on private ordering in the divorce context. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015, 1024-31 (1985).

Social science scholars, *see, e.g.,* KRESSEL, *supra*, at 51-56; M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation*, MEDIATION Q., Winter-Spring 1986-1987, at 163, 168-70; Jeffrey Z. Rubin, *Third Parties Within Organizations: A Responsive Commentary*, in 1 RESEARCH ON NEGOTIATION, *supra*, at 271, 272, as well as family law practitioners also express skepticism. *E.g.,* Harriet N. Cohen, *Mediation in Divorce: Boon or Bane?*, WOMEN'S ADVOC., Mar. 1984, at 1; Richard E. Crouch, *The Dark Side of Mediation: Still Unexplored*, in ALTERNATIVE MEANS, *supra*, at 339, 343-45; Ann L. Diamond & Madeleine Simborg, *Divorce Mediation's Weaknesses*, CAL. LAW., July 1983, at 37; Joanne Schulman & Laurie Woods, *Legal Advocacy vs. Mediation in Family Law*, 4 WOMEN'S ADVOC. 3 (1983).

For general critiques of Alternative Dispute Resolution's ("ADR") ability to produce fair outcomes for the disadvantaged, *see, e.g.,* AUERBACH, *supra*; Abel, *supra*; Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987) (questioning the general utility of ADR as a dispute resolution technique); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359. Despite these warnings divorce mediation grows in popularity and use. *See* Riskin, *supra*, at 29, 30-31; *see generally* NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 1 (1987).

2. Laws pertaining to the financial aspects of divorce have changed extensively during the past two decades. One category of change is what property is considered marital and, therefore, subject to distribution upon divorce. For instance, twenty years ago if the husband held property solely in his name, the property was nonmarital and went to him upon divorce regardless of when and how it was obtained. Today, with the exception of property acquired by gift, bequest, or inheritance, all

vors women.³ Negotiating lawyers rely upon these legal entitlements and

property acquired during the marriage, irrespective of how it is titled, is considered part of the marital estate. Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 522-24 (1990). Some jurisdictions even consider nonmarital property, see, e.g., Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 156 (1989), or increases in the value of nonmarital assets, see, e.g., COLO. REV. STAT. § 14-10-113(4) (1974), available for distribution.

Major changes also have taken place in what is considered property. Contrary to their former stance, courts now acknowledge many intangible assets as property. For example, vested and nonvested pension plans, see, e.g., Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989) (discussing vested and nonvested pension rights as economic assets suitable for division); Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 201 & n.34 (1989) (discussing the division of intangibles such as contingent pension rights); Mary Meers Wenig, *Increase in Value of Separate Property During Marriage: Examination and Proposals*, 23 FAM. L.Q. 301, 308-09 (1989) (discussing the apportionment of retirement benefits in community property states); and a business' goodwill, see, e.g., William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 183-84 (1989) now commonly are considered property capable of community ownership. Additionally, while most jurisdictions still resist recognizing enhanced earning capacity acquired during the marriage as property available for distribution, Scott E. Willoughby, Note, *Professional Licenses as Marital Property: Responses to Some of O'Brien's Unanswered Questions*, 73 CORNELL L. REV. 133, 137 & n.23 (1987), courts tend to make adjustments in other economic awards in recognition of the unenhanced spouse's contribution to the other spouse's greater earning capacity. See, e.g., Carol S. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 813 & n.170 (1982); Jean M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 260-61 (1989) [hereinafter Krauskopf, *Division Theories*]. Moreover, because recognition of professional degrees as property creates no more, and perhaps fewer, valuation problems than acknowledgement of goodwill as property, see Reppy, *supra*, at 819, and because many cogently argue that enhanced earning capacity should be property, e.g., Bruch, *supra*, at 813-20; Krauskopf, *Division Theories*, *supra* at 260-62 & n.26; Jean M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980) [hereinafter Krauskopf, *Marital Investor*], one can anticipate the courts' future acceptance of increased earning capacity as property.

While law reform has granted divorcing women more property rights than twenty years ago, more changes are needed before women are treated equitably in the formal system. See generally Bruch, *supra*; Fineman, *supra* (noting the difficulties encountered by dependent wives caught in distribution schemes based on equality between marital partners and the disadvantage experienced by more independent wives divorcing in a distribution scheme based on need). Mediation, however, not only sabotages the reforms that have occurred, it also inhibits needed additional reform. See *infra* note 269 for discussion of mediation's affect on legal reform.

3. Women clearly have lost ground in custody matters. The tender years presumption in favor of the mother's custody has fallen before attacks by fathers' rights groups and the legal system's commitment to gender neutral principles. Fineman, *supra* note 1, at 738-39. Joint legal and physical, rather than sole, custody has gained acceptability. *Id.* at 732-35. A mother can no longer assume she will retain control over the children of the marriage upon divorce. However, the legal standards used to determine custody still favor the parent who spends more time caring for the child. Several legal commentators, for instance, support the primary caretaker standard in custody determinations. See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Fineman, *supra* note 1, at 770-74; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV.

craft divorce agreements reflecting them,⁴ thereby loosening the control men traditionally wield over economic resources and the socialization of children. While mediation proponents employ the obscuring rhetoric of relatedness,⁵ mediation unobtrusively reduces this threat to patriarchy by returning men to their former dominant position.⁶ This article explains

168 (1984). Furthermore, several states explicitly recognize the primary caretaker standard. *E.g.*, *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985); *Dinius v. Dinius*, 448 N.W.2d 210 (N.D. 1989); *In re Maxwell*, 456 N.E.2d 1218 (Ohio Ct. App. 1982); *Moore v. Moore*, 574 A.2d 105 (Pa. Super. 1990); *Allen v. Allen*, 320 S.E.2d 112 (W. Va. 1984). Since mothers continue to fit the profile of the primary caretaker far more frequently than fathers, Fineman, *supra* note 1, at 769, mothers generally continue to retain greater control over the children at divorce than do fathers.

Substantive custody law used by lawyers in negotiating custody arrangements then fails to grant fathers the control over the children they desire. As Fineman points out, fathers' rights groups perceive mediation as more amenable to their concerns and easier to manipulate than attorneys and judges. *Id.* at 758.

4. Substantive and procedural law significantly affects lawyer negotiations. *E.g.*, Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1143-44 (1988); see also Riskin, *supra* note 1, at 43-46 (discussing how the lawyer's standard philosophical map encourages reliance on legal rules).

5. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 313-14 (1985) [hereinafter DISPUTE RESOLUTION] (categorizing mediation as particularly suitable in family cases because of its focus on relationships). As one family mediator states:

There is nothing more fulfilling than to work and sweat with a couple through the mediation process, and then to see them leave knowing that, although they will never again live together as husband and wife, they can still respect each other and be friends, and continue to work together as parents of the same children.

Lawrence D. Gaughan, *Divorce and Family Mediation*, in CONFLICT MANAGEMENT, *supra* note 1, at 107, 109.

6. The threat to patriarchy posed by reforms in divorce law that favor women takes on added significance when coupled with a high divorce rate. The divorce rate in the United States more than doubled between 1970 and 1980, more than a million divorces occur every year, and the divorce rate promises to remain stable at approximately 50%. See, e.g., BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 79 (106th ed. 1986); TERRY ARENDELL, MOTHERS AND DIVORCE 1 (1986); John N. Edwards, *Changing Family Structure and Youthful Well-Being*, 8 J. FAM. ISSUES 355, 357 (1987).

Other commentators note that informalism is a reaction to progressive reforms in the formal legal system. See AUERBACH, *supra* note 1, at 124-25 (informalism is a backlash to progressive legal reforms); Richard L. Abel, *Introduction to INFORMAL JUSTICE*, *supra* note 1, at 3 (noting that one explanation for the ADR movement is state reaction to the progressive victories of the early 1960's and 1970's); Abel, *supra* note 1, at 297 (informalism disadvantages the less powerful by denying them the "sword of formality"); Marilyn L. Ray & Carol Bohmer, Public and Private Ordering Within the Context of Divorce (unpublished manuscript available from Marilyn Ray, Executive Director, The Finger Lakes Law & Social Policy Center, Inc., 96 Besemer Road, Ithaca, New York, New York 14850); Boaventura De Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in INFORMAL JUSTICE, *supra* note 1, at 260-61 (arguing that informalism stabilizes social relations by focusing on harmony and consensus and failing to provide coercive power to redress inequities experienced by the disadvantaged); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 1985 CLEARINGHOUSE REV. 431.

how mediation accomplishes this feat.⁷

Proponents proclaim mediation's superiority to lawyer negotiation of divorce disputes⁸ because mediation purportedly enhances autonomy and individual dignity by empowering the couple to order their post divorce lives.⁹ The first Part of this article, however, explores power disparities between husbands and wives and the impact these disparities have on the spouses' relative negotiating abilities. This exposition clarifies that, absent mediator, lawyer, or judicial intervention, mediation empowers only the already more powerful husband.¹⁰

7. This article is the first in a trilogy that demystifies the rhetoric used to market divorce mediation in order to develop a different and less problematic model for resolving divorce disputes. This text critiques mediation's promise to produce greater distributive justice than dispute resolution through lawyer negotiation. The second article, currently in progress, explores whether mediation provides greater procedural justice than more traditional forms of divorce dispute resolution. While most of the claims made by mediation advocates remain unfulfilled in practice, some aspects of divorce mediation, such as party participation in decisionmaking, prove worthwhile. As contemplated, the third article will set forth a dispute resolution system for divorce cases that preserves the good aspects of mediation while minimizing risks to weaker parties and maximizing the legal system's legitimacy.

8. I compare divorce mediation to lawyer negotiation rather than judicial decision because negotiating lawyers rather than judges resolve over 90% of all divorce disputes. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 108 (1974). *But see* Melli et al., *supra* note 4, at 1157 (approximately 17% of the divorce cases studied (58 of 349 cases) went to trial, however, 13 of the 58 cases were contested on personal jurisdiction grounds and another 13 cases involved an issue created by the state's Child Support Enforcement Agency rather than the parties).

9. *E.g.*, JAY FOLBERG & ALLISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICT WITHOUT LITIGATION* 7-8, 35-36 (1984); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613, 615 (1989) (discussing how various mediation techniques differ in the degree to which they place the divorcing couple in control of the decisionmaking process); John M. Haynes, *A Conceptual Model of the Process of Family Mediation: Implications for Training*, 10 AM. J. FAM. THERAPY 5, 10 (1982) (mediator must be committed to the client's right of self-determination). *But see infra* notes 214-41 and accompanying text for discussion of how the mediator controls custody decisions.

Others argue that informalism extends, rather than limits, state intrusion. *E.g.*, Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in *INFORMAL JUSTICE*, *supra* note 1, at 238-41 (suggesting that informalism actually expands state control by allowing the mediating third party to delve more deeply into the disputants' characters and feelings and to refer the disputants to other state sponsored social services); Santos, *supra* note 6, at 262 (through informalism the state controls actions and social relations that formal law cannot reach).

10. History provides numerous examples of informality in dispute resolution working to the advantage of the more powerful. The movement, for instance, to informality in the juvenile justice system resulted in gross injustice for the relatively powerless youngsters. AUERBACH, *supra* note 1, at 127; Abel, *supra* note 6, at 11. Likewise, tenants in a newly established informal Housing Court in the South Bronx found the strong position they previously had established through use of formal court procedures quickly subverted by the more powerful landlords. Mark H. Lazerson, *In the*

Moreover, mediator intervention does not protect the lesser powered wife from disadvantageous outcomes. Part II of this article exposes how divorcing mothers' sex role ideology and mediators' biased intervention result in custody agreements more favorable to fathers than those obtained through lawyer negotiation. Mediator intervention also fails to protect the divorcing wife from the husband's control over financial issues. Part III shows how the complicated interplay between spousal power disparities, sex role ideology, mediator deficiencies and bias, mediation marketing rhetoric and program design, and the legal system's efficiency concerns prevents mediator intervention on financial issues. Part III also explains why lawyer and judicial review of mediated agreements provide inadequate protection for the disadvantaged wife. Finally, Part IV briefly discusses why lawyer negotiation should produce agreements more advantageous for divorcing women than mediation and concludes that the shift from lawyer negotiation to mediation of divorce disputes reinforces patriarchy.

I. DISTRIBUTION OF POWER BETWEEN HUSBANDS AND WIVES

During negotiation the parties explore their relative power¹¹ and reach agreements reflecting their strengths and weaknesses.¹² Since the

Halls of Justice, the Only Justice Is in the Halls, in *INFORMAL JUSTICE*, *supra* note 1, at 119. Turning back the clock to the early years of the twentieth century, the movement toward industrial arbitration of employer and individual worker disputes proved disadvantageous for the employee. AUERBACH, *supra* note 1, at 63-65.

The rhetoric used by the employers in the industrial arbitration movement has an eerie similarity to the rhetoric currently used to market divorce mediation to the public. Employers likened the industrial relations between labor and management to family relations and claimed industrial disputes were merely "family differences." The rhetoric obscured the inherently conflictual nature of management and labor interests as well as the unequal wealth and power of the disputants. *Id.* In a similar fashion, divorce mediation's focus on preserving relationships obscures the conflictual nature of the husband and wife's economic and child-related interests and trivializes the importance of power disparity between the spouses.

11. Although power has resisted precise definition, most equate power with the ability of one party to influence another to behave according to the first party's preferences. See MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 84 (1973); P. H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 186-90 (1979); DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 87 (1981); R. H. TAWNEY, *EQUALITY* 159 (1964); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 152 (1947).

12. GULLIVER, *supra* note 11, at 186-207. The empowerment model of conflict regulation also recognizes that a balance of power between disputants is desirable in any conflict situation to prevent unrestrained behavior by the more powerful party and/or desperation in the weaker party. PAUL WEHR, *CONFLICT REGULATION* 26, 37-38 (1979). See also DEUTSCH, *supra* note 11, at 382 (noting that disputants are more likely to face their conflicts openly, rather than suppress them, when the balance of power between them is symmetrical); Maire A. Dugan, *Intervenor Roles and Conflict Pathologies*, in *CONFLICT MANAGEMENT*, *supra* note 1, at 57, 58; Joseph A. Scimecca, *Conflict*

husband and wife negotiate directly with each other in divorce mediation, absent active mediator intervention, outcomes should reflect power differences between them.

Possession of tangible and intangible resources creates negotiating power.¹³ Part I first explores how the tangible resources of income, education, and occupation are distributed between men and women, as well as the effects distributional disparities have on the wife's ability to negotiate effectively with her husband. Next I discuss how the intangible differences between men and women in status, dominance, depression, self-esteem, reward expectations, and fear of achievement affect their abilities to negotiate in mediation.

Throughout this article, the mediation model I contemplate offers an informal conflict resolution process in which a neutral mediator helps the husband and wife negotiate the disputed issues in their divorce.¹⁴ The mediator guards the process,¹⁵ while the parties determine the substance of the divorce agreement.¹⁶ Substantive law does not control the divorce settlement's terms.¹⁷ Rather the mediator encourages the couple

Resolution: The Basis for Social Control or Social Change?, in CONFLICT MANAGEMENT, *supra* note 1, at 30, 31-32.

13. Social science researchers and theorists explain that negotiating power is based on possession of tangible and intangible resources, as well as macrosocietal conditions such as prevailing ideologies or norms. *E.g.*, DEUTSCH, *supra* note 11, at 85, 87; GULLIVER, *supra* note 11, at 179-207. Another widely accepted approach posits six bases of power: reward, coercive, legitimate, referent, expert, and information. *See* John R. P. French & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER 150-67 (Dorwin Cartwright ed., 1959); Bertram H. Raven, *Social Influence and Power*, in CURRENT STUDIES IN SOCIAL PSYCHOLOGY 371-82 (Ivan D. Steiner & Martin Fishbein eds., 1965) [hereinafter CURRENT STUDIES]. The concept of power used in this paper subsumes each of these power bases. And, finally, in his theorizing and research on negotiations between spouses, Professor John Scanzoni has found income, education, occupation, self-esteem and sex role ideology important power bases. *See* LETHA D. SCANZONI & JOHN H. SCANZONI, MEN, WOMEN, AND CHANGE: A SOCIOLOGY OF MARRIAGE AND FAMILY 361-418 (1988); JOHN H. SCANZONI, SEXUAL BARGAINING: POWER POLITICS IN THE AMERICAN MARRIAGE (2d ed. 1982) [hereinafter SCANZONI, SEXUAL BARGAINING]; JOHN H. SCANZONI & MAXIMILIANE SZINOVACZ, FAMILY DECISION-MAKING: A DEVELOPMENTAL SEX ROLE MODEL 15-44, 85-104 (1980); JOHN H. SCANZONI, OPPORTUNITY AND THE FAMILY 26-78 (1970).

14. *See, e.g.*, Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971); Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

15. *See generally* Abel, *supra* note 1, at 294-95 (informal justice focuses on procedure); Brunet, *supra* note 1, at 13-14 (the focus on process, to the exclusion of concern with substantive outcomes, pervades informal justice).

16. *E.g.*, FOLBERG & TAYLOR, *supra* note 9, at 7-8; Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, MEDIATION Q., Sept. 1983, at 3, 9-10 (1983); Lois Vanderkooi & Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAM. REL. 557, 560 (1983).

17. *E.g.*, Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW &

to design an agreement that reflects their particular needs and interests.¹⁸ While some variation exists, this model captures most divorce mediation. Moreover, because most divorce mediation occurs in court affiliated programs¹⁹ and most divorce mediators have mental health backgrounds,²⁰ this article anticipates a mediation program with these characteristics.

Before beginning, I want to acknowledge that Part I presents a dreary picture of women's position in society, as well as the effect this position has on women's psychology. As sobering as I find some of my own statements, I choose to recognize, rather than ignore, the burdens under which women labor in their struggle for equality. In no manner does this Part imply women's inferiority. The hostile world in which women live, not women's inherent weakness, creates each of the tangible and intangible differences I describe. Recognition of women's oppression does not diminish their dignity; rather, their simple survival becomes attributable to that dignity and to women's strength. Moreover, those who

INEQUALITY 21, 27 (1984) (law is an irrelevant constraint on the mediator's ability to bring parties to agreement).

18. See Brunet, *supra* note 1, at 3-4 (noting that alternative dispute resolution proponents perceive substantive law as "frustrating creative results").

19. See Susan Myers et al., *Divorce Mediation in the States: Institutionalization, Use, and Assessment*, STATE CT. J., Fall 1988, at 17, 20 (86% of mediation programs responding to nationwide survey indicated strong institutional connection to the courts: 42% were court annexed and 44% were court sponsored); Jessica Pearson et al., *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Custody and Visitation Issues*, J. DIVORCE, Fall-Winter 1982, at 17, 21 (1982) [hereinafter Pearson et al., *Decision to Mediate*] (private divorce mediators report low case volumes and continual problems attracting mediation clients); Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, CONCILIATION CTS. REV., June 1983, at 1, 10-12 [hereinafter Pearson et al., *Portrait of Divorce Mediation*] (1981 survey of public and private mediation services revealed 93% of private mediation services conducted fewer than fifty mediations annually and 51.3% handled fewer than ten cases annually).

Differences exist in how divorcing couples enter court-affiliated mediation programs. Some programs simply offer mediation services to divorcing parties. Participation, although encouraged, is voluntary. More commonly, court-affiliated programs mandate that all or selected divorcing spouses make a good faith attempt to mediate before access to the courts is granted. See ROGERS & SALEM, *supra* note 1, at 224-26. Regardless of how the parties enter court-affiliated programs, however, the programs' main focus remains efficiency. *Id.* at 226-28.

20. *E.g.*, Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control*, 3 CANADIAN J. WOMEN & L. 134, 141 (1989); Grillo, *supra* note 1, at 1553 (custody mediators in California's mandatory custody mediation program are required to have a master's degree in one of the behavioral sciences); Myers et al., *supra* note 19, at 23 (with 74 mediation programs responding to the nationwide survey, only 12 mediators were attorneys, whereas 62 mediators were social workers or court service officers); Pearson et al., *Portrait of Divorce Mediation*, *supra* note 19, at 8, Table 4 (survey revealed approximately 78% of private sector mediators and approximately 90% of public sector mediators are mental health professionals (i.e. social workers, therapists, psychologists and psychiatrists), whereas approximately 15% of private sector mediators and 1% of public sector mediators are lawyers).

design dispute resolution systems harbor a moral responsibility to promote the equality between men and women this society allegedly reveres. Without acknowledging the world in which most, if not all, women live and struggle, this responsibility goes unfulfilled. In the hope then of promoting genuine, rather than formal, equality, I now turn to the tangible and intangible differences between spouses that create serious risks for wives in divorce mediation.

A. *Tangible Resources*

The spouse with greater income has several advantages in negotiation. He more easily can hire experts to advise him on how to negotiate or how to structure an agreement to maximize his, and minimize the other party's, interests. Moreover, due to greater self-sufficiency, he more credibly can threaten to terminate or extend the length of negotiations if the other party fails to meet his demands. Income disparity between negotiating spouses then affects their negotiating strength.

In the United States men earn much more than women.²¹ The wage gap between husbands and wives is even wider than between men and women generally. Approximately fifty percent of married women²² and married women with children in the home²³ earn no income because they

21. The difference between male and female earnings is very wide and has changed little in the past fifty years despite the women's liberation movement and women's increased workforce participation. In 1939 women earned sixty-three cents to a man's dollar, whereas in 1985 they earned just sixty-four cents to a man's dollar. Furthermore, in 1984 the median earnings of women who worked full-time all year were \$14,479, while similarly employed men earned \$23,218. As recently as 1984, employed women with college educations earned less than employed male high-school dropouts. SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 71-72 (1986). This wage disparity is reflected in nearly every occupation. For example, according to 1980 census data, female attorneys between twenty-five and thirty-four years of age earned, on average, \$20,573, while their male counterparts earned \$27,563. Male bus drivers averaged a yearly income of \$15,611, while female bus drivers earned only \$9,903, and male retail salespersons averaged \$13,002, while similarly employed women averaged only \$7,479. *Id.* at 72.

The wage gap is greater and more intractable in the United States than in other advanced industrialized countries. Contrary to the United States' experience, during the 1970's the wage gap in many other countries narrowed significantly. In Sweden in 1970 women earned 71% of male earnings, but by 1980 they earned 81%. During the 1970's the wage gap between British men and women narrowed by 12%, even though British women are among the lowest paid in Europe. Similarly, the wage gap in Italy and Denmark also narrowed by 12%, leaving the income of Italian women at 86% and the income of Danish women at 86% of male earnings in 1982. By 1982 in Germany and France women earned 73% and 78%, respectively, of male earnings. *Id.* at 73.

22. In 1987, 51% of married women were not participating in the paid labor force. ARLENE F. SALUTER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS SPECIAL STUDIES, SERIES P-23, NO. 163, CHANGES IN AMERICAN FAMILY LIFE 18* (1989).

23. JEAN LIPMAN-BLUMEN, *GENDER ROLES AND POWER* 163 (1984) (in 1981 the wife/mother

do not participate in the paid labor force.²⁴ Even when married women work outside the home, they average less than half the income of married men.²⁵ More specifically, in 1980 wives' earnings, on the average, accounted for only twenty-six percent of total family income, and the median contribution to the total family income of wives with full-time, year round employment was only thirty-eight percent.²⁶ Wives with children whose births are spaced over many years and wives with many children have the lowest wages of all wives.²⁷ While certainly some spouses will have equivalent incomes and a few wives' incomes will exceed that of their husbands, most marriages will reflect the pattern these statistics reveal: the wife, if employed at all, will earn much less than her husband. The husband thus is better able to purchase expert advice and to threaten termination or extension of negotiations — significant advantages in the mediation process that promises empowerment to both parties.

Educational superiority also can create negotiating power. The individual with more education may have important knowledge, such as the tax consequences of property distribution, that enables him to negotiate an agreement more favorable to him than the other spouse suspects. Advanced education also might provide training in negotiation skills. Moreover, the better educated individual can control outcomes because his exposure to a wider range of ideas helps him generate more alternatives during negotiation. Higher education, too, implies a superior ability to understand what occurs in mediation. Tellingly, in one custody mediation program, only the women with graduate educations and/or women over forty-five years of age failed to complain of jumbled and confused thoughts during negotiations with their husbands.²⁸

In the United States men and women tend to marry those of similar

did not participate in the labor force in 40% of married-couple families with children under age eighteen).

24. SALUTER, *supra* note 22, at 23. A number of factors influence the low employment rate of wives besides unequal access to the opportunity structure. Incompatibility of employment and family responsibilities, the husband's disapproval of his wife's employment, and long-standing societal disapproval of working wives are three of the most salient factors. While public attitudes toward working wives have become more tolerant in recent decades, women still sense and are influenced by the social prescription that their highest calling is home and hearth. See Sharon K. Araji, *Married White Women: Occupational Mobility and Earnings of Part-Time vs. Full-Time Workers*, HUMBOLDT J. SOC. REL., Spring-Summer 1983, at 61; Elaine R. Ognibene, *Moving Beyond "True Women" Myths: Women and Work*, HUMBOLDT J. SOC. REL., Spring-Summer 1983, at 7.

25. HEWLETT, *supra* note 21, at 82. This statistic contrasts sharply with never-married women who have complete wage parity with never-married men. *Id.*

26. LIPMAN-BLUMEN, *supra* note 23, at 165.

27. HEWLETT, *supra* note 21, at 81-83.

28. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research* 21-22

educational levels.²⁹ However, where a difference exists, women more than men marry people with higher educational attainment.³⁰ When this occurs the husband has further advantages in divorce mediation.³¹ One's

(April 1985) (unpublished manuscript, available from the authors at Center for Policy Research, 1720 Emerson Street, Denver, Colorado 80218).

29. E.g., Steven Rytina et al., *Inequality and Intermarriage: A Paradox of Motive and Constraint*, 66 SOC. FORCES 645 (1988); Gillian Stevens et al., *Education and Attractiveness in Marriage Choices*, 53 SOC. PSYCHOL. Q. 62 (1990); Gillian Stevens & Robert Schoen, *Linguistic Intermarriage in the United States*, 50 J. MARRIAGE & FAM. 267 (1988).

30. For instance, Stevens, Owens and Schaefer recently conducted a study of newly married couples in a geographic area offering both a major university and a community college. They found the mean post-secondary education of the grooms to be 2.14 years, whereas the mean post-secondary education of the brides was 1.90 years. Stevens et al., *supra* note 29, at 66. Additionally, data collected by the U.S. Bureau of the Census in 1983 showed that married white men aged 25 to 34 years old had a mean of 13.3 years of education, whereas married white women aged 25 to 34 years old had a mean of 13.0 years of education. *Id.* at 66 n.8.

The tendency for women to marry men with higher educational levels than themselves is linked to women's tendency to pay more attention to the economic characteristics of their prospective marital partners than men. Paul DiMaggio & John Mohr, *Cultural Capital, Educational Attainment, and Marital Selection*, 90 AM. J. SOC. 1231 (1985). However, some evidence exists that younger women, because of their greater opportunity for economic independence, pay less attention to economic characteristics of prospective husbands than do older women. Stevens et al., *supra* note 29, at 68.

Old attitudes, however, die hard. Husbands who feel their wives are "over-educated" tend to report their marriages as "stressful," whereas achievement-oriented wives tend to find marriage "satisfying" when they are married to men they perceive as "overeducated." Carlton A. Hornung & B. Claire McCullough, *Status Relationships in Dual-Employment Marriages: Consequences for Psychological Well-Being*, 43 J. MARRIAGE & FAM. 125, 138 (1981).

31. A small educational disparity between the husband and wife, while itself insignificant, may mask significant power differences. Education correlates more closely with power for men than women because men, unlike women, have converted their educational capital into greater earnings and/or higher occupational levels. LIPMAN-BLUMEN, *supra* note 23, at 167. For instance, one study found that education correlated with securing positions of authority, but the relationship proved three times stronger for men than for women. Belle Rose Ragins & Eric Sundstrom, *Gender and Power in Organizations: A Longitudinal Perspective*, 105 PSYCHOL. BULL. 51, 68 (1989) (citing M.S. Hill, *Authority at Work: How Men and Women Differ*, in 7 FIVE THOUSAND AMERICAN FAMILIES: PATTERNS OF ECONOMIC PROGRESS 107-46 (G.J. Duncan & J.N. Morgan eds., 1980)). Thus, while educational differences between husbands and wives might be minimal, they reflect power disparities between spouses because of the systematically different impacts on husbands' and wives' access to other power resources.

Educational attainment carries additional importance to women in divorce mediation because it is associated with at least two intangible psychological power bases. See *infra* notes 123-41 and accompanying text for discussion of self-esteem as an intangible power base; see also *infra* notes 96-122 and accompanying text for discussion of depression as an intangible power base. Women with higher educational attainment are less depressed and have higher self-esteem than women with lower educational achievement. Patricia M. Ulbrich, *The Determinants of Depression in Two-Income Marriages*, 50 J. MARRIAGE & FAM. 121, 128-29 (1988). Consequently, while a well-educated wife may not have the same access to income as her well-educated husband, she may possess greater self-esteem and be less depressed than less educated wives. She may still have difficulty negotiating effectively with her powerful husband, but she should have less difficulty than a wife with lower educational achievement. Furthermore, highly educated wives, as opposed to wives with lower education, more

occupation also can increase one's negotiating strength by providing training or information relevant to divorce issues. If the husband is an attorney or a corporate financial officer, his occupation provides him knowledge of legal rights and finances. Moreover, some occupations require negotiation skills. A construction foreman, for instance, must negotiate.

In contrast to the negotiating strength husbands acquire through their work, fifty percent of married women have no employment outside the home. The knowledge and skill these wives gain through homemaking and child rearing do not prepare them for divorce negotiations on financial issues. Moreover, while mothers have knowledge that creates negotiating strength on child issues, as I explain in Part II, mediator coercion and bias deprive the mother of this child-centered power base.³²

Women who do work remain segregated into female-typed occupations that require only minimal levels of the knowledge and skills helpful in divorce negotiations.³³ Even if the wife works outside the home then her occupation likely will not provide her with knowledge and negotiation skill equivalent to her husband's. Unsurprisingly, divorce mediators acknowledge that the husband's greater financial expertise³⁴ and his occupational experience can make him a significantly more effective negoti-

likely prefer working outside the home, encounter less husband resistance to their working, and believe their husbands favor their employment. *Id.* at 127. Well-educated wives, then, should tend to work with greater frequency and possess more income and occupational prestige than less educated wives.

32. See *infra* notes 211-41 and accompanying text.

33. For instance, in 1981 women clustered into a few occupational categories: 34.7% of all employed women were clerical workers; 25% were in education (except higher education), health care (except medicine), and food and domestic service; another 17% were professional and technical workers with 4.9% health workers, 5.3% noncollege teachers, and 6.8% other professional and technical workers; and only 13.5% employed women had managed to penetrate blue-collar occupations. LIPMAN-BLUMEN, *supra* note 23, at 169.

