The Family Mediation System: An Art of Distributions

Ruth Phegan*

The appeal of family mediation lies in its representation as an effective means of producing lasting commitment to peaceful agreement. Family mediation supporters distinguish among various approaches, partly to counter a substantial body of mainly feminist critique of its manipulative and more overtly coercive practices. Offending approaches are those which overemphasize therapeutic techniques in the production of agreements presumed by the mediator to meet emotional needs. Approaches which balance law and therapy, or rights and needs, are said to be empowering. The author argues that so-called balanced, as well as therapist, mediators deceive themselves and the public with respect to the nature of their practices. Manoeuvres for steering clients towards agreement are governed by systems rationality, not by the inter-subjectivity which is vital to any process of empowerment. Therapeutic and balanced approaches alike create a number of spatial boundaries according to interacting principles of behavioural science and law. Excluding dissent and integrating difference, mediator operation of these boundaries guarantees widespread acceptance of mediation as the normal procedure for (re)constituting family, and the perpetuation of nuclear family as the normal family form.

L'attrait qu'exerce la médiation en matière familiale provient du fait que ce mécanisme apparaît comme un moyen efficace d'amener les parties à s'engager sur la voie d'un règlement sans heurts de leurs différends. Afin de contrer les effets d'un large courant de critique principalement féministe selon lequel la médiation familiale cacherait certaines pratiques de manipulation et, plus ouvertement, de coercition, les partisans de la médiation familiale distinguent différentes approches. Ces approches critiquées sont celles qui accordent trop d'importance aux techniques thérapeutiques dans le but de produire des ententes qui, de l'opinion du médiateur, combleront certains besoins émotionnels. Quant aux approches qui tenent à maintenir l'équilibre entre le droit et la thérapie, les droits et les besoins, elles accordent beaucoup de pouvoirs aux parties. L'auteure est d'avis que ces médiateurs, tant «équilibristes» que «thérapeutes», trompent le public et se trompent eux-mêmes quant à la nature de leurs pratiques respectives. Plutôt que d'être régies par une inter-subjectivité essentielle à tout processus attributif de pouvoirs, les manœuvres devant amener les clients vers une entente reposent sur des systèmes rationnels. Les approches équilibristes et thérapeutiques créent toutes deux un certain nombre de frontières conceptuelles reposant sur des principes interreliés qui proviennent tant du droit que de la science du comportement. En excluant la dissension et en intégrant la différence, la mise en place de telles frontières par le médiateur garantit l'acceptation répandue de la médiation comme procédure normale permettant de (re)constituer la famille, et favorise ainsi la perpétuation des familles nucléaires à titre de norme familiale.

* The author wishes to thank Professor Sheila Noonan for supervising this work in its original form as part of a thesis for an LL.M. degree at Queen's University. She also wishes to thank Professor Martha Bailey for her contribution as joint supervisor of the thesis, in its early stages, and Professors Kathleen Lahey, Mary Jane Mossman, Mary Morton and Virginia Bartley for many helpful comments, on its completion.

To be cited as: (1995) 40 McGill L.J. 365
Mode de référence: (1995) 40 R.D. McGill 365

Synopsis

Introductiou

> Thoughtlessness — the heedless recklessness or hopeless confusion or complacent repetition of "truths" which have become trivial and empty — seems to me among the outstanding characteristics of our time. What I propose, therefore, is very simple: it is nothing more than to think what we are doing.
>
> Arendt[1]

Family mediation is generally represented and promoted as a process whereby a mediator helps the parties to a separation or related dispute to reach agreement in a manner superior to litigation. Assistance provided by a mediator is nonetheless often criticized as manipulative and more obviously coercive, which calls into question the meaning and effect of both the mediation process and the settlement contract signed at its conclusion.[2]

The Ontario Attorney General's Advisory Committee on Mediation in Family Law defined mediation as a "non-adversarial alternative dispute resolution mechanism in which an impartial mediator assists clients of a relatively equal bargaining position, to reach a mutually satisfactory agreement on issues affecting the family."[3] The Committee members attempted to close the gap between the reality of mediation practices and their own description thereof by explaining that, in part, mediation had "[come] to be defined by what Committee members hoped it could achieve."[4] However, underpinning much of the Committee members' understanding of the practices they promote is an expectation disconnected from experience. The reasoning behind such attribution is indicative of that which pervades the *Re-*

---

[1] H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) at 5.

