



January 2005

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Recommended Citation

Klein, Karen K. (2005) "A Judicial Mediator's Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice," *North Dakota Law Review*: Vol. 81 : No. 4 , Article 5.
Available at: <https://commons.und.edu/ndlr/vol81/iss4/5>

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A JUDICIAL MEDIATOR'S PERSPECTIVE: THE IMPACT OF GENDER ON DISPUTE RESOLUTION: MEDIATION AS A DIFFERENT VOICE

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I. INTRODUCTION

Over the past twenty years, mediation has become a commonplace and increasingly preferred avenue for resolution of legal disputes.¹ During the same time period, the number of women engaged in the practice of law as litigators, corporate litigation supervisors, and judges has increased dramatically.² Are these two developments coincidental, or has the growing presence of women in the legal profession caused, or at least impacted, the rise of mediation? This article explores the potential relationship between these growing phenomena in the context of Carol Gilligan's premise, set forth in her book *In a Different Voice*,³ that women tend to take a relational, care-based approach to resolving conflicts, while men tend to take an individualist, rights-based approach to conflict resolution.

At the outset, I acknowledge there are no empirical studies making the connection between the increasing presence of women in the law and the rise of mediation. Without such evidence, my conclusions necessarily rest on my own experiential impressions and on the observations of other commentators. I am well aware of the dangers in over-generalizing the role of

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I thank my law clerk, Laurel R. Hanson, and Sarah Hradek, intern to Hon. Celeste F. Bremer, U.S. Magistrate Judge for the Southern District of Iowa, for their invaluable assistance in researching and editing this article. I also wish to express my appreciation to Judge Bremer and her law clerk, Nancy O'Brien, for their helpful comments.

1. This shift from adjudication to mediation has prompted some judges and commentators to bemoan the "vanishing trial." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* 78 (ABA Litig. Sec. Symposium on the Vanishing Trial, December 12-14, 2003), available at <http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf>.

2. In 1985, women comprised 13% of the legal profession. AMERICAN BAR ASSOCIATION, *FACTS ABOUT WOMEN AND THE LAW* 1 (1998), available at <http://www.abanet.org/media/factbooks/womenlaw.pdf>. As of 2001, that percentage had risen to almost 30%, and by 2010, the percentage of women lawyers is expected to reach 40%. AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *THE UNFINISHED AGENDA: WOMEN IN THE LEGAL PROFESSION* 13 (2001) (hereinafter ABA UNFINISHED AGENDA).

3. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (Harvard Univ. Press 1993) (1982).

gender, and I do not wish to exaggerate gender as a factor. Yet, Gilligan's work does suggest a rough correlation between gender and approach to problem solving.

This article considers the symmetry of the ethic of care identified by Gilligan with facilitative mediation of legal disputes. First, I summarize Gilligan's work in defining two moral perspectives, or "voices." Then, I review the impediments that the adversarial system presents to those lawyers who prefer a care orientation, most of whom, according to Gilligan, are women. Next, I summarize the growth of mediation in the law, the nature of the mediation process, and the relationship between mediator style and moral perspective. I also consider the scope of mediation compared with the scope of litigation and the cooperative style of negotiation compared with traditional negotiation. In conclusion, I observe that mediation, at least in its facilitative form, reflects Gilligan's relational, care-oriented model, and that the presence of women in the legal profession has indeed impacted the growing preference for resolving legal disputes through mediation.

II. CAROL GILLIGAN'S ETHIC OF RIGHTS/ETHIC OF CARE THEORY

A. BACKGROUND OF GILLIGAN'S *IN A DIFFERENT VOICE*

Carol Gilligan began her research into the moral development of women in the early 1970s following the United States Supreme Court decision in *Roe v. Wade*.⁴ The topic appealed to Gilligan⁵ because the *Roe v. Wade* decision "made it legal for a woman to speak for herself and awarded women the deciding voice in a complex matter of relationship which involved responsibility for life and for death."⁶ She undertook the first reported study to approach moral theory through an analysis of

4. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

5. Interestingly, Gilligan came to this subject somewhat through default. In her pursuit of a field involving moral conflict that was real, not hypothetical, she had undertaken a study of Harvard students facing the draft for the Vietnam War, when President Nixon announced the termination of the draft and pulled U.S. troops out of Vietnam. As Gilligan says, "There went my study." *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 37 (1985) [hereinafter *Mitchell Lecture*] (remarks of Carol Gilligan). As she searched for another study topic involving judgment and action, the Supreme Court decided *Roe v. Wade*. Though she acknowledges her thinking was influenced by the growing women's movement, Gilligan turned to the topic without giving consideration to the fact that it would involve a study group of women only. *Id.*

6. GILLIGAN, *supra* note 3, at ix.

women's language and thought.⁷ As she interviewed pregnant women weighing the decision whether to have an abortion,⁸ Gilligan noticed they did not speak of their moral dilemma in adversarial terms—self versus fetus—consistent with public discussion of abortion. Rather, they spoke about their interdependence and connection with the fetus.⁹ They felt it would be “selfish” to speak just for themselves.¹⁰

In addition to the “abortion decision study,” Gilligan performed two other significant studies, the “college student study”¹¹ and the “rights and responsibilities study.”¹² All three studies reflected Gilligan's assumption that “the way people talk about their lives is of significance, [and] that the language [that] they use and the connections they make reveal the world that they see and in which they act.”¹³ Her research led her to the conclusion that people speak or think from two separate moral perspectives. She documented “a different moral voice in the decision-making processes”¹⁴ of the women she interviewed.

This “different voice”¹⁵ represented a departure from the moral perspective and expected moral development observed in studies conducted by other psychologists dating back to Sigmund Freud.¹⁶ Notably, those earlier studies were limited to male subjects, and the psychologists' conclusions about moral development reflected that limitation. Gilligan drew a connection between the lack of female subjects included in the critical studies underlying existing psychological theory and the problems she had encountered in interpreting women's moral development during years of teaching and studying.¹⁷ Gilligan did not accept the premise of prior theory-building

7. *Mitchell Lecture*, *supra* note 5, at 46 (remarks of Carol Gilligan).

8. See GILLIGAN, *supra* note 3, at 72. The study involved twenty-nine women from different backgrounds, interviewed during their first trimester of pregnancy and again at the end of the following year. Of the twenty-nine women, four decided to have the baby, two suffered miscarriages, and two could not be contacted after the initial interview. *Id.*

9. *Mitchell Lecture*, *supra* note 5, at 38 (remarks of Carol Gilligan).