Turning to professions that might require knowledge and skills helpful in divorce negotiation, in 1980 women represented 13.4% of physicians, 12.8% of lawyers and 8.6% of industrial engineers. Although these percentages represent significant increases since 1970, they clearly fall short of equality with men. *Id.*

Women are concentrated in the lowest ranks of organizations, and are underrepresented in relatively powerful managerial positions. Some estimate that women occupy 15% of entry-level manager positions, only 5% of all middle level manager slots, and just 1% of top management positions. Ragins & Sundstrom, *supra* note 31, at 51. Promotion from lower to higher ranks in a labor market category also can prove more difficult for women than for men. Thomas A. DiPrete & Whitman T. Soule, *Gender and Promotion in Segmented Job Ladder Systems*, 53 AM. SOC. REV. 26 (1988).

34. As Kressel observed from his studies on divorce mediation: "Although husbands were frequently uninformed about financial matters, they were paragons of financial expertise in comparison to their wives." KRESSEL, *supra* note 1, at 53.

ator than his wife.³⁵

B. *Effects of Tangible Resource Power On Mediated Outcomes*

Research on divorce mediation focuses on efficiency concerns that appeal to formal justice system administrators,³⁶ rather than on the difficult, and potentially embarrassing, question of how power imbalances between negotiating spouses affect mediated outcomes. Marital decision-making research, however, provides insight into how tangible resource power affects mediated outcomes because spouses bring their marital conflict resolution and communication styles with them into divorce mediation,³⁷ where these patterns resist change.³⁸

35. Isolina Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women*, J. DIVORCE, Spring-Summer 1985, at 49, 57. Richard Curtis suggests that men's negotiating advantage in the family extends to interpersonal as well as financial issues. He explains that men's power in families exceeds what one would expect based solely on men's possession of more tangible resources because men have acquired skills in interpersonal exchanges from their work:

The "resource" theory of family power can be used to misconstrue the significance of extra-familial resources by proceeding as if intra-familial exchanges follow the economic set of rules. The present argument is that [the] rules governing family bargaining are largely noneconomic and that in this interaction men are often in the position of pitting organizational skills learned in the family and in larger organizational settings against skills learned by the women within the family only.

Richard F. Curtis, *Household and Family in Theory on Inequality*, 51 AM. SOC. REV. 168, 179 (1986) (citation omitted).

36. See, e.g., HARRINGTON, *supra* note 1, at 141-44; RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN A CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE xxvi-xxvii (1987); KRESSEL, *supra* note 1, at 185-202; Koopman, *supra* note 1, at 125; Levy, *supra* note 1.

37. Many commentators specifically note that couples bring prior marital conflict resolution styles and communication patterns into divorce mediation. E.g., FOLBERG & TAYLOR, *supra* note 9, at 184-85 (mediation participants bring with them preexisting "patterns of dominance and submission, deference and competition, and dependence [and] competence" and can be expected to resort to familiar and comfortable power patterns during negotiations in mediation); KRESSEL, *supra* note 1, at 38-39; Emily M. Brown, *The Emotional Context of Divorce: Implications for Mediation*, in ALTERNATIVE MEANS, *supra* note 1, at 43, 45; Howard H. Irving & Michael Benjamin, *Therapeutic Family Mediation: Fitting the Service to the Interactional Diversity of Client Couples*, MEDIATION Q., Winter 1989, at 115-16, 122. This tendency for personal stability of conflict resolution style also has been recognized in conflict resolution research. E.g., Robert J. Sternberg & Diane M. Dobson, *Resolving Interpersonal Conflicts: An Analysis of Stylistic Consistency*, 52 J. PERSONALITY & SOC. PSYCHOL. 794 (1987); Robert J. Sternberg & Lawrence J. Soriano, *Styles of Conflict Resolution*, 47 J. PERSONALITY & SOC. PSYCHOL. 115 (1984).

Many other writers discussing divorce mediation techniques implicitly recognize the persistence of preexisting communication patterns when they attempt to explain how to interrupt and change these patterns during mediation. E.g., George Sargent & Bleema Moss, *Ericksonian Approaches in Family Therapy and Mediation*, MEDIATION Q., Winter 1986-Spring 1987, at 87; Richard B. Stuart & Barbara Jacobson, *Principles of Divorce Mediation: A Social Learning Theory Approach*, MEDIATION Q., Winter 1986-Spring 1987, at 71, 79-80.

38. As noted by Bruch, "In less dramatic cases, too, established patterns of spousal interaction

Research on marital negotiations shows that the greater income and education and the higher occupational level of husbands, compared to wives, confers upon husbands greater power over routine decisions and decisions on issues over which the couple frequently disagrees.³⁹ Moreover, husbands believe they control decisions over important financial issues,⁴⁰ whereas they perceive as shared or wife-dominated less impor-

are virtually impossible for a weaker spouse to overcome under the emotional pressure of unaccompanied face-to-face negotiations." Carol S. Bruch, *And How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 8 INT'L J.L. & FAM. 106, 120 (1988).

Two therapeutic family mediators felt four to eight two-hour sessions were necessary for them to successfully alter preexisting marital communication patterns of their relatively elite clientele, who present fewer problems than clients in court affiliated programs. Irving & Benjamin, *supra* note 37, at 116, 123. However, most mediation takes place in court affiliated mediation programs, Myers et al., *supra* note 19, at 20; Pearson et al., *Decision to Mediate*, *supra* note 19, at 21, and the average time taken to complete a mediation in such programs is significantly shorter than the time needed by Irving and Benjamin to simply alter the spouses' preexisting communication patterns. Pearson & Thoennes, *supra* note 1. See *infra* notes 251-54 and accompanying text for fuller discussion of this issue.

39. In their research on marital decisionmaking, Blood and Wolfe asked respondents whether the husband or wife usually made the "final" decision about: (1) what car to buy; (2) whether or not to buy life insurance; (3) what house or apartment to take; (4) what job (the husband) should take; (5) whether or not (the wife) should go to work or quit work; (6) how much money the family can afford to spend per week on food; (7) what doctor to have when someone is sick; (8) where to go on vacation. ROBERT O. BLOOD & DONALD M. WOLFE, *HUSBANDS AND WIVES: THE DYNAMICS OF MARRIED LIVING* 282 (1964). The responses to these questions were then collapsed into an index measuring family decisionmaking. This index has produced quite consistent results in the United States and Western Europe: husbands have greater decisional power than their wives, e.g., SCANZONI, *SEXUAL BARGAINING*, *supra* note 13 at 68, and that power is rooted in possession of greater income, education and occupational status. E.g., Richard Centers et al., *Conjugal Power Structure: A Re-Examination*, 36 AM. SOC. REV. 264 (1971); Dair L. Gillespie, *Who Has the Power? The Marital Struggle*, 33 J. MARRIAGE & FAM. 445, 451 (1971); see also Rene Konig, *Family and Authority: The German Father in 1955*, 5 SOC. REV. 107, 124 (1957); Eugene Lupri, *Contemporary Authority Patterns in the West German Family: A Study in Cross-National Validation*, 31 J. MARRIAGE & FAM. 134 (1969); Andree Michel, *Comparative Data Concerning the Interaction in French and American Families*, 29 J. MARRIAGE & FAM. 337 (1967); cf. Denise B. Kandel & Gerald S. Lesser, *Marital Decision-Making in American and Danish Urban Families: A Research Note*, 34 J. MARRIAGE & FAM. 134 (1972) (contending that educational attainment and not occupational status is strongly related to spousal bargaining power). *But see* Glenn R. Hawkes & Minna Taylor, *Power Structure in Mexican and Mexican-American Farm Labor Families*, 37 J. MARRIAGE & FAM. 807 (1975) (egalitarianism found to be the most common mode of marital decisioning in farm labor families).

Other research addressing which spouse more frequently resolves often contested issues in his or her favor reveals similar results: husbands more frequently than wives resolve heavily conflicted issues in their favor. SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 68-69.

40. Husbands tend to perceive themselves controlling decisions related to: (1) the type of job the husband will take; (2) the purchase of life insurance; (3) the use of available money; and (4) the purchase of a car. Constantina Safilios-Rothschild, *Family Sociology or Wives' Family Sociology? A Cross-Cultural Examination of Decision-Making*, 31 J. MARRIAGE & FAM. 290, 297 (1969).

tant financial decisions or mundane decisions requiring time to implement.⁴¹ That employed wives have more decisional power relative to their husbands than unemployed wives,⁴² further illustrates the importance of tangible resources to marital negotiating power.⁴³

41. As an example, husbands tend to perceive the power over decisionmaking pertaining to what house or apartment to buy, what doctor to consult, how many children to have, and choice of friends as shared with their wives. They see their wives as having greater power only over decisions related to purchasing food, clothing, furniture or household items, relations with in-laws, and rearing children. As indicated by Safliios-Rothschild:

This pattern may not be a mere coincidence but rather an indication that American husbands do not wish to take on "bothersome" decisions which are not crucial (with the exception of the child-rearing decision) and take too much of the time and energy that they prefer to dedicate to their work or leisure-time activities.

Id.

42. *E.g.*, Robert O. Blood, Jr. & Robert L. Hamblin, *The Effects of the Wife's Employment on the Family Power Structure*, 36 SOC. FORCES 347 (1958); Rae L. Blumberg & Marion T. Coleman, *A Theoretical Look at the Gender Balance of Power in the American Couple*, 10 J. FAM. ISSUES 225 (1989); David M. Heer, *Dominance and the Working Wife*, 36 SOC. FORCES 341 (1958); Sarah Rosenfield, *The Effects of Women's Employment: Personal Control and Sex Differences in Mental Health*, 30 J. HEALTH & SOC. BEHAV. 77, 78 (1989); Scott J. South, *Sex Ratios, Economic Power, and Women's Roles: A Theoretical Extension and Empirical Test*, 50 J. MARRIAGE & FAM. 19 (1988); Glenna Spitze, *Women's Employment and Family Relations: A Review*, 50 J. MARRIAGE & FAM. 595, 602 (1988).

One researcher suggests that this greater decisional power within marriage may account for the tendency of wives to prefer their outside employment more than their husbands prefer their own even though that employment produces work overloads for employed wives. Marianne A. Ferber, *Labor Market Participation of Young Married Women: Causes and Effects*, 44 J. MARRIAGE & FAM. 457, 465 (1982).

43. David Heer suggests wives with children have less power than their childless counterparts because the child care responsibilities inhibit their ability to mobilize the options or resources that might otherwise give them power. David M. Heer, *The Measurement and Bases of Family Power: An Overview*, MARRIAGE & FAM. LIVING, May 1963, at 133, 137-39 [hereinafter Heer, *Family Power*]. As Judith Laws suggests, Heer's explanation fits nicely into social exchange theory that posits the partner with fewer alternatives (a lower comparison level of alternatives), as more dependent, and thus less powerful, than the partner with more numerous attractive options. Judith L. Laws, *A Feminist Review of Marital Adjustment Literature: The Rape of the Locke*, 33 J. MARRIAGE & FAM. 483, 492 (1971). Social exchange theory also anticipates that coalition formation by the less powerful person will curb exploitation by the more powerful individual. In the isolation and privacy of the family, however, the wife with children cannot readily form coalitions to avoid exploitation. *Id.* Laws, thus, agrees:

[C]hildbearing is used as a mechanism for the suppression of women's exercise of their talents and rights to determine the conditions of their lives. Heer's analysis makes it clear that a woman is not esteemed, in the culture or in the small society of her family, in proportion to her exercise of her "glory," childbearing The data on working wives and on family power tell us . . . that to the extent that a woman is unable to exercise her options (e.g., working), her status is depressed. She is least able to do this when she has young children; and the more children she has, the more this is true. Completing the vicious circle, of course, is the probability that in the absence of viable alternatives the young wife decides to have yet another baby, and thereby perpetuate her powerlessness.

Id. at 493.

Tangible resources probably create more power for the husband in divorce negotiations than marital decisionmaking research indicates. Spouses inevitably develop psychological and emotional interdependencies.⁴⁴ A wife then has some power over her husband during marriage because of his dependence on her for emotional and psychological support, as well as sexual gratification.⁴⁵ At divorce these sources of power evaporate.⁴⁶ Thus, tangible resources probably have even more influence in divorce than in marital negotiations.

In summary, marital decisionmaking research suggests that, unless the mediator intervenes, the husband's greater tangible resources will grant him the lion's share of power in divorce negotiations, particularly over critical financial issues.⁴⁷ Differences in possession of tangible re-

44. People in all types of relatively long-term social relationships develop these interdependencies. See, e.g., ROBERT L. BURGESS & TED L. HUSTON, *SOCIAL EXCHANGE IN DEVELOPING RELATIONSHIPS* (1979); JOHN H. SCANZONI ET AL., *THE SEXUAL BOND: RETHINKING FAMILIES AND CLOSE RELATIONSHIPS* (1989); Blumberg & Coleman, *supra* note 42, at 235.

45. See Constantina Safilios-Rothschild, *A Macro- and Micro-Examination of Family Power and Love: An Exchange Model*, 38 J. MARRIAGE & FAM. 355 (1976).

46. Mediator Isolina Ricci acknowledges: "[T]he reciprocity on the emotional investment she assumed she generated in her past family relationships with her husband is not uniformly honored in the business world of divorce, where facts, figures, projections and written agreements are the norm, rather than attentiveness to interpersonal feelings or attitudes. Ricci, *supra* note 35, at 53. She also notes that husbands may become reluctant to pay spousal maintenance because their wives no longer provide them with emotional nurturance. *Id.* at 58.

47. While research shows husbands exercising more decisional control than wives, some suggest that methodological problems have prevented marital decisionmaking research from revealing the full extent of the husband's decisional control. Gillespie argues that Blood and Wolfe failed to expose the full extent of husband dominance because they gave all decisions equal weight. Thus, determining which doctor to use, typically the wife's decision, may not indicate the same level of power as determining what job the husband should take, typically the husband's decision. In Blood and Wolfe's research, however, the respective control of the husband and wife over these two decisional spheres would indicate that they possess equivalent power. Gillespie argues that the researchers failed to consider that a decision on what food to buy, usually the wife's decision, would be made with far greater frequency than a decision regarding the wife's employment, usually controlled by the husband. The greater frequency of food decisions thus would inaccurately inflate the estimation of the wife's power relative to her husband's. Gillespie, *supra* note 39, at 446.

Others have criticized marital decisionmaking research for theoretical, as well as methodological, weaknesses. E.g., Gerald W. McDonald, *Family Power: The Assessment of a Decade of Theory and Research, 1970-1979*, 42 J. MARRIAGE & FAM. 841 (1980); Daisy Quarm, *Random Measurement Error as a Source of Discrepancies Between the Reports of Wives and Husbands Concerning Marital Power and Task Allocation*, 43 J. MARRIAGE & FAM. 521 (1981). Furthermore, the research has failed to explore sufficiently the distinctions between power dynamics in ethnic minority marriages and predominantly white majoritarian families. See, e.g., Vicky L. Cromwell & Ronald E. Cromwell, *Perceived Dominance in Decision-Making and Conflict Resolution Among Anglo, Black and Chicano Couples*, 40 J. MARRIAGE & FAM. 749 (1978).

Despite these criticisms, however, those studying marital power generally have come to accept the importance of tangible resources to power in marital decisionmaking. E.g., Blumberg & Coleman, *supra* note 42; Centers et al., *supra* note 39; Spitze, *supra* note 42, at 602.

sources, however, are only one source of inequality between spouses. Intangible factors such as status, dominance, depression, self esteem, reward expectation and fear of achievement further empower the husband during divorce mediation. My next section explores these intangible factors and their contribution to inequality in divorce negotiations.

C. *Intangible Resources*

1. *Introduction.* Numerous experts recognize the importance of intangible factors in negotiations.⁴⁸ Mediation literature itself acknowledges several that affect the power of mediating spouses: (1) guilt at initiating the divorce;⁴⁹ (2) diminished self-worth caused by rejection;⁵⁰ and (3) risk aversiveness.⁵¹ These acknowledged attributes do not, however, suggest systematic disadvantages to either wives or husbands because they have potentially contradictory effects on divorce negotiations. For instance, guilt may cause the initiating spouse to "give away the farm," or to lash out in anger at the perceived victim spouse.⁵² Moreover, these characteristics are not found more commonly in one sex than the other.⁵³ Consequently, while these particular intangible factors might create

48. *E.g.*, KRESSEL, *supra* note 1, at 125; FRUITT, *supra* note 11, at 45; Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 67 (1985).

49. KRESSEL, *supra* note 1, at 82.

50. *Id.* at 83.

51. Mnookin & Kornhauser, *supra* note 1, at 969-71, 978-79. Characteristic of mediation proponents, Professor Mnookin fails to recognize other psychological variables that might affect an individual's ability to negotiate effectively. He does acknowledge that a party's capacity to negotiate might be affected adversely by the emotional trauma of divorce. *Id.* at 971-72. He leaves unexplored, however, how men and women might differ in their emotional response to divorce and how that difference might affect their respective abilities to negotiate effectively.

52. KRESSEL, *supra* note 1, at 83. Kressel provides another example of the unpredictability of these characteristics in negotiations. He notes that diminished self-worth potentially can cause the rejected spouse to abjectly accept whatever the initiating spouse offers. *Id.* On the other hand, the rejected spouse also might take an extreme position on an issue in an attempt to save face or sabotage negotiations in hopes of preventing divorce. *Id.* at 223. The first response would disadvantage the rejected spouse, whereas the latter reaction might well produce significant concessions from an over-anxious initiator.

53. Predicting whether husbands are more likely than wives to feel guilt at having initiated the divorce is difficult because research is inconclusive as to whether husbands or wives more frequently file for divorce. Several studies reveal that after the passage of no-fault divorce laws husbands filed for divorce more frequently than their wives. Compare B.G. Gunter & Doyle P. Johnson, *Divorce Filings as Role Behavior: Effect of No-Fault Law on Divorce Filing Patterns*, 40 J. MARRIAGE & FAM. 571 (1978) and B.G. Gunter, *Notes on Divorce Filing as Role Behavior*, 39 J. MARRIAGE & FAM. 95 (1977) with Ruth B. Dixon & Lenore J. Weitzman, *When Husbands File for Divorce*, 44 J. MARRIAGE & FAM. 103 (1982) (indicating the percentage of husbands filing for divorce in California jurisdictions increased dramatically after implementation of no-fault divorce, but the percentage of wives filing still exceeded the percentage of husbands). Filing behavior, however, does not necessarily indicate which spouse actually made the decision to divorce. See Antonette M. Zeiss et al., *Sex*

power differences in an individual marriage, they provide little insight into how mediation systematically disadvantages wives or husbands.

Some intangible factors,⁵⁴ however, do differ between males and females,⁵⁵ and knowledge exists on how these factors affect negotiating or decisionmaking ability. This section explores these known intangible differences between men and women and shows how these differences systematically disadvantage wives in divorce mediation. Remarkably, no known factor systemically disadvantages men, with the possible exception of sex role ideology's impact on men's control over children that is treated in Part II.

2. *Status.* Income, education, occupational rank, and sex determine an individual's status. Status disparity between husbands and wives becomes important in divorce mediation because high status people have authority,⁵⁶ command automatic deference, and exert subtle and covert control over lower status people.⁵⁷ As already shown, husbands earn far

Differences in Initiation of and Adjustment to Divorce, J. DIVORCE, Winter 1980, at 21 (an Oregon study revealing wives made the decision to divorce more frequently than their husbands).

Furthermore, while one intuitively might expect husbands to be less risk averse than their wives because of their superior power bases, other factors suggest just the opposite. Husbands might be more risk averse than wives simply because they may have more to lose in financial negotiations. Additionally, women tend to attribute their successes and failures in life to forces outside themselves, such as luck. See *infra* notes 126-36 and accompanying text for discussion of this point. Consequently, having grown comfortable with the idea of lack of control, women might be less reluctant than men to pursue a course of action in which success depends on luck. Hence, contrary to intuition, women might be less risk averse than men. Some support for this conclusion lies in research indicating that women prefer activities involving luck, whereas men prefer activities which depend upon skill. Kay Deaux, *From Individual Differences to Social Categories: Analysis of a Decade's Research on Gender*, 39 AM. PSYCHOLOGIST 105, 106 (1984).

54. Some recognize that women possess and rely upon "individual" resources such as intelligence, wit, beauty, sexuality, youth, potential parenthood, nurturance, charm, and gentleness to secure power in interpersonal relationships. See LIPMAN-BLUMEN, *supra* note 23, at 21. However, no systematic disparity exists between the intelligence of women and men that would advantage women in divorce negotiations. Furthermore, because of their exchange value, the other resources mentioned above may prove important power bases during the development and duration of an interpersonal relationship. During divorce, however, the husband no longer depends upon his future ex-wife for the provision of these resources, and these resources no longer provide the wife bases of power.

55. Research largely fails to investigate distinctions between white and minority women in their possession of intangible factors explored in this section. The data presented here thus must be interpreted accordingly.

56. Alice H. Eagly, *Gender and Social Influence*, 38 AM. PSYCHOLOGIST 971 (1983). See also SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 82-83.

57. Joseph Berger & Morris Zelditch, Jr., *Artifacts and Challenges: A Comment on Lee and Ofshe*, 46 SOC. PSYCHOL. Q. 59 (1983); Eagly, *supra* note 56; McDonald, *supra* note 47; Charlan Jeanne Nemeth, *Reflections on the Dialogue Between Status and Style: Influence Processes of Social Control and Social Change*, 46 SOC. PSYCHOL. Q. 70 (1983); Aysan Tuzlak & James C. Moore, Jr.,

more income than wives and, while only small educational disparities exist between spouses, the resulting status distinctions can be large. For instance, the husband with a four-year college degree has far greater status than his wife who completed three years of college.

Women also remain segregated in lower status occupations.⁵⁸ In 1981 almost eighty percent of all working women held low status jobs,⁵⁹ whereas men occupy positions throughout all occupational ranks.⁶⁰ In 1980 fifty-one percent of employed women worked in female-typed occupations⁶¹ that provide less pay, power, and prestige than male-typed occupations.⁶² When women do infiltrate high status occupations, they remain underrepresented at the highest levels,⁶³ and even the few women who do occupy high status male-typed positions do not acquire the same status as males occupying those positions.⁶⁴

The disparity in occupational status between men and women becomes more pronounced in many marriages.⁶⁵ Fifty percent of married women have no occupation other than homemaker⁶⁶ — an occupation with a status roughly equivalent to that of a skilled clerk in a female-dominated occupation.⁶⁷ Moreover, when a highly educated wife does work outside the home, she tends to hold a lower status job than her husband because of perceived incompatibility of career and family

Status, Demeanor and Influence: An Empirical Reassessment, 47 SOC. PSYCHOL. Q. 178 (1984). For instance, French and Raven describe legitimate power as a leader's ability to influence another's behavior regardless of the leader's actual competence or the leader's potential benefit to the other. The more the leader's influence attempts are perceived as legitimate, the less likely the individual at whom they are directed will resist. French & Raven, *supra* note 13, at 158-67.

58. *See supra* note 33.

59. Nancy Reeves, *Reality Gap*, HUMBOLDT J. SOC. REL., Spring-Summer 1983, at 215, 219 (women occupied low-paying, low-skilled jobs).

60. Ragins & Sundstrom, *supra* note 31, at 56.

61. *Id.* at 55.

62. *Id.* at 56; JANET SALTZMAN, *SEX AND ADVANTAGE* 14 (1984).

63. For instance, in organizations women are concentrated in the lowest ranks and are underrepresented in relatively powerful managerial positions. Some estimate that women occupy 15% of entry level manager positions, only 5% of middle level manager slots, and just 1% of top management positions. Ragins & Sundstrom, *supra* note 31, at 51. In other prestigious male-typed professions the researchers observe that women "may still be segregated into female-typed specialties that offer fewer resources for power than do male-typed specialties." *Id.* at 56.

64. *Id.*

65. Beth Ensminger Vanfossen, *Sexual Stratification and Sex-Role Socialization*, 39 J. MARRIAGE & FAM. 563 (1977).

66. *See supra* notes 22-24 and accompanying text.

67. Linda Burzotta Nilson, *The Social Standing of a Housewife*, 40 J. MARRIAGE & FAM. 541 (1978). Moreover, homemaker status likely will decline in the future because young people value the role less than older people. *Id.*

responsibilities.⁶⁸

Men also have more status simply because they are male. Although men's greater status has historical roots in possession of more income, education, and occupational status,⁶⁹ maleness now has acquired independent salience as a status cue.⁷⁰ That both males and females perceive an occupation as less desirable when they anticipate increased female participation⁷¹ reflects the lower status attributed to females. Husbands thus have more status than their wives due to their sex.

Because divorce mediation primarily is task-oriented,⁷² research on

68. See HEWLETT, *supra* note 21, at 77-88; Denise Del Vento Bielby & William T. Bielby, *Work Commitment, Sex-Role Attitudes, and Women's Employment*, 49 AM. SOC. REV. 234, 245 (1984). *But see* Jon Lorence, *A Test of "Gender" and "Job" Models of Sex Differences in Job Involvement*, 66 SOC. FORCES 121 (1987) (characteristics of the job setting influence female and male job involvement).

69. *E.g.*, Joseph Berger et al., *Status Organizing Processes*, 1980 ANN. REV. SOC. 479; Alice H. Eagly & Wendy Wood, *Inferred Sex Differences in Status as a Determinant of Gender Stereotypes about Social Influence*, 43 J. PERSONALITY & SOC. PSYCHOL. 915 (1982); Wendy Wood & Stephen J. Karten, *Sex Differences in Interaction Style as a Product of Perceived Sex Differences in Competence*, 50 J. PERSONALITY & SOC. PSYCHOL. 341 (1986).

70. Berger et al., *supra* note 69; Eagly & Wood, *supra* note 69; Catherine Radecki & Joyce Jennings (Walstedt), *Sex as a Status Variable in Work Settings: Female and Male Reports of Dominance Behavior*, 10 J. APPLIED SOC. PSYCHOL. 71 (1980).

For instance, studies indicate that lower class husbands, who do not possess high levels of tangible resources compared to their wives, exert a high degree of control over their spouses. SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 81. In addition to the power inherent in being male, some of this control likely stems from lower class couples' adherence to traditional sex role ideology. See *infra* notes 174-241 and accompanying text for discussion of sex role ideology and marital power.

Studies also reveal that peers consistently evaluate male leaders more positively than female leaders. Virginia Brown & Florence L. Geis, *Turning Lead into Gold: Evaluations of Men and Women Leaders and the Alchemy of Social Consensus*, 46 J. PERSONALITY & SOC. PSYCHOL. 811 (1984); Jeffrey A. Kelly et al., *Gender and Sex Role Differences in Group Decision-Making Social Interactions: A Behavioral Analysis*, 12 J. APPLIED SOC. PSYCHOL. 112 (1982); Wood & Karten, *supra* note 69. This gender-biased evaluation occurs even when both sexes perform identical behaviors. Brown & Geis, *supra*. The relatively negative evaluation of females appears rooted in the belief that males are more competent than females. Wood & Karten, *supra* note 69.

Research in the corporate arena, likewise, indicates that male managers perceive female managers as less powerful than their male counterparts and less likely to have future upward mobility within the organization. Mary Glenn Wiley & Arlene Eskilson, *Scaling the Corporate Ladder: Sex Differences in Expectations for Performance, Power and Mobility*, 47 SOC. PSYCHOL. Q. 351 (1983) [hereinafter, Wiley & Eskilson, *Scaling the Corporate Ladder*]; Mary Glenn Wiley & Arlene Eskilson, *Coping in the Corporation: Sex Role Constraints*, 12 J. APPLIED SOC. PSYCHOL. 1 (1982) [hereinafter Wiley, & Eskilson, *Sex Role Constraints*].

71. John C. Touchey, *Effects of Additional Women Professionals on Ratings of Occupational Prestige and Desirability*, 29 J. PERSONALITY & SOC. PSYCHOL. 86 (1974).

72. Although a couple may process some emotional problems during divorce mediation, their main goal is to reach an agreement. See *infra* notes 249-54 and accompanying text for discussion of mediation's task orientation. See also Haynes, *supra* note 9 (a task-oriented description of the ideal mediation process).

influence in task-oriented small groups⁷³ provides insight into status effects in divorce mediation.⁷⁴ In task-oriented groups men's greater status enables them to participate more and engage in more task-oriented behavior than women.⁷⁵ These behaviors facilitate men's becoming group leaders.⁷⁶ Men's greater status also leads other group members to expect

73. The reconceptualization of mediation as a task-oriented small group phenomenon receives support from Vanderkooi and Pearson's research on the Denver Mediation Project. They note that many mediators who begin with a therapeutic approach tend to become more task-oriented as they gain experience. Lois Vanderkooi & Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAM. REL. 557, 565 (1983). Furthermore, after noting that mediators of custody/visitation disputes frequently participate actively in formulating the agreement, they state: "[M]ediation may be more aptly characterized as a participatory forum for disputants and mediators together to attempt to generate answers to difficult, painful and terribly important questions." *Id.*

74. This analogy poses some difficulty. Most frequently the research on status influence concerns newly-formed groups of strangers, rather than groups where the participants have prior knowledge of one another, as is true of divorce mediation. Two studies conducted in the early 1960's also suggested that the effect of status upon influence decreased as the prior acquaintance of the group's members increased. Berger et al., *supra* note 69, at 480. However, even though the effect decreased, it did not disappear. Moreover, the strongest and central findings of the research support this analogy. As noted by Berger, Rosenholtz and Zelditch, when groups contained participants initially unequal in power,

[i]nequalities significant outside the group were maintained inside the group. The power-prestige order of the group correlated with external status differences; more important, it appeared to be "instantaneously" created instead of evolving out of the face-to-face interaction of the members of the group. It did not seem to make much difference what kind of status differentiated the group: [t]he same effect was found for age, sex, race, occupation, ethnicity, education, and organizational office But, most importantly, it did not make any difference whether or not the status characteristic had any prior, established association with the goal or task of the group.

Id. See also Linda D. Molm, *Gender, Power, and Legitimation: A Test of Three Theories*, 91 AM. J. SOC. 1356, 1363-64 (1986) (making a similar argument for the validity of extending expectation states theory to dyadic interaction). Family decisionmaking research and theory also supports the viability of the analogy. While most husbands exercise more marital decisionmaking power than their wives, the most powerful husbands are those with high status. SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 69-70, 79-83.