[2] See M. Bailey, "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989) 8 Can. J. Fam. L. 61; M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 U. T. Fac. L. Rev. 162; N.Z. Hilton, "Mediating Wife Assault: Battered Women and the 'New Family'" (1991) 9 Can. J. Fam. L. 29; M. Arsenault, "Mediation and Abused Women: Who's Looking Out for Their Safety?" (1990) 8:2 Vis-a-Vis 5; M.L. Fassel & D. Majury, "Against Women's Interests: An Issues Paper on Joint Custody and Mediation" (National Action Committee on the Status of Women, April 1987) [unpublished]; D. Majury, "Unconscionability in an Equality Context" (1991) 7 Can. Fam. L.Q. 123.

[3] Ontario, *Report of the Attorney General's Advisory Committee on Mediation in Family Law* (Toronto: Ministry of the Attorney General, 1989) at 6 [hereinafter *Advisory Committee Report* or *Report*]. The Advisory Committee was established in 1987 to examine the role and function of family mediation. The Committee's Report endorsed family mediaton in Ontario as a positive development, and as a process for which no evidence existed at that time of its potential to work hardship on its clients (*ibid.* at 7). It recommended that mediation services be delivered as needed across the province (*ibid.* at 20).

[4] *Ibid.* at 57.

port.[5] Where attention is given to mediation experience, and such experience evidences harm, it is attributed to jurisdictions outside Ontario. Consequently, the *Report* contributes to the administrative rationalization of mediation's domination, in which federal and provincial legislatures and the judiciary are complicit, and to the production of client docility. In so doing, the *Report* becomes an exercise of the kind of power so artfully portrayed by Foucault.[6]

I argue that dominant mediation practices, in Ontario as elsewhere, continue to manipulate and subvert the meaning of agreement. Mediation may be a gentler technique than the system of juridical right, but equating 'gentler practices' with 'more humane' leaves paternalism, and the violence it sometimes more and sometimes less successfully masks, steadfastly in place. Mediation practices are governed by the instrumental rationality of a system which is maintained by virtue of its ability to produce settlement contracts, and which is operated in such a way as to require client conformity with the imperative of settlement. Inter-subjective or dialogical discussion,[7] necessary for meaningful autonomy and responsibility, is subverted

---

[5] Thus "mediation in the criminal process" in the U.S., for example, is to be distinguished from "mediation in family law" in Ontario. The purpose of distinguishing the criminal process and family law is to counter arguments made in feminist critique with respect to damage done to women and children by mediation of family relationships where violence has been experienced (*ibid.* at 33-40). To answer concerns with respect to other forms of gender based inequality, a U.S. practice of utilising a single advisory attorney to review settlement agreements is to be distinguished from Canadian practices which allow parties to be advised by their individual lawyers (*ibid.* at 40-41); and mandatory mediation, practised in some U.S. states and in Manitoba, is to be distinguished from compulsory initial "educative" sessions envisaged for Ontario's separating families (*ibid.* at 66-73).

[6] M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York, Vintage, 1979) [hereinafter *Discipline and Punish*].

[7] A dialogic ethic, which should guide mediation, is explained by Nancy Fraser as one which takes into account the fact that dominant and subordinated groups stand in different and unequal relations to what she calls "the socio-cultural means of interpretation and communication," for example:

> [T]he officially recognized vocabularies in which one can press claims; the idioms available for interpreting and communicating one's needs; the established narrative conventions available for constructing the individual and collective histories which are constitutive of social identity; the paradigms of argumentation accepted as authoritative in adjudicating conflicting claims; the ways in which various discourses constitute their respective subject matters as specific sorts of objects; the repertory of available rhetorical devices; the bodily and gestural dimensions of speech which are associated in a given society with authority and conviction (N. Fraser, "Toward a Discourse Ethic of Solidarity" (1986) 5:4 Praxis International 425).

by that imperative. The system perpetuates a number of spatial boundaries, such as the mediation/litigation boundary, to ensure that what is included in or excluded from family mediation is self-perpetuating and productive of 'agreement' to the continuation and proliferation of the inequalities protected by family.