10. GILLIGAN, *supra* note 3, at ix.

11. *Id.* at 2. The college student study involved twenty-five college students enrolled in a course on moral and political choice. They were interviewed during their sophomore and senior years, and then again five years after graduation. *Id.*

12. *Id.* at 3. In the rights and responsibility study, researchers sampled 144 “males and females matched for age, intelligence, education, and social class at nine points across the life cycle” about their concepts of morality and self, and their reactions to hypothetical moral dilemmas. *Id.*

13. *Id.* at 2.

14. *Mitchell Lecture*, *supra* note 5, at 36 (remarks of Paul J. Spiegelman, moderator).

15. “Voice” is “a metaphor that can apply to many aspects of women's experience and development.” MARY FIELD BELENKY, ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* 18 (1986).

16. *Id.* at 22.

17. *Id.* at 1.

research that women fail to follow the recognized pattern of moral development. She posited that women were not failing in moral development; rather, the research itself failed by not including women.¹⁸

Gilligan's work is not about gender. Its focus is on perspectives, or ways of moral thought, in dealing with conflict. Her work's association with gender comes through her empirical observations, but that association is not absolute.¹⁹ She did not compare women with men; rather she compared women with existing theory.²⁰ The "different voice" she observed stemmed from the very connection of the women subjects to others, for instance, connection to the fetus in the abortion study.²¹

This "different voice" appeared in Gilligan's other studies as well. One of those studies, the rights and responsibility study, has particular application to the practice of law and legal dispute resolution, although Gilligan did not approach her work from a legal perspective.²²

B. RECOGNITION OF AN ETHIC OF CARE

In the rights and responsibility study, two eleven-year-old children, a boy and a girl from the same school class, were asked to resolve a classic moral dilemma constructed by Lawrence Kohlberg to measure moral development.²³ The hypothetical involved a man named Heinz considering whether to steal from a pharmacy a drug he could not afford to buy in order to save the life of his ailing wife. Each child was asked whether Heinz should steal the drug.

The boy, Jake, answered in classic moral theory fashion by weighing the value of the wife's life against the druggist's property, concluding that Heinz should steal the drug because "a human life is worth more than money."²⁴ Essentially, Jake viewed the situation as "a math problem with humans" in which he arrived at his solution through logic.²⁵ Though stealing is ordinarily a crime, the law had not contemplated this situation, and Heinz was justified in stealing under the circumstances.²⁶

18. *Id.* at 2.

19. *Id.*

20. *Mitchell Lecture*, *supra* note 5, at 38 (remarks of Carol Gilligan).

21. *Id.*

22. *Id.* at 36. Gilligan's work has "provided important methodological precepts for rethinking disciplines and institutions generally, and law, in particular." Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 48 (1990).

23. GILLIGAN, *supra* note 3, at 25.

24. *Id.* at 26.

25. *Id.*

26. *Id.*

The girl, Amy, approached the problem from the perspective of the relationships among the individuals. She concluded that Heinz should not steal the drug, reasoning, "I think that there might be other ways besides stealing it, like if he could borrow the money or make a loan or something, but he really shouldn't steal the drug—but his wife shouldn't die either."²⁷ When asked why Heinz should not steal the drug, Amy replied,

If he stole the drug, he might save [the life of] his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So they [Heinz and the druggist] should really just talk it out and find some other way to make the money.²⁸

The responses given by Jake and Amy illustrate the main premise of Gilligan's work: people operate either from a morality of rights²⁹ or from a morality of care, or responsibility.³⁰ Jake represents the ethic of rights, a logical, hierarchical, impersonal perspective. This perspective places the world in relation to self, with one's own self viewed as foremost and as separate from others. Problem solving in this moral perspective occurs through application of abstract, objective rules. Amy represents the ethic of care, a connected, nonhierarchical, relationship-centered approach, with a contextual perspective. Such an approach places self in relation to the world, which is viewed as a web of relationships to be preserved. The rights perspective prioritizes rules over relationships, and the care perspective would change the rules in order to preserve relationships.³¹

Gilligan observed that men tend to exhibit a rights perspective, and more women than men exhibit a care perspective,³² but she specifically noted that these perspectives are not gender specific.³³ A small percentage

27. *Id.* at 28.

28. *Id.*

29. GILLIGAN, *supra* note 3, at 167. Gilligan alternatively called the ethic of rights the "ethic of justice." *Id.* Some commentators object to use of the term ethic of justice to describe this perspective because "[b]oth ethics seek justice," yet the label suggests the rights perspective approaches justice more closely than the care perspective. Bender, *supra* note 22, at 36-37 and 37 n.89.

30. GILLIGAN, *supra* note 3, at 164.

31. *Id.* at 164-65.

32. *Mitchell Lecture*, *supra* note 5, at 48 (remarks of Carol Gilligan). This finding can be misleading. Gilligan does not state that most women choose a care orientation, only that women exhibit that perspective more often than men. It is the male preference for the rights perspective, not a female preference for the care perspective, that has led many commentators to over-generalize by calling the perspectives male and female. See Naomi R. Cahn, *Theoretics of Practice: The Integration of Progressive Thought and Action: Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1152 (1992).

33. GILLIGAN, *supra* note 3, at 2. Law review commentators have tended to equate Gilligan's ethic of rights/ethic of care distinction as strictly male and female, resulting in

of men in her studies exhibited a preference for the care perspective, and a significant percentage of women preferentially showed a rights perspective.³⁴ In addition, Gilligan found that “most people, male and female, represent both voices in defining and resolving moral problems,”³⁵ though we may demonstrate “a very strong tendency to focus on one voice or another,”³⁶ with lesser presence of the other perspective.

I recognize in my own reading of Gilligan’s work, and in the commentary of others who have written about her theories, a temptation to use gender as shorthand which thereby over-generalizes her findings. Such over-generalization exaggerates the role of gender in her theoretical models and creates a danger of misconstruction.³⁷ Gilligan’s theoretical framework is *associated* with gender through the tendencies shown by her studies, but her work is not *based* on gender.

Gender, in any event, is a less than homogeneous category. There are as many or more differences between persons of the same gender as between persons of different genders.³⁸ Not every woman shares a particular trait, and not every person who has that trait is a woman; the same is true for men.³⁹ Yet, patterns emerge from Gilligan’s work that illuminate the consideration of moral perspective in the law.⁴⁰

considerable criticism that its focus on gender “differences” will only serve to perpetuate “women’s subordination.” Bender, *supra* note 22, at 39 (citing Catharine MacKinnon’s remarks from *Mitchell Lecture*, *supra* note 5). Bender has recognized such criticism as stemming from “oversimplified” and “vulgarized” analysis of Gilligan’s work. *Id.* at 16-17. Naomi Cahn recognizes that society has constructed gender stereotypes which are neither “universally valid, or even accurate constructions” of particular individuals. Cahn, *supra* note 32, at 1141.