75. *E.g.*, B.F. Meeker & P.A. Weitzel-O'Neill, *Sex Roles and Interpersonal Behavior in Task-Oriented Groups*, 42 AM. SOC. REV. 91 (1977); Berger et al., *supra* note 69, at 494-96; see generally Wood & Karten, *supra* note 69. Of course, status is not the only factor which increases men's leadership potential in task-oriented groups. Their sex role socialization encourages dominance, self-expression and assertiveness. See *infra* notes 176-79 and accompanying text. Furthermore, the literature on influence in small groups suggests that one's demeanor also affects one's ability to influence. See Margaret T. Lee & Richard Ofshe, *The Impact of Behavioral Style and Status Characteristics on Social Influence: A Test of Two Competing Theories*, 44 SOC. PSYCHOL. Q. 73 (1981); Aysan Sev'er, *Simultaneous Effects of Status and Task Cues: Combining, Eliminating, or Buffering?*, 52 SOC. PSYCHOL. Q. 327 (1989); see generally Nemeth, *supra* note 57.

76. *E.g.*, Edwin I. Megaree, *Influence of Sex Roles on the Manifestation of Leadership*, 53 J. APPLIED PSYCHOL. 377 (1969); Cecelia L. Ridgeway, *Status in Groups: The Importance of Motivation*, 47 AM. SOC. REV. 76 (1982); see generally Wood & Karten, *supra* note 69.

greater competence from men than from lesser status women,⁷⁷ and creates their willing deference to men's leadership attempts.⁷⁸ Men thus exercise greater influence over results than lower status women.

The lower status of women, relative to men, also leads to women's greater influenceability⁷⁹ and conformity.⁸⁰ Moreover, women seem

77. Wood & Karten, *supra* note 69, at 341.

For instance, Molm states:

Expectation states theory proposes that differences in external status characteristics such as sex, race and age are used by group members to form initial expectations about the relative competencies of individuals working on a group task. These expectations in turn will affect important features of group interaction. In the absence of information to the contrary, groups will assume that members who are higher on the status characteristic will be more competent at the task than those of lower status. These expectations essentially act as a self-fulfilling prophecy: [t]he persons for whom higher performance expectations are held will get more opportunities to participate, initiate more actions, receive more positive reactions from other group members and have more influence on group decisions. As a result, they will achieve higher status and power within the group, thus perpetuating the members' original beliefs about the relations between the status characteristic and attributes of the individual members. A large number of carefully controlled experiments, using a standardized setting, have provided support for the assumptions of the theory.

Linda D. Molm, *Gender and Power Use: An Experimental Analysis of Behavior and Perceptions*, 48 SOC. PSYCHOL. Q. 285, 286 (1985) (citations omitted).

78. A recent study by Eagly and Wood illustrates how sexual and occupational status are related to people's expectations of one's ability to influence another. The researchers found that when subjects were shown scenarios depicting a man attempting to influence a woman or a woman trying to influence a man, subjects believed that the woman held a lower status job than the man and that the woman was more likely to behaviorally comply with the man's influence attempt than the man was to comply with such an attempt by the woman. However, when subjects were given job status information, they then rated the relative power of the man and woman on the basis of job status rather than sex role expectations. Eagly & Wood, *supra* note 69, at 920. If one places these dynamics in the context of divorce negotiations, the mediator and the wife would expect the husband, because of his sex and his probable higher occupational status, to influence them and that expectation would encourage the husband to engage in influence attempts.

One should not make too much, however, of the implications in this study that other status cues, such as occupational prestige, can totally erase the higher status normally imputed to males. On this point, Eagly herself has questioned the applicability of the study beyond the organizational context, as well as its validity in the organizational context. Eagly, *supra* note 56, at 975.

79. While researchers have sometimes questioned whether studies actually establish sex differences in influenceability, e.g., Alice H. Eagly, *Sex Differences in Influenceability*, 85 PSYCHOL. BULL. 86 (1978) [hereinafter Eagly, *Sex Differences*], more recent and statistically sophisticated studies have generated acceptance of this finding. For instance, in an earlier review, Eagly found that, although textbooks typically expressed the view that women are more easily influenced than men, the majority of studies conducted reported no significant sex differences in influenceability. *Id.* at 86-89. More recently she has been convinced by research which aggregates the findings of numerous studies and conclude that findings of sex differences in influenceability rise to levels of statistical significance. Eagly, *supra* note 56, at 976. However, while the average differences between the sexes may be small, Deaux notes, "differences in the proportions of males and females occurring at the extremes of the distribution or even the percentages above the median may be quite substantial and

most influenceable in settings, like divorce mediation, requiring ongoing interaction between the sexes.⁸¹ Thus, while the higher status of men enhances their ability to influence,⁸² the corresponding lesser status of women promotes their greater influenceability.⁸³ Unsurprisingly, research on marital power indicates high status husbands possess the most power of all husbands over marital decisions.⁸⁴ Taken together, this research on status effects strongly suggests that husbands will act as influential leaders and that wives will defer to husbands during divorce mediation.

3. *Dominance.* Men's greater status also promotes dominance behaviors⁸⁵ important in divorce negotiations.⁸⁶ For instance, men engage

thus have some practical significance." Kay Deaux, *Sex and Gender*, 36 ANN. REV. PSYCHOL. 49, 62 (1985). The debate thus goes on.

80. Eagly, *supra* note 56, at 976-77. An alternative explanation for the women's, as opposed to men's, greater influenceability is the greater concern of women with the relationships among group members. E.g., Eagly, *Sex Differences*, *supra* note 79, at 103-04; Douglas M. Tuthill & Donelson R. Forsyth, *Sex Differences in Opinion Conformity and Dissent*, 116 J. SOC. PSYCHOL. 205 (1982).

81. The tendency for men to exert more influence than women appears stronger in studies allowing for actual interaction between the sexes than in studies where subjects are merely requested to relate their expectations regarding the influence of the different sexes. Subjects in the former experiments are thought to conform more to stereotypical expectations because of group pressures. Eagly, *supra* note 56, at 976-77.

82. Curtis argues that men in families gain power not just from their greater authority, but also from the greater experience in larger scale authority systems outside the family. Curtis, *supra* note 35, at 172.

83. While this deference to men because of their higher status has been well documented in research on expectation states theory, other research suggests that the effect of male status can be neutralized if a woman is shown to be "more" competent than her male counterparts at a task related to, but distinct from, the task at hand. M.D. Pugh & Ralph Wahrman, *Neutralizing Sexism in Mixed-Sex Groups: Do Women Have to Be Better than Men?*, 88 AM. J. SOC. 746 (1983). See also David G. Wagner et al., *Can Gender Inequalities Be Reduced*, 51 AM. SOC. REV. 47 (1986) (gender-based status expectations could be reversed by introduction of evidence of female competence).

84. SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 69, 81-83; Gillespie, *supra* note 39, at 451. See also John Mirowsky, *Depression and Marital Power: An Equity Model*, 91 AM. J. SOC. 557, 587 (1985) (the more a husband earns, the more his wife perceives his marital power is justified); Vanfossen, *supra* note 65, at 569 (results revealed that high status fathers were more likely to dominate their families than lower status fathers).

85. Certain behaviors are recognized as expressions of dominance, i.e., the ability to impose one's will upon another. See, e.g., Anne K. McCarrick et al., *Gender Differences in Competition and Dominance During Married-Couples Group Therapy*, 44 SOC. PSYCHOL. Q. 164, 164-65 (1981) (examining competition and dominance behaviors in male-female verbal interaction).

86. The unequal status positions of men and women, and their socialization into different sex roles, are thought to contribute to men's tendency to exhibit far more dominance behaviors.

As noted by Ridgeway and Berger:

The extent to which members treat positions in a behavioral power and prestige order as legitimate has been shown to have a number of effects on task group status processes. First of all, it appears to affect the type of power use high ranking members may success-

in verbal dominance more frequently than women.⁸⁷ They tend to control conversations with women by monopolizing conversation time and interrupting frequently,⁸⁸ particularly when the topic concerns a traditionally male dominated area, such as automobile repair or finances.⁸⁹ In the marital context, husbands dominate conversation time and interrupt their wives far more frequently than their wives interrupt them.⁹⁰ One study of distressed married couples suggests that wives have more difficulty asserting themselves in conversations with their husbands than they do in conversations with other males.⁹¹

fully engage in, although it may also reduce their need to use power. With legitimacy, high ranking members appear able to engage more effectively in directive or domineering behaviors.

Cecelia L. Ridgeway & Joseph Berger, *Expectations, Legitimation, and Dominance Behavior in Task Groups*, 51 AM. SOC. REV. 603, 603 (1986) (citations omitted). See also Kathryn A. Adams & Audrey D. Landers, *Sex Differences in Dominance Behavior*, 4 SEX ROLES 215 (1978) (study investigating sex differences in dominance as a function of a challenger's sex); McCarrick et al., *supra* note 85 (examining dominance patterns during verbal interaction).

87. *E.g.*, HILARY M. LIPS, *WOMEN, MEN, AND THE PSYCHOLOGY OF POWER* 100-101 (1982). Many other differences exist between male and female dominance behaviors. To mention but a few: males tend to occupy larger areas of personal space than females; fathers are more likely than mothers to have a special room in the house; women, far more frequently than men, yield space and choose body postures designed to minimize space utilization; males exhibit facial expressions associated with dominance, such as stern, non-expressive stares or clenched jaws, whereas females more frequently display facial expressions associated with submissiveness, such as smiling or lowering of gaze; men use expansive, relaxed gestures, while women tend to be more proper and constricted in their body movements; and men hold their head erect during conversations, whereas women frequently tilt their heads in deference. *Id.* at 97-100.

88. *E.g.*, Peter Kollock et al., *Sex and Power in Interaction: Conversational Privileges and Duties*, 50 AM. SOC. REV. 34 (1985); McCarrick et al., *supra* note 85.

89. For instance, from their research conducted on decisionmaking in mixed sex groups, Kelly, Wildman and Urey found females' social behavior more inhibited than that of males during a decisionmaking process regarding car accessories. They explained their results as follows:

[P]reference for car accessories taps the historically more male-stereotyped domain of activities dealing with automobiles. In spite of the fact that the decision-making process during the car task involved the expression of opinions about very common accessories familiar to both male and female subjects (radios, power steering, vinyl roofs, etc.), females' social behavior was more inhibited during this decisionmaking interaction relative to that of males. One might surmise that the relative denial of social opportunities to engage in instrumental decisionmaking, and sex-stereotypes which may inhibit many females from even offering opinions in familiar but traditionally male-dominated content areas, were responsible for this finding.

Kelly et al., *supra* note 70, at 123-24. See also Joyce L. Carbonell, *Sex Roles and Leadership Revisited*, 69 J. APPLIED PSYCHOL. 44 (1984) (high-dominant women tended to defer to low-dominant men in masculine task situations, but became leaders 56% of the time when the tasks appeared feminine in nature).

90. This verbal dominance is thought to establish and reinforce hierarchy within the marital relationship. McCarrick et al., *supra* note 85, at 164-65; Ridgeway & Berger, *supra* note 86, at 613.

91. McCarrick et al., *supra* note 85. Note that since the couples studied here were undergoing

Although women are capable of dominance behaviors, in mixed-sex groups they exhibit socially inhibited and submissive behavior toward men during problem-solving⁹² and decisionmaking. Even women who demonstrate high dominance propensities tend to defer to both high and low dominant men in mixed-sex decisionmaking groups.⁹³ And, some women who do express their dominant tendencies do so primarily through group-oriented, rather than individually focused, actions.⁹⁴ Thus, during divorce negotiations husbands likely will attempt domination and their wives, even those with high-dominance propensities, likely will engage in inhibited and submissive behaviors with respect to problem-solving and decisionmaking, particularly in the male dominated financial sphere.⁹⁵

therapy for troubled marriages, their communication patterns may be more representative of divorcing couples than of nondistressed couples.

92. E.g., Cornelius Riordan, *Sex as a General Status Characteristic*, 46 SOC. PSYCHOL. Q. 261, 261-62 (1983).

93. In Nyquist and Spence's study they paired a high-dominant person with a low-dominant person and had them work on a gender-neutral task. In same-sex pairs 73% of the high-dominant individuals assumed the leadership role. In mixed-sex dyads where the high-dominant person was a male, 93% of high-dominant males became leaders. However, in mixed-sex pairs where the high-dominant individual was a women, only 35% of the high-dominant women assumed the leadership role. Linda V. Nyquist & Janet T. Spence, *Effects of Dispositional Dominance and Sex Role Expectations on Leadership Behaviors*, 50 J. PERSONALITY & SOC. PSYCHOL. 87 (1986). This study replicated an earlier study by Megargee that reached essentially the same result. Megargee, *supra* note 76. A recent study found that 50% of the high-dominant women became leaders when paired with low-dominant men. Robin A. Fleischer & Jerome M. Chertkoff, *Effects of Dominance and Sex on Leadership Selection in Dyadic Work Groups*, 50 J. PERSONALITY SOC. PSYCHOL. 94 (1986). These researchers suggest that their results might differ from those of Nyquist and Spence because their study was conducted in the Midwest, whereas Nyquist and Spence's study, as well as Megargee's, was performed in the Southwest. *Id.* at 98. Furthermore, while high-dominant women emerged as leaders 50% of the time when paired with low-dominant men, indicating an increase over Nyquist and Spence's results, high-dominant women assumed this leadership role far less frequently than did high-dominant men when paired with low-dominant women (i.e. 86% for high-dominant men and 63% for high-dominant women). In the latter situation, high-dominant men became leaders 85% of the time. *Id.* at 97.

94. David M. Buss, *Sex Differences in the Evaluation and Performance of Dominant Acts*, 40 J. PERSONALITY & SOC. PSYCHOL. 147 (1981).

95. One might think that upper class women would fare better than middle or lower class women regarding status disparities between husbands and wives. However, the status differences between men and women in the upper class frequently are greater than in the lower classes. While middle and lower class women may tend to participate, out of necessity, in economically productive activity that generates some status for them relative to their husbands, upper class women frequently are encouraged to lead lives of leisure and conspicuous consumption. Unless independently wealthy, they lack the status, relative to their husbands, of their lower class counterparts. Consequently, upper class women are frequently dependent upon their husbands' positions for whatever status they have. Divorce, of course, deprives such women of this imputed status, leaving them potentially more vulnerable, on the basis of status, in divorce negotiations than lower class wives. See generally JANET SALTZMAN CHAFETZ, *SEX AND ADVANTAGE: A COMPARATIVE, MACRO-STRUCTURAL THE-*

4. *Depression.* Depression has a devastating effect on negotiating ability. Learned helplessness theory explains that depression results from frequent exposure to outcomes over which one lacks control and the corresponding expectation that nothing one does can alter circumstances. The person's ability to see how to produce desired outcomes (the cognitive deficit) and the person's motivation to engage in outcome producing behaviors (the motivational deficit) become inhibited or blocked. The depressed spouse thus will have difficulty perceiving how to achieve desired outcomes and engaging in effective negotiation.⁹⁶ Depressed people's self perceptions increase their reluctance to engage in negotiations. For example, negotiation requires skill, intelligence, common sense, and social sensitivity. Depressed individuals, however, see themselves as helpless in skilled situations,⁹⁷ and expect themselves to perform poorly in situations requiring intelligence, common sense, and social adept-

ORY OF SEX STRATIFICATION 8 (1984) (discussing the lower status for upper class women relative to upper class men).

Perhaps, along with resource disparity, this status distinction between lower class and upper class women, relative to their husbands, helps explain studies in marital power that indicate working wives in working-class families wield more power than working wives in middle class families. See Heer, *supra* note 42; see also Hawkes & Taylor, *supra* note 39 (egalitarianism found to be the most common mode of decisionmaking in Mexican and Mexican-American farm labor families). However, other studies indicate that lower class blue-collar husbands, contrary to middle-class or higher class blue-collar husbands, have more power than their wives even if their wives possess superior educations, and thus, potentially greater status. A possible explanation for this seeming anomaly is the less-educated couple's greater adherence to traditional sex role ideology that grants the husband ultimate authority within his family. Gillespie, *supra* note 39, at 452. See *infra* notes 174-210 and accompanying text for discussion of the power implications of sex role ideology in divorce mediation.

96. See Rosenfield, *supra* note 42, at 77. However, the learned helplessness theory of depression has its detractors among those who find depressed subjects have more accurate perceptions than nondepressed subjects of their control over certain events. Ivan H. Gotlib & Robert F. Asarnow, *Interpersonal and Impersonal Problem-Solving Skills in Mildly and Clinically Depressed University Students*, 47 J. CONSULTING & CLINICAL PSYCHOL. 86 (1979); Carmelo Vazquez, *Judgment of Contingency: Cognitive Biases in Depressed and Nondepressed Subjects*, 52 J. PERSONALITY & SOC. PSYCHOL. 419 (1987). Others who argue against the learned helplessness theory of depression urge a somewhat different explanation of depression in humans. E.g., Arthur Frankel & Melven L. Snyder, *Poor Performance Following Unsolvably Problems: Learned Helplessness or Egotism?*, 36 J. PERSONALITY & SOC. PSYCHOL. 1415 (1978); David C. Zuroff, *Learned Helplessness in Humans: An Analysis of Learning Processes and the Roles of Individual and Situational Differences*, 39 J. PERSONALITY & SOC. PSYCHOL. 130 (1980). Nevertheless, the learned helplessness theory of depression seems particularly appropriate to understanding women's depression because of its relationship to women's and the public's attributional patterns, see *infra* notes 127, 129-30 and accompanying text. Moreover, much research specifically has addressed learned helplessness in women. See, e.g., Donald H. Baucom & Bahr Weiss, *Peers' Granting of Control to Women with Different Sex Role Identities: Implications for Depression*, 51 J. PERSONALITY & SOC. PSYCHOL. 1075 (1986).

97. Judy Garber & Steven D. Hollon, *Universal Versus Personal Helplessness in Depression: Belief in Controllability or Incompetence?*, 89 J. ABNORMAL PSYCHOL. 56 (1980).

ness.⁹⁸ These self perceptions will decrease the depressed person's motivation to engage in the very behaviors necessary for effective negotiation.

Moreover, depressed individuals display a greater reluctance than nondepressed people to make risky decisions that potentially expose them to social risks, such as embarrassment or conflict, as well as risky decisions that concern important and potentially long-term social contact.⁹⁹ Depressed people, especially depressed wives,¹⁰⁰ also demonstrate less interpersonal problem-solving ability than nondepressed people.¹⁰¹ Divorce negotiations, however, require problem solving as well as risky decisions that provoke conflict and concern long-term social contact, especially with children. Consequently, a depressed individual will experience extreme disadvantage in divorce negotiations.

Far more women than men suffer from depression.¹⁰² As noted by Rosenfield: "These differences are found across cultures, over time, in different age groups, in rural as well as urban areas, and in treated as well as untreated populations. Researchers estimate that women have as much as twice the rate of distress and depression as men."¹⁰³ Two different, yet interrelated, factors explain women's higher depression rates: learned helplessness¹⁰⁴ and sex role identity.¹⁰⁵ Women, because of their

98. Peter M. Lewinsohn et al., *The Measurement of Expectancies and Other Cognitions in Depressed Individuals*, 6 COGNITIVE THERAPY & RES. 437, 444 (1982).

99. Paula R. Pietromonaco & Karen S. Rook, *Decision Style in Depression: The Contribution of Perceived Risks Versus Benefits*, 52 J. PERSONALITY & SOC. PSYCHOL. 399, 405 (1987). This pattern holds even when the risky decision also promises social benefits, such as respect or liking. *Id.* However, the decisional style employed by the depressed subjects in this study did not differ significantly from that of the nondepressed subjects when the scenario involved decisions relating to asserting one's rights or remaining dissatisfied, experiencing financial gains or losses, or validating or compromising one's morals. *Id.* at 401, 405. While divorce negotiations clearly involve some of these other issues, they also inevitably involve intense and long-term social contact. This mixture of issues in divorce negotiations suggests then that depressed individuals will remain at a disadvantage, even on financial issues, because of their unwillingness to take risks.

100. A study exploring problem solving interactions in married couples with depressed wives showed the wives exhibited less problem-solving behavior than their husbands. Anthony Biglan et al., *Problem-Solving Interactions of Depressed Women and Their Husbands*, 16 BEHAV. THERAPY 431 (1985).

101. Gotlib & Asarnow, *supra* note 96.

102. *E.g.*, Baucom & Weiss, *supra* note 96, at 1075; Susan Nolen-Hoeksema, *Sex Differences in Unipolar Depression: Evidence and Theory*, 101 PSYCHOL. BULL. 259 (1987).

103. Rosenfield, *supra* note 42, at 77. *See also* Esther D. Rothblum, *Women's Socialization and the Prevalence of Depression: The Feminine Mistake*, 1 WOMEN & THERAPY 5, 5 (1982) (women consistently present higher rates of depression than men, usually at a two-to-one ratio).

104. Carol E. Ford & John M. Neale, *Learned Helplessness and Judgments of Control*, 49 J. PERSONALITY & SOC. PSYCHOL. 1330, 1330 (1985).

105. Baucom & Weiss, *supra* note 96. Competing with learned helplessness and sex role identity as causes of depression are explanations based on physiological differences between men and women.

low power and their disadvantaged access to society's opportunity structure, experience less control over outcomes than men. Consequently, they more frequently develop a learned helplessness response set and concomitant depressive symptoms.¹⁰⁶ A woman's sex role identity also can exacerbate her tendency toward learned helplessness. In response to failure, women with a feminine sex role identity tend to exert less control over a subsequent task than do women with a masculine sex role identity.¹⁰⁷ Moreover, other people are reluctant to grant control to women of a feminine sex role identity. One study found that others gave control over enjoyable and creative tasks to women high in masculinity, whereas they allowed feminine women control only over unenjoyable methodical tasks and tasks requiring interpersonal skills.¹⁰⁸ Consequently, because they do not seek control and because others do not allow them control, women with a feminine sex role identity likely will exhibit depression more frequently than women with a masculine sex role identity.

Married people show the greatest differences between men and women in anxiety and depression.¹⁰⁹ Wives' low decisionmaking power in marriage and their consequent lack of control over outcomes lead to depression.¹¹⁰ Even if a wife gains decisionmaking power through employment outside the home, she still may have a greater tendency toward depression than her husband. Frequently the wife's employment remains coupled with primary responsibility for housework and children.¹¹¹ Her role overload leads to perceptions and feelings of lack of control which

See Sarah Rosenfield, *Sex Differences in Depression: Do Women Always Have Higher Rates?*, 21 J. HEALTH & SOC. BEHAV. 33, 35 (1980).

106. Rosenfield, *supra* note 42, at 77.

107. For example, in a study exploring the desire for control, college women were exposed to an initial failure experience and then requested to choose the amount of control they would like to exert in an upcoming two-person task. Seventy-one percent of the masculine sex-typed women chose to exercise control over the upcoming task, whereas none of the feminine sex-typed women chose the control option. Donald H. Baucom, *Sex Role Identity and the Decision to Regain Control Among Women: A Learned Helplessness Investigation*, 44 J. PERSONALITY & SOC. PSYCHOL. 334 (1983).

108. The researchers conclude that this lack of control over desirable tasks might make feminine sex-typed women more vulnerable to depression than more masculine women. Baucom & Weiss, *supra* note 96, at 1979.

109. Rosenfield, *supra* note 42, at 77.

110. *Id.* at 77-78. See Mirowsky, *supra* note 84 (inequity in marital power produces depression); Robert B. Schafer & Patricia M. Keith, *Equity and Depression Among Married Couples*, 43 SOC. PSYCHOL. Q. 430 (1980) (inequity in long-term marriages associated with depression).

111. For instance, Radloff's study indicated that only 23% of husbands worked around the house or yard daily, whereas 69% of employed wives performed household chores daily. Leonore Radloff, *Sex Differences in Depression: The Effect of Occupation and Marital Status*, 1 SEX ROLES 249, 260 (1975).

then create depression and anxiety.¹¹² However, if high family demands do not exist, the employed wife remains less susceptible to depression than a housewife because of her greater control over marital decisioning.¹¹³

Divorce strengthens the likelihood of depression in wives. Among all marital status categories, depression rates are highest for separated and divorced women.¹¹⁴ One might expect a wife's depressive symptoms to lift on divorce because of her greater decisional control in her husband's absence. Many divorcing women, however, become overwhelmed by their acquisition of unfamiliar roles, such as single parent and primary wage earner.¹¹⁵ Furthermore, most divorced women face substantial fi-

112. Rosenfield, *supra* note 42, at 79-81. Unsurprisingly, the researcher found full-time employed women with children significantly higher than men in anxiety and depressive symptoms. In contrast, no significant differences in symptoms emerged between men and full-time employed women without children or part-time employed women with children. *Id.* at 84.

113. Rosenfield's research supports this analysis. She found that employed women with high work and high family demands evidenced significantly higher levels of anxiety and depression than housewives. Employed women with low work and low family demands, however, had significantly lower symptoms than housewives. *Id.* at 85. See also Rothblum, *supra* note 103, at 7.

114. *E.g.*, KRESSEL, *supra* note 1, at 58; Rothblum, *supra* note 103, at 7 (citing Robert M. Hirschfeld and Christine K. Cross, *Psychosocial Risk Factors in Depression*, in RISK FACTOR RESEARCH IN THE MAJOR MENTAL DISORDERS 81 (Darrel A. Regier & Gordon Allen eds., 1981)).

The significantly higher depression rates of divorced women discussed is a post-divorce finding that may not indicate accurately the likelihood of a wife's depression during pre-divorce negotiations with her husband. However, this research does suggest that the wife is more likely than her husband to be depressed during divorce negotiations if the husband and wife have been physically separated for a period of time, the wife has assumed diverse and unfamiliar roles, and/or the wife's pre-divorce financial situation is adverse. Furthermore, the marriage's initial disruption seems to trigger depression more frequently in women than in men, because more women than men react adversely to events that precipitate divorce, such as the other spouse's adultery or the other spouse's request for divorce. Rothblum, *supra* note 103, at 7-8 (citing C. William Briscoe & James B. Smith, *Depression and Marital Turmoil*, 29 ARCHIVES GENERAL PSYCHIATRY 811 (1973)).

115. In speaking of the psychological distress surrounding the divorce negotiation period, for instance, Kressel notes:

For the divorced mother, the changes set in motion by the separation are usually even more radical than those experienced by her ex-husband. Residential instability may be nearly as common among women as it is among men, and as bad as divorce is financially for men, for women it may amount to an economic disaster. Because of these economic pressures most divorced women are obliged to work outside of the home, for which, because of economic discrimination, they can generally expect to be paid about half of what a man doing comparable work would earn.

While adjusting to the new and unremunerative responsibilities of employment, the divorced wife is simultaneously playing the role of both mother and father to her children. Mastering all of these challenges is not easy.

KRESSEL, *supra* note 1, at 44-45 (citations omitted). Kohen explains how a wife's transition from married parenthood to single parenthood differs from more positive role transitions:

The role transition between married motherhood and divorced single parenthood does not share the characteristics of adult role change described above. Divorced mothers are

nancial hardship¹¹⁶ that precipitates stress and depression. And, finally, loss of a major role can devastate an individual, particularly if other major roles do not supplement the lost role.¹¹⁷ Wives generally consider the marital role more important than do husbands,¹¹⁸ thereby enhancing the likelihood of depression at divorce.¹¹⁹ Moreover, a traditional housewife's major roles normally consist of wife and mother. The husband, on the other hand, usually has numerous occupational and extrafamilial roles, leaving his self-identity less dependent upon his spousal role. Thus, the traditional housewife more likely will experience depression at the loss of her marital status than will her husband.¹²⁰ Role loss, transi-

not trained in the skills necessary for their new role as head of the family; they are not socially validated in that role; and they often have less access to power and other resources than they had through their marriages. Furthermore, family, friends, and community reinforce marital roles, seeing them as based on women's sex role and merging them with women's identities. Thus, heading a family requires mastery, control, and assertiveness — skills and attitudes that are neither consciously taught nor valued for women either before or after divorce. Access to social and economic opportunities — authority, respect, jobs, and income — that provide rewards to men who head their families are generally limited for women who head their families. Family and friends who supported divorced mothers' marital roles often find their single parenthood uncomfortable if not unacceptable. Given the discontinuity between the roles of the married and divorced mothers and the absence of training and social support for accomplishing a transition between them, we should expect that most women will have difficulty, at least initially, both in giving up their identity with marriage and in developing an identity based on heading their families. Without social patterns which support the adoption of their new role, we should also expect that identification with it, when it occurs, will be a function of individual abilities and circumstances.

Janet A. Kohen, *From Wife to Family Head: Transitions in Self-Identity*, 44 *PSYCHIATRY* 230, 231 (1981) (citations omitted).

It is conceivable, of course, that a wife might avoid depression even under the conditions noted by Kressel and Kohen. However, because of these major role transitions and losses, a wife's stress level likely exceeds her husband's. Decisionmaking under high stress promotes premature closure of issues and nonsystematic scanning of alternatives. *E.g.*, Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 *J. PERSONALITY & SOC. PSYCHOL.* 639 (1987). Consequently, even were a wife to avoid depression, she is still likely to be disadvantaged, compared to her husband, in decisionmaking during divorce negotiations due to her higher stress level.

116. *See, e.g.*, LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); *see also infra* note 319 for further discussion.

117. *See* Kohen, *supra* note 115.

118. *See* William A. Barry, *Marriage Research and Conflict: An Integrative Review*, 73 *PSYCHOL. BULL.* 41-42 (1970).

119. Those husbands who have made parenting a major role and who likely will lose physical custody of their children upon divorce, will, of course, be at risk for depression.

120. Research reveals a strong correlation between a wife's traditional orientation and depression at the loss of the wife role. The researchers concluded that "women who have traditional self-concepts are uniquely vulnerable to the loss of their status as wives." Richard D. Cartwright et al.,

tion, and overload, as well as diminished financial status thus contribute to the wife's enhanced vulnerability to depression during divorce.¹²¹

All of the foregoing suggest the greater likelihood of the wife's, as opposed to the husband's, depression during divorce mediation, as well as the devastating effect that depression will have on her ability to negotiate effectively. Significantly, Bruch notes: "Data indicate that women are more depressed during mediation than during litigation and feel that they have lost more and gained less in mediation. Mediation is viewed more favourably, both procedurally and substantively, by men."¹²²

5. *Self-Esteem.* Self-esteem proves critical to negotiating power because people with high self-esteem negotiate better outcomes than peo-

The Traditional-Liberated Woman Dimension: Social Stereotype and Self-Concept, 44 J. PERSONALITY & SOC. PSYCHOL. 581, 586 (1983). This study, however, did not compare the wives' depression rates to those of their husbands. Nonetheless, research in other areas has consistently found women more emotionally vulnerable than men to undesirable life events. E.g., Ronald C. Kessler & Jane D. McLeod, *Sex Differences in Vulnerability to Undesirable Life Events*, 49 AM. SOC. REV. 620, 620 (1984). This greater vulnerability seems attributable to women's greater emotional involvement in others' lives. *Id.* Finally, when women and men are asked to comment upon the traumatic nature of their divorce experience, women indicate they experienced more trauma and stress, Stan L. Albrecht, *Reactions and Adjustments to Divorce: Differences in the Experiences of Males and Females*, 29 FAM. REL. 59, 62 (1980), and depression, KRESSEL, *supra* note 1, at 58, than do men.