In support of this claim, I compare three approaches to family mediation, chosen in part to test the theory of feminist mediator and critic, Linda Girdner.[8] Girdner's theory plots mediator emphasis along two axes: law and therapy are the poles of one axis; self-determination and coercion are the poles of the other. According to the theory, coercive therapist-mediators are those who, within a family systems paradigm, focus on the psychological aspects of divorce, advocate children's interests, and are committed to the specific outcome of shared parenting. Their focus on these aspects can result in a coalition between mediators and fathers against mothers.[9] In comparison, Girdner suggests that the mediator who practises a balanced and empowering form of mediation operates at the centre of these axes. With respect to the law/therapy axis,[10] this mediator emphasizes rights and needs, external and internal criteria of fairness, and cognitive and affective aspects of disputes. With respect to the self-determination/coercion axis, she or he emphasizes process over any specific outcome, but also acts as an agent of social control: she or he keeps children's needs at the forefront of custody disputes, yet does not assume to be the final authority on a particular child's best interests.[11]

One of the three approaches to family mediation which I examine within the context of Girdner's schema is the family therapy model used and developed by Irving and Benjamin.[12] Situated at the therapy end of Girdner's

---

[8] L.K. Girdner, "Custody Mediation in the United States: Empowerment or Social Control?" (1989) 3 C.J.W.L. 134.

[9] *Ibid.* at 144. The lawyer-mediator can also be coercive. Utilising a conflict-bargaining paradigm, she or he is more likely to focus on the legal issues, advocate for the process, and treat children as another bargaining chip. However, there are few mediators in this category as those who begin at the law pole of the axis tend to move towards the centre as they gain experience in the field (*ibid.* at 141).

[10] This axis is commonly referred to in mediation literature as the bargaining/therapy axis (see *e.g.* S.S. Silbey & S.E. Merry, "Mediator Settlement Strategies" (1986) L. & Pol'y 7 at 8).

[11] Girdner, *supra* note 8 at 139-42.

[12] H. Irving & M. Benjamin, *Family Mediation: Theory & Practice of Dispute Resolution* (Toronto: Carswell, 1987) [hereinafter *Family Mediation*]. The theoretical and operational principles described in this work presumably influence Irving's Toronto-based training of many Canadian mediators. As Professor C. James Richardson notes, "through his writing and lectures, [he] has had a dominant influence on the field" (Canada, Department of Justice, *Court-based Di-*

law-therapy axis, Therapeutic Family Mediation (TFM) is potentially a model of coercive practices. The second approach, the procedural model of Christopher Moore,[13] draws predominantly on dispute resolution techniques developed in labour negotiation.[14] This model also borrows from techniques emphasized in several other family mediation models, and from family therapy literature. Situated at the centre of the axis, it is potentially a model of empowering practices. The third approach, also in the centre position, is that of Landau, Bartoletti and Mesbur.[15] Their model is not labelled by its designers but their "Handbook" does locate their approach in a blend of family law and family therapy principles and procedures. The therapy model and both of the balanced models use many of the same techniques and dominant theories and practices. My analysis of the general principles and practices of these models exposes how all three operate to silence and exclude certain voices and concerns, particularly those of women, insofar as these perspectives are unproductive of the mediation system's goals.

A fundamental concept in Irving and Benjamin's therapy model is "systems", which is defined "in terms of participation."[16] This definition implies that, for the practitioner of TFM, the family system, rather than the husband or wife, is the mediation client; while the practitioner may respond to each client's pain, she or he must never lose sight of the larger whole. Further, the mediator must tap the emotional substratum of contentious issues in order to discover any underlying interaction, effect, and/or mean-

---

vorce Mediation in Four Canadian Cities: An Overview of Research Results by C.J. Richardson (Ottawa: Supply and Services Canada, 1988) at 16).