34. One of Gilligan’s studies showed that when women focused strongly on only one perspective, they split evenly in choosing an ethic of rights and an ethic of care. Men almost unanimously chose the rights perspective. GILLIGAN, *supra* note 3, at 25. *See also* Cahn, *supra* note 32, at 1052 (citing Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN* 73, 81 (Carol Gilligan et al. eds., 1990)).

35. *Mitchell Lecture*, *supra* note 5, at 47 (remarks of Carol Gilligan).

36. *Id.*

37. Gilligan’s work, when viewed in a gender context, has attracted opposing camps of criticism, with one side arguing her theories of gender difference perpetuate the devaluation and subordination of women, and the other side arguing that she advocates women are morally superior because of their differences. *See generally* Bender, *supra* note 22, (discussing various critiques). Gilligan herself cringes at the association of her work with such inquiries as whether women and men really are different, whether any differences are a matter of nature or nurture, and whether women are better than men or worse than men. Gilligan reveals that when she hears such questions, “I know that I have lost my voice, because these are not my questions. Instead, my questions are about our perceptions of reality and truth: how we know [what we know], how we hear, how we see, how we speak. My questions are about voice and relationship.” GILLIGAN, *supra* note 3, at xiii.

38. ABA UNFINISHED AGENDA, *supra* note 2, at 30 (citing psychological research).

39. Bender, *supra* note 22, at 29.

40. *Id.* at 7, 25-26. The loose relationship between gender and moral perspective identified in Gilligan’s work is often attributed primarily to socialization patterns in our society, not to biological factors. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism*,

III. CARE-ORIENTED LAWYERS AND THE ADVERSARIAL SYSTEM

Women lawyers, like women generally, presumably exhibit a care-oriented morality more often than their male counterparts. As care-oriented people, these women lawyers use relational reasoning, through which they approach problem solving from a contextual, connected perspective. This value system often conflicts with their professional training.

Both legal education and the practice of law have traditionally focused on rights, not on people or the relationships among them.⁴¹ In its resolution of conflict, the law stresses order and ignores human connection and emotion.⁴² As students are educated in the law and its practice, they are taught to "think like lawyers."⁴³ Historically, this has meant educating lawyers to think from an ethic-of-rights perspective, approaching problems with detached objectivity, applying rules and screening out other concerns, including emotion, as irrelevant.⁴⁴ Law students are bright people; they can master the exercise of analytical skills, advocacy skills, and practical skills, such as negotiation, from the perspective in which they are trained, whether or not that perspective is their preferential moral base. Once students graduate, they generally begin the practice of law under the guidance of one or more lawyers experienced in the adversarial mode of practice. Consequently, they are socialized to adopt a professional style compatible with the prevailing rights-based system.⁴⁵ Whether they are comfortable with this style or not is another question.

Lawyers who naturally prefer a rights-based morality find the adjustment to their professional role relatively easy, but those who reason primarily through a morality of care experience tension between their

and Legal Ethics, 2 VA. J. SOC. POL'Y & L. 75, 83 (1994) [hereinafter *Portia Redux*]. Girls are socialized through connection to please and accommodate others, to listen and to show patience and empathy. Boys, on the other hand, are socialized through separation to behave more individually. Bender posits that instead of girls' relational socialization being viewed a problem in the way we raise girls, "it is equally plausible that an ethic of care is a part of being human that was inappropriately suppressed in men, rather than inappropriately encouraged in women." Bender, *supra* note 22, at 42.

41. THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* 192 (2004).

42. Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCH. PUB. POL'Y & L. 921, 927 (1999).

43. The demands of legal education and the professional role generally "trump gender patterns in moral reasoning." *Portia Redux*, *supra* note 40, at 96.

44. Mary Jo Eyster, *Clinical Teaching, Ethical Negotiation, and Moral Judgment*, 75 NEB. L. REV. 752, 756 (1996).

45. ABA UNFINISHED AGENDA, *supra* note 2, at 30.

personal values and normalized professional expectations.⁴⁶ As they develop a professional style, care-oriented lawyers must choose between focusing on their preferred morality of care or on the moral perspective valued by the profession. The majority of women in one study of law students admitted feeling pressure to set aside their own values in order to conform to the adversarial model.⁴⁷ If they choose to remain true to themselves and exhibit a morality of care as their professional style, rather than conforming to the prevailing rights-based model of lawyering, they must practice essentially as outsiders. Many choose instead to portray themselves in the traditional norm, emphasizing their morality-of-rights side in their professional reasoning,⁴⁸ which requires them to suppress their "voice of care."⁴⁹ They "often feel unheard even when they believe that they have something important to say."⁵⁰ This suppression relegates their care perspective to the role of conscience, which causes them inner conflict.⁵¹ They find it difficult to reconcile their professional face with their personal values.⁵² The two perspectives exist in fundamental tension with one another, and the adversarial system does not easily accommodate both voices.⁵³

Care-oriented lawyers may find the litigation environment overly competitive and disconnected from the clients and their needs. A trial lawyer is expected to analyze the merits and value of the client's position from a legal standpoint and, perhaps, from a financial standpoint, but not usually from an emotional standpoint. The lawyer presents the client's legal position to the court, usually without addressing or understanding the client's emotional needs. Knowing that trial is a highly unlikely event in contemporary

46. Jennifer A. Freyer, Note, *Women Litigators in Search of a Care-oriented Judicial System*, 4 AM. U. J. GENDER & LAW 199, 200-01 (1995).

47. Cahn, *supra* note 32, at 1051 (citing Suzanne Homer and Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1990)). Significant numbers of women lawyers have chosen career paths that avoid the confrontational litigation environment, and among those who have entered litigation practice, many have left it out of frustration. *Id.* at 1045. David Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 261 (1989) (discussing a 1989 study of University of Michigan law graduates which showed that five years after graduation, 70 percent of men worked in private practice, but only 44 percent of women were in private practice).

48. Freyer, *supra* note 46, at 201, 214-15.

49. Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337, 369 (1989-1990).

50. BELENKY, *supra* note 15, at 5.

51. Many litigators struggle to maintain the drive to "win" that the adversary system requires. Care-oriented lawyers, in particular, are torn by their lifelong concern for the impact of their actions on others. Freyer, *supra* note 46, at 209.

52. Freyer, *supra* note 46, at 203.

53. *Mitchell Lecture*, *supra* note 5, at 48 (remarks of Carol Gilligan).

civil litigation, the lawyer nevertheless communicates to the court and adverse counsel an expectation that the case will be tried. Also, rather than taking the initiative to raise the issue of settlement and risk appearing weak, a litigator often waits for the other lawyer to broach the subject.⁵⁴ The two lawyers then negotiate with one another in a guarded fashion, trying to discover each other's strategy without revealing their own strategy.