121. Although well grounded in theory and research, the conclusion that wives are more likely than husbands to exhibit depression during divorce negotiations is not unassailable. A seemingly contradictory study found that women experience more severe psychological symptoms of general emotional discomfort, neurosis and psychosomatic disorders prior to marital separation, whereas men evidence more of these symptoms after separation. Bernard L. Bloom & Robert A. Caldwell, *Sex Differences in Adjustment During the Process of Marital Separation*, 43 J. MARRIAGE & FAM. 693 (1981). Since for most couples divorce negotiations probably occur after separation, this study suggests that husbands might be disadvantaged by their emotional states during divorce negotiations. However, the symptoms of emotional trauma mentioned in the foregoing study are not depressive. They simply illustrate that few can divorce without emotional discomfort. More importantly, none of these symptoms necessarily diminish the individual's capacity to negotiate effectively. Other research also suggests that men, perhaps because of their socialized tendency to deny or suppress emotional problems, have more difficulty than women facing and processing the emotional issues in divorce. See David A. Chiriboga & Loraine Cutler, *Stress Responses Among Divorcing Men and Women*, J. DIVORCE, Winter 1977, at 95, 104. In response to divorce men frequently engage in extreme instrumental behaviors, such as excessive work or social activity, to temporarily avoid their emotional problems. Women, on the other hand, tend to face and process the emotional problems precipitated by divorce more willingly and more quickly. *Id.* These observations suggest that at the time of divorce negotiations, husbands will be highly instrumental and wives will be processing emotions. Therefore, since divorce negotiation is a highly instrumental activity, husbands should be better prepared for it than their wives. In summary, then, the research that seems to contradict the conclusion that wives are more likely than husbands to be depressed during divorce negotiations either supports that conclusion or addresses different symptoms.

122. Bruch, *supra* note 38, at 119 (citing Robert E. Emery & Melissa M. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULT. & CLINICAL PSYCHOL. 179 (1987)).

ple with low self-esteem,¹²³ and high self-esteem leaves one less vulnerable to persuasion.¹²⁴ Low self-esteem, on the other hand, can inhibit bargaining ability and cause acceptance of extremely unfavorable terms.¹²⁵ A large disparity in self-esteem between negotiating spouses then can influence the outcomes reached in divorce mediation.

An individual's self-esteem comes from: (1) self-efficacy, the belief that one's own actions and abilities cause one's success in the world, and (2) internalization of other's reflections regarding one's effectiveness and worth.¹²⁶ Women do not attribute their worldly successes to their own efforts and abilities, but rather to outside sources such as luck, fate, or powerful others.¹²⁷ Men attribute their successes to their own innate

123. John F. Stolte, *Self-Efficacy: Sources and Consequences in Negotiation Networks*, 119 J. SOC. PSYCHOL. 69 (1983). Other scholars also have noted the importance of self-esteem to power in marital negotiations. SCANZONI & SZINOVACZ, *supra* note 13, at 31.

124. E.g., Steven J. Sherman, *Internal-External Control and Its Relationships to Attitude Change Under Different Social Influence Techniques*, 26 J. PERSONALITY & SOC. PSYCHOL. 23 (1972); David Vern Stimpson, *The Influence of Commitment and Self-Esteem on Susceptibility to Persuasion*, 80 J. SOC. PSYCHOL. 189 (1970).

125. "[D]iminished feelings of self-worth may inhibit the ability to bargain constructively and effectively, or worse, produce an abject acceptance of almost any terms dictated by the other." KRESSEL, *supra* note 1, at 83. While Kressel was writing about the low self-esteem of the non-initiating spouse, no reason exists to think that low self-esteem attributable to another source would have a less potent impact.

126. Viktor Gecas & Michael L. Schwalbe, *Beyond the Looking-Glass Self: Social Structure and Efficacy-Based Self-Esteem*, 46 SOC. PSYCHOL. Q. 77 (1983).

127. E.g., Hilary M. Lips, *Gender and the Sense of Power: Where Are We and Where Are We Going*, 8 INT'L J. WOMEN'S STUD. 483 (1985). In the social psychological literature, this attributional pattern is called an external locus of control. E.g., Julian Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, in 80 PSYCHOL. MONOGRAPHS (American Psychological Association General & Applied Psychological Monograph No. 1, Whole No. 609, 1966).

This persistent and negative attributional pattern in women may relate to their employment and social position. Not taking credit for their successes facilitates women's acceptance of the inequitable reward distributions of income and occupational status they endure in the employment context, while simultaneously allowing them to perceive their worlds as just. If they attributed their successes to their intrinsic worth, they would have to face squarely the unfairness of reward distributions and question the benevolence of their employers as well as the justness of their worlds. This change in perception could lead to depression or open confrontation with employers. Open confrontation for those allowed only marginal and tenuous participation in high status occupations or for those whose employers are (usually) male elites, however, could prove costly. Perhaps these potentially costly consequences help explain why many professional women deny the existence of discrimination and their membership in a minority group. Edward LaFontaine, *Forms of False Consciousness Among Professional Women*, HUMBOLDT J. SOC. REL., Spring-Summer 1983, at 26. Attributional patterns inhibiting recognition of discriminatory treatment, thus, might have functional utility for women in today's employment and social context.

In contrast to their attributional style regarding success, women's tendency to attribute failures to external causes might reflect their accurate, yet perhaps not yet conscious, awareness that powerful others are responsible for such failures. A research project by William J. Doherty & Cynthia Baldwin, *Shifts and Stability in Locus of Control During the 1970s: Divergence of the Sexes*, 48 J. PER-

abilities.¹²⁸ Even high achievement-motivated women explain success and failure in terms of effort and luck, whereas high achievement-motivated men tend to attribute their successes to their abilities and their failures to external causes.¹²⁹ To the extent then that self-esteem comes from self-efficacy, women should have lower self-esteem than men.

Moreover, to the extent self-esteem comes from positive feedback from one's environment, women should have lower self-esteem than men. Rather than credit women for their successes, those who evaluate male and female performances attribute women's success to external causes such as luck or powerful others, whereas they attribute men's success to ability and competence.¹³⁰ Women also receive more negative evaluations by others than they deserve. For example, in mixed-sex small groups peers consistently evaluate female leaders more negatively than male leaders,¹³¹ even when both sexes perform identically,¹³² and both

PERSONALITY & SOC. PSYCHOL. 1048 (1985), suggests this explanation. Doherty and Baldwin found that in the late 1960's and early 1970's, females and males showed close similarity in locus of control scores. However, by 1976-78, the same groups of women had moved substantially toward the external end of the scale, attributing their successes and failures to outside forces. The attributional patterns of the same groups of men, however, remained essentially unchanged. Demographic factors did not account for the shift. The researchers suggested, rather, that a "cultural-shift" had occurred: women in the mid-70's became more aware of the external constraints on their ability to meet the labor force and social goals that they developed during the liberal years of the late 1960's and early 1970's. Attributing their failures to external forces simply reflected their experiences. Men as a group had not met the same barriers as women in the fulfillment of their goals and their attributional patterns reflected continued success. Andrisani and Nestel also found labor force failure to be positively related to external locus of control scores, lending credence to Doherty and Baldwin's explanation. Paul J. Andrisani & Gilbert Nestel, *Internal-External Control as Contributor to and Outcome of Work Experience*, 61 J. APPLIED PSYCHOL. 156 (1976).

128. E.g., LIPS, *supra* note 87; Lips, *supra* note 127. In the social psychological literature this attributional pattern is known as an "internal locus of control." E.g., Rotter, *supra* note 127.

129. Daniel Bar-Tal & Irene Hauson Frieze, *Achievement Motivation for Males and Females as a Determinant of Attributions for Success and Failure*, 3 SEX ROLES 301 (1977).

130. E.g., Kay Deaux & Tim Emswiller, *Explanations of Successful Performance on Sex-Linked Tasks: What Is Skill for the Male Is Luck for the Female*, 29 J. PERSONALITY & SOC. PSYCHOL. 80 (1974); Ragins & Sundstrom, *supra* note 31, at 63.

131. E.g., Brown & Geis, *supra* note 70; Kelly et al., *supra* note 70; Wood & Karten, *supra* note 69.

132. Brown & Geis, *supra* note 70. This relatively negative evaluation of female leaders seems grounded in observers' beliefs that the sexes differ in competence. Wood & Karten, *supra* note 69.

Several studies have found that women themselves judge men as more competent than women in a variety of professional fields. These results suggest that women have internalized their lower status. However, the age, geographic location, and educational level of the evaluating women also seem to influence their perceptions of the relative competence of males and females. Liliane Tawil & Carol Costello, *The Perceived Competence of Women in Traditional and Nontraditional Fields as a Function of Sex-Role Orientation and Age*, 9 SEX ROLES 1197, 1197-98 (1983). For example, Tawil and Costello found that younger women tended to find females equally competent to or more competent than men. *Id.* at 1201-02.

women and men tend to evaluate female-authored articles more negatively than identical male-authored articles.¹³³

Coupling the above observations with women's own attributional patterns, research findings that indicate women have lower self-esteem than men¹³⁴ should come as no surprise. Similar to depression, some women have greater susceptibility to low self-esteem than others. Females with a feminine sex role orientation exhibit lower self-esteem than women with a masculine sex role orientation,¹³⁵ and wives in the labor force generally have significantly higher self-esteem than housewives.¹³⁶

Divorce exacerbates the disparity in self-esteem between men and women. A wife's self-esteem more strongly corresponds to her marital status than does the husband's.¹³⁷ Unless she anticipates prompt remarriage, the impending divorce deprives the wife of her marital status. This deprivation creates an all-time low in her self-esteem,¹³⁸ making her extremely vulnerable during divorce negotiations.

The attributional patterns underlying self-esteem also independently offer to influence divorce negotiations. Individuals attributing their suc-

133. Nancy L. Toder, *The Effect of the Sexual Composition of a Group on Discrimination Against Women and Sex-Role Attitudes*, 5 PSYCHOL. WOMEN Q. 292 (1980). However, in all-women groups women did not devalue female-authored articles. *Id.* at 304.

134. *E.g.*, Jon W. Hoelter, *Factorial Invariance and Self-Esteem: Reassessing Race and Sex Differences*, 61 SOC. FORCES 834 (1983); Sharron Koffman & Hilary M. Lips, *Sex Differences in Self-Esteem and Performance Expectancies in Married Couples*, 8 SOC. BEHAV. & PERSONALITY 57 (1980). *But see* Marlene Mackie, *The Domestication of Self: Gender Comparisons of Self-Imagery and Self-Esteem*, 46 SOC. PSYCHOL. Q. 343 (1983) (finding no self-esteem differences between husbands and wives).

135. Bernard E. Whitley, Jr., *Sex Role Orientation and Self-Esteem: A Critical Meta-Analytic Review*, 44 J. PERSONALITY & SOC. PSYCHOL. 765, 770, 775 (1983).

136. *E.g.*, Mackie, *supra* note 134.

137. *E.g.*, Barry, *supra* note 118; Mackie, *supra* note 134; *see also* Anne Statham Macke, et al., *Housewives' Self-Esteem and Their Husbands' Success: The Myth of Vicarious Involvement*, 41 J. MARRIAGE & FAM. 51 (1979) (housewives' self-esteem related to perceived marital success).

138. In their study Gecas and Seff found an individual's self-esteem strongly influenced by those things psychologically central to the individual, such as work or family. Viktor Gecas & Monica A. Seff, *Social Class and Self-Esteem: Psychological Centrality, Compensation, and the Relative Effects of Work and Home*, 53 SOC. PSYCHOL. Q. 165 (1990). The stronger link between marital status and women's, compared to men's, self-esteem is unsurprising. For most of history success for women has been defined as the proper execution of wife and mother roles. As Elaine Ognibene notes in her essay:

For an American woman the formula for success was simple and decreed by tradition: she was to await passively the arrival of a man who would marry her and make her a mother. In 1868, Elizabeth Lynn Linton wrote in MODERN WOMEN: "What business and profession are to most men, marriage is to most women. Women, compelled to await at home for the wooing which changes their destiny, busy themselves with attractions"

Ognibene, *supra* note 24, at 11 (citing ELIZABETH L. LINTON, MODERN WOMEN 16 (1886)).

cess on a task to their efforts allocate more of the available reward to themselves than those attributing their success to external causes.¹³⁹ Conceptualizing marriage as a joint task and employing standard attributional patterns, the husband will attribute the acquisition of marital assets and his earning power to his efforts, whereas the wife will attribute marital acquisitions to luck or perhaps to her husband's efforts. These attributional patterns which credit the husband more than the wife thus should encourage husbands to award more of the marital assets to themselves and wives to accept this distribution as appropriate.¹⁴⁰ Moreover, to the extent that information generates power in divorce negotiations, husbands will negotiate more effectively than wives, because those who credit themselves for success actively seek information relevant to a particular task, whereas those who attribute their success to outside forces appear passive regarding acquisition of relevant information.¹⁴¹

In conclusion, the husband's higher self-esteem provides him a significant advantage during divorce negotiations with his wife.

6. *Reward Expectation.* Negotiators with higher aspirations tend to obtain larger distributive shares than do bargainers with lower expectations.¹⁴² Divorce negotiations then should favor the spouse with a higher reward expectation than the other. Because women face both structural and ideological inequality¹⁴³ and tend to accept the inequality

139. Michele Andrisin Wittig et al., *Luck Versus Effort Attributions: Effect on Reward Allocations to Self and Other*, 7 PERSONALITY & SOC. PSYCHOL. BULL. 71 (1981).

140. Other research supports this conclusion. Those who attribute success to their own efforts depend more on themselves and seek control when circumstances warrant, whereas "externals" tend to defer to others' judgements. Herbert M. Lefcourt et al., *Internal vs. External Control of Reinforcement and Attention in a Decision-Making Task*, 36 J. PERSONALITY 663, 664 (1968).

141. William L. Davis & Jerry Phares, *Internal-External Control as a Determinant of Information-Seeking in a Social Influence Situation*, 35 J. PERSONALITY 547 (1967). The more active participation of "internals" in information seeking is due to their underlying belief that their actions can influence outcomes. *Id.* at 548.

142. DONALD G. GIFFORD, *LEGAL NEGOTIATIONS: THEORY AND APPLICATIONS* 99 (1989) (citing CHESTER KARRASS, *THE NEGOTIATING GAME: HOW TO GET WHAT YOU WANT* 18 (1970); Donald L. Harnett et al., *Personality, Bargaining Style and Payoff in Bilateral Monopoly Bargaining Among European Managers*, 36 SOCIOMETRY 325, 342 (1973)); PRUITT, *supra* note 11, at 26 (citing John G. Holmes et al., *The Effects of Prenegotiation Expectations on the Distributive Bargaining Process*, J. EXPERIMENTAL SOC. PSYCHOL. 582 (1971)).

143. Women's disadvantaged position, compared to men, with regard to access to valued societal resources, *see supra* notes 21-35 and accompanying text, is bolstered by an ideology that persistently devalues women and their contributions to society. *See supra* notes 126-33 and accompanying text. After experiencing relative deprivation and a discrediting ideology, many women internalize their relative valuelessness and, ultimately, perceive their inferior status as legitimate. In discussing why individuals accept the legitimacy of a social hierarchy that disadvantages and discredits them, Stolte notes:

as legitimate,¹⁴⁴ they expect less for their societal contributions than men making similar or identical contributions.¹⁴⁵

Because women receive lower rewards than men despite their equivalent performances, women's low expectations receive strong reinforcement and should prove difficult to change.¹⁴⁶ Moreover, women formulate reward expectations based on what other women, rather than men, in similar situations obtain.¹⁴⁷ Since most women receive lower so-

The negative reflected appraisals and the obvious facts of the situation lead the person to attribute his/her relative deprivation to the "objective" inferiority of the self. Consequently, the person will come to believe that s/he deserves to be located where s/he is located in the structure of inequality. Both advantaged and disadvantaged actors will therefore come to accept the structure of inequality as legitimate, right, and reasonable.

John F. Stolte, *The Legitimation of Structural Inequality: Reformulation and Test of the Self-Evaluation Argument*, 48 AM. SOC. REV. 331, 332 (1983). Many scholars, in a variety of contexts, recognize that social norms define an individual's expectations. See, e.g., PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 22 (1986); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 643 (1980-1981).

144. Women's acceptance of their inequality's legitimacy is illustrated beautifully in the following statements of a political activist for the Infant Custody Bill of 1839:

The wild and stupid theories advanced by a few women, of "equal rights" and "equal intelligence," are not the opinions of their sex. I, for one (I, with millions more), believe in the natural superiority of man, as I do in the existence of a God.

The natural position of woman is inferiority to man. Amen! That is a thing of God's appointing not of man's devising. I believe it sincerely, as a part of my religion. I never pretended to the wild and ridiculous doctrine of equality.

JANE G. PERKINS, *THE LIFE OF MRS. NORTON* 149-50 (1909).

While, perhaps, few today would openly admit to this perspective, to believe that women, in just eighty years, have eradicated such total thought domination seems naive, particularly in light of research suggesting the persistent and pervasive devaluation of women. See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

145. Unequal distribution of rewards leads recipients to believe they possess unequal ability. This belief, in turn, encourages the recipients to accept the unequal reward distribution as an appropriate reflection of their unequal merit. Wendy Jean Harrod, *Expectations from Unequal Rewards*, 43 SOC. PSYCHOL. Q. 126, 129 (1980).

146. The experience of relative powerlessness in obtaining rewards decreases women's belief that they can obtain equal rewards as well as their motivation to attempt obtaining them. See Wiley & Eskilon, *Scaling the Corporate Ladder*, *supra* note 70, at 358 (suggesting that women managers would exhibit poorer organizational performance if they believed organizational mobility and power were determined by gender rather than quality of performance). A field study of 98 male and female employees in two organizations offers additional tangential support. In investigating responses to powerlessness, the researcher found women more likely than men to report acceptance of and resignation to perceived power imbalances. Ragins & Sundstrom, *supra* note 31, at 69 (citing Lisa A. Mainiero, *Coping with Powerlessness: The Relationship of Gender and Job Dependency to Empowerment-Strategy Usage*, 31 ADMIN. SCI. Q. 633 (1986)).

147. Social comparison theory and equity theory suggest that individuals formulate expectations and judgments of fairness in reward allocations by comparing what they receive to what others of similar qualities and attributes receive. See, e.g., BLAU, *supra* note 143, at 143-60; Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117, 121, 136 (1954). Women, consequently, compare themselves to other similarly situated women. Brenda Major & Blythe Forcey, *Social Com-*

cietal rewards than men, comparison to other women perpetuates women's low reward expectations. Research on men and women's pay expectations illustrates women's lower reward expectations. Women feel they deserve less pay for their work than do men,¹⁴⁸ irrespective of whether they work in a male- or female-dominated job,¹⁴⁹ and when they lack comparison data they pay themselves less than men despite their perception of equivalent work inputs.¹⁵⁰ Women management students also exhibit significantly lower expectations than male management students with respect to their beginning and maximum salaries.¹⁵¹ And, finally, women managers characteristically expect lower salaries and organizational ranking than do male managers.¹⁵²

In divorce mediation then many wives will believe they are entitled to a relatively small share of the marital assets even if they believe their marital contributions are as valuable as those of their husbands.¹⁵³ Negotiating with these expectations, wives naturally will obtain smaller shares of the marital assets than their husbands.

7. *Fear of Achievement.* Divorce mediation proponents obscure the competitive nature of negotiations during divorce mediation¹⁵⁴ by la-

parisons and Pay Evaluations: Preferences for Same-Sex and Same-Job Wage Comparisons, 21 J. EXPERIMENTAL SOC. PSYCHOL. 393, 394 (1985); Brenda Major et al., *Overworked and Underpaid: On the Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCHOL. 1399, 1401 (1984). For example, both women's and men's self-pay, in the absence of social comparison information, reflected what they thought same-sex others would pay themselves. Major et al., *supra*, at 1405.

148. A low sense of reward entitlement is even more probable if the wife has remained a traditional homemaker, because individuals occupying female-dominated jobs expect lower pay than those holding male-dominated jobs. Major & Forcey, *supra* note 147, at 403.

149. *Id.*

150. E.g., Charlene M. Callahan-Levy & Lawrence A. Messe, *Sex Differences in the Allocation of Pay*, 37 J. PERSONALITY & SOC. PSYCHOL. 433 (1979); Major et al., *supra* note 147.

151. Ragsin & Sundstrom, *supra* note 31, at 72 (citing Major & Konar, *An Investigation of Sex Differences in Pay Expectations and Their Possible Causes*, 21 ACAD. MGMT. J. 777 (1984)).

152. Ragsin & Sundstorm, *supra* note 31, at 72 (citing Myra H. Strober, *The M.B.A.: Same Passport to Success for Women and Men?*, in WOMEN IN THE WORKPLACE 25 (Phyllis A. Wallace ed., 1982)). Some argue that women have lower salary expectations because they do not value income as highly as do men. Major et al., *supra* note 147, at 1400 (citing FAYE J. CROSBY, *RELATIVE DEPRIVATION AND WORKING WOMEN* (1982)). However, this explanation has failed to receive any consistent support in research findings. For instance, one study found that women did not value the monetary reward any less than did men. *Id.* at 1405.

153. Research indicates that males take more than half the reward when their performance is superior, whereas females take "only" half the reward when their performance is superior. Gerald S. Leventhal & Douglas W. Lane, *Sex, Age, and Equity Behavior*, 15 J. PERSONALITY & SOC. PSYCHOL. 312, 314-15 (1970).

154. Proponents of divorce mediation underestimate the divorce situation's competitive nature. See, e.g., KRESSEL, *supra* note 1, at 24, 28.

being the mediation process cooperative and by emphasizing relational and emotional issues.¹⁵⁵ Yet bargaining over scarce marital resources is fundamentally competitive¹⁵⁶ and induces the use of competitive negotiation tactics.¹⁵⁷ Research on women's attitudes toward competition and achievement sheds light on their capacity to negotiate effectively during divorce mediation.

In the early 1970's, Horner found women motivated to avoid achievement and inhibited in achievement-oriented behavior.¹⁵⁸ These women felt their feminine sex role identity inconsistent with displays of competence, independence, competition, intellectual acumen and leadership.¹⁵⁹ They also feared that displaying such behaviors risked social rejection, loss of femininity, or personal or social destruction.¹⁶⁰ Even

155. By focusing on emotional issues rather than substantive outcomes and pretending that no one wins or loses in mediation, mediators obscure the unwitting disputants' awareness that what actually occurs in divorce mediation is distribution of scarce resources. See Abel, *supra* note 1, at 294-95; see also AUERBACH, *supra* note 1, at 63-67 (discussing how proponents of arbitration between southern planters and newly freed slaves and arbitration between labor and management employed the rhetoric of harmony and consensus to obscure class conflict and preserve preexisting social hierarchies); Hofrichter, *supra* note 9, at 243 (ideology of accommodation in informal neighborhood justice centers obscures the conflicting nature of disputants' interests).

Mediation's emphasis on compromise and accommodation, and its view of conflict as a social evil, is consistent with liberal legal reformism. In the liberal reform tradition, only conflict that does not threaten existing social hierarchies is legitimate. All other conflict, such as the competition for scarce resources between divorcing men and women, is denied and obscured by transformation into apolitical issues (preserving post-divorce relationships) and by separation from struggles that transcend the specific couple (economic oppression of women). See Hofrichter, *supra* note 9, at 213.

156. In conflict theory bargaining over scarce resources is considered a competitive situation. See, e.g., KENNETH E. BOULDING, *CONFLICT AND DEFENSE: A GENERAL THEORY* 4-5 (1962); DEUTSCH, *supra* note 11, at 20-25; Morton Deutsch, *The Effects of Cooperation and Competition Upon Group Processes*, in *GROUP DYNAMICS* 462 (Dorwin Cartwright & Alvin Zander eds., 1968); see Clinton F. Fink, *Some Conceptual Difficulties in the Theory of Social Conflict*, 12 *J. CONFLICT RESOL.* 412, 448 (1968); June Starr & Barbara Yvgesson, *Scarcity and Disputing: Zeroing-In on Compromise Decisions*, 2 *AM. ETHNOLOGIST* 553, 560-61 (1975). The time with children available for allocation between divorcing parents, as well as financial assets and income, are limited marital resources. If the wife has the children 300 days of the year, the husband can only have them for 65 days. If she bargains for more than 300 days, he necessarily loses. The same can be argued for allocation of marital assets and income. Bargaining over marital resources, then, in divorce mediation can be conceptualized as a competitive, rather than a cooperative, negotiation situation. Cf. Barbara J. Lonsdorf, *Coercion: A Factor Affecting Women's Inferior Financial Outcome in Divorce*, 3 *AM. J. FAM. L.* 281, 288 (1989) (arguing that women are urged to behave cooperatively with respect to child issues, whereas competition sets in over financial issues the couple perceives as scarce).

157. See Morton Deutsch, *Conflict and Its Resolution*, National Tech. Info. Serv., Tech. Rep. No. 1, 7 (October 1, 1965); Lonsdorf, *supra* note 157, at 288; Starr & Yvgesson, *supra* note 156.

158. Matina S. Horner, *Toward an Understanding of Achievement-Related Conflicts in Women*, 28 *J. SOC. ISSUES* 157, 173 (1972).

159. *Id.* at 171.

160. *Id.* at 162.

though the women, many of whom had high ability and high achievement orientation, realized that competitive behavior was necessary to success, they hesitated to behave in this fashion.¹⁶¹ Their hesitation was greatest when they were competing with men¹⁶² or when important males, particularly husbands or intimates, or parents disapproved of the women's achievement-oriented behavior.¹⁶³

Recent research reveals that a greater percentage of women than men associate violence with competitive success and separation from relationships.¹⁶⁴ Other research confirms that men, as well as women, experience threat when women dominate in an achievement situation.¹⁶⁵ Taken together these findings suggest that women will avoid competition, or will perform beneath their abilities in competitive situations, particularly when they compete with males to whom they meaningfully relate.¹⁶⁶ Moreover, women evidence more reluctance than men to be-

161. *Id.* at 171. The negative consequences anticipated by these women seem quite reasonable when one considers research indicating that women's popularity is adversely affected by aggressive, assertive behavior, Edward K. Sadalla et al., *Dominance and Heterosexual Attraction*, 52 J. PERSONALITY & SOC. PSYCHOL. 730, 731-34 (1987), and that women's recent advances have precipitated a powerful backlash. See generally FALUDI, *supra* note 144.

162. Horner, *supra* note 158, at 173.

163. *Id.* at 168-69. In the years since Horner's original research, her studies have received criticism on methodological grounds, e.g., Adeline Levine & Janice Crumrine, *Women and the Fear of Success: A Problem in Replication*, 80 AM. J. SOC. 964, 969-71 (1974); Rugins & Sundstrom, *supra* note 31, at 71, and have proven difficult to replicate. E.g., Levine & Crumrine, *supra* (finding no sex differences in fear of success imagery). However, recent research lends support to Horner's original conclusions. See *infra* notes 164-66 and accompanying text.

164. Men and women were asked to write stories in response to various scenes. Some of the response stories contained violent imagery. When the violent imagery in men and women's stories was compared, a greater percentage of women than men associated violence with competitive achievement and separation from relationships. The men's fantasies contained a greater incidence of violence than the women's and a greater percentage of men than women associated violence with interpersonal intimacy. Susan Pollak & Carol Gilligan, *Images of Violence in Thematic Apperception Test Stories*, 42 J. PERSONALITY & SOC. PSYCHOL. 159, 161 (1982).

This research, like Horner's, also has suffered attack, Cynthia J. Benton et al., *Is Hostility Linked With Affiliation Among Males and With Achievement Among Females? A Critique of Pollak and Gilligan*, 45 J. PERSONALITY & SOC. PSYCHOL. 1167 (1983); Bernard Weiner et al., *Compounding the Errors: A Reply to Pollak and Gilligan*, 45 J. PERSONALITY & SOC. PSYCHOL. 1176 (1983), and sparked controversy, Susan Pollak & Carol Gilligan, *Differing About Differences: The Incidence and Interpretation of Violent Fantasies in Women and Men*, 45 J. PERSONALITY & SOC. PSYCHOL. 1172 (1983), perhaps more, as Pollak and Gilligan note, because of the unwelcome message it bears than for methodological reasons. Susan Pollak & Carol Gilligan, *Killing the Messenger*, 48 J. PERSONALITY & SOC. PSYCHOL. 374 (1985). Nevertheless, a recent study by Helgeson and Sharpsteen replicated Pollak and Gilligan's findings. Vicki S. Helgeson & Don J. Sharpsteen, *Perceptions of Danger in Achievement and Affiliation Situations: An Extension of the Pollak and Gilligan Versus Benton et al. Debate*, 53 J. PERSONALITY & SOC. PSYCHOL. 727 (1987).

165. Helgeson and Sharpsteen, *supra* note 164, at 732.

166. This conclusion receives support from the study finding that women have more difficulty

have competitively in situations where competition meets with disapproval.¹⁶⁷ In divorce mediation the wife competes with her husband with whom she has a significant relationship and mediators encourage compromise and accommodation rather than competition.¹⁶⁸ The wife, therefore, might fear engaging in the assertive behavior necessary to ensure expression and fulfillment of her needs.

This conclusion receives support from research indicating that women tend to employ weak, indirect influence tactics, whereas men tend to use strong, direct influence tactics.¹⁶⁹ Furthermore, wives tend to use more accommodative, compromising, and facilitative conflict resolution styles than their husbands and they provide more support for their husbands during marital conflicts than their husbands provide for them.¹⁷⁰ If a wife initially makes a fair financial request,¹⁷¹ mediation's insistence on compromise endangers her by reinforcing her conditioned conflict styles and making accommodation by her more likely than by her more

asserting themselves with their husbands than they do with other men. See *supra* note 91 and accompanying text.