[13] C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 1986) [hereinafter *The Mediation Process*]. Moore's book covers generally the practice of mediation, its process and theory, as relevant to labour, family, organizational, environmental, public policy, community, and other areas. The *Advisory Committee Report*, *supra* note 3 at 22, reproduces a 12-stage chart used by Moore to outline his model, referring to it as "an excellent portrayal of what mediation is and how it operates as a dispute resolving process." Moore deals specifically with family mediation in "Techniques to Break Impasse" in J. Folberg & A. Milne, eds., *Divorce Mediation: Theory and Practice* (New York: The Guilford Press, 1988) 251 [hereinafter *Divorce Mediation*]. While Moore does not expressly propose that his approach be regarded as a model, his explication of the mediation process fulfils the three requirements of a model articulated by Irving & Benjamin: that it describe the processes involved in case handling; that it take a position on ethical issues; and that it generate or adhere to some theory of how client couples or families work (see *Family Mediation*, *supra* note 12 at 55-56).

[14] See *e.g.* R. Fisher, *International Mediation: A Working Guide* (New York: International Peace Academy, 1978).

[15] B. Landau, M. Bartoletti & R. Mesbur, *Family Mediation Handbook* (Toronto: Butterworths, 1987).

[16] *Family Mediation*, *supra* note 12 at 179.

ing.[17]

I argue that the TFM family system is not defined in terms of participation, as its designers assert; rather, participation is defined in terms of the family system. Emotional issues are discussed, not according to an intersubjective or dialogical ethic, but largely according to a regulation of individual decisions which goes beyond client awareness. The particular emotional issues discussed during mediation will be selected according to their potential for maintaining TFM's boundaries and goals. Since these boundaries and goals are incapable of being empirically ascertained, they are stipulated or set by TFM designers and practitioners.[18] In purporting to liberate client men and women from the repressive scripts of their rationality and emotions, Therapeutic Family Mediation encodes another rationality, another "hysteria". It encodes, despite Foucault, another repression.[19]

Similar processes are at work in the "balanced" models. Of fundamental importance in Moore's procedural model are mediator interventions intended to shift clients from a mode of bargaining based on dissent — and characterized by Moore as conflict-provoking and/or escalating — to consensus- or interest-based bargaining. Client partiality for normative judgment is identified as a central obstacle to interest-based bargaining.[20]

The procedural model's array of techniques for breaking impasse manipulates clients into accepting consensus-based bargaining as the appropriate way of conceptualizing the interaction of consent and dissent in negotiating a resolution of family separation problems. Although Moore occasionally refers to the relationship between procedures and their underlying values, he does not question the values which underlie his choice of consensus-based bargaining coupled with therapy for resolving family disputes.

---

[17] *Ibid.* at 78.

[18] Thomas McCarthy refers to this aspect of systems-objective decisionmaking in "Complexity and Democracy, or The Seducements of Systems Theory" (1985) 35 New German Critique 27 at 47.

[19] I say "despite Foucault" because Foucault has doubts about the value of the word 'repression' in view of its double reference to sovereignty and normalization:

> I believe that the notion of repression remains a juridical-disciplinary notion whatever the critical use one would make of it. To this extent the critical application of the notion of repression is found to be vitiated and nullified from the outset by the two-fold juridical and disciplinary reference it contains to sovereignty on the one hand and to normalisation on the other (M. Foucault, "Two Lectures" in C. Gordon, ed., *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (New York: Pantheon Books, 1980) 78 at 108 [hereinafter "Two Lectures"]).

[20] *The Mediation Process, supra* note 13 at 178.

Another aspect of mediation is the "new" conceptualization of contractual responsibility prominent in the other balanced approach. According to Landau, Bartoletti and Mesbur, law and therapy principles, of primary importance to their approach, have shifted focus from preserving marriage and treating emotionally disturbed persons to new formulations based on the freedom of adults to choose whether or not to remain married,[21] the dysfunction of the family system, and the need for therapeutic change. The family can thus be helped to take responsibility through the notion of "self".[22] This model, which I term the contracted responsibility model,[23] perpetuates a fundamentally liberal, and therefore distorted, notion of freedom and responsibility. The freedom or rights protected by mediation contracts are those of the mediation system itself and of those client groups favoured by the mediation system. As a result, client groups not favoured by mediation are burdened with unwanted contractual obligations. Operating under the power and privilege of their contractual rights, mediators use the therapeutic techniques at their disposal to ensure the functional processing of this unequal arrangement.