Clients are rarely involved in the litigation process, unless they must testify at a deposition or trial. They do not participate directly in traditional settlement negotiations between the lawyers. Clients' motivations and the origin of the dispute usually go unexplored.⁵⁵ When they do testify, litigants often leave the courthouse feeling as though no one has listened to them.⁵⁶ Their rights may be vindicated through trial, but at the conclusion, they are probably suffering financially, as well as emotionally.⁵⁷ Litigation never satisfies both parties; the outcome is win-lose, or, in some cases, lose-lose.

The adversarial process, and the style of practice just described, embodies the ethic of rights model and serves as the antithesis of the ethic of care. As women have entered the profession in growing numbers, many of them, joined increasingly by men, have expressed dissatisfaction with the confrontational, competitive, client-distancing and client-disenfranchising nature of the adversarial process.⁵⁸ Their frustration with the adversarial nature of litigation and their concern for their lack of connection with their clients has led such lawyers to call for a more care-oriented approach to law practice,⁵⁹ with less confrontation and better client relationships.⁶⁰

54. Eyster, *supra* note 44, at 759-60.

55. Barton, *supra* note 42, at 930.

56. Thane Rosenbaum, a novelist, essayist and law professor, remarks:

Oftentimes a trial is just a show trial. . . . The injured person is only patronizingly allowed to say his piece, if at all, while everyone in the courtroom is doodling or day-dreaming, or staring at the clock, or biding time until recess. The official hearing is not accompanied by parallel listening. . . . [L]awyers remain inured to both our words, and our screams.

ROSENBAUM, *supra* note 41, at 63.

57. The law, "focused on the external world of observable human conduct rather than on the labyrinths of interior pain," does not know or account for "the emotional history of hurts, grievances, and motives that explains how citizens come to, or are brought to, the law in the first place." *Id.* at 7.

58. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 44-45 (1987) [hereinafter *Excluded Voices*].

59. Amy Cohen, Note, *Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis?*, 13 TEX. J. WOMEN & L. 169, 169 (2003). Care-oriented law practice is intended to benefit men as well as women, freeing them to express both voices. Hill, *supra* note 49, at 369.

60. Carrie Menkel-Meadow, *The Future of the Legal Profession: Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of*

Advocates of a care-centered style of lawyering have urged development of dispute resolution processes that are not based in adversarial, competitive, winner-take-all models.⁶¹ They prefer “reconciliation of different positions, rather than choice between them.”⁶²

Recalling Gilligan’s interview with Amy, who suggested a relationship-oriented solution, “we can imagine a structure in which the parties might talk to each other, we can imagine a structure in which the parties might be asked to sit down and talk about whether the drug should be stolen or financed in some other way.”⁶³ One process that has the potential to meet these criteria is mediation.⁶⁴

IV. MEDIATION: ITS NATURE AND GROWTH

A. THE RISE OF MEDIATION

Just as women began entering the legal profession in significant numbers, mediation was gaining recognition as a viable process for resolving legal disputes.⁶⁵ Generally, the initial impetus for alternative forms of dispute resolution, including mediation, was the expense and delay encountered by litigants in the courts,⁶⁶ but it also stemmed from alternate dispute resolution’s (ADR’s) “less absolutist approach.”⁶⁷ In the ensuing thirty years, mediation has become institutionalized in our court systems and in the private market.⁶⁸

Lawyering, 44 CASE W. RES. L. REV. 621, 639-40(1994) [hereinafter *Culture Clash*]; Bender, *supra* note 22, at 46.

61. Bender, *supra* note 22, at 46.

62. Hill, *supra* note 49, at 342.

63. *Mitchell Lecture*, *supra* note 5, at 53 (remarks of Carrie Menkel-Meadow).

64. *Id.*

65. See Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution*, PSYCHOL. PUB. POL’Y & L. 1084, 1085 (1999) (explaining that mediation and other forms of alternative dispute resolution (ADR) grew out of the 1976 Roscoe Pound Conference, which focused on the shortcomings of the adversarial system).

66. See Civil Justice Reform Act, 28 U.S.C. § 471 (1990) (requiring each federal district court to conduct a study of its civil justice process and implement a civil justice expense and delay reduction plan designed to “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”). The Act specifically required each court to consider ADR as a component of its expense and reduction plan. 28 U.S.C. § 473(b) (1990). The subsequent ADR Act of 1998 requires each United States district court to offer at least one form of ADR. See 28 U.S.C. § 651 (1998).

67. Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 307 (2003).

68. Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 327 (2003).

Critics of mediation express regret about the movement away from the certainty and transparency of court-adjudicated resolutions and bemoan the "vanishing trial."⁶⁹ Advocates of mediation express concern about the purity of mediation being diluted through its close connection with the court system. They fear that through this association, mediation has become more focused on rights, like adjudication, and less of a client-powered resolution process.⁷⁰ These criticisms aside, mediation has become a significant area of the practice of law, and it is effecting changes in the judiciary's own conception of its dispute resolution role.⁷¹

B. THE MEDIATION PROCESS

Mediation is a fluid, "dialogue-centered process"⁷² in which a neutral third party facilitates communication between two or more disputing parties.⁷³ The process is confidential, informal and generally voluntary, although some court ADR programs do mandate participation in mediation.⁷⁴ The defining aspect is that the mediator lacks the power to impose a resolution or bind the parties to a settlement agreement.⁷⁵ Mediation differs from traditional negotiation not only in the involvement of a neutral third party, but in the presence and participation of the disputing parties. The parties are actively involved in the mediation process.

A mediation session generally involves the mediator meeting with both parties, together with their counsel, if the parties are represented. It may also include a series of caucus sessions during which the mediator meets separately with one party and then the other. In the mediation process, the parties have an opportunity to "tell their stories."⁷⁶ They may do so during the joint session, but often they wait until the caucus to reveal information about their position, their feelings, and their "authentic concerns."⁷⁷

69. See generally Galanter, *supra* note 1, at 1 (discussing the decline in courtroom trials).

70. Phipps Senft & Savage, *supra* note 68, at 328.

71. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 195-96 (2003); Phipps Senft & Savage, *supra* note 68, at 333.

72. ROSENBAUM, *supra* note 41, at 243.

73. Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 460 (2001).

74. *Id.*; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991).

75. Michelle R. Evans, Note, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 145, 150 (2001).

76. McCabe, *supra* note 73, at 462.

77. *Id.*

Mediation offers the parties “voice and choice,” the freedom to “speak freely without constraints and rules” and to choose their own resolution.⁷⁸

The mediator plays an assisting role; the authority to settle belongs to the disputing parties. In the process, the mediator engages the parties in a search for a resolution acceptable to all. The mediator will gather information from the parties, listen to their “stories,” allow them to “vent” their frustrations, and watch for obstacles as well as avenues to settlement. Mediation has been called an archeological process, because the mediator looks for motivations and solutions that are below the surface.⁷⁹ A good mediator will defuse the air of mistrust and competition, and move the parties beyond the dispute toward resolution.