167. Sheryle Whitcher Alagna, *Sex Role Identity, Peer Evaluation of Competition, and the Responses of Women and Men in a Competitive Situation*, 43 J. PERSONALITY & SOC. PSYCHOL. 546, 553 (1982). Moreover, after reviewing negotiation and social science literature, Kressell acknowledges that men are stronger than women in competitive negotiation contexts. KRESSELL, *supra* note 1, at 52-53. Social psychological research also suggests individuals with high power tend to exploit those with low power when negotiating in an inherently competitive situation. E.g., Dean Tjosvold, *Unequal Power Relationships Within a Cooperative or Competitive Context*, 11 J. APPLIED SOC. PSYCHOL. 137, 147 (1981).

168. See Brunet, *supra* note 1, at 4 (compromise the norm in ADR).

169. See generally Gloria Cowan et al., *The Effects of Target, Age and Gender on Use of Power Strategies*, 47 J. PERSONALITY & SOC. PSYCHOL. 1391 (1984) (suggesting women's use of weak, indirect power strategies in intimate relationships with men results from women's inferior power position); Toni Falbo & Letitia Anne Peplau, *Power Strategies in Intimate Relationships*, 38 J. PERSONALITY & SOC. PSYCHOL. 618 (1980); Judith A. Howard et al., *Sex, Power and Influence Tactics in Intimate Relationships*, 51 J. PERSONALITY & SOC. PSYCHOL. 102 (1986) (people in weak power positions tend to use weak influence tactics in intimate relationships); David Kipnis et al., *Metamorphic Effects of Power*, 61 J. APPLIED PSYCHOL. 127 (1976) (use of strong, direct influence tactics is related to control).

While some research on negotiations indicates women are more likely than men to exploit a soft opponent, e.g., Dean G. Pruitt & Helena Syna, *Mismatching the Opponent's Offers in Negotiation*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 103 (1985), this research cannot be generalized to divorce negotiations between spouses because the power disparities between husbands and wives may not exist between negotiating strangers.

170. Leonard H. Chusmir & Joan Mills, *Gender Differences in Conflict Resolution Styles of Managers: At Work and At Home*, 20 SEX ROLES 149, 151 (1989).

171. The wife's initial request might also be low because of her low expectations, see *supra* notes 142-53 and accompanying text, or her lack of the knowledge necessary to detect her true financial vulnerability. See *infra* notes 197, 199 and accompanying text.

competitive husband.¹⁷² That the husband just as easily could curtail conflict and produce agreement by acceding to his wife's fair requests goes unnoticed in the mediator's quest for peace through compromise.¹⁷³ The wife's predisposition and the mediator's constant pressure to accommodate then will cause the wife to accommodate her husband's interests with greater ease and frequency than he will accommodate hers.

In summary, resource-based power disparity between spouses exposes the significant disadvantage of many wives in divorce mediation. Part II explores how sex role ideology exacerbates the wife's disadvantage on financial issues and how this ideology, when combined with mediator bias, promotes the divorcing father's control over children.

II. SEX ROLE IDEOLOGY

Sex role ideologies¹⁷⁴ currently fall along a continuum from egalita-

172. Divorce mediation prepares the wife for compromise in several ways. First, by fully exploring both sides of the dispute and encouraging the wife's sensitivity to her husband's perceptions, the mediator urges the wife to change her perspective of the issues and the conflict. As Dworkin and London note:

Parties are invited through reframing to re-perceive their conflict from a vantage point that can incorporate the whole or blend the differing points of view. The focus of the family is redirected from concrete issues to . . . superordinate goals.

Joan Dworkin & William London, *What Is a Fair Agreement*, 7 *MEDIATION Q.* 3, 6 (1989) (citation omitted). The wife may lose focus on her firm request for a fair portion of her husband's retirement plan by subsiding that request under the superordinate goal of preserving post-divorce relationships with her husband. The tactic of seeing all points of view as equally valid also encourages the wife to accept partial responsibility for the divorce and/or her husband's dissatisfactions. The wife's sense of moral vindication, then, cannot thwart the mediator's press for compromise. A second way the mediator prepares the wife for compromise is through denigration of legal rights. This weakens the wife's normative basis for specific financial requests. And, finally, cutting the weaker wife off from the assistance and support of legal counsel or friends during mediation, encourages the continuation of marital dominance patterns. See generally Abel, *supra* note 1, at 293 (discussing how informality prepares the grievant for compromise).

173. See Abel, *supra* note 1, at 285 (discussing this phenomenon in informal justice generally).

174. An individual's ideologies or systems of belief serve as a source of self-definition, provide a guide for making decisions and choosing among available behaviors, and motivate behaviors consistent with one's ideological perspective. Chafetz defines ideology as:

[A] coherent system of ideas that helps its adherents to understand their world, explain and evaluate events, structures and processes, and make decisions in terms of their understanding and evaluation of their world and their role in it. It thus has cognitive, evaluative, and motivational components.

CHAFETZ, *supra* note 62, at 32. See SCANZONI & SZINOVACZ, *supra* note 13, at 22-28 (explaining how sex role ideology influences spouses' decisionmaking).

The degree of commitment one has to an ideology determines how strongly that ideology will control the individual's perceptions and behaviors that relate to that belief system. See Cynthia J. Voelz, *Effects of Gender Role Disparity on Couples' Decision-Making Processes*, 49 *J. PERSONALITY & SOC. PSYCHOL.* 1532, 1540 (1985) (importance couple attaches to sex role ideology a significant variable in gender role-related decisions).

rian/modern to traditional.¹⁷⁵ Egalitarian sex role ideology contemplates an equal partnership between spouses: a sharing of roles and equal power in marital decisionmaking. Traditional sex role ideology anticipates a very different marital relationship: a spousal partnership exists, but equality and role interchangeability do not.¹⁷⁶ Traditional sex role ideology depicts husbands as competent, assertive and rightfully dominant, and wives as emotive, nurturing, passive¹⁷⁷ and rightfully submissive.¹⁷⁸ The public domain becomes the husband's proper sphere of action, while the private family domain remains the wife's.¹⁷⁹ As eloquently stated by Justice Joseph P. Bradley:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

. . . The paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother. This is the law of the Creator.¹⁸⁰

These traditional notions of male and female roles still dominate.¹⁸¹ While some studies find an increase in egalitarian attitudes among husbands and wives, others show that these attitudinal changes have little

175. For women increased education and career involvement are related to egalitarian sex role ideology, whereas large families and fundamentalist Protestantism are related to traditional sex role ideology. *E.g.*, Arland Thornton & Deborah Freedman, *Changes in the Sex Role Attitudes of Women, 1962-77: Evidence From a Panel Study*, 44 AM. SOC. REV. 831 (1979); *see also* Carolyn Stout Morgan & Alexis J. Walker, *Predicting Sex Role Attitudes*, 46 SOC. PSYCHOL. Q. 148 (1983) (older, less-educated, lower-income women with lower feelings of personal competence supported traditional sex roles for women).

176. *E.g.*, SCANZONI & SZINOVACZ, *supra* note 13, at 15-28, 94, 101-104, 114-116; Voelz, *supra* note 174, at 1532.

177. *Cf.* LIPMAN-BLUMEN, *supra* note 23, at 2.

178. Nyquist and Spence argue that high-dominant women's deference to the decisions of low dominant men 65% of the time, compared to high-dominant men's deference to the decisions of low dominant women only 10% of the time, indicates the continued viability of traditional sex roles that require men to lead and women to follow. Nyquist & Spence, *supra* note 93, at 92.

179. *E.g.*, CHAFETZ, *supra* note 62, at 16; LIPMAN-BLUMEN, *supra* note 23, at 23; Sharon Berlin & Craig G. Johnson, *Women and Autonomy: Using Structural Analysis of Social Behavior to Find Autonomy Within Connections*, 52 PSYCHIATRY 79, 80 (1989).

A recent study suggests that sex role specialization (development of sympathy, nurturance, anger suppression, and reliance on the male) occurs for women from age 21 to 27 years old. Ravenna Helson & Geraldine Moane, *Personality Change in Women From College to Midlife*, 53 J. PERSONALITY & SOC. PSYCHOL. 176, 185 (1987). These younger women, then, may be as vulnerable as their older counterparts to the power implications of traditional sex role ideology.

180. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

181. *E.g.*, ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 85-87 (1985); LIPMAN-BLUMEN, *supra* note 23, at 2-34, 38-41; SCANZONI & SZINOVACZ, *supra* note 13, at 16; John H. Scanzoni & Greer Litton Fox, *Sex Roles, Family and Society: The Seventies and Beyond*, 42 J. MARRIAGE & FAM. 743, 744 (1980).

relationship to behavioral adjustments. For instance, when both husband and wife work full time, their attitudes reflect that housework should be shared equally. Nevertheless, in all but very few of these couples, the wives actually carry a far heavier housework burden than the husbands and claim to prefer it that way.¹⁸² Research that only taps sex role attitudes rather than behavioral changes, thus, suggests a more significant shift to modern sex role ideology than actually exists.¹⁸³ Furthermore, the fifty percent employment rate of married women suggests that for many couples the husband's sphere remains the public domain, whereas the wife's consists of home and hearth.¹⁸⁴

A. *Legitimizing Male Dominance*

Because traditional sex role ideology pervades this culture and ideologies affect disputants' behaviors,¹⁸⁵ sex role ideology will influence nego-

182. Spitze, *supra* note 42, at 602. See also Donna Hodgkins Berardo et al., *A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework*, 49 J. MARRIAGE & FAM. 381 (1987) (women surveyed performed more housework than men); Margaret M. Poloma & T. Neal Garland, *The Married Professional Woman: A Study in the Tolerance of Domestication*, 33 J. MARRIAGE & FAM. 531, 533-35 (1971) (some women perform more housework and state that they prefer it); Sara Yogev, *Do Professional Women Have Egalitarian Marital Relationships?*, 43 J. MARRIAGE & FAM. 865 (1981).

Some also suggest that women's movement into and success in the traditionally male-dominated public sphere threaten a social structure partially founded upon sexual stratification. They argue that this perceived threat has sparked a public backlash against women's progress in challenging traditional sex role ideology. LIPMAN-BLUMEN, *supra* note 23, at 41, 183; Ognibene, *supra* note 24, at 14-15. See also FALUDI, *supra* note 144.

183. Many researchers have noted this discrepancy between attitudinal shifts toward modern sex roles and the lack of corresponding behavioral adjustments. *E.g.*, Scanzoni & Fox, *supra* note 181, at 745; Thornton & Freedman, *supra* note 175, at 834. Scanzoni and Fox offer the following possible explanation:

Though women hold stronger egalitarian preferences than men, many women may be unwilling to risk the potentially negative consequences to their total marital relationship that might ensue should they actually seek to negotiate those preferences. Likewise, men who profess egalitarianism may seldom find themselves confronted with women insisting that they should negotiate more equitable behaviors. In short, changes in preferences may have exceeded behavioral change because the preferences have not been accompanied by the kinds of decisioning processes necessary to translate them into actual reality.

Scanzoni and Fox, *supra* note 181, at 746.

An equally plausible explanation for this discrepancy, however, is that husbands only are willing to articulate egalitarian preferences when those preferences do not precipitate actual changes in role allocations.

184. Studies suggest that the more modern a woman's sex role ideology, the higher her income and the greater her workforce continuity. *E.g.*, Alan C. Acock & John N. Edwards, *Egalitarian Sex-Role Attitudes and Female Income*, 44 J. MARRIAGE & FAM. 581 (1982).

185. *E.g.*, GULLIVER, *supra* note 11, at 10 (disputants in arbitration influenced by traditional sex role ideologies). As Merry and Silbey note:

Yet this model tends to underestimate the role of cultural norms and values for the

tiations between many divorcing husbands and wives.¹⁸⁶ For instance, a wife with resources equivalent to her husband's will have less negotiating power than expected if her sex role ideology prescribes submissiveness.¹⁸⁷ Moreover, people do not perceive how strongly normative prescriptions influence their behaviors.¹⁸⁸ Without this awareness, a mediator might

substance and process of dispute behavior. . . . Perceptions of behavior and ways of dealing with them derive from habits and customs embedded in social groups and cultures. Ideas about how to respond to grievances are linked with socially constructed definitions of normal behavior, respectability, responsibility and the good person.

Sally Engle Merry & Susan S. Silbey, *What do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 157 (1984).

186. Sex role ideology influences negotiations in intact marriages. For instance, the results of Kingsbury and Scanzoni's research on decisionmaking power in dual career couples suggest that tangible resources and sex role ideologies held by the spouses interact to produce marital power. Nancy M. Kingsbury & John H. Scanzoni, *Process Power and Decision Outcomes Among Dual-Career Couples*, 20 J. COMP. FAM. STUD. 231, 242 (1989). Many other researchers and theorists also acknowledge the importance of sex role ideology in moderating the effect of resource power in marital decisioning. *E.g.*, SCANZONI & SZINOVACZ, *supra* note 13, at 26-28; Mirowsky, *supra* note 84; Boyd C. Rollins & Stephen J. Bahr, *A Theory of Power Relationships in Marriage*, 38 J. MARRIAGE & FAM. 619, 622 (1976); Spitze, *supra* note 42, at 602; Voelz, *supra* note 174 (discussing gender role disparity in the context of married couples' decisionmaking processes generally). Because divorcing couples bring marital dispute resolution patterns into mediation, *see supra* note 37 and accompanying text, sex role ideology's influence on marital negotiations sheds light on possible patterns in divorce negotiations.

187. In their research on power in dual career couples, Kingsbury and Scanzoni suggest that the wife's sex role ideology might have greater impact on marital decisioning than the husband's. The more modern wife seems willing to negotiate with her husband for her interests, whereas the traditional wife seems to accept her husband's position. Kingsbury & Scanzoni, *supra* note 186, at 243.

Of course, a husband high in tangible resource power might also curtail his use of that power if he subscribes to a sex role ideology that prescribes egalitarian marital decisioning. However, in a recent study of dual career couples, when the husband's sex role ideology was egalitarian and the wife's was traditional, the husband exercised significantly more power than the wife. The researchers offered one possible explanation: "[T]hese more traditional wives were less willing to negotiate for their own points of view in deference to their partners' 'legitimate' power." *Id.* at 243.

188. For example, in their research on group decisionmaking, Kaplan and Miller found their subjects largely unaware of how strongly their judgmental decisions had been normatively influenced. Rather, these strongly influenced subjects reported experiencing low levels of influence. Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Informational Influence Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOL. 306, 312 (1987).

MacKinnon contextualizes this observation in male/female relations:

Consciousness raising discovered that one form of the social existence of male power is inside women. In this form, male power becomes self-enforcing. Women become "thingified in the head." Once incarnated, male superiority tends to be reaffirmed and reinforced in what can be seen as well as in what can be done. So male power is and is not illusory. As it justifies itself, namely as natural, universal, unchangeable, given and morally correct, it is illusory; but the fact that it is powerful is no illusion. Power is a social relation. Given the imperatives of women's lives, the necessity to avoid punishment — from self-rejection to involuntary incarceration to suicide — it is not irrational for women to see themselves in a way that makes their necessary compliance tolerable,

have difficulty convincing a wife that her deference to her husband's suggestion results from her socialized beliefs rather than her free choice.¹⁸⁹ Traditional sex role ideology then lends additional legitimacy to male dominance and female submissiveness during divorce negotiations.¹⁹⁰

B. *Public Sphere*

Traditional sex role ideology further imbalances power relations between spouses by designating different spheres of action and authority for men and women.¹⁹¹ Assignment to the public sphere advantages the husband in several ways. Serving as the family's spokesperson with other social institutions, he gains additional negotiation experience that benefits him in divorce mediation.¹⁹² Moreover, mediators sometimes align themselves with the more experienced negotiator because the "pro" can better fulfill the mediator's primary goal of generating an agreement.¹⁹³

even satisfying. Living each day reconvines everyone, women and men alike, of male hegemony, which is hardly a myth, and of women's innate inferiority and men's innate superiority, a myth that each day's reliving makes difficult to distinguish meaningfully from reality.

CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 99-100 (1989).

189. Other ideologies also influence behaviors relevant to divorce negotiations between mediating spouses. For instance, most major religions support sexual inequality and different roles for men and women. *E.g.*, BELLAH ET AL., *supra* note 181, at 96-97; CHAFETZ, *supra* note 62, at 12. A couple's religious commitment, thus, might intensify a wife's disadvantage during divorce negotiations by increasing the couple's adherence to traditional sex role ideology. For example, in a longitudinal panel study, researchers found that fundamentalist Protestant women tended to retain traditional sex role attitudes from 1962-1977 despite significant attitudinal shifts in other populations of women. Thornton & Freedman, *supra* note 175, at 838. *See also* Charles W. Peek & Sharon Brown, *Sex Prejudice Among White Protestants: Like or Unlike Ethnic Prejudice?*, 59 SOC. FORCES 169 (1980) (prejudice against women's participation in politics greater among white Protestants than among unaffiliated whites).

However, most religions also prescribe a concern for others, BELLAH ET AL., *supra* note 181, at 223, that might limit self-interested bargaining and mitigate the exaggerated effect of traditional sex role ideology in religious couples. Because of the potential for religious ideologies to positively and negatively affect behaviors of negotiating spouses, they are omitted from this article's analysis.

190. *See generally* BLAU, *supra* note 143, at 205-11; SCANZONI, *SEXUAL BARGAINING*, *supra* note 13, at 80-82.

191. For instance, a study of newlyweds indicates that traditional sex role attitudes significantly diminish the likelihood of the wife participating in the workforce as well as the likelihood of the husband participating in household tasks. Jean Atkinson & Ted L. Huston, *Sex Role Orientation and Division of Labor Early in Marriage*, 46 J. PERSONALITY & SOC. PSYCHOL. 330 (1984).

192. The advantage the experienced negotiator has in mediation receives open acknowledgement by some mediators. DEBORAH M. KOLB, *THE MEDIATORS* 134 (1983). *See also* Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141, 141-42; Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 187 (1985).

193. *See* KOLB, *supra* note 192, at 94, 115-17 (noting the value mediators place on and their deference to pro negotiators in union/management mediation).

The husband's assignment to the outside world also assures his role as primary provider. As a result the couple and other societal members perceive his earnings as generating the marital assets, whereas the wife's financial contribution, if any, remains secondary.¹⁹⁴ This makes the husband's claim to marital assets presumptively more legitimate than the wife's.¹⁹⁵ A mediated outcome awarding him more of the marital assets than his wife then will seem fair and just.¹⁹⁶

Assignment to the public sphere also reinforces male authority on financial issues. Financial expertise and authority within a traditional marriage belong to the husband. Little surprise then that in divorce mediation:

194. Even when the wife contributes considerable income to the family, her salary frequently is not perceived as having the same central importance to family survival as the husband's salary. Rather, her income is perceived as providing "extras." Mirowsky, *supra* note 84, at 567.

195. The greater legitimacy of the husband's claim to marital assets has been acknowledged in the divorce literature. Lonsdorf, *supra* note 156, at 288.

Furthermore, divorce mediators recognize the husband's potential reluctance to share marital assets, particularly his income, because he perceives his entitlement to them as greater than hers.

When the husband does not believe that the wife should share in the family assets which have resulted from his earning power, he may be indignant when his wife expects spousal support for more than a few years believing she is not entitled to the fruits of his labor now that she is no longer emotionally nurturing him.

Ricci, *supra* note 35, at 58.

196. The husband's successful fulfillment of and belief in the propriety of his primary provider role might influence him to retain some sense of financial responsibility for his soon-to-be ex-wife and their children during divorce mediation. Mitigating this sense of responsibility, however, might be the husband's desire to remarry and his awareness that upon remarriage he again will assume the primary provider role for a different family system. In order to maintain his potential to resume the provider role in his new family, he would need to retain sufficient marital assets, particularly his income. Research indicating men's tendency to abandon social responsibility in favor of maximizing their own outcomes and women's tendency to remain socially responsible to those dependent on them supports this assertion. John Schopler & Nicholas Bateson, *The Power of Dependence*, 2 J. PERSONALITY & SOC. PSYCHOL. 247 (1965). Moreover, in my private conversations with numerous divorce mediators over the past three years, they have candidly admitted the difficulty of getting a husband to agree to provide spousal maintenance. This observation corresponds to the importance of income to men. See Ulbrich, *supra* note 31, at 123 (men believe that their earnings objectively indicate success in employment and illustrate their worth in society). With income level so strongly related to the husband's well-being, one understands why mediators have difficulty convincing him to part with that income to support an ex-wife.

Moreover, the inevitable pain and resultant hostility and resentment that accompanies divorce should decrease the husband's willingness to provide for his ex-wife. The husband's reluctance to share financial assets with his wife may be worse when she, rather than he, initiates the divorce. See Ricci, *supra* note 35, at 58.

Certainly the same reluctance also exists when lawyers negotiate the divorce agreement. However, in lawyer negotiations the wife's attorney is motivated to protect the wife's legal right to spousal maintenance and has the force of formal substantive law behind her. See *infra* pp. 101-05 and notes 313-20 for further discussion of differences between mediation and lawyer negotiation.

[A]lthough husbands were frequently uninformed about financial matters, they were paragons of financial expertise in comparison to their wives. Husbands had almost exclusive control of important financial documents and were aware of financial arrangements of which their wives were ignorant¹⁹⁷

The husband's legitimate authority over finances can hurt the divorcing wife in at least three ways. First, she may accept without questioning whatever inadequate proposal he makes.¹⁹⁸ Second, to the extent her husband has dominated financial planning and decisions, she lacks the experience and knowledge of her financial vulnerability necessary to develop a sound financial plan for her future.¹⁹⁹ Third, if she does create a sensible financial plan, her lack of legitimate authority over finances may cause her husband to ignore, resent, discount and/or refuse her requests.²⁰⁰

While the husband's assignment to the public sphere enhances his negotiation experience and authority, confinement of the wife's authority to the private sphere diminishes her negotiating power in mediation.

C. *Private Sphere*

Some argue the wife's responsibility for the day to day care of the family promotes a moral orientation of care and relatedness.²⁰¹

197. KRESSEL, *supra* note 1, at 53.

198. As MacKinnon notes: "In a society of gender inequality, the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under a despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare." MACKINNON, *supra* note 188, at 205.

199. Mediator Isolina Ricci acknowledges that the wife's familial role may result in her inability and reluctance to engage in the long-range planning necessary for effective negotiation on the support, custody, and property issues in mediation. Ricci, *supra* note 35, at 53. Additionally, as noted by Arendell, many women fail to anticipate the financial hardships of divorce. ARENDELL, *supra* note 6, at 53.

200. Social psychological research suggests that individuals with high power may ignore the interests and reject the offers of those with low power. Tjosvold, *supra* note 167, at 138.

201. Gilligan's work is cited most frequently in support of this proposition. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). While Gilligan's work has received negative criticism on methodological grounds, e.g., John M. Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983), her findings have found support in other social science research. For instance, Wine notes that women evidence greater interpersonal sensitivity than men and define themselves in relation to family and others, whereas men define themselves in term of their work. Jeri Dawn Wine, *Models of Human Functioning: A Feminist Perspective*, 8 INT'L J. WOMEN'S STUD. 183, 188 (1985). See also Maureen Rose Ford & Carol Rotter Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50 J. PERSONALITY & SOC. PSYCHOL. 777 (1986) (in response to questionnaires posing moral dilemmas females were found more consistent than males in the use of care orientation,

Whatever the origin of women's care orientation,²⁰² it compounds the power imbalance between spouses on financial issues. The wife's focus on relationships and care encourages her to overlook the importance of economic arrangements and to sacrifice economic goals in order to preserve her relationship with her husband.²⁰³

Mediators recognize the wife's care orientation can interfere with her ability to negotiate effectively with her husband. For instance, Ricci reports that in order to preserve family peace a wife might act as the husband's economic equal, when objective reality reveals her economic inferiority. With her income only one-fifth of her husband's, this wife might agree to pay for half of the child's college education in order to preserve the family peace.²⁰⁴ Coupling the traditional husband's legiti-

whereas males were found more consistent than females in the use of justice orientation); Sara E. Snodgrass, *Women's Intuition: The Effect of Subordinate Role on Interpersonal Sensitivity*, 49 J. PERSONALITY & SOC. PSYCHOL. 146, 153 (1985) (women more sensitive to men than to other women, whereas men equally sensitive to men and women); Janice C. Stapley & Jeannette Haviland, *Beyond Depression: Gender Differences in Normal Adolescents' Emotional Experiences*, 20 SEX ROLES 295, 306 (1989) (girl's affiliative experiences more emotionally elaborated than boy's, and boys deny many emotional experiences). Gilligan's findings also remain intuitively, as well as scientifically, appealing. However, some attribute their intuitive appeal more to a need to perpetuate cultural myths than to reality. Mary Brabeck, *Moral Judgment: Theory and Research on Differences Between Males and Females*, 3 DEVELOPMENTAL REV. 274, 286-90 (1983).

202. Some suggest women's care orientation originates in early responsibility training or socialization. Because women, either as adults or as older siblings, care for children, they of necessity learn to place others' needs before their own, to anticipate and experience others' emotions, and to restrain harmful impulses. Avonne Mason & Virginia Blankenship, *Power and Affiliation Motivation, Stress and Abuse in Intimate Relationships*, 52 J. PERSONALITY & SOC. PSYCHOL. 203, 208 (1987).

Others argue that women value relatedness more than do men because of the past oppression of women by men, not because of any innate differences between women and men. See generally MACKINNON, *supra* note 188, at 37-80. To the extent that the powerful define morality in ways that serve their ends, what is moral for men serves men's ends and what is moral for women serves men's ends. *Id.* at 162, 201. Women's moral orientation toward care and relatedness serves men's ends by providing men and their offspring with nurturance and by blunting and/or diverting women's competitiveness. See *id.* at 64-67, 109-12. Additionally, women may value relatedness simply because their survival frequently is contingent upon their successful relatedness to powerful men. *Id.* at 51-52; Snodgrass, *supra* note 201, at 153 (noting that subordinates' greater sensitivity to their leaders might be due to the subordinate's need to gain the leader's favor by fulfilling the leader's needs). Women's moral orientation, then, that Gilligan sees as natural and others see as positive socialization, may be little more than women's response to male oppression. See generally MACKINNON, *supra* note 188, at 51-52.

For an interesting discussion of how stereotyping women as relationship-centered can produce and perpetuate women's economic marginalization, see Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

203. Ricci, *supra* note 35, at 53-54. As noted by Kressel, "[t]he research suggests that the wife is highly reactive to the interpersonal messages emanating from her husband, while the husband is focused instead on the tangible and concrete demands and objectives of the bargaining situation." KRESSEL, *supra* note 1, at 56.

204. Ricci, *supra* note 35, at 53-54.

mate authority with the wife's care orientation, the wife's precarious position on financial issues during divorce negotiations stands in bold relief. As Ricci notes:

[T]he reciprocity on the emotional investment she assumed she generated in her past family relationships with her husband is not uniformly honored in the business world of divorce, where facts, figures, projections and written agreements are the norm, rather than attentiveness to interpersonal feelings or attitudes. When she does develop a utilitarian parenting or financial plan, the husband might call her "cold," "calculating," or "selfish." Without interventions, these attributional labels may be taken to heart rather than identified as a part of the husband's bargaining tactics, and the wife may pull back and revise her plan to gain his approval.²⁰⁵

Mediators often enhance the threat women's care orientation poses to financial negotiations by appealing to emotional and relational interests²⁰⁶ and by denigrating the importance of monetary issues.²⁰⁷ This emphasis reinforces the traditional woman's socialization and obscures that obtaining an equitable financial agreement from a reluctant husband might require the wife to sacrifice relatedness and good feeling.²⁰⁸ In such an atmosphere, the wife likely will refrain from the needed sacrifice.²⁰⁹ Mediation, in essence, encourages and rewards the wife's failure

205. *Id.* at 53.

206. Some argue the formal legal system is vulnerable to the same criticism. For instance, Simon contends that the formal doctrinal tradition in legal theory and education is under attack by proponents of a new formalism, the "Psychological Vision." He argues that the Psychological Vision advocates, as does mediation, a focus on the client's intimate feelings and obscures the critical issues of lawyering and legality. William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 488-89 (1980). Approaching the same problem from a different direction, Fineman exposes the formal legal system's growing dependence on the decisions of mental health professionals on child custody issues. Fineman, *supra* note 1. Perhaps divorce mediation, with its dependency on mental health professionals and its focus on emotions and relatedness, simply sits at the extreme end of the jurisprudential continuum between legal/rational/public and psychological/emotional/private formalism.

207. Grebe admits mental health mediators' tendency to focus on custody (emotional) issues to the exclusion of financial concerns. Sarah Childs Grebe, *Family Mediation Training Programs: Establishing Standards*, MEDIATION Q., Spring 1988, at 13, 24. Vanderkooi and Pearson found an interesting, yet predictable, difference in focus between custody mediators who were lawyers and those with a mental health background. Whereas lawyer mediators asked questions about economic aspects of the divorce (funds for college educations, medical and dental care), mental health mediators asked about relational and emotional issues (the children's developmental needs and adjustment to divorce, custody and visitation arrangements). Vanderkooi & Pearson, *supra* note 16, at 561.

208. Cohen also points out that an equitable financial agreement might do more to improve relations between divorced spouses than emotional ventilation in mediation. Cohen, *supra* note 1, at 1.

209. As stated by Barbara Hart:

Mediation privatizes divorce, moving it back "into the closet." Mediation produces the

to recognize the threat her care orientation poses during negotiation of financial issues.²¹⁰

While assignment to the private family sphere disadvantages the wife on financial issues, it should give her some power over child issues. In the family's private realm the wife has primary responsibility for child care and possesses legitimate authority on issues concerning the children's welfare. Consequently, during divorce mediation the traditional wife should have authority over child custody and visitation issues similar to the authority the husband has over financial issues. She could use this power to retain control of the children or she could pit it against her husband's power in hammering out the financial terms of the divorce agreement. Counterintuitively, however, the wife has no such authority in mediation.

D. *Mediator Coercion On Child Issues*

In divorce mediation the wife confronts a mental health mediator surrounded by an aura of professional expertise regarding the children's best interests.²¹¹ Mediators claim expert authority by describing their training and experience to the couple and by sharing their allegedly expert knowledge on children's developmental needs.²¹² The wife's legitimate authority over the children pales in the shadow of the professional's expert authority.²¹³

If the expert mediator remained neutral, the wife still could use her child-centered power in direct negotiation with her husband. Or, if the

situation where the traditional conciliatory cultural script for women is encouraged, *e.g.*, "Gee I hope that we can make it. All right, the problem is my fault. Anyway, this wouldn't have fallen apart if I had done it right. I want to be sophisticated and civilized about this." It is very difficult for women to move out of that kind of conciliatory script when we are in the process of negotiation — even for those of us who are trained and have been advocates for a long time.

Barbara Hart, *False Prophets, False Promises and False Advertising*, Speech presented at the First National Conference on Mediation in Battered Women and Family Law Cases, New York, New York (March 25, 1985).