Settlement is the goal, but a successful mediation is not necessarily limited to one that achieves settlement. While settlement is clearly important to the participants, research suggests that “most important is the quality of the interaction at the mediation, including being respected, being understood, being able to face the other person and talk or to have questions addressed, and the responsiveness of the other person(s).”⁸⁰

My own experience as a judicial mediator over the past twenty years bears this out. A number of lawyers following mediation sessions have told me that their clients derive more satisfaction from mediation before a judge than they do from trial. These lawyers have remarked that their clients experience real benefit from conversing directly with a judge and the other party. They feel someone has really listened to them. The clients feel their emotional pain has been validated through the mediation process, and they begin a healing process which moves them beyond the dispute to reclaim their lives. This kind of feedback suggests the real benefit of mediation is

78. Phipps Senft & Savage, *supra* note 68, at 334.

79. KENNETH CLOKE AND JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT: STORIES OF TRANSFORMATION AND FORGIVENESS* 7 (2000).

80. Phipps Senft & Savage, *supra* note 68, at 335. Phipps Senft and Savage refer to the “core value” of mediation as “voice and choice,” the opportunity to speak in one’s own words and to choose to listen to the other party. *Id.* at 334. They list settlement as only one of a number of valuable outcomes:

Other positive outcomes include: the ability to speak, to be heard, and to talk about what may be irrelevant in the litigation process, but very important to parties; narrowing of important issues; clarity about what is most important to the participants; freer more unfettered conversation between the participants; better understanding of those involved and their situations; good faith restored; reputation and stature strengthened; and agreements based on genuine terms created by the participants, both pecuniary and non-monetary. The core value of mediation could be fulfilled even without complete or total settlement, if in fact that is what the parties genuinely decided was the best course to take. The core value of mediation could also be fulfilled even if the parties decide it is best if the case continues through the litigation system, and the judicial system determines the legal outcome.

Id.

in the client's telling of his or her story, and not in the client sensing he or she has achieved a better outcome than the other party.

C. MEDIATOR STYLES AND MORAL PERSPECTIVE

Leonard Riskin has identified two basic mediator styles: evaluative and facilitative.⁸¹ An evaluative mediator will guide the parties overtly by offering comments and opinions on the substantive outcome.⁸² A facilitative mediator tries to clarify and improve communication between the parties without injecting into the process the mediator's personal views on the substantive outcome,⁸³ but a facilitative mediator "routinely offers both advice and substantive direction on matters of process."⁸⁴ A third style of mediation, transformative, is often described as akin to facilitative mediation.⁸⁵ Transformative mediation utilizes the same format as facilitative mediation, but it focuses on the parties and their relationship, not on settlement of the dispute.⁸⁶

Riskin has also identified two approaches to the scope of mediation: narrow and broad.⁸⁷ A narrow mediator will confine the discussion to the legal dispute. A broad mediator will address the parties' interests, needs, and motivations, although such factors are beyond the scope of the disputed legal issues. Evaluative mediators tend to utilize a narrow approach, and facilitative mediators tend to take a broad approach.⁸⁸ Evaluative mediation, with its narrow approach, is law-based, focusing on the parties' relative strengths and weaknesses on the issues in dispute. Facilitative

81. See generally Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996).

82. Hensler, *supra* note 71, at 189. "[T]he [evaluative] mediator may 'reality test' a proposed resolution, questioning the parties as to whether or not a proposed settlement suits the parties' wishes; make predictions as to the outcome of the resolution; and advise the parties." Evans, *supra* note 75, at 173-74.

83. Hensler, *supra* note 71, at 189.

84. Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 112 n.4 (2002).

85. Larry Spain and Kristine Paronica, *Considerations for Mediation and Alternative Dispute Resolution in North Dakota*, 77 N.D. L. REV. 391, 399 (2001). Because this article focuses on resolution of litigated disputes, I mention transformative mediation only in passing.

86. Riskin, *supra* note 81, at 23-24. A transformative mediator raises opportunities for the parties to feel empowered and more self-aware, and to recognize one another's views. Spain & Paronica, *supra* note 85, at 399. Through this process, the parties and their relationship improve, and "[s]ettlement takes care of itself." Baruch Bush, *supra* note 84, at 112 n.4.

87. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 8 (2003). Riskin notes that he would prefer the terms "directive" and "elicitive" to "evaluative" and "facilitative," in part because they better convey the goal of his original continuum, which focused on the impact of the mediator's behavior. *Id.* at 30.

88. *Id.*

mediation is more contextual, taking into consideration the parties' interests and needs, not just their legal positions. Facilitation requires more patience and more listening⁸⁹ than evaluation, and it demands that the mediator afford the parties more leeway in the content, tone, and result of the discussion.

Most advocates of mediation consider the facilitative approach as the only "true" form of mediation, favoring it because the facilitative model embraces the historical and policy goals associated with mediation.⁹⁰ They charge that the evaluative approach destroys neutrality and the "rapport necessary for truly productive interaction."⁹¹ The facilitative approach, by allowing participants to make their own evaluations and decisions, promotes confidence and feelings of empowerment, which may help them cope constructively with conflicts in the future.⁹²

Gender is often correlated with mediator style.⁹³ Men are perceived as competitive and goal-oriented, and thus are presumed to be better suited for an evaluative narrow approach to mediation. Women, viewed as more nurturing and more responsive to emotional tones, are presumed to be better suited for facilitative/broad mediation. Females are credited with personality traits such as patience, empathy and willingness to listen,⁹⁴ which better prepare them to mediate facilitatively.⁹⁵

My experience as a teacher of mediation skills for judges is consistent with these generalizations.⁹⁶ Most male judges favor the evaluative approach. Female judges use evaluative techniques too, but they do not favor evaluation as heavily as males.⁹⁷ Judges tend to gravitate toward evaluation naturally, as a result of their adjudicatory roles.⁹⁸ Also, the lawyers and parties involved in a judge-hosted mediation usually want—or say they

89. "Listening is part of the healing process—for everyone." ROSENBAUM, *supra* note 41, at 230.

90. Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 990 (1997); Hensler, *supra* note 71, at 189.

91. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 157 (1998).

92. *Id.* at 164.

93. David Maxwell, *Gender Differences in Mediation Style and their Impact on Mediator Effectiveness*, 9 MEDIATION Q. 353, 362 (1992). The connection Maxwell draws between gender and mediation style is "admittedly hypothetical." *Id.*

94. Cahn, *supra* note 32, at 1065.

95. Maxwell, *supra* note, 93 at 362.

96. The following observations are based on my experience as a faculty member at several Federal Judicial Center Mediation Skills Workshops for federal judges.

97. Federal judges who attend the Federal Judicial Center Mediation Skills Workshop usually complete a Riskin style mediation exercise.

98. This is another example of professional norm trumping individual preference in moral reasoning. *Portia Redux*, *supra* note 40, at 96.

want—to hear an evaluation from the judge, albeit only a favorable evaluation, and most judges reportedly accommodate this desire for evaluation. Women judges are generally more willing to try facilitation, and are often better at it, although this is not universal.⁹⁹ When judges do learn the facilitative approach,¹⁰⁰ they tend to use both approaches,¹⁰¹ usually starting a mediation in the facilitative mode and switching to the evaluative mode as needed if the parties approach impasse.¹⁰² Female judge mediators report they tend to stay with the facilitative approach longer into a session than male judges do.¹⁰³ In the private sector, gender stereotypes seem to influence the parties' selection of mediators. On a national level, men are almost universally chosen to mediate large disaster and mass tort disputes.¹⁰⁴ For practical reasons, such as the lack of time or lack of opportunity to address individual interests, mediation of class actions or other disputes involving a large number of claims tend to involve an evaluative model. Males are also commonly chosen to mediate business disputes. The evaluative style is typically used to mediate business disputes because most participants presume such disputes involve only money. The parties and lawyers often overlook the opportunity mediation presents to repair or build a relationship for the future.

The difference between gender stereotypes in mediation style is most crucial when the parties have shared a long-term or ongoing relationship. Family disputes, for instance, require consideration of the parties' emotions and the nature of their future relationship, so facilitative mediation is best suited for such conflicts. Women tend to predominate mediation of family law disputes, presumably because of the emotionally-charged dynamics and relationship issues.

99. Some male judges have demonstrated excellent facilitative skills, and some females have shown a strong evaluative bent.

100. In the federal judiciary, mediation instruction for judges focuses on development of facilitative skills because of the tendency of judges to gravitate naturally to an evaluative mode.

101. This fluidity has prompted a description of mediation as an "eclectic" process. Stempel, *supra* note 67, at 321.

102. I, along with other judges participating in Federal Judicial Center Mediation Skills Workshops, tend to use this facilitative-to-evaluative approach when mediating.

103. Some writings opine that most female judges, while operating within their judicial roles, "engage in contextual analysis, consider a broad range of factors, and tie their decisions less to arbitrary rules than to flexible standards," suggesting an adjudicatory approach that is more closely identified with the ethic of care than the ethic of rights. Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 891 (1995). This adjudicatory approach closely resembles the broad, contextual style of facilitative mediation.

104. Interview with Donna Steinstra, Senior Researcher, Federal Judicial Center, in Washington, D.C. (October 19, 2005).

D. MEDIATION REMEDIES COMPARED WITH LITIGATION REMEDIES

As mediation has been subsumed into the litigation culture in the United States court systems, it has tended to narrow toward a legal, rights-based orientation. In its true, facilitative orientation, however, mediation differs greatly from litigation in a number of respects: there is more client involvement in mediation, and clients control the outcome. Litigation focuses on the adjudication of the parties' rights; it "is not about the repair of relationships."¹⁰⁵ The law, by adopting abstract rules and objective standards to provide certainty and predictability, has left out the possibility that emotions and relationships could serve as useful adjuncts in problem solving.¹⁰⁶

While litigation provides a sum-zero¹⁰⁷ result, mediation is not so limited. Mediation offers the possibility of an array of remedies not available through litigation.¹⁰⁸ Such remedies include continuation of a relationship; consideration and resolution of other related disputes, either between the same parties or other parties, that would have to be litigated separately; apology as a healing device;¹⁰⁹ and other non-monetary and emotion-addressing resolutions.¹¹⁰ By offering the possibility of solutions not available through litigation, mediation increases the likelihood of client satisfaction with the result.

Carol Gilligan relates another story which has application here: Two four-year-olds "were playing together and wanted to play different games. The girl said: 'Let's play next-door neighbors.' The boy said: 'I want to play pirates.' 'Okay,' said the girl, 'then you can be the pirate who lives next door.'"¹¹¹ Gilligan terms the girl's proposal "*an inclusive solution* rather than a *fair solution*."¹¹² "The fair solution would be to take turns and play each game for an equal period,"¹¹³ so each child would have an opportunity to play the game of his or her choice and "would enter the

105. ROSENBAUM, *supra* note 41, at 192.

106. Barton, *supra* note 42, at 933.

107. McCabe, *supra* note 73, at 474 (citing Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?* 8 GA. ST. U. L. REV. 385 (1992)) (stating that "[l]aw generally operates on a zero-sum basis, that is, one pie that must be divided and the winner gets the bigger piece.>").

108. *Id.*

109. "Apologies have enormous value, independent of any monetary settlement And, of course, an apology can be not only costless to make, but enriching to the maker." ROSENBAUM, *supra* note 41, at 179. "Acknowledgments and apologies offer moral relief, whereas purely legal remedies, which compensate mostly for economic loss, provide only a very small spiritual dimension." *Id.* at 189.

110. Evans, *supra* note 75, at 151-52.

111. *Mitchell Lecture*, *supra* note 5, at 45 (remarks of Carol Gilligan).

112. *Id.*

113. *Id.*

other's imaginative world."¹¹⁴ The games would not change. But, in the girl's solution both games would change, resulting in a new, combined game "that *neither* child had separately imagined. In other words, a new game arises through the relationship."¹¹⁵ Mediation holds out the promise of such inclusive solutions by providing a forum that gives voice to the care perspective.¹¹⁶

E. COOPERATIVE NEGOTIATION AND MEDIATION

Some psychological studies and empirical research suggest that women are more risk-averse and have a lower preference for competition than men.¹¹⁷ Such findings have led to a general perception, despite research to the contrary, that women bargain and negotiate more cooperatively than men.¹¹⁸ Because traditional negotiation is competitive in nature, cooperation is viewed as a negative characteristic in negotiation. Empirical studies indicate that women and men achieve comparable outcomes in negotiation exercises,¹¹⁹ yet women are perceived by others—and often perceive themselves—as less successful negotiators than men.¹²⁰ Such "stereotypical perceptions have undoubtedly disadvantaged women."¹²¹ A negotiator who is actually, or is perceived to be, cooperative or accommodating may be vulnerable to the ploys of a non-cooperative negotiator.¹²² And, women who tend to "lock into an unrelenting competitive stance when their partners refuse to cooperate," perhaps to compensate for their perceived vulnerability, are viewed as "vindictive."¹²³ The perception that cooperation

114. *Id.*

115. *Id.*

116. "By considering the specific needs of all the parties, as articulated from those parties' own perspectives, and by attending to particularized contexts rather than abstract rights and universalizable rules, care-oriented problem-solvers frequently design creative, alternative solutions that may never occur to their justice-oriented counterparts." Bender, *supra* note 22, at 37.