210. Abel discusses how informal dispute resolution processes refocus the grievant's attention from gaining tangible relief to emotional catharsis, in effect, "cooling-out" the grievant. Abel, *supra* note 1, at 293-94.

211. See *supra* notes 19-20 for studies indicating that most custody mediation is done in court affiliated mediation programs and most of the mediators in these programs have mental health, rather than legal, backgrounds.

212. See Vanderkooi & Pearson, *supra* note 16, at 560.

213. Expertise is a widely recognized basis of power. *E.g.*, DEUTSCH, *supra* note 11, at 87; LIPS, *supra* note 87, at 50; Ragins & Sundstrom, *supra* note 31, at 52. See also PRUITT, *supra* note 11, at 216 (an expert's communications are more persuasive than a nonexpert). Closely aligned with expert power is informational power, see generally Lips, *supra* note 127; see also LIPS, *supra* note 87, at 50,

formal law that recognizes the caretaking mother's superior right to children remained relevant in mediation, it might enhance the wife's power over child issues. But formal law does not dictate mediated outcomes²¹⁴ and mental health mediators do not remain neutral. Emboldened and legitimated by their professional expertise,²¹⁵ divorce mediators abandon their prescribed neutrality and zealously intervene to protect defenseless children from the custody and visitation decisions of their allegedly destructive parents.²¹⁶ Mediator intervention results in custody arrangements more favorable to fathers than fathers could obtain in direct negotiations with their authoritative wives.

Divorce mediators have a strong bias in favor of joint custody²¹⁷ and coerce divorcing mothers into this arrangement.²¹⁸ Irving and Benjamin²¹⁹ unwittingly provide an illustrative case. At mediation's beginning, the mother requested sole custody of the couple's two girls, aged ten and six.²²⁰ The case report nowhere indicates the mother's unfitness.

which psychologist mediators also allegedly possess regarding the best interests of the children of divorce.

Mediators in court affiliated programs also may acquire legitimate authority with the divorcing couple because of their association with the court. KRESSEL, *supra* note 1, at 214.

214. See *supra* note 17 and accompanying text.

215. The acceptance and dependence of judges on psychologists' expertise in resolving child issues, see Fineman, *supra* note 1, at 740, reinforces and validates coercion by court affiliated mental health mediators.

216. See, e.g., KRESSEL, *supra* note 1, at 118-19; Dworkin & London, *supra* note 172, at 7-8; Judith S. Wallerstein, *Psychodynamic Perspectives on Family Mediation*, MEDIATION Q., Winter 1986-Spring 1987, at 7, 12-13, 16, 19.

217. E.g., Girdner, *supra* note 20, at 142-43; Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Parties*, 8 J. DIVORCE, Spring-Summer 1985, at 33, 42 [hereinafter Girdner, *Adjudication and Mediation*]; Grillo, *supra* note 1, at 1594-95. Lawyers, as well as mental health mediators exhibit this bias. See Andrew Shepard et al., *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616, 625-26 (1984). Professor Fineman notes that mediators often consider a party's opposition to joint custody pathological, Fineman, *supra* note 1, at 766, and mental health professionals favor joint custody because of its seeming fairness and its ability to symbolically accommodate fathers' interests. See *id.* at 732-35.

218. Vanderkooi and Pearson's study revealed that custody mediators frequently coerced divorcing parents regarding custody plans and sometimes dictated the agreement's terms. Vanderkooi & Pearson, *supra* note 16, at 565. They also found that directive mediators who actively participate in generating custody agreements have significantly higher success rates than passive mediators, *id.*, suggesting that most mediated custody agreements reflect mediator coercion. Likewise, Girdner's article exposes the coercive attitudes and tactics of many family mediators regarding the imposition of joint custody upon the divorcing couple. Girdner, *supra* note 20, at 142-47. While Girdner points out that not all mediators impose their views regarding joint custody upon the divorcing couple, *id.* at 147-51, the less coercive mediators about whom she speaks tend to work in elite private programs. See *id.* at 141-42. These programs process small numbers of divorces compared to mandatory court affiliated programs where obvious coercion is more prevalent.

219. Irving & Benjamin, *supra* note 37.

220. See *id.* at 123-24.

The mother, however, did raise some question about the quality of the father's prior involvement with the girls.²²¹ During the course of the mediation, the mediators convinced the mother that, irrespective of the father's past behavior,²²² the children "needed" and "loved" their father and suggested the mother should behave in accordance with the children's best interests.²²³ In seeking to persuade the mother, the mediators engaged the children in the mediation as well as the maternal grandmother who, at the outset, had insisted the girls' mother should have sole custody.²²⁴ At mediation's end, the agreement reflected a joint physical custody arrangement with the girls spending weekdays with their mother and weekends with their father.²²⁵ The couple, however, continued having difficulty and returned for follow-up mediation.²²⁶ With the mediators' assistance, the couple arrived at a new custody arrangement: the girls would stay with their father two evenings per week as well as the weekends, leaving them with their mother only three days per week.²²⁷

Only the mother's resistance offers to control a biased mediator's imposition of joint custody. However, the mother's insistence upon sole custody or her threat to walk out of mediation seems unlikely because of the mental health professional's expert authority and because the mother's sex role socialization makes her susceptible to manipulation by the mediator.²²⁸ Her belief in her responsibility to maintain familial rela-

221. *Id.* at 124.

222. In her article Professor Grillo explains how mediation's focus on future, to the exclusion of past, events, mediation's denigration of rights, and mediation's treatment of husband and wife as formally equal assist the mediator in coercing the caretaking mother into a joint custody arrangement. Grillo, *supra* note 1, at 1563-64.

223. Irving & Benjamin, *supra* note 37, at 124.

224. *Id.* at 126.

225. *Id.*

226. *Id.* at 127.

227. *Id.* at 127. In reading this case history I cannot escape the impression that the mediators simply wore down an exhausted and embattled mother, much the same as they did in Professor Grillo's case example. See *infra* note 228.

228. In her article Professor Grillo provides the following startling example:

Kenny spent ten days with his father Jerry before Thanksgiving, and was scheduled to return on a flight arriving on Thanksgiving afternoon. That morning, Jerry called and said that flying was expensive, and that he was returning to the area at Christmas anyway. He said he intended to keep Kenny with him until then; his wife would care for Kenny at home. Linda, her Thanksgiving dinner in the oven and relatives scheduled to arrive, thought of going herself to pick up Kenny or going to court, but decided that the worst thing for Kenny would be a custody battle.

When Kenny returned at Christmas, his behavior was odd; for the first time in his life he was violent and aggressive towards other children. Upon questioning Kenny, Linda discovered that he had not been cared for by his stepmother during the day as promised, but had instead been sent to an unlicensed day care where the teacher had regularly used

tionships²²⁹ predisposes her to joint custody because mediators present that arrangement as the one best designed to preserve the children's relationship with their father. Moreover, as the above case illustrates, mediators appeal to the traditional mother's care orientation by emphasizing the father's emotional importance to the children.²³⁰ The tradi-

corporal punishment, to which Linda was passionately opposed and to which Kenny had never before been exposed.

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

Grillo, *supra* note 1, at 1562-63.

In a footnote following this story, Professor Grillo explains that after a year of Kenny's alternating months between parents in a traumatic joint physical custody arrangement, Linda's concern for Kenny's psychological well-being led her to relinquish custody to Jerry. Linda explained that requesting sole custody for herself would have been futile because she felt the mediator again would side with Jerry. *Id.* at 1563 n.73.

229. *See supra* notes 201-03 (discussing women's care orientation).

230. Throughout her article, Professor Grillo warns of women's susceptibility to mediator manipulation because of women's care and relatedness orientation. Grillo, *supra* note 1, at 1601-06. Highlighting this danger is the recognition by family sociologists that even within intact families the traditional wife's focus on and responsibility for familial relationships inhibits her ability to effectively bargain on her own behalf. Scanzoni and Szinovacz note in discussing the role sex role ideology plays in determining the theory of negotiation a wife uses:

[W]omen who conform to long-standing (traditional) prescription regarding the four sex roles are likely to carry on their decisioning in such a way as to promote primarily the well-being of the marriage, or the family, as a whole. They perceive their own well-being to be achieved if the well-being of their husband and child(ren) is achieved. But women who fall more toward the modern end of the same continuum carry on their decisioning in such a way as to promote their own well-being *alongside the well-being of other family members*

SCANZONI & SZINOVACZ, *supra* note 13, at 27.

The authors go on to explain how traditional sex role ideology influences men's marital negotiations quite differently:

Men who turn up on the traditional side of the same continuum expect women to carry on decisioning by keeping group goals uppermost. Traditional men do not expect women to equate their own goals or rewards with those of the family group. At the same time, those men carry on decisioning by keeping their own interests (especially occupational) primary — based on the assumption that if they do well the family will too. Traditional men expect women to recognize the primacy of men's interests — “for the sake of all of us.”

Id.

tional mother then falls victim to a skillful mediator armed with such rhetoric.²³¹ Unsurprisingly, mediation produces a significantly greater percentage of joint custody arrangements than any other process of custody dispute resolution.²³²

The joint custody agreements reached in mediation, however, more

231. The mental health profession's recent focus and insistence upon the value of fathers to children's well-being, reflected in its bias in favor of joint custody, is puzzling when no evidence indicates that joint custody is a superior custody arrangement for children. While the profession continues to cloak its preference for joint custody in rhetoric emphasizing the best interests of the children, some suspect that this bias is simply one more example of the use of the psychological profession to control women and support preexisting hierarchy. See Scarlet Pollock & Jo Sutton, *Fathers' Rights, Women's Losses*, 8 WOMEN'S STUD. INT'L F. 593 (1985).

This suspicion finds support in history. In the past the male dominated psychological profession has marginalized women's concerns, portrayed women as inferior hysterical human beings, and urged women to happily assume their proper subordinate position to men. Sanity in women often meant little more than proper accommodation to male dominance. See PHYLLIS CHESLER, *WOMEN AND MADNESS* (1972); HEWLETT, *supra* note 21, at 244-52; MACKINNON, *supra* note 188, at 152-53, 283 n.42; Wine, *supra* note 201, at 189. But see Michael Smyth & Gregory McFarlane, *Sex-Role Stereotyping by Psychologists and Psychiatrists: A Further Analysis*, 8 INT'L J. WOMEN'S STUD. 130 (1985) (suggesting some evidence exists that the more negative evaluation by mental health professionals of female, in contrast to male, patients is changing, especially among female mental health professionals).

Currently the psychological profession has seized significant control in child custody decision-making. See generally Fineman, *supra* note 1. It has done so at a time when men have politically organized and successfully pushed for joint custody legislation in many states. See Dan Menzie, Note, *Fathers are Parents Too: Pros and Cons of the New Missouri Domestic Relations Statute*, 57 U. MO.-KAN. CITY L. REV. 963 (1989). The ability of the psychological profession to retain its newfound decisional control on child issues likely depends upon placation of elite males who now actively seek increased parental rights. The psychological profession's bias in favor of joint custody can therefore be better understood as another accommodation to pre-existing hierarchy as opposed to a concern for the best interests of the children.

This accommodation, as opposed to concern with the child's best interests, is illustrated by the following case example. In mediation an admitted alcoholic father requested overnight visits by his four year old daughter. He refused treatment for his alcoholism, lived alone, and smoked in bed. When the child's mother expressed concern for the child's physical safety, the court mediator countered by insisting the mother had an obligation to cooperate with the father. Bruch, *supra* note 38, at 119. Further calling into question the mediators' concern with children, rather than accommodation of fathers, is their continued insistence that mediation is better for children than adjudication despite evidence that no correlation exists between children's adjustment to divorce and the custody dispute resolution process used by the parents. *Id.* at 117 (quoting Jessica Pearson et al., *The Effects of Divorce Mediation and Adjudication Procedures on Children*, 24, 25 (1984) (unpublished manuscript available from the Research Unit of the Ass'n of Family & Conciliation courts, 1720 Emerson St., Denver, Colorado 80218)).

232. For example in their study of a Colorado custody mediation program, Pearson and Thoennes found that nearly 70% of the mediating couples agreed to joint custody, whereas those couples choosing an alternative form of dispute resolution only agreed to joint custody in 30% of the cases. Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 506 (1984) [hereinafter Pearson & Thoennes, *Longitudinal Study*]. See also, e.g., Christine Leick, *Guidelines for Mediator/Attorney Cooperation*, MEDIATION Q., Spring 1989, at 37, 43; Pearson & Thoennes, *supra* note 1, at 60; Ray & Bohmer, *supra* note 6, at 18.

commonly seem to reflect joint legal, rather than joint physical, custody.²³³ In contrast to joint physical custody where the child spends extended periods of time living with each parent, joint legal custody requires the parents only to share control over important child related decisions. Because this form of custody superficially seems less threatening to mothers, its subtle political implications frequently go unnoticed. Joint legal custody often perpetuates the preexisting patriarchal family structure by allocating the day-to-day care of the children to the mother, while solidifying the ex-husband's power over important child related decisions. The mother can make decisions as long as they reflect her ex-husband's wishes. The moment, however, her opinion differs from his, he has veto power.²³⁴ This veto power, or the threat of its use, invades the ex-wife's consciousness and makes her ex-husband, and the male control he represents, an ever-present force with which to contend. The message is clear: she may escape the marriage but will remain subject to male domination.²³⁵ This implicit, yet powerful, message keeps women aware of their required submissiveness and thus strengthens patriarchy.²³⁶

The effect joint legal or physical custody has on the children of divorce also reinforces existing hierarchy between men and women. The father's absence from the family unit interferes with socialization of the children into patriarchal patterns.²³⁷ How, for instance, does a little girl

233. However, other reports "from the trenches" indicate that joint physical custody may be more prevalent in mediation than limited research results suggest. See Leick, *supra* note 232, at 43. Furthermore, agreement to joint physical custody in mediation often seems based on a naïve misunderstanding of its practical and legal implications. *Id.*

The joint physical custody agreed to in mediation seems to mimic the timesharing found in conventional sole custody arrangements. Girdner, *supra* note 20, at 137. However, one study indicates that mediated joint physical custody agreements provided the father two to three more days per month with the children than nonmediated agreements. Pearson & Thoennes, *Longitudinal Study*, *supra* note 232, at 507. Consequently, joint physical custody agreements negotiated in mediation probably provide the father greater access to the children than other dispute resolution processes.

234. Girdner, *supra* note 20, at 138.

235. See Bruch, *supra* note 38, at 107.

236. See generally Ann M. Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power*, 3 CANADIAN J. WOMEN & L. 33 (1989); Ray & Bohmer, *supra* note 6.

237. As Pollock and Sutton state:

Elsewhere we have explored the authority of fatherhood as the means of instilling in family members a recognition and acceptance of, and acquiescence to, male authority in general. It is a means through which male supremacy is self-perpetuated. Fatherhood ensures that male children grow up "normal" — that is, heterosexual, practising brotherhood, and eventually growing into fathers. Through fatherhood, girls are taught femininity — the proper place of women subordinate to men, the art of loyalty and service to men, and a thorough disrespect for women. While the rhetoric of mutual parenthood may seem to convey equality and exchange, the social position of each parent is hierar-

learn proper submissiveness to male authority in the absence of a powerful male figure and in the presence of an independently decisive mother. Likewise, how can a little boy learn proper domination of women if he lacks his father's modeling, his mother dominates the household, and he observes his mother operating as an autonomous adult. While certainly children's exposure to patriarchal patterns in other areas of life will influence them, the absence of these patterns in their homes makes their socialization less effective. Joint legal and joint physical custody reintroduce male power into the post-divorce family and ensure that children remain aware of male dominance. The significant increase in joint custody, whether physical or legal, generated by mediation thus reflects a corresponding increase in the male dominance characteristic of patriarchy.²³⁸

Not only does mediator bias in favor of joint custody reinforce patriarchy through custody arrangements, it also further weakens the wife's already precarious financial position in divorce mediation by eliminating the wife's ability to use her child-centered power during negotiations over financial issues. Moreover, a mother intent upon sole custody despite mediator coercion might attempt to circumvent the mediator and appeal directly to the father by offering to accept a grossly inequitable financial arrangement in exchange for sole custody.²³⁹ While those

chically organized. The powerlessness of women is made clear and is continually affirmed by the father's authority over mothers and motherhood.

Arguments in support of the heterosexual family are couched in terms of the "best interests" of the child. This is a circular argument for what is seen to be in the best interests of the child is to have a social father, and thus to live in a heterosexual family. The possibility for women to break away from this patriarchal family structure is extremely limited. It is currently being made more difficult as both right- and left-wing positions support the ideal family as if it were based upon equality, and in the best interests of children.

. . . State concern with the problem of fatherless families is less a consideration of poverty and stigmatization than an attempt to impose male authority . . .

Pollock & Sutton, *supra* note 231, at 595-96 (citations omitted).

238. That most divorced women remarry seems to diminish the force of this argument. The step-father can provide the needed socialization into patriarchal patterns. This counter-argument ignores, however, the lower legitimacy of a step-parent's authority, especially with older children. Moreover, the mere spectre of women raising children without male influence, causes alarm in a patriarchal society, *see* Pollock & Sutton, *supra* note 231, at 594 (discussing the alarm expressed in Britain's Law Commission Reports over the perception that more women than before choose to have illegitimate children and bring them up without men), and promotes the popularity of joint legal custody among the mental health mediators entrusted with defending the bulwarks of patriarchy. *See* sources cited *supra* note 231.

239. *See* Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1111 (1988). Dworkin and London provide a relevant case example in which the father wanted joint custody of the younger child and

working in family law recognize that fathers frequently threaten to dispute custody in order to strengthen their financial position,²⁴⁰ the mediator's advocacy of joint custody enhances the father's coercive power.

Considering the foregoing, women's highly ambivalent response to custody mediation causes no surprise:

Although a complete analysis is not available, there is reason to think that women are significantly more likely to regard mediation as threatening and balanced against them than are men. While women did report that mediation helped them in understanding themselves and their spouses, they were also far more likely than men to report a sense of being pressured into agreement, a lack of comfort in expressing their feelings, anger during mediation sessions, and a sense that mediators essentially dictated the terms of the agreement.²⁴¹

In conclusion, traditional sex role ideology enhances the husband's

the mediators suspected the mother of reducing her financial requests in order to assure her sole custody of that child. Dworkin & London, *supra* note 172, at 9-11. The mother initially agreed to retaining only 15% of the marital assets, while the husband was to receive 85%. *Id.* at 10. Concerned that the wife implicitly was trading marital assets for sole custody and that the court would not accept such an inequitable property division, the mediators told the couple they would not approve the agreement. *Id.* at 11. Although the couple was displeased with mediator nonconcurrence, they finally did agree to a more equitable split of the property: the wife retained 36% and the husband received 64% of the marital assets. *Id.*

This case differs from the situation described in the text, but it nevertheless supports the proposition that a firm joint custody request, regardless of its proponent, can induce the mother's acceptance of inequitable financial results. Furthermore, the case described by Dworkin and London is more favorable to the mother than the scenario described in the text because in their case, the husband alone, rather than the mediators in addition to the husband, pushed for joint custody, and the mediators uncharacteristically intervened in the face of gross financial inequity. *See id.* One could expect, then, the text example of a mother appealing directly to the father to result in an agreement reflecting even greater financial inequity than the agreement in the case example reflects.

240. *E.g.*, Lonsdorf, *supra* note 156, at 281; Neely, *supra* note 3; *see* Teitelbaum & DuPaix, *supra* note 239, at 1124.

In the words of one divorcing wife who negotiated through her lawyer:

My husband . . . was threatening that if I went for half (the property) he would go for custody, . . . assuming that he would not get it, but he would drag it out as long as possible and have as nasty a battle as possible. I really didn't want the kids to have to go through that . . . didn't want to go through that prolonged fight. So, I decided to go ahead with what we had come up with . . . even though I knew it was not a fifty-fifty split.

Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *LAW & SOC'Y REV.* 585 (1987).

241. Teitelbaum & DuPaix, *supra* note 239, at 1121 (citation omitted). The women expressed this high level of ambivalence in an elite mediation program where conditions are far better than most court affiliated programs. *Id.* *See also* Robert E. Emery & Melissa M. Wyer, *A Systematic Comparison of Child Custody Mediation and Litigation*, *FAIRSHARE*, Feb. 1988, at 10, 11 (women who mediated their custody arrangements were more depressed than women who litigated custody).

power over financial issues and, when coupled with mediator bias for joint custody, strengthens the father's position in custody matters as well.

Because mediators perceive themselves as advocates for the children, they ignore how their bias harms divorcing mothers and acknowledge no need to protect either spouse in child centered negotiations. Some proponents and critics express concern, however, that the weaker wife might have difficulty negotiating with her husband on financial issues. Mediation proponents assuage this concern by offering mediator power balancing and lawyer and judicial review of mediated agreements as protection for the weaker spouse on financial issues. In Part III, however, I argue that mediators cannot power balance because they do not know what creates power, they cannot detect power disparities, and they lack the skills necessary to power balance. Moreover, mediator ignorance and mishandling of power issues will continue because they are encouraged by mediator self-interest. Next I argue that even if mediators possessed the knowledge and skill necessary to power balance, mediator's role and ethical prescriptions prevent meaningful efforts to eliminate power disparities. Mediators will not abandon these inhibiting role and ethical demands because they support the interests of many powerful actors. And, finally, I explore why lawyer and judicial review of mediated agreements also provide inadequate protection.

III. PROTECTION FOR THE DISADVANTAGED WIFE

A. *Balancing The Power: A Rhetorical Smokescreen*²⁴²

1. *Mediator Self-Interested Ignorance on Power Issues.* Given the importance of power balancing, divorce mediation literature carefully should explain the factors that create power, how those factors normally are distributed among husbands and wives, and methods for detecting

242. The mediation model contemplated in this section remains a mandatory court affiliated program staffed primarily with mental health mediators. While many court affiliated divorce mediation programs address only custody issues, NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 11.2, at 76 (Supp. 1991), the trend is to expand mediation services to include financial issues because the issues are seen as interrelated. See Koopmen, *supra* note 1, at 119, 122; Susan Myers et al., *Court-Sponsored Mediation of Divorce, Custody, Visitation, and Support: Resolving Policy Issues*, STATE CT. J., Winter 1989, at 24, 26. (of 118 mediation programs responding to national survey, two-thirds mediated child support as well as custody and visitation issues); Pearson, *supra* note 1, at 180 (a recent study of four public and ten private divorce mediation programs which entertain the financial as well as the child-related issues in divorce); Vanderkooi & Pearson, *supra* note 16, at 561 (stating that custody mediation programs sometimes entertained financial issues because resolution of custody and financial issues were interdependent). Additionally, private sector mediators frequently address both financial and child issues. Dworkin & London, *supra* note 172, at 9.

these factors as well as techniques for correcting power disparities rooted in different factors. As I mentioned earlier, however, the literature proves insensitive to power issues.²⁴³ Characteristically, a recent book on divorce mediation devotes only sixteen of over four hundred pages to power imbalances.²⁴⁴ In those sixteen pages the authors deny the existence of power imbalances²⁴⁵ or suggest that if they exist they do not affect mediation.²⁴⁶

Divorce mediation training programs show equivalent insensitivity to power issues. The better divorce mediation training programs require trainees to devote a maximum of forty hours, usually over a five day period, to becoming a mediator.²⁴⁷ In that short time the program director attempts to instill in the trainees an expertise in basic mediation

243. For instance, mediators in a private mediation program indicated that approximately 70% of their 200 mediation clients were not ready to negotiate when they first entered mediation. Irving & Benjamin, *supra* note 37, at 116-20. In explaining why, they listed numerous criteria in which power imbalances were implicit: nonacceptance of divorce, dysfunctional dominant patterns of interaction, lack of coping skills, inappropriate emotional attachment, lack of future planning, inadequate financial, emotional and/or social resources. *Id.* at 118-19. However, the participating mediators never mention power imbalance or suggest how to manage such imbalances.

Some writers do acknowledge that significant power disparities between husband and wife may exist, but give little guidance, aside from terminating the mediation, on how to empower the weaker spouse. Robert E. Emery & Melissa M. Wyer, *Divorce Mediation*, 42 AM. PSYCHOLOGIST 472, 477-78 (1987). See also *infra* notes 265-82 and accompanying text discussing mediator strategies for power balancing.

244. LENARD MARLOW & S. RICHARD SAUBER, *THE HANDBOOK OF DIVORCE MEDIATION* 103-19 (1990).

245. *Id.* at 104, 111-13.

246. *Id.* at 104-09, 113-19. Christopher W. Moore's book on mediation, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986), as well as John M. Haynes' book on divorce mediation, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* (1981), pay only cursory attention to power issues. And, finally, while Rogers and Salem devote more attention to the issues of fairness and power imbalance than most, the nature of their book does not lead them into the specific power problems in divorce mediation. ROGERS & SALEM, *supra* note 1.

Articles on how to practice mediation, with rare exception, likewise sidestep the issue of power imbalance. When how-to articles recognize power imbalance issues, the authors commonly assume that informing the weaker spouse of his/her legal rights is sufficient to equalize the power relationships. See, e.g., Ricci, *supra* note 35, at 55-57.

247. There are no uniform standards for divorce mediator training. While many think mediators should have a firm foundation in the psychological, economic, tax and legal aspects of divorce, there is no agreement as to the precise quantity of knowledge that should be required. KRESSEL, *supra* note 1, at 181.

While a strong movement exists to specify training and qualification criteria for divorce mediators, ROGERS & MCEWEN, *supra* note 242, at 179-86 (discussing the proliferation of diverse standards for mediation generally), this push for specification seems fruitless. Before training and qualification criteria can be delimited rationally, realistic and clear goals for mediation must be established. At the moment mediation claims to accomplish all things, suggesting that mediators must be, at least, omnipotent: a qualification rather difficult to train.

skills, the psychology of divorce, child psychology, and the complex financial and legal issues presented in divorce. During this ambitious agenda, power issues remain unacknowledged or receive scant attention.²⁴⁸

Because mediation literature and training fail to address and explain power adequately, mediators can avoid acknowledging the seriousness of unequal power between divorcing spouses and the need for mediator intervention. Moreover, because of insufficient training, even those who do recognize the need to power balance have knowledge and skills inadequate to the task. Deficient in both skills and awareness, mediators lack the motivation and the ability to power balance.

More importantly, the mediation profession cannot be expected to correct its inadequate response to power issues: their ignorance serves their purposes. Candid exposition of the depth, breadth, and tenacity of power disparities between spouses threatens the survival of this budding profession because it suggests the impossibility of power balancing. In order to alter a power disparity, a mediator must first be able to detect its existence. Yet diagnosis of a disparity based on intangible power factors or sex role ideology proves difficult. For instance, if a highly educated professional wife earns a high income and the husband does not make obvious his greater power during mediation by dominating conversation, the mediator has little reason to suspect an imbalance. This wife, however, may agree to her husband's inadequate financial proposal because her adherence to traditional sex role ideology, her depression, and her low self-esteem override her more obvious tangible power bases. The mediator, insensitive to the wife's low power based on intangible factors, will assume the wife freely has chosen to accept her husband's proposal and will see no need to power balance. Because many of the bases for power disparity remain elusive, the need to power balance frequently will go unrecognized. Without this recognition power balancing cannot occur.

Moreover, the severity and complexity of power disparities between most spouses suggest that power balancing requires skills most mediators do not and cannot have. It defies imagination to think of the skill and

248. During the time I spent formulating my thoughts on power issues in divorce mediation, I was trained as a divorce mediator in a program identical to the one described in the text. During the training, I repeatedly attempted to raise the issue of power imbalance. My trainer, however, proved more adept at evasion than I was at confrontation. At the training session's end power issues remained unexplored. In the time since, I have observed several similar training sessions. In none of these training programs were power issues adequately acknowledged, developed, or resolved.

knowledge required to empower a depressed wife with low self-esteem who believes in traditional sex role ideology, fears confronting her husband, and has no occupation outside the home. Certainly the mediator cannot alter the wife's occupation during mediation. Nor can the mediator significantly improve the wife's psychological and emotional state. Even if the mediator has knowledge of counseling psychology, mediation focuses on the task of reaching agreement,²⁴⁹ rather than on therapy for troubled spouses.²⁵⁰ The extensive therapy required to balance a power disparity grounded in a wife's low self-esteem, depression, fear of confrontation, and traditional sex role ideology would require a mediator willing to redefine mediation and develop complex skills.

Even if a sufficiently talented mediator was willing to assume this task, the efficiency rationale justifying court affiliated mediation programs makes therapy a practical impossibility. The efficiency focus of these programs pressures the mediator to produce agreements quickly.²⁵¹ For instance, studies indicate that custody mediation in court affiliated programs takes an average of about four hours.²⁵² In contrast, two therapeutic mediators in a private mediation program acknowledged that "detection" of the twenty percent of their clients who were totally inap-

249. *E.g.*, Emery & Wyer, *supra* note 243, at 472 (exploration of emotional issues should only occur to the extent necessary to facilitate the primary task of agreement); Steven C. Bowman, Comment, *Idaho's Decision on Divorce Mediation*, 26 IDAHO L. REV. 547, 553 (1990).

250. Bowman, *supra* note 249, at 553. Girdner, *supra* note 20, at 147-48. For some mediators, however, mediation is therapy. *E.g.*, *id.* at 144-47. This form of mediation also harbors immense risk for women. In the case example reported by Irving and Benjamin, the mediators focus on therapeutic intervention with the divorcing couple. Irving & Benjamin, *supra* note 37, at 121-26. Their therapeutic approach allows them to successfully manipulate the mother, who initially requested sole custody, into a joint physical custody arrangement. *See id.* *See supra* note 227 and accompanying text for fuller discussion of the case. Under the guise of therapy, the lesser powered wife is not given support capable of providing greater empowerment. Rather, she is subtly, or not so subtly, coerced into accepting the mediator's bias in favor of joint custody. Therapeutic mediation by mental health professionals, consequently, seems more an accommodation of men's interests than "therapy." *See supra* note 231 and accompanying text for further discussion of this possibility.

251. *E.g.*, Girdner, *supra* note 20, at 146-47.

252. A 1981 survey revealed that in the public sector mediations averaged 6.3 hours and 40% were completed in four hours or less. In contrast, the average mediation in the private sector took 8.7 hours and 52% were completed in nine or more hours. Pearson, et al., *supra* note 19, at 12. A more recent study of three court affiliated programs found the following average times for completion of custody mediation: in Minnesota 4.3 hours; in Los Angeles 3.0 hours; in Connecticut 2.3 hours. Pearson & Thoennes, *supra* note 1, at 7. *See also* Irving & Benjamin, *supra* note 37, at 116 (private mediations averaged between sixteen and twenty-three hours).