117. Charles B Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 345 (1999). See generally Muriel Niederle & Lisa Vesterlund, *Do Women Shy Away from Competition* (Nat'l Bureau of Econ. Research, Working paper 11474), available at <http://www.nber.org/papers/w11474>; Uri Gneery, Muriel Niederle & Aldo Rustichini, *Performance in Competitive Environments: Gender Differences*, 118 Q. J. OF ECON. 1049, 1049 (2003).

118. Carol Watson, *In Theory: Gender Versus Power as a Predictor of Negotiation Behaviors and Outcomes*, 10 NEGOTIATION J. 117, 118 (1994).

119. Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 292 (1999); Craver & Barnes, *supra* note 117, at 347.

120. Farber & Rickenberg, *supra* note 119, at 291-92; Watson, *supra* note 118, at 118.

121. Craver & Barnes, *supra* note 117, at 347.

122. Watson, *supra* note 118, at 118.

123. *Id.*

signals weakness may suppress cooperative tendencies in negotiators, both men and women, leading to heightened competition and mistrust.¹²⁴

Lawyers who are disadvantaged by the traditional, competitive negotiation approach can benefit significantly from the involvement of a mediator in their negotiations. A competent mediator will build an environment of trust, tone down the competitive atmosphere, and strive to keep the negotiation cooperative in nature. The mediator accomplishes this task by providing a calming, tension-defusing environment, by expecting and modeling cooperation and candor throughout the process, and by discouraging and filtering out any manipulative strategies and confrontational statements.¹²⁵ This atmosphere allows cooperative negotiators to focus on problem solving methods that incorporate reconciliation rather than aggressive posturing.¹²⁶ Problem solving through reconciliation is particularly beneficial when the parties have shared or may form a long-term relationship.¹²⁷

When I began conducting judicial mediation about twenty years ago, there was virtually no mediation—public or private—in our regional legal culture. Young lawyers, of whom women lawyers constituted only a small subset, were the first to embrace the availability of judicial mediation. Frequently, the more trial and negotiation experience male lawyers possessed, the more resistance they showed to the idea of a judge or private neutral mediator facilitating their negotiations. Lawyers did not trust the mediation process and often tried to use the session simply as an opportunity to learn about the other party's strategy and weaknesses. Experienced trial lawyers also found it difficult to listen to the other party. They approached mediation as an opportunity to convince their adversary and the mediator of the strength of their position, with an apparent expectation that their persuasiveness would compel an agreement on favorable terms.¹²⁸ That tactic rarely, if ever, resulted in settlement. Usually, upon failing to persuade or refute the other party, these lawyers would give

124. Reform efforts in teaching negotiation courses have proposed making more "visible the collaborative and connective skills that are critical to negotiations." Deborah M. Kolb, *More than Just a Footnote: Constructing a Theoretical Framework for Teaching about Gender in Negotiation*, 16 NEGOTIATION J. 347, 354 (2000).

125. Debate has arisen over whether the mediator should guard against and correct inequalities in bargaining power by taking a position on the fairness of the outcome, since doing so affects the mediator's neutrality. Hill, *supra* note 49, at 351-52. See also Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO ONLINE J. CONFLICT RESOL. 19, 22 (2004).

126. Craver & Barnes, *supra* note 117, at 315.

127. *Id.*

128. See Eyster, *supra* note 44, at 760 (noting the same behavior in law students taking traditional negotiation classes).

up on the process and declare impasse. Gradually, this type of resistance has diminished, but it still surfaces occasionally.

Women lawyers and younger male lawyers showed some initial reluctance to express themselves candidly and to allow their clients to speak openly in my presence, but on the whole they quickly learned to trust in the mediation process to level the negotiation playing field. These lawyers have recognized that the mediation process provides a more supportive, less confrontational environment for them and their clients than traditional negotiation does. The mediator's expectation of cooperation frees these lawyers to practice in a manner consistent with their natural inclinations. They and their clients actually fare better in a mediation environment than lawyers and clients who resist the call for cooperation. By trusting in the process and cooperating fully, they negotiate more effectively.¹²⁹

V. FACILITATIVE MEDIATION: THE INFUSION OF CARE INTO DISPUTE RESOLUTION

During the course of a Federal Judicial Center program for ADR administrators that I attended a few years ago, a female judge inquired what had ever happened to the "counselor of law" aspect of the practice of law. She lamented that only the advocacy role seems to have survived. Counselors of law, of course, strive to advise the client holistically, taking into account all of the client's interests and needs, present and future, not just the merits of the client's legal position in the dispute at hand. Likewise, advocates of therapeutic law practice urge a style of lawyering and judging that stresses development of a relationship of respect and trust through empathetic, personal conversation with the client.¹³⁰ The client's best interests may not always coincide with fully pressing the client's legal position. Sometimes a client's greatest need is "plain talk . . . about the need for that client to reconcile a torn relationship or to be more respecting or charitable toward another person."¹³¹ The roles of counselor of law and therapeutic legal practitioner represent a care-based approach to the practice of law. In the context of dispute resolution processes, proponents of a care-based approach offer mediation as a dispute resolution process that fulfills many of the characteristics of the ethic of care.¹³²

129. *Id.* at 775.

130. Barton, *supra* note 42, at 941-42; David Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 748 (2005).

131. Barton, *supra* note 42, at 942.

132. Cahn, *supra* note 32, at 1048.

One definition of conflict says conflict “arises whenever there is a failure of connection, collaboration, or community, an ability to understand our essential interconnectedness”¹³³ Facilitative mediation addresses this conceptualization of conflict by incorporating the contextual relatedness of the ethic of care into the dispute resolution process.¹³⁴ Mediation, if practiced facilitatively, is directed to persons, not to law.¹³⁵ It opens up the dialogue, rather than limiting it to legal issues encompassed in the dispute.¹³⁶ This allows the participants to address not just the legal dispute, but also the problem(s) that led to the dispute.¹³⁷ Essentially, facilitative mediation “promises to consider disputes in terms of relationships and responsibility,”¹³⁸ rather than objectively relying on external rules. Facilitative mediation employs a contextual approach based on the parties’ needs and interests, rather than a narrow approach limited to the legal issues presented in the dispute.¹³⁹ Such mediation also relies on cooperation, not competition. It is also voluntary, not coercive.¹⁴⁰ Finally, facilitative mediation empowers the parties to express themselves and to make their own decisions, rather than imposing “the hierarchy of dominance that characterizes the judge/litigant and lawyer/client relationships.”¹⁴¹ Participants not only may speak for themselves, but may “speak in a language which is familiar to them.”¹⁴² They can enlarge the sum-zero environment of litigation by crafting their own customized remedies.