While power balancing efforts seem unlikely in public mediation, Kressel suggests that private mediators may also lack motivation to inquire into a party's suitability for mediation because of their zealous belief in mediation and their desire to make a living in the face of little demand for their mediation services. KRESSEL, *supra* note 1, at 206.

propriate for mediation and the other fifty percent who needed a therapeutic "premediation" stage to prepare them for mediation, required an approximately six hour assessment stage.²⁵³ Mediator power balancing through extensive therapy thus proves a practical impossibility.²⁵⁴

In summary, full exploration of power issues by mediation proponents would require the corresponding admission that detection difficulties, lack of skill, and program constraints make power balancing impossible for most, if not all, mediators. With power balancing no longer available as a rhetorical safeguard, judicial administrators and the public would understand mediation for what it is: an informal process that places the low powered spouse, usually the wife, fully at the mercy of her more powerful husband. This recognition might cause the demise of this new profession. Mediation proponents thus have a vested interest in remaining ignorant of power issues.

The above only scratches the surface of mediator reluctance and inability to power balance. Even if one makes the questionable assumption that mediators can detect and mitigate power imbalances, conflicting role and ethical demands inhibit mediator power balancing efforts.

2. *Conflicting Role and Ethical Prescriptions.* Contrary to mediator advocacy on child issues, on financial issues the mediator role requires neutrality.²⁵⁵ While some mediators cleverly rationalize their way around this prescription,²⁵⁶ many others take it quite seriously.²⁵⁷ Neu-

253. Irving & Benjamin, *supra* note 37, at 118-120. The private mediators also admitted that their relatively affluent clientele presented far fewer problems than the couples seen in court affiliated programs. *Id.* at 116. One could expect, then, that mediators in court affiliated programs would need even more time to detect those couples needing lengthy preparation in order to mediate successfully. However, the time consuming approach by private therapeutic mediators contrasts starkly with time statistics from court affiliated mediation programs.

254. As Abel notes, informal dispute resolution programs typically promise therapeutic intervention despite program constraints and party and dispute characteristics that make such intervention impossible. Abel, *supra* note 1, at 278-79.

255. See, e.g., ROGERS & SALEM, *supra* note 1, at 139 (stating that neutrality is the norm in mediation in the United States).

256. I am reminded of a mediation program director in a large metropolitan area who told me that he dealt with clients who challenged his neutrality by saying that neutrality meant he did not favor or personally know either party at the mediation's *beginning*. It did not mean, however, that he could not side *during* the mediation with a spouse he felt was disadvantaged.

Mediation literature also contains numerous examples of mediator intervention to promote the mediator's vision of fairness. However, these examples do not mean mediation will produce economic results as equitable as those produced through lawyer negotiation. See *infra* notes 313-20 and accompanying text for exploration of lawyer negotiation. First, the mediator may think the wife is entitled to only slightly more than her husband. For example, one mediator suggests that mediators should intervene only when gross inequality is present: modest inequality demands mediator re-

trality, in its pure form,²⁵⁸ requires the mediator to refrain from attempting to influence the substance of mediated agreements.²⁵⁹ Mediators

straint. Donald E. Matz, *Why Disputes Don't Go to Mediation*, *MEDIATION Q.*, Fall 1987, at 7; see *infra* notes 274-77 and accompanying text (discussing the equity norm in mediation). The mediator's intervention, then, may improve the wife's position only slightly and may not reflect the wife's full legal entitlements. Second, many of the examples of coercive mediator behavior concern custody issues. Use of coercive tactics on custody issues does not mean mediators will intervene with equal vigor on financial issues. See *infra* notes 287-89 and accompanying text for discussion of lack of mediator authority on financial issues and the threat of husband withdrawal from mediation. Third, Greatbatch and Dingwall describe a case in which a mediator in Britain advocated a specific property division between the husband and wife: the wife was to retain the marital home and the husband was to retain a second, less valuable, house. Greatbatch & Dingwall, *supra* note 9, at 617-36. This example, however, cannot suggest that mediators in the United States would do the same. In Britain, a stronger emphasis is placed on children's needs and, unlike the United States, children are entitled to a share of the family's wealth and property. WEITZMAN, *supra* note 116, at 95 (citing California as an example of the parent-centeredness of American divorce settlement). In Greatbatch and Dingwall's case study, the divorcing couple had two young children who were to remain with the mother. Consequently, the mediator's insistence that the wife receive the family home may have reflected different notions of children's entitlements from those found in the United States, and the mediator's attitude may have had more to do with protecting the children's economic interests than with imposing economic justice upon the divorcing couple. This case study, thus, cannot be used to suggest that mediators in the United States will vigorously intervene to promote economic justice for divorcing women.

Besides self-serving rationalizations, some urge the mediator has a duty in certain contexts to assure outcomes consistent with important social policies and public perceptions of fairness. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* 1, 17-18 (1981) (urging that environmental mediators have such duties).

257. See, e.g., Gregg B. Walker, *Training Mediators: Teaching About Ethical Concerns and Obligations*, *MEDIATION Q.*, Spring 1988, at 36-37 (discussing the Association of Family and Conciliation Court's "model standards for family and divorce mediation"); Wallerstein, *supra* note 216, at 15-16.

258. Confusion abounds regarding the precise meaning of neutrality in mediation. Cf. Teitelbaum & DuPaix, *supra* note 239, at 1126 n.110 (when referring to neutrality, ABA standards for mediators equate non-alignment with value-neutrality). This confusion may allow some mediators to rationalize non-neutral behaviors, but an ethical requirement of neutrality, whether or not ill-defined, still constrains mediators from actively participating in substantive financial decisions.

259. Strict neutrality is a human impossibility. See Teitelbaum & DuPaix, *supra* note 239, at 1125. Mediators inevitably bring with them their social class, ethnicity and ideologies. Hofrichter, *supra* note 9, at 242. Mediators who adhere to neutrality thus can influence an agreement's substance by subtly and unknowingly indicating their preference to the couple through emphasizing or deemphasizing various options. Honeyman, *supra* note 192, at 141. Furthermore, many mediators admit their willingness to deviate from their formal role prescription to avoid grossly unfair results. E.g., Girdner, *supra* note 20, at 147-51. However, the neutrality role requirement keeps mediators uncertain about the propriety of intervention, see, e.g., Walker, *supra* note 257, at 34-37 (acknowledging the dilemma, but advocating that the decision to intervene be left to the discretion of individual mediators' "subjective ethics"), and inhibits their willingness to substantively intervene to promote fairness.

The standards adopted by the Family Law Section of the American Bar Association do little to alleviate mediator role confusion. The standards acknowledge a mediator's duty to be impartial but also state that impartiality does not mean substantive neutrality: a mediator must be impartial as between the participants while retaining an obligation to avoid unreasonable results. *Id.* at 35-37.

must not give advice on what alternatives they think superior, for doing so represents a biased infliction of the mediator's value preference upon the divorcing couple.²⁶⁰ Mediator neutrality places the responsibility for generating alternatives and outcomes solely on the parties.

The ethic of party empowerment firmly buttresses mediator neutrality. Empowerment in mediation allegedly respects and fosters individual autonomy and dignity while simultaneously limiting state intrusion.²⁶¹ In marketing mediation to clients mediators contrast mediation to the spectre of the intrusive judge imposing formal, external, and insensitive criteria on private family matters.²⁶² In place of this threatening alternative, mediators offer couples the chance to make their own decisions on how to order their post-divorce lives.²⁶³ Under this ethic, as with neutrality, the responsibility for generating alternatives and outcomes lies exclusively with the parties.²⁶⁴

Some mediators intuitively sense the tension between neutrality and empowerment and mediation's ability to protect the weaker party from unfair outcomes. Faced with this tension they do not abandon their role and ethical prescriptions. Nor do they use the drastic and time-consuming measures necessary to meaningfully power balance. Instead mediators assume they can resolve the tension and generate fair outcomes if they simply control the process of mediation while ignoring the substance of emerging agreements.²⁶⁵ Mediators believe process tactics

This double speak utterly fails to acknowledge that a mediator who promotes a fair outcome for the lesser powered spouse will inevitably seek to influence the agreement's substance and will be perceived by the other spouse as highly "partial."

260. FOLBERG & TAYLOR, *supra* note 9, at 53.

261. Greatbatch & Dingwall, *supra* note 9, at 614.

262. In one study of a custody mediation program, mediators presented litigation to the couples as a painful and expensive alternative that produces unpredictable and unsatisfactory results. Vanderkooi & Pearson, *supra* note 16, at 560.

263. *E.g.*, Haynes, *supra* note 9, at 10 (arguing a mediator must be committed to the client's right of self-determination). As stated by Folberg and Taylor:

Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process. . . . It is a finite process that produces specific outcomes by utilizing the values, norms, and principles of the participants rather than those of the mediators.

FOLBERG & TAYLOR, *supra* note 9, at 7-8.

264. *E.g.*, Folberg, *supra* note 16, at 9-10.

265. This tendency to focus exclusively on process to the exclusion of concern for substantive justice reflects the continual struggle to preserve the public's belief that the legal system fulfills its articulated liberal ideas while continuing to maintain the hierarchical power structures in this society. HOFRICHTER, *supra* note 36, at xxv; Abel, *supra* note 1, at 294-95 (informal dispute resolution mechanisms primarily yield cathartic, rather than equitable, relief); Brunet, *supra* note 1, at 13-14; Galanter, *supra* note 8 (arguing that legal rules generally favor "culturally dominant interests");

like allowing both spouses ample opportunity to speak,²⁶⁶ or requiring both spouses to submit detailed budgets, allow them neutrally to balance power and generate fair outcomes.²⁶⁷ Yet neither these, nor other allegedly neutral process tactics,²⁶⁸ however, assure balanced power or fair outcomes. A wife actually may speak more than her husband, yet his few words may command her deference. The wife may submit a thorough budget, yet the budget may reflect her low expectations or her depression may blunt her ability to effectively negotiate for her financial needs reflected in the budget. Once the multifaceted nature of power is understood, tactics designed to control only process do little to protect the disadvantaged spouse.

Moreover, mediators concerned with fairness cannot use substantive legal norms to balance power and assure outcomes that, at least, somewhat reflect society's perception of justice.²⁶⁹ Imposition of legal norms would violate neutrality and empowerment. Furthermore, if mental

William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 99-101.

266. See, e.g., FOLBERG & TAYLOR, *supra* note 9, at 57 (stressing the need for "equality in communication"). Other methods frequently mentioned are clarifying statements, providing information regarding legal entitlements, and caucusing. E.g., Girdner, *supra* note 20, at 148-49. None of these tactics, however, assure fair outcomes. See *infra* notes 267-89 and accompanying text for additional discussion.

267. E.g., FOLBERG & TAYLOR, *supra* note 9, at 185.

268. I do not mean to suggest that these tactics really are neutral. As do all procedures, they have substantive impact. Rather, I speak of these as neutral process tactics only because they are perceived as such by mediators.

269. I am not suggesting that the employment of substantive law in the formal system produces financial equity for divorcing women. Most evidence points to the contrary conclusion. See *infra* note 319. Nor am I suggesting that uniform application of substantive laws occurs in the formal system. Again, research suggests the opposite conclusion. See Kenneth R. White & R. Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75, 75-76, 83 (1976) (a study of judicial opinions in Florida revealed little consistency among judges in the selection of or emphases placed on a range of variables used to determine child support or alimony awards). However, as I argue throughout this article, the leap from acknowledging the formal system's problems to believing mediation the cure is unwarranted.

The use of mediation to resolve divorce disputes significantly inhibits the very reform necessary to correct the inequities now existing in the formal system. Before reform can occur, both private individuals and the public must become sensitive to the need for change. Mediation's privacy makes monitoring results more difficult than in the more public formal system and limits the public's ability to detect and press for correction of unjust results. See AUERBACH, *supra* note 1, at 124-26 (discussing how shuffling consumer grievances into the more informal arbitration process inhibited public disclosure of consumer fraud and retarded the formal system's ability to generate meaningful reform). Mediation's privacy also inhibits the disputant's ability to measure her results against those obtained by others and, consequently, to voice complaint when her results seem unfair, in comparison. In addition, because legal norms are not relevant in mediation and parties are urged to shape their own idiosyncratic agreements, mediated results defy evaluation. The inability to evaluate medi-

health mediators impose law or give legal advice, they expose themselves to accusations of unauthorized practice of law. Law then remains just as irrelevant to financial issues in mediation as to child custody issues.²⁷⁰ Mediators instead encourage couples to fashion idiosyncratic financial agreements unconstrained by the rigid dictates of formal law.²⁷¹ The wife freely can relinquish her legal right to a portion of her husband's pension fund or her right to spousal maintenance.²⁷² Mediation cloaks

ated results further obscures detection of unfairness. Thus, the much celebrated privacy and flexibility of mediation are questionable virtues from the standpoint of legal reform.

Even were unfairness obvious in mediation, the formal legal system could not correct the problem by creating different substantive laws. Without the cases before them, judges have no way to create new precedent in response to compelling factual situations and persuasive attorney argument. Shuffling the majority of divorce cases into mediation, thus, retards the development of new and more just substantive laws. See generally Owen W. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984) (arguing that settlements inhibit the evolution of formal substantive law); Hofrichter, *supra* note 9, at 242 (informalism's ideology of accommodation results in settlement and inhibits the formation of general criteria applicable to future injurious behavior). And, finally, even were judges to occasionally entertain a novel divorce case and articulate more just substantive laws, or even were the legislature to articulate new reformative laws, these new norms would do little to create better justice in mediation where legal norms remain irrelevant. Reforms in the formal system, thus, would have even greater difficulty trickling down to the public through mediation than through the formal system. Galanter, *supra* note 8, at 123-24 (discussing how in the formal system, substantive laws frequently fail to reach, and thus aid, the disadvantaged).

270. Ignoring substantive legal norms on financial issues should be particularly easy for mental health mediators. Simon argues that those possessing the "Psychological Vision" treat social norms, rules and values as obstacles to fulfillment of one's affective self — the only legitimate and valuable goal. Simon, *supra* note 206, at 495.

271. *E.g.*, Brunet, *supra* note 1, at 3-4 (noting that proponents of alternative dispute resolution perceive substantive law "as frustrating creative results"); Rifkin, *supra* note 17, at 27 (noting that, theoretically, law is an irrelevant constraint on mediator's ability to bring parties to agreement).

The irrelevance of formal distributional law and the lack of objective fairness standards creates great confusion for mediators. Dworkin and London express this confusion:

Fairness in property division and allocation of material resources involves a number of external or objective criteria, but even in this area, internal factors play a role. How do you assess whether the "bottom line" is fair? A 50/50 agreement somehow inherently appears to be fair. Some jurisdictions legally require such a settlement, as in California. In equitable property jurisdictions, a 50/50 agreement is most often used as a starting point. However, in mediation the couple has an opportunity to develop their own standards of equity, which may not be the same as those prevailing in the community. To what extent does the mediator allow these standards to deviate from the prevailing ones? And what percentages are within the parameters of fairness?

Dworkin & London, *supra* note 172, at 8-9. Tellingly, the authors defer the answer to the important question they pose to the parties themselves, trusting a somewhat foggy commitment to "self-determination." See *id.* at 11.

For arguments regarding the importance of formal substantive and procedural law in promoting quality outcomes in alternative dispute resolution, see Brunet, *supra* note 1. Ironically, the ways to "fix" the problems of informality seem always to introduce more formality.

272. Mediators sometimes point to a study by Heister to illustrate the fairness of property division in mediation. *Cf.* Dworkin & London, *supra* note 172, at 8-9 (discussing John W. Heister,

her right to forgo these legal entitlements in the seductive and obscuring

Appendix. Property Allocation in Mediation: An Examination of Distribution Relative to Equality and to Gender, MEDIATION Q., Fall 1987, at 97-98). The study involves data collected over three and a half years from 141 couples who employed a male mediator. Results showed that 43% of the couples divided marital property almost equally. Another 11% deviated from equal distribution by 5-10%, whereas 35% of the couples deviated by 10-25%. The remaining approximately 12% of the couples departed from equal distribution by more than 25%. John W. Heister, *Appendix. Property Allocation in Mediation: An Examination of Distribution Relative to Equality and to Gender*, MEDIATION Q., Fall 1987, at 97. The data also revealed that of the 57% of the cases in which property division was not equal, approximately 46% of the men received more than the women and approximately 54% of the women received more than the men. *Id.* at 98. Task forces investigating outcomes obtained in New Jersey and New York's formal justice system, in contrast, suggest that women in equitable distribution states frequently receive less than 50% of the marital assets. WEITZMAN, *supra* note 116, at 106-107 (unscientifically obtained estimates are that women receive between 35 and 40% of the marital assets).

Heister's study, however, does not support the conclusion that mediation inevitably produces better financial outcomes for women than the formal system. The data on the formal system were obtained through informal and unscientific investigations rather than methodologically sound studies. The data's validity, therefore, is questionable. Heister also fails to give any specific financial information. The women who received more than men might have clustered in the small deviation ranges, receiving, for example, only 6% more than the men; whereas the men who received more than women might have clustered in the higher deviation ranges, receiving 15-25% more than the women. Second, even if the questionable assumption is made that the above statistics indicate this mediator generated fairer property distributions than the formal system, all the mediations studied were conducted by a male mediator. Because of his sex, the male mediator likely is imbued with an authority over financial issues that approximates that of the husband. A male mediator then might be able to gently coerce a reluctant husband into an equitable agreement. See *supra* notes 211-31 and accompanying text for discussion of the relationship between legitimate authority and the ability to successfully coerce. Furthermore, all the mediations were conducted by the same mediator. I do not contend that all mediators generate inequitable financial agreements. Some mediators consider fairness more important than neutrality and party empowerment, and impose financial fairness on mediating couples. This does not mean, however, that most mediators, particularly those in court affiliated programs who take neutrality and party empowerment seriously, will produce better economic outcomes than lawyer negotiation. See *supra* notes 313-20 and accompanying text for a fuller comparison of lawyer negotiation to mediation. In essence, one cannot generalize about all mediators based on results obtained by a single mediator. And, finally, the study contains no assessment of whether spousal maintenance would have been appropriate for any of the women. As noted by Lenore Weitzman in her landmark study of the California domestic relations courts, because so few couples have significant amounts of property, spousal maintenance may be a far more important vehicle for achieving financial equity between divorcing spouses than property distribution. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1191, 1197 (1981) (from data collected in 1978 Weitzman determined that approximately 50% of the couples had less than \$10,000 net worth, and approximately 60% had less than \$20,000 net worth). The mediated property divisions in Heister's study that imply fairness thus might mask a deeper inequity.

A more recent study by Jessica Pearson found that mediated financial results differed little from lawyer negotiated or judicially assisted outcomes. Pearson, *supra* note 1, at 192-93. However, all the couples studied initially participated in mediation and resolved some of their divorce issues in mediation. *Id.* at 180-84. Consequently, mediation may have influenced lawyer negotiated results by decreasing the lawyer's sense of responsibility for her client, see *infra* note 306 and accompanying text, reinforcing the wife's predisposition for compromise, see *supra* notes 154-73 and accompanying text,

rhetoric of autonomy and empowerment.²⁷³

Mediators do, however, urge the divorcing couple to treat each other with fairness. Cut loose from its moorings in formal distributional law and set upon the stormy seas of divorce negotiations, this fragile skiff of equity will not promote fair financial results for women. Because of their social power men, not women, determine and occupy the roles society perceives valuable and deserving of reward.²⁷⁴ The husband's role of primary economic provider, for instance, commands more value than the wife's provision of a clean home, properly dressed children and well prepared meals. When divorce occurs and only a vague equity norm determines a fair distribution of marital income and assets,²⁷⁵ a result giv-

or resolving the custody/visitation issues that might have provided the wife a bargaining chip in lawyer negotiations, *see supra* notes 214-32 and accompanying text. Moreover, the researcher candidly acknowledges other methodological problems. *Id.* at 184.

273. Legal norms have diminished relevance in divorce mediation for yet another reason. In mediation, the divorce dispute is expanded to include emotional and relational issues not considered legally relevant. The resolution of the divorce dispute in mediation is expected to incorporate and reflect a concern for these issues. However, expansion of the dispute in this manner also implies that a legal principle will no longer be sufficient as a principle of resolution and that a strictly legal remedy likely will be inadequate or insensitive. *Cf.* Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 *LAW & SOC. INQUIRY* 145, 150-51 (1988) (proponents of alternative dispute resolution assert that its discretionary characteristics facilitate "speedy, flexible, and non-intimidating" agreements).

274. MacKinnon describes how consciousness raising facilitates women's realization that their economic dependency on men results from the low value placed on their work by dominant men and capitalist ideology:

For instance, when they first seriously considered never marrying or getting a divorce, women often discovered their economic dependency, having been taught to do little they can sell or having been paid less than men who sell comparable work. Why? To understand the precise causation would be to identify the supportive dynamics of male supremacy and capitalism. But an equivalency, at least, was clear: women's work is defined as inferior work, and inferior work is defined as work for women. Inferior work is often considered appropriate for women by the same standards that define it as inferior, and by the same standards that define "women's work" as inferior work — its pay, status, interest or complexity, contacts with people, its relation to cleanliness or care of bodily needs.

MACKINNON, *supra* note 188, at 91-92.

275. Interestingly, men and women differ in the norm they prefer to employ in reward distributions. Focused on individual gain and competition, men prefer to distribute rewards on the basis of equity: the reward size should be commensurate with the contribution made to reward acquisition. Women, on the other hand, focused on relational issues rather than competition or gain maximization, prefer equal distribution: the reward size should promote group solidarity rather than reflect individual contribution. Men are thought to prefer equity over equality because they are exploitive and because the equity norm inevitably creates and/or perpetuates status differences, whereas women are thought to prefer equality because they are accommodative and because the equality norm preserves relationships. *See, e.g.,* Imat R. Amidjaja & W. Edgar Vinacke, *Achievement, Nurturance, and Competition in Male and Female Triads*, 2 *J. PERSONALITY & SOC. PSYCHOL.* 447, 450 (1965) (suggesting that males and females might be characterized as exploitive and accommodative, re-

ing the husband a greater share than the wife might seem equitable to the couple and the mediator because of his more deserving marital duties.²⁷⁶ Moreover, when one considers the value men attach to their income and wealth,²⁷⁷ reliance upon an unspecified norm of fairness to induce the husband to part with income or assets seems, at best, naive. The equity norm used by mediators to balance power and produce fair outcomes provides a thin reed, indeed, of protection for the disadvantaged wife.

Since mediators cannot power balance effectively by altering the causes of power disparity, by blindly relying upon process control, by employing formal distributional law, or by appealing to an informal equity norm,²⁷⁸ mediator efforts at power balancing prove insufficient to protect the weaker wife. Mediators, however, could achieve power balancing's goal of equitable financial agreements by closely monitoring the substance of the emerging agreement, and, when necessary, intervening

spectively); Arnold Kahn et al., *Cooperation and Optimal Responding in the Prisoner's Dilemma Game: Effects of Sex and Physical Attractiveness*, 17 J. PERSONALITY & SOC. PSYCHOL. 267 (1971) (finding that females, unlike males, vary behavior according to the interpersonal situation); Edward E. Sampson, *On Justice as Equality*, J. SOC. ISSUES, Summer 1975, at 45, 55-57; Elaine Walster & G. William Walster, *Equity and Social Justice*, J. SOC. ISSUES, Summer 1975, at 21, 26-27.

276. *E.g.*, Lonsdorf, *supra* note 156, at 287 (noting that in the divorce context, reliance upon an equity norm means that resources belong to the one who earned them — normally the husband); *see also, e.g.*, David Kipnis, *Does Power Corrupt?*, 24 J. PERSONALITY & SOC. PSYCHOL. 33 (1971) (discussing research that shows a tendency of the more powerful to devalue the contributions made by the less powerful).

Some argue that dominant men, sensitized only to their burden of public and economic responsibility, fail to accord due weight to the contributions of women and less powerful men. *See* LIPMAN-BLUMEN, *supra* note 23, at 23-24 (arguing that male economic dominance devalues feminine contributions). Furthermore, they attribute women's success to the wrong causes: to luck rather than competent performance. Their insensitive attitude toward women's contributions and their inaccurate attributional patterns make them reluctant to share power and societal rewards with women because they do not see women as "deserving."

Mediators are as vulnerable to a concept of equity favoring husbands as the husbands themselves. As noted by Kolb in discussing labor/management mediation:

Less often appreciated, however, are the contributions the mediators make to preserving the existing social order. This is not only because their efforts may minimize the instances and duration of overt conflict but because their efforts serve to reinforce and maintain the ideology of the system. This may be the major institutional role played by mediators.

KOLB, *supra* note 192, at 173.

277. "Earnings are an objective indicator of a man's success in the employment sector and hence, an important indicator of worth in our society." Ulbrich, *supra* note 31, at 123. Also, *see supra* notes 40-41, 195-96 and accompanying text, for a discussion of a male's perceived responsibility of financial matters.

278. Kolb notes in her book on labor/management mediation that many observers of the process believe that outcomes are more reflective of the respective parties' political and economic positions than of any strategies employed by mediators. KOLB, *supra* note 192, at 134.

to promote fairness.²⁷⁹ Herein, however, lies the problem. Mediator neutrality and party empowerment norms require the mediator steadfastly to avoid interference with the parties' right to self-determination.²⁸⁰ Active substantive intervention lacks neutrality and violates party empowerment.²⁸¹ Consequently, even a mediator concerned with fair results will feel obligated to refrain from using this tactic,²⁸² and will cling, instead, to ineffective process tactics and a biased equity norm.

Abandonment of neutrality and party empowerment as guiding

279. Another option is termination of the mediation. *E.g.*, Girdner, *supra* note 20, at 148; Schepard et al., *supra* note 217, at 650-51. However, terminating mediation compromises the mediator's self-interest in reaching agreement, and is, therefore, an unpopular and unlikely option. See *infra* notes 287-89 and accompanying text discussing mediator reaction to the husband's threat of termination.

The following passage illustrates mediator discomfort with termination as a way of coping with power imbalances:

The mediator may decide that the inequality is a permanent condition or one that cannot be effectively dealt with in mediation — such as physical abuse or intimidation, a total disparity in financial sophistication, significantly lower intelligence of one participant, a language or physical handicap, or a long-standing behavior or mental problem. In such cases the mediator has an ethical responsibility to notify both participants of the evaluation, suspend the mediation process, and refer them to lawyers, psychologists, or other helpers outside of mediation. *This ethical position should not become a professional escape clause, however—a way of hiding a mediator's lack of skill by reframing it as the participant's problem.* In divorce it is important to realize that the basic inequality between the spouses has often led to the decision to part. *Mediators are not charged with the responsibility of balancing all relationships. They must ensure, however, that participants are not railroaded into choices that are unconscionable.*

FOLBERG & TAYLOR, *supra* note 9, at 185-86 (emphasis added).

280. In their study of custody mediations, Vanderkooi and Pearson found that mediators frequently emphasize the couple's right to self-determination. Vanderkooi & Pearson, *supra* note 16, at 560.

281. Kressel acknowledges no agreement exists among mediators whether the mediator has an obligation to secure fair outcomes or whether the mediator must refrain from imposing her concept of fairness upon the divorcing parties. KRESSEL, *supra* note 1, at 215.

282. Matz, *supra* note 256 (suggesting mediators should intervene only when gross inequality is present, whereas modest inequality demands mediator restraint). Dworkin and London present a case example in which the mediators did intervene to protect the wife from what seemed to the mediators a grossly inequitable property division. However, Dworkin and London implicitly acknowledge that their intervention violated their commitment to self-determination. They also express the confusion mediators experience because the ethic of party empowerment inevitably conflicts with and requires the mediator to compromise any commitment to fairness:

If the process has been fair and the couple has reached agreement and by their standards believe that the agreement is fair, how and when should the mediator intervene if the mediator disagrees? To what extent should local court practices influence the couple's agreement? *We offer to allow parties to create their own agreements with our help, with an implicit or explicit commitment to self-determination. . . .*

But the mediator is a professional with a body of knowledge and expertise and an obligation to alert if he or she believes some harm might result from an agreement. . . . Dworkin & London, *supra* note 172, at 11 (emphasis added). Even with mediator intervention,

principles in mediation and adoption of mediator responsibility for fair outcomes provide obvious ways for mediation to afford some protection for the weaker spouse. Mediator self-interest, however, prohibits this solution. First, mental health professionals' lack of financial expertise, their discomfort with their lack of financial sophistication,²⁸³ and the low value they place on financial, as opposed to emotional and relational concerns,²⁸⁴ should make them unwilling to accept responsibility for determining and imposing fair financial agreements.²⁸⁵

Moreover, administrators in efficiency-driven court-affiliated programs measure a mediator's success by how many agreements he can

however, the wife in the case example received only 36% of the marital assets valued at \$800,000. The husband received the remaining 64%. *Id.*

Ingram and Markowitz provide another example of mediator reluctance to engage in effective power balancing behavior. These mediators argue that strict neutrality must be balanced against the need to protect the unrepresented (weaker) spouse. They suggest assisting the lesser powered spouse by assuring that each party give equally valued input into the decisionmaking process. They even state that a mediator might teach effective negotiation to a weak spouse. However, throughout their article they stress the dangers inherent in empowerment of the weaker party, openly acknowledge that too much empowerment might be an extremely serious mistake, and empowering the weaker spouse must not "harm" the more powerful spouse. In the end they state:

Notice that in this example we are not advocating that the mediator propose a solution.

A mediator who makes a proposal in a divorce situation is likely to be expressing his or her own biases and may be violating several ethical principles.

Pamela S. Ingram & James R. Markowitz, *Ethical Issues in Divorce Mediation: Divorce and Labor Compared*, *MEDIATION Q.*, June 1985, at 19, 24. Thus, even these mediators who recognize the importance of fairness far fall short of advocating mediator behaviors that might actually balance the power between spouses.

283. Grebe, *supra* note 207, at 22-24.

284. See Simon, *supra* note 206, at 519-20 (discussing the value psychologists place on feelings and their corresponding disdain for social, practical, and material concerns). Simon also argues that the psychologist's focus on feelings and relations, as opposed to practical, social or material concerns masks a political agenda:

Here are some of the basic notions of the Psychological Vision: Satisfaction does not depend on the material world: it is merely a function of how people feel. Individuals do not need money so much as they need to be "accepted" as "people." To treat individuals as "people" means to ignore the distinctions of class, of wealth and power, which separate them, and to emphasize the abstract affective needs they share. It means to flatter them, to encourage them to retreat from the social and material world to a world of passive self-love. The price of being treated as "human" is acquiescence in the prevailing social and material inequalities.

Id. at 521.

285. Some suggest, however, that mediators are less than neutral on financial issues. Rather mediators tend to stress the importance of women becoming economically independent of their husbands. Marilyn Ray, *Divorce Settlements: Comparing Outcomes From Three Processes for Resolving Disputes* (1988) (unpublished manuscript, available from Marilyn Ray, Executive Director, The Finger Lakes Law & Social Policy Center, Inc., 96 Besemer Road, Ithaca, New York, New York 14850).

produce and how long he takes to produce them.²⁸⁶ Pressing for financial fairness might threaten a mediator's success by provoking the husband to terminate mediation before reaching an agreement. While divorcing mothers likely will succumb to the expert mediator's coercion on child issues, the husband likely will walk out in response to mediator coercion on financial issues because the mental health mediator lacks legitimate authority over financial issues.²⁸⁷ Moreover, husband resistance to mediator coercion on finances²⁸⁸ seems more likely than a mother's resistance to coercion on child issues because the mediator's insistence on financial fairness overtly conflicts with the husband's interest in retaining marital income and assets. In contrast, the mediator manipulates the traditional mother into joint custody by explaining how this custody arrangement coincides with the mother's interest in maintaining relationships. The threat then of the husband's walkout should inhibit a mediator concerned with success from pressing the husband on financial issues and should encourage mediators to retain neutrality and party empowerment as guiding principles.²⁸⁹

Mediators also resist abandoning these guiding principles and taking responsibility for fair financial outcomes because these norms provide several layers of insulation from malpractice liability. First, they place responsibility for substance exclusively on the parties. Additionally, the empowerment ethic creates the expectation that mediated agreements will reflect the idiosyncratic needs of the couple. No objective standard then exists against which to measure the fairness of mediated agreements.²⁹⁰ Since mediators cannot be accountable for what they do not

286. *E.g.*, Hofrichter, *supra* note 9, at 241 (mediation success usually measured by the number of disputes they resolve); KRESSEL, *supra* note 1, at 214; Sally Engle Merry, *Defining "Success" in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 172-77* (Roman Tomasic & Malcolm M. Feely eds., 1982) (discussing how efficiency norms drive mediation programs generally). *See also* note 294 *infra*.

287. Kressel notes that one of the most difficult mediator tasks is maintaining the husband's good will while simultaneously strengthening the wife's position. KRESSEL, *supra* note 1, at 232 (discussing his study on couples who exhibited a direct conflict pattern of interaction).

288. The husband also may resist coercion on financial issues because it potentially violates his expectation of getting a better deal through mediation than he would obtain in other dispute resolution processes. *See* Pearson et al., *Decision to Mediate*, *supra* note 19, at 30.

289. The spectre of the husband's withdrawal from mediation probably threatens court affiliated mediators more than private sector mediators because continued employment in the public sector is often contingent upon the mediator's effectiveness at producing agreements. Reaching agreement, however, remains a primary motivation of private sector mediators as well. Consequently, their self-interest in producing agreement may inhibit the willingness of both public and private sector mediators to press the husband on financial issues.

290. *See* ROGERS & SALEM, *supra* note 1, at 140-43 (describing the difficulty of evaluating the fairness of mediated agreements).

control and the fairness of mediated agreements defies evaluation,²⁹¹ the norms of neutrality and party empowerment artfully insulate the mediator from accountability for fair outcomes. Trading these norms for responsibility, in contrast, would expose the mediator to liability for unfair results. The spectre of malpractice provides additional disincentive for abandoning these principles.

The judicial system, with its overwhelming concern for efficiency,²⁹² also has much to lose if mediators publicly declare their intent to shape the substance of mediated financial agreements. This declaration would force the divorcing public to choose between a judge sworn to impose known substantive laws and a mediator sworn to impose his own unknown sense of fairness on the couple's financial dispute. Facing this choice the public might prefer the relative predictability of a judge sworn to impose known substantive law to a mediator whose preferences remain a mystery.²⁹³ If this were to happen, mediation programs would fail, forcing the legal system to reassimilate the numerous family law cases it now shuffles into mediation.²⁹⁴ Active mediator participation in financial agreements thus ultimately threatens to exacerbate the legal system's efficiency problems and judicial administrators will not encourage mediators to abandon neutrality and party empowerment norms.

Judges, too, have a self-interest in promoting public acceptance of

291. The expansion of the dispute to include legally irrelevant issues peculiar to the particular couple contributes to the inability to comparatively evaluate mediated outcomes. See Delgado, *supra* note 273, at 150-51. For instance, making a specific couple's emotional and relational issues relevant assures that the resolution of their dispute cannot be compared meaningfully to that of another couple whose emotional and relational issues are necessarily different.

292. System efficiency remains the major justification employed by justice system administrators for implementation of court affiliated mediation programs. AUERBACH, *supra* note 1, at 122-27; HARRINGTON, *supra* note 1, at 73-77; Abel, *supra* note 1, at 273-75, 279; Riskin, *supra* note 1, at 31; Vidmar, *supra* note 1, at 188.

293. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86-87 (1981) (arguing that mediators must remain predictably neutral in order to encourage the public's willingness to participate).

294. A significant number of actions filed in the formal court system are dissolution of marriages cases. In discussing the alleged increase in filing rates in the United States, Professor Galanter notes that "[t]he greatest single source of the bulge in filings is the increase in divorce (and post-divorce) proceedings." Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 10 (1986). As a specific example, in 1986 49.3% of all civil actions filed in Florida circuit courts were domestic actions, including custody and dissolution of marriage cases. J. Fraser Himes & Richard Y. Feder, *Family Law Judicial System: Indictment from Within*, FLA. B.J., Nov. 1987, at 11. How much court time is actually allocated to domestic relations disputes, however, remains unknown. Professors Mnookin and Kornhauser suggest that the overwhelming majority of divorcing couples privately resolve the distributional aspects of their divorce disputes and enter the court simply to secure the judicial imprimatur necessary for formal dissolution. Mnookin & Kornhauser, *supra* note 1, at 951.

mediation through the promise of mediator neutrality and party empowerment. Judges do not like hearing family law cases.²⁹⁵ If mediators abandon neutrality and party empowerment and as a result the divorcing public avoids mediation, judges would be forced to entertain distasteful dissolution cases in greater numbers. Because of their interest in avoiding these cases, judges will not encourage mediators to abandon the norms and impose their sense of fairness on the divorcing couple.

Moreover, mediator relinquishment of neutrality and party empowerment threatens the dignity and legitimacy of the formal justice system. If mediators impose their ideas of financial fairness upon divorcing couples, the distinction between mediation and judicial decisionmaking blurs. Even though the origins and content of the distributive norms employed by judges and mediators would differ,²⁹⁶ both mediators and judges would impose external norms on the divorcing couple rather than effectuate what the couple might prefer. Also, in both dispute resolution processes a third party rather than the divorcing couple would do the decisionmaking. In essence, if mediators abandon neutrality and party empowerment they would act as judges act. The realization then would emerge that the shift to divorce mediation does little more than change which third party does the decisionmaking and the public would see me-

295. In a Florida survey of attorney and judicial attitudes toward family law practice, the vast majority of responding lawyers felt judges either disliked or strongly disliked family law matters (68.1%) and that judges simply did not want to hear family law cases (71.7%). Himes & Feder, *supra* note 294, at 12. Judicial discomfort with dissolution cases is further evidenced by judges' growing tendency to relinquish decisional control over child custody and visitation issues to mental health professionals. See, e.g., Fineman, *supra* note 1; Robert J. Levy, *Custody Investigations in Divorce Cases*, 1986 AM. B. FOUND. RES. J. 713, 724-25.

The following statement made by a judge during a custody proceeding illustrates judicial exasperation with family law cases:

The two of you are before me as parents. We are getting to what frequently happens in this case, that you are acting as if the other was some stranger Has any effort been made to resolve this? I never understand why parents want to spend all their money on lawyers' fees for something between themselves. I could care less about the parties. I look at the children. This is a custody issue. If anyone is using the children as a pawn to get at the other, I have little sympathy. I can't resolve marital problems. You two are probably going to fight on and on. We're here and you brought it I'm going to have to have two parents be told by me what to do about their children. Here I am a total stranger and I'm going to have to tell you when the children can see the other parent. It's utterly ridiculous.

Girdner, *Adjudication and Mediation*, *supra* note 217, at 33, 37-38 (emphasis omitted).

296. The distributive norms employed in judicial decisionmaking spring from a societal consensus of fairness articulated in statutes and/or case law. The distributive norms employed by a mediator would emanate from the mediator's individual sense of fairness. Moreover, mental health mediators cannot employ formal law in dictating the terms of a financial agreement for to do so would engage them in the practice of law.

diation as little more than an abdication of judicial responsibility. This perception would threaten the justice system's legitimacy. Thus, once again, little pressure from the formal justice system should exist for mediators to abandon neutrality and party empowerment norms in favor of mediator activism.

In summary, the ethic of neutrality and party empowerment compromises any attempt by the mediator to produce fair financial agreements through power balancing because it denies mediators the opportunity to use the only effective power balancing technique: interference with the substance of financial agreements. Nor will mediators abandon these norms willingly and accept responsibility for producing fair outcomes because these norms protect several mediator self-interests as well as those of judges and efficiency minded judicial administrators. Even if mediators could, if they chose, power balance, these numerous constraints make that choice highly unlikely. Power balancing thus proves a rhetorical, rather than real, protection for the weaker spouse.

Not only then does divorce mediation strengthen patriarchy by assuring men greater access to and control over their children and by keeping male dominance ever present in the ex-wife's consciousness, it also promotes men's economic superiority by facilitating the husband's ability to retain his income and marital assets upon divorce. Yet, argue mediation proponents, one need not worry: lawyer and judicial review of mediated agreements remain safeguards against injustice.²⁹⁷ I now turn to this final line of defense.

B. *Ineffectiveness Of Lawyer And Judicial Review*

Lawyer review of mediated agreements does not assure results as favorable to the weaker spouse as lawyer negotiated agreements. Some couples participating in court affiliated divorce mediation programs will not have legal representation.²⁹⁸ For them, there will be no attorney review. Some argue mediation is superior to no legal representation, because it provides a knowledgeable third party who can help the parties make thoughtful decisions.²⁹⁹ However, given mediator bias for joint custody that weakens the wife's power base over children, mediator re-

297. Mnookin and Kornhauser suggest that judicial review can protect one against power disparities in mediation. Mnookin & Kornhauser, *supra* note 1, at 993. However, they caution that the lack of articulated standards often prevents unfairness from being checked in individual cases. *Id.*

298. This statement is based on the observation that pro se divorce is becoming more popular and that one spouse sometimes goes unrepresented in divorce proceedings. Jay Folberg, *Divorce Mediation: Promises and Problems*, in DISPUTE RESOLUTION, *supra* note 5, at 315, 316-17.

299. *Id.* at 316.

luctance to push the husband on financial issues, and mediator insistence on compromise, the wife might well negotiate a better outcome without mediator intervention. For spouses represented by attorneys, lawyer review of mediated agreements frequently comes too late to provide meaningful protection.

Many mental health mediators dislike lawyers and believe that attorney oversight in mediation only interferes with the mediator's ability to bring the couple to agreement.³⁰⁰ These mediators discourage couples from seeking legal advice during mediation. They sometimes will, however, recommend that an attorney review the final product.³⁰¹ This proves a difficult to impossible task because the lawyer has no idea what information, other than what the client can recall, shaped the agreement's terms.³⁰² Furthermore, because of the unavailability of formal discovery in mediation,³⁰³ the lawyer cannot know whether the client's decisions were based on full disclosure by the other spouse. When the push for speed in court affiliated programs is considered, the lack of full disclosure during mediation seems likely. The mediation process thus severely restricts the lawyer's ability to review knowledgeable the mediated agreement.

Assuming that, in spite of these difficulties, the lawyer undertakes review of the agreement, several client interests compromise the attorney's ability to provide protection. The client's emotional and psychological condition at mediation's conclusion might inhibit the lawyer's ability to convince the client to reopen negotiations to alter unfair provisions. Most divorcing couples find the uncertainty surrounding unresolved child and financial issues highly threatening. Resolving those issues generates intense relief and a sense of closure. The prospect of reopening closed issues and exposing oneself again to anxiety proves unattractive to many clients. Furthermore, the mediation process itself is

300. *E.g.*, Emery & Wyer, *supra* note 243, at 476. Not only mental health mediators, however, frown on lawyer interference during mediation. Schepard, Philbrick and Rabino, all lawyers, refuse to allow attorneys to participate in mediation because they believe lawyers promote an adversarial atmosphere and hinder direct communications between husband and wife. Schepard et al., *supra* note 217, at 637-38 (mediation of both custody and child support issues).

Additionally, not all mental health mediators harbor hostility for lawyers. Some, primarily those in the private sector, see legal counsel as a way to balance power. *See, e.g.*, Ricci, *supra* note 35, at 57, 59.

301. *E.g.*, Schepard et al., *supra* note 217, at 638.

302. *A Dialogue on Legal Representation in Divorce Mediation*, in *DISPUTE RESOLUTION*, *supra* note 5, at 337, 339.

303. *See* Brunet, *supra* note 1, at 31-39 (arguing that the lack of formal discovery in ADR risks inaccurate and low quality results).

difficult and emotionally draining. The exhaustion many clients feel will inhibit their willingness to face the thought and task of another mediation. The client's psychological commitment to the agreement compounds these difficulties. As mediation proponents argue, people who actively participate in the process that produces an agreement become psychologically committed to the agreement.³⁰⁴ Dislodging that commitment might prove difficult for the attorney who believes the agreement unfair.

Financial concerns also might make a client resistant to further negotiations. The client may have expended a considerable sum on mediator fees and may hesitate to spend more. The client's uncertainty as to whether any better results actually can be obtained also might increase the client's reluctance to finance further negotiations. And, finally, the client's awareness that an expensive trial might ensue if the reopened negotiations failed provides further disincentive to follow the lawyer's advice. Financial considerations as well as the client's emotional state therefore compromise a lawyer's ability to provide protection against unfairness at the end of the mediation. Tellingly, a recent study found that most of the divorcing parties in public mediation programs had legal counsel but few reported changing agreements in response to attorney advice.³⁰⁵

Attorney interests also work against effective lawyer review of mediated agreements. Similar to the client, the attorney likely experiences some relief that the client's case has settled. A reluctance to reopen closed issues thus affects both attorney and client. Additionally, many attorneys believe in mediation's rhetoric and think that mediation produces client satisfaction, empowers the spouses, and generates agreements that reflect client interests. The attorney consequently lacks the motivation to challenge the agreement's fairness and might relax her professional obligation to protect client interests.

Moreover, a mediated agreement generates fewer reputational concerns for the lawyer than a settlement the lawyer negotiates. A poor divorce settlement negotiated by the lawyer threatens her reputation for competence. A poor mediated agreement, however, does not create the same threat to the lawyer's reputation because the lawyer can justify the poor results in ways that do not implicate her own competence. For

304. See, e.g., Jessica Pearson & Nancy Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26 (1982) (relitigation rates lower in mediated than in other types of divorce cases).

305. Pearson, *supra* note 1, at 194.

example, she can rely on mediation's rhetoric and maintain the client has responsibility for the result or that, irrespective of its substance, the agreement reflects her client's interests. She also can maintain that challenging the agreement would have caused reprisal from the judge that mandated mediation. A lawyer will not have then the same incentive to protect her client's interests when reviewing a mediated agreement that she experiences when she alone has responsibility for the divorce settlement's terms.³⁰⁶

The mandatory nature of court affiliated mediation programs also reduces the effectiveness of attorney review. When a judge orders a divorcing couple into mediation, the representing counsels know that failure to reach agreement likely will evoke judicial displeasure. If an attorney does advise her client to reject the mediated agreement, judicial reprisal may injure the client in subsequent hearings. A reviewing attorney thus might urge acceptance of an otherwise unacceptable agreement out of fear of judicial retaliation.

The confidentiality of mediation should protect against judicial backlash at recalcitrant parties. Not all jurisdictions, however, recognize confidentiality in mediation. For instance, some California courts allow the custody mediator to make a recommendation to the court in the event the spouses fail to reach agreement.³⁰⁷ Furthermore, in court affiliated mediation programs many informal communications take place between judges and mediators that severely compromise confidentiality.³⁰⁸ And, finally, opposing counsel always can facilitate judicial backlash by subtly exposing which client caused the mediation's failure. Thus, concern with the possibility of judicial retaliation blunts the reviewing attorney's effectiveness in protecting her client.

While the protection offered by attorney review is questionable, the safeguard of judicial review is even more so. Some mediators suggest judges should exercise more restraint in reviewing mediated agreements than agreements negotiated by lawyers.³⁰⁹ Even if judges ignore such advice, however, their ability to assess the agreement's fairness suffers from the same informational deficit confronting reviewing lawyers.³¹⁰ Furthermore, judges have their own reasons for paying only cursory at-

306. Pearson, *supra* note 1, at 194.

307. ROGERS & MCEWEN, *supra* note 1, at 138.

308. Several mediators, in jurisdictions where mediation is supposed to be confidential, have told me of judicial insistence that the mediators inform the court which party was responsible for mediation's failure.

309. Schepard et. al., *supra* note 217, at 660-61.

310. As admitted by one judge, "Under the law we can disapprove an agreement. But if evi-

tention to mediated divorce agreements. If a judge reviews and rejects a mediated settlement, her actions compromise the efficiency of the court affiliated program and might necessitate her having to hear a distasteful domestic relations case.

Moreover, judges pay only cursory attention to divorce settlements generally.³¹¹ Little reason exists to expect them to devote more attention to mediated divorce agreements than ones negotiated by lawyers. To the contrary, a judge who mandates a case into mediation might be inclined to pay less attention to the resulting agreement³¹² than a settlement negotiated by legal counsel. Judicial review thus promises little protection for the divorcing wife.

The foregoing calls into question the ability of lawyer and judicial review to provide protection for mediating wives, and brings to a close this critique of divorce mediation. To complete the argument that divorce mediation enhances patriarchy, however, the significant differences between lawyer negotiation and divorce mediation require exploration.

IV. THE COMPARATIVE EFFECTIVENESS OF LAWYER NEGOTIATION

Divorce agreements negotiated by lawyers will be more favorable to wives than mediated agreements for several reasons. While mediators must remain substantively neutral, lawyers have a professional obligation to pursue and protect the client's interests during negotiations.³¹³ The

dence isn't presented, we don't know. We wouldn't know if someone was blackjacked into joint custody. We can't spot lopsided or unfair agreements." Pearson, *supra* note 1, 194.

311. As noted by Melli, Erlanger and Chambliss in their study of divorce proceedings in Dane County, Wisconsin, "[M]ost striking about our interviews was evidence which demonstrated the minimal role of the judge as reviewer of the substance of the parties' agreement." Melli et al., *supra* note 4, at 1144-45. The researchers went on to note that in their superficial review of divorce settlements judges seemed to focus on whether the parties actually agreed to and understood the agreement's terms, rather than the acceptability of the agreement's substance. *Id.* at 1145. They quote one judge as follows:

If they know what they're doing, even if it is out of line, then it is not my job to change their decision. I'll inquire to make sure they know what they are doing. I have to let them know what their options are. But I won't usually change it. I don't know if I have ever changed an amount set by the couple.

Id.

312. Several commentators have noted that the efficiency rationale underlying court affiliated alternative dispute resolution programs helps create judicial reluctance to participate, even peripherally, in the cases referred to the informal programs. See, e.g., Brunet, *supra* note 1, at 11-12.

313. Even Professor Schwartz, who argues a lawyer should temper her advocacy with a higher sense of personal morality during non-adversarial negotiations, still maintains that a lawyer should pursue client interests constrained only by unconscionability in process and substance. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978). Moreover, attorneys behave consistently with this role in dissolution of marriage cases and undermine

lawyer advocate also insulates the disadvantaged wife from her husband and prevents the tangible, intangible,³¹⁴ and sex role differences between them from dictating the terms of the agreement.³¹⁵ By forcing the husband and wife to deal directly with one another, mediation, in contrast, sharpens the wife's disadvantages. Even lawyers who might compromise their clients' concerns in order to fulfill their own interests³¹⁶ have an advocacy role and professional ethic to constrain their self-interested behaviors. The mediator, as a neutral, has no counterbalancing role or ethical prescription to mitigate the mediator's interest in obtaining an agreement irrespective of its substance. The lawyer's advocacy role thus differs markedly from mediator neutrality and offers far greater protec-

their clients' decisional autonomy by acting as non-legal and personal counsel when their clients are particularly vulnerable and in need of guidance. See Bruce W. Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389, 391-92 (1977).

The finding that claimants injured in automobile accidents recover more frequently when represented by an attorney reflects the importance of legal representation to the outcome for lesser powered individuals. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 193 (1970). This observation, of course, does not refute that the quality of legal representation will be affected by the social position and wealth of the individual client and the lawyer. It does support, though, the central theme of this section: lawyer representation, with its acknowledged deficiencies, produces better results for low power individuals than they can achieve on their own.

314. While the legal profession also is stratified, e.g., Galanter, *supra* note 8, at 116, most attorneys representing divorcing spouses come from the same or approximately equivalent strata. See *id.*

315. Cf. Brunet, *supra* note 1, at 46 (noting the importance of lawyer advocacy in balancing power between disputants).

316. For example, a personal injury specialist who repeatedly negotiates with the same insurance companies may be tempted to compromise his client's goals in a specific case in order to maximize his returns from the numerous cases he has with these companies. ROSS, *supra* note 313, at 82. The same tendency to trade away client interests has been noted in the plea bargaining behaviors of criminal defense attorneys. E.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975). However, the divorce attorney does not have the same degree of incestuous interdependency with opposing counsel as does the criminal defense attorney with the prosecutor and the personal injury specialist with the insurance adjuster. See Herbert Jacob, *The Contours of Divorce Lawyering* 9, 10 (1990) (unpublished manuscript prepared for the 1990 Meeting of the Law and Society Association, Berkeley, California, May 31 - June 3, 1990, on file with author) (found 59% of Chicago divorce lawyers confined in isolated work settings, and between 30 and 40% of them only occasionally handled a divorce case). Furthermore, the personal injury specialist as well as the criminal defense attorney is insulated relatively well from malpractice liability because few objective standards exist against which to judge negotiated outcomes. For the divorce attorney, however, the possibility of a malpractice claim is greater because some expectations flow from formal substantive law. For instance, a domestic relations attorney knows that a sixty-five year old traditional homemaker in a thirty-year marriage whose husband's income approaches or exceeds six figures is entitled to permanent alimony unless she has substantial income or assets of her own. While outcome parameters are vague for the divorce attorney, they are not as obscure as for the personal injury specialist or the criminal defense attorney. Consequently, the threat of malpractice liability should constrain a divorce lawyer's tendency to compromise client interests more than it does the personal injury or criminal defense attorney.

tion for a low power spouse.³¹⁷

Market factors provide the lawyer additional motivation to protect the low powered wife's interests. An attorney's ability to generate business turns upon whether professional peers and clients see her as competent in protecting client interests.³¹⁸ To remain in business the mediator in a court affiliated program, on the other hand, need only produce many agreements quickly. Market factors suggest then that negotiating lawyers will provide much more protection for client interests than will mediators.

In addition to role and market factors, liability for professional malpractice helps motivate the lawyer to seek legally defined client interests during negotiations. The possibility of a malpractice claim for failure to secure the wife's legal entitlement to part of her husband's pension plan, for instance, motivates the lawyer to negotiate assertively to secure that right in the divorce settlement. In contrast, the mediator, who lacks accountability for the mediated agreement's substance, will have less difficulty allowing the wife to relinquish her right to a portion of the pension plan.

The above observation invites recognition of the importance of legal rights in determining the substance of a lawyer negotiated, as opposed to a mediated, divorce agreement. Women's ability to avoid substantive law in mediation might seem attractive to a group these laws consistently have treated unfairly.³¹⁹ However, as argued throughout this article,

317. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

318. See Simon, *Ideology of Advocacy*, *supra* note 265, at 31-32. A recent study of domestic relations practice in Chicago indicates that 61% of the clients surveyed found their divorce lawyer through referral by a relative, friend or neighbor. Moreover, the divorce attorneys studied believe a significant proportion of their clients come from a combination of client and lawyer referral. Jacob, *supra* note 316, at 5.

319. I do not maintain that the formal system, either in its substantive norms or in its operation, produces justice for divorcing women and their dependent children. Quite the contrary. The economic devastation experienced by most women upon divorce contribute significantly to the impoverization of women and their dependent children. *E.g.*, HEWLETT, *supra* note 21, at 51-69; RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 27-47 (1986); WEITZMAN, *supra* note 116; Ruth A. Brandwein et al., *Women and Children Last: The Social Situation of Divorced Mothers and Their Families*, 36 J. MARRIAGE & FAM. 498 (1974); Sanford L. Braver et al., *Economic Hardship and Psychological Distress in Custodial Mothers*, J. DIVORCE, vol. 12, no. 4, 1989, at 19; Carol S. Bruch & Norma J. Wikler, *Factors Contributing to Postdivorce Poverty: Economic Consequences of Divorce*, 63 MICH. B.J. 472 (1984); Mary Corcoran, *The Economic Consequences of Marital Dissolution for Women in the Middle Years*, 5 SEX ROLES 343 (1979); Ronald D. Day & Stephen J. Bahr, *Incomes Changes Following Divorce and Remarriage*, J. DIVORCE, Spring 1986, at 75; Leslie A. Morgan, *Economic Well-Being Following Marital Termination*, 10 J. FAM. ISSUES 86 (1986). Perhaps the most commonly cited statistic comes from Lenore

movement out of a dispute resolution system in which law is relevant into an informal system where it is not limits law's ability to constrain power abuses and ensures that preexisting power disparities, rather than law, will dictate the divorce agreement's terms. In contrast, substantive legal norms form the expectations of negotiating lawyers and create a foundation from which they can begin to judge the acceptability of the negotiated agreement.³²⁰ Thus, while formal substantive law may not

Weitzman's 1977 study of the California domestic relations courts. She found that within a year of divorce women experienced a 73% decrease in their standard of living, whereas men experienced a 42% increase. WEITZMAN, *supra* note 116, at 338-39. Unsurprisingly, then, despite their steadily increasing workforce participation in the past two decades, e.g., SIDEL, *supra*, at xv (in 1950 approximately one-third of women in the United States worked outside the home, whereas by 1985 over 50% of women participated in the labor force), an increasing number of women live in poverty.

Equally troublesome is the dramatic contrast in the poverty of male and female-headed households. While during the past twenty-five years the number of poor people living in white, male-headed families has decreased significantly, *id.* at xvi, the number of poor people living in families headed by women has increased dramatically. While the families headed by women account today for only 16% of all families, they account for 48% of all poor families. And, finally, nearly 40% of the American poor are children and over half of them live in female-headed households. *Id.*; Barbara Ehrenreich, *What Makes Women Poor?*, in FOR CRYING OUT LOUD: WOMEN AND POVERTY IN THE UNITED STATES 18, 19-20 (Rochelle Lefkowitz & Ann Withorn eds., 1986). The poverty statistics for families headed by black and Hispanic women paint an even more dismal picture. SIDEL, *supra*, at xvi. Children raised in poverty have poorer health, shorter life-expectancies, dimmer educational prospects and a greater likelihood of suffering abuse and neglect than children raised in adequate material circumstances. HEWLETT, *supra* note 21, at 109-10. See also Sara McLanahan, *Family Structure and the Reproduction of Poverty*, 90 AM. J. SOC. 873 (1985) (the economic deprivation and the stress of family disruption commonly associated with growing up in a female-headed family increases the risk of offspring's lower educational attainment at adulthood).

Rather than provide divorcing women and their dependent children with substantive justice, the traditional dispute resolution process has helped create a significant social problem. The assertion in this article that divorce mediation will exacerbate this problem should prompt significant concern. I am aware of the argument that procedural changes cannot result in better substantive outcomes for the disadvantaged as long as power differences between adversaries remain the same. See, e.g., Galanter, *supra* note 8. This attitude, however, encourages a dangerous complacency when procedural changes like mediation occur and ignores the interdependency of procedure and substantive outcomes. Professor Galanter may well be correct that procedural changes cannot "better" outcomes for the less powerful, but that does not negate the argument made here that procedural changes can severely disadvantage the already disadvantaged. Moreover, the switch to mediation is not merely a procedural change: the nonrelevance of law in mediation makes the switch substantive as well as procedural.

320. In their study of lawyer negotiation of divorce settlements in Dane County, Wisconsin, Melli, Erlanger and Chambliss note:

In our interviews, there was evidence consistent with this conventional view of the importance of the courts. Parties who settled were clearly influenced by their lawyers' predictions of how the court would decide. One husband, who was reluctant to settle because he thought the settlement was unfair, gave in based upon his attorney's advice: I told [my lawyer] a number of times how I felt, but he pulls out a stack of law statutes and law books and says, "the judge is going to look at or take that into consideration." That came up a number of times . . . she had a right to ask for it or a right to collect it.

reflect true distributive justice for divorcing women, because of power disparities and the lack of meaningful safeguards in mediation women will obtain more advantageous outcomes when negotiating lawyers rely on law than when mediators rely on vague and biased equity norms.

V. CONCLUSION

Today custody law still favors women and recent reforms in family law create new economic rights for divorcing women. Lawyers negotiating divorce settlements concern themselves with implementing these legal entitlements. Mediation proponents believe the lawyer's focus on rights generates hostility among divorcing parties and unnecessarily infringes upon the couple's right to order their post divorce lives. In contrast they maintain mediation preserves relationships, empowers the parties, and generates good feelings. Legal rights fade into the shadows of informality.

This shift in focus from rights to relatedness, however, endangers divorcing women and reinforces male dominance. Mediation proponents seductively appeal to women's socialized values by speaking softly of relatedness. Yet mediation exploits wives by denigrating their legal entitlements, stripping them of authority, encouraging unwarranted compromise, isolating them from needed support, and placing them across the table from their more powerful husbands and demanding that they fend for themselves. The process thus perpetuates patriarchy by freeing men to use their power to gain greater control over children, to implant more awareness of male dominance into women's consciousness, and to retain more of the marital financial assets than men would obtain if lawyers negotiated divorce agreements.

The insidious nature of mediation for divorcing women, though, remains hidden beneath its carefully crafted marketing rhetoric. This article looks beneath that rhetoric. The effects upon women of the political agenda disclosed should inspire critical debate on the propriety of divorce mediation. At the very least those who structure court affiliated programs, as well as mediators, now should recognize their complicity in the continued oppression of women and their dependent children.

Melli et al., *supra* note 4, at 1143-44 (alteration in original). See also Brunet, *supra* note 1, at 25 (indicating the importance of law to the lawyer in assessing the likelihood of client success).