Like the solution proposed by Amy to the Heinz moral dilemma, mediation offers:

a dialogue-centered process; the more the parties speak for themselves, and to each other, the more likely they will agree on some resolution. They may even reconcile, which seldom occurs in a winner-take-all adversarial process. . . . Mediation works to make peace rather than foment retaliation. And mediation, if done

133. KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 6 (2001).

134. Hill, *supra* note 49, at 374.

135. McCabe, *supra* note 73, at 471.

136. ROSENBAUM, *supra* note 41, at 243.

137. *Portia Redux*, *supra* note 40, at 110.

138. Grillo, *supra* note 74, at 1548.

139. McCabe, *supra* note 73, at 472-74.

140. Grillo, *supra* note 74, at 1548. Grillo criticizes mediation when it is mandatory, since it loses all its positive care-based virtues in the coercive environment. *Id.* at 1549-50.

141. Grillo, *supra* note 74, at 1548.

142. McCabe, *supra* note 73, at 471.

properly, resolves disputes by opening up the story rather than shutting it down.¹⁴³

Incorporating an ethic-of-care perspective into the practice of law cannot help but effect change in the dispute resolution process, and vice versa: facilitative mediation's infusion of relational problem solving into legal dispute resolution is changing the practice of law.¹⁴⁴ This style of mediation offers an environment in which the perspective of care can flourish. The inclusiveness of the facilitative process allows the participants to transform the pirate game and the neighbor game into the pirate-neighbor game.

Some criticize mediation as essentially a process for compromise, where the parties give up their rights instead of vindicating their rights.¹⁴⁵ It is true that mediated settlements, as any other settlements, can and often do involve compromise, but compromise does not necessarily require capitulation. As the pirate-neighbor story illustrates, an inclusive solution can accommodate the interests of both parties to a conflict. Under the girl's proposal, she continues to play neighbors and the boy continues to play pirates; they play their roles of choice together in a new game. They have reformed their relationship to accommodate both their interests. "The two children create the new game together, create the rules of play together, and explore the possible resolutions together."¹⁴⁶ Mediation participants face a challenge to broaden their focus beyond the legal issues and to undertake a search for inclusive solutions.

VI. CONCLUSION

Mediation is not a perfect dispute resolution process.¹⁴⁷ While mediation has its drawbacks, it represents the best process available within the adversarial legal system today for injecting relational, care-oriented reasoning into problem solving. The explosion of mediation in legal dispute resolution within the past twenty years is no accident.¹⁴⁸ As the number of

143. ROSENBAUM, *supra* note 41, at 243.

144. Cahn, *supra* note 32, at 1043-50.

145. Laura Nader, for instance, has criticized mediation and other forms of ADR as "peace over justice." Stempel, *supra* note 67, at 349. I agree that mediation, or any other form of settlement, may not be an appropriate resolution for some disputes, for instance, those that involve issues of public policy. Adjudication and imposition of objective rules have their place and should not be replaced entirely by mediation.

146. Hill, *supra* note 49, at 370.

147. The mediation process is subject to manipulation by participants who do not approach it cooperatively, in good faith. It can become simply a vehicle by which the parties feel pressured to give up their claims or defenses, whether out of the financial strain of litigation or pressure from the court to settle. Finally, the development of public jurisprudence suffers when the parties resolve their own disputes.

148. *Mitchell Lecture*, *supra* note 5, at 54 (remarks of Carrie Menkel-Meadow).

women attorneys has grown from a mere novelty segment of the bar to a significant force, the profession has been exposed to a more relational approach to clients and their problems, particularly in the preference of female attorneys for a less confrontational, contextual, care-based approach to dispute resolution.¹⁴⁹ Practicing law from an ethic-of-care perspective “challenge[s] the most deeply rooted paradigms of law—the adversary system as we know it and its professional dominance of and distance from the client.”¹⁵⁰

Mediation has not grown in popularity solely because of the increasing presence of women and the awakening ethic of care in male lawyers; economic factors such as litigation cost and delay engendered by crowded dockets have likely provided a significant impetus for the mediation explosion. Yet, the contribution of care-based practice should not be discounted.¹⁵¹ Growing acceptance of the different approach women bring to the profession¹⁵² and the subtle (or, maybe not so subtle) push of care-minded lawyers¹⁵³ has caused a shift from the win-lose dichotomy of litigation toward the client-driven, relational approach of mediation. There are no empirical studies on the issue, but it seems apparent that as the number of attorneys who are more temperamentally suited for mediation enter the profession, among them a growing percentage of women,¹⁵³ the preference for mediation and other inclusive, non-confrontational dispute resolution methods will continue to grow.

This does not mean dispute resolution through adjudication is headed toward extinction. Decisions by judges and juries should and will continue to hold a critical place in our legal system.¹⁵⁴ But, there is room for both a rights-based approach and a care-based approach to dispute resolution. As

149. Cahn, *supra* note 32, at 1044-45 (citing the conclusion by Stacy Caplow and Shira Scheindlin following their study of female law graduates); Freyer, *supra* note 46, at 217; Menkel-Meadow, *Culture Clash*, *supra* note 60, at 639.

150. Menkel-Meadow, *Excluded Voices*, *supra* note 58, at 45.

151. Grillo, *supra* note 74, at 1548, 1601.

152. Stempel, *supra* note 67, at 311-12. Though Professor Stempel's comments are somewhat tongue-in-cheek, he does admit to a personal view that women lawyers' thinking is “less linear and more flexible,” resulting in more creativity, and that women lawyers show more sensitivity to relationship between the parties and the relational nature of their dispute. *Id.* at 311.

153. *See id.* at 311-12; Stephen N. Subrin, *Perspectives on Dispute Resolution in the Twenty-First Century: A Traditionalist Looks at Mediation: It's Here to Stay and Much Better than I Thought*, 3 NEV. L.J. 196, 207-08 (2002/2003).

154. *See* Stempel, *supra* note 67, at 349-50 (referring to the work of Laura Nader, a critic of mediation as promoting agreement for the sake of agreement, which does reduce conflict, but also lessens the opportunity for judicial decision making to contribute to social development). *See also* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 1 (1993); Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99, 101 (1994).

Carol Gilligan says, "The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse."¹⁵⁵ "This inclusive approach allows greater creativity in society and keeps the one voice from overwhelming and silencing the other. It allows society to meet the needs of both perspectives without compromising."¹⁵⁶ We should continue to cultivate conflict resolution methods that value the voices of both pirates and neighbors.

155. *Mitchell Lecture*, *supra* note 5, at 45 (remarks of Carol Gilligan).

156. Hill, *supra* note 49, at 370.