This article compares the approaches of the various models in relation to a number of spatial boundaries. The first section examines a set of inter-systemic boundaries (*i.e.* the means whereby people connected with, but extraneous to, family and the mediation process are defined, separated and/or combined). In particular, the roles of clients' parents and new partners, therapists and lawyers are discussed. The second section deals with sub-systemic boundaries, specifically the various ways parent-child relationships are conceptualized and the consequences of such conceptualizations for children's participation in decisions about custody and access. The last section focuses on sub-systemic boundaries with respect to the husband-wife relationship. In this regard, mediators concentrate not so much on how two people interact as on a single interaction. A modern version of "they both shall be one flesh" reverberates through mediator discussion of how the spouses interact, both inside and outside the mediation procedure. All of these boundaries shift in accordance with the parameters governing each of

---

[21] This is best expressed in mediated domestic contracts (see Landau, Bartoletti & Mesbur, *supra* note 15 at 1-4). The authors also draw attention to the influence of labour negotiations on law's recognition of mediation as a mode of alternative dispute resolution suited to "ongoing" family relationships.

[22] *Ibid.* at 6-10.

[23] I use the name "contracted responsibility" not only to suggest a responsibility which has been narrowed to clients, and often ultimately to one client, the wife, but also to suggest a contagious illness.

the three models, and with all the dominant approaches to mediation.

I. Enclosing Family

> Discipline sometimes required *enclosure*, the specification of a place heterogeneous to all others and closed in upon itself.
>
> Foucault[24]

In family mediation, inter-systemic boundaries are a means of controlling external influences exerting pressure on family mediation. These boundaries are drawn (and/or erased) by mediators as they distinguish (and/or merge) family and extra-family, mediation and therapy, and mediation and law. The purpose here is to illuminate how these boundaries are drawn and whether they are consistent with the principle of client participation. Each mediation model segregates or merges significant actors and spheres of action within the process of family mediation. Specifically, each model is examined in relation to the determination of family membership for the purposes of mediating separation disputes, and in relation to the roles of therapist and lawyer in the mediation process. I argue that, notwithstanding differences between particular practice models, planned manoeuvres by the mediator are common to all. The models discussed subvert more than address client concerns that are incompatible with the general mediation imperative of agreement to mediation and to binuclear family.

A. Combining Mediator with "The Family"

In Irving and Benjamin's therapy model, TFM, the mediator appropriates to himself or herself relevant decision-making power with respect to internal and external determinants of family boundaries. That appropriation is clearly influenced by the way General Systems Theory, which informs TFM, conceptualizes the inter-systemic aspect of boundaries:

> Patterning in the interaction among family members necessarily means that they interact with each other in ways that are both qualitatively and quantitatively different from the way they relate to people outside the system. In this sense, family members are bounded or constrained by the nature of their mutual relationship.
>
> The bounded nature of family systems serves simultaneously to delimit the extent of the system in question (who is in) and to differentiate it from

[24] *Discipline and Punish, supra* note 6 at 141.

> all other systems (who is out).[25]

This conceptualization is vague and potentially restrictive. If family is defined by the nature of the relationship of its members — one that is different, both qualitatively and quantitatively, from how members relate to outsiders — then these qualitative and quantitative signs must be read. How are they read and by whom?

Benjamin's elaboration of the passage quoted does not directly answer these questions. He leaves the notion of family unclear, merely "relating" variation in the degree of family permeability (*i.e.* the degree of freedom with which someone moves into or out of the family system) to the degree of family organization. He further states that the degree of family organization partly determines the permeability of family boundaries, adding that other systems, "in particular cultural, ethnic and occupational systems,"[26] may also influence boundaries. He does not, however, explain in what circumstances cultural and occupational systems would *not* determine family boundaries, nor does he consider that family members may make conscious decisions about the degree of organization or permeability desired. Thus, General Systems Theory seems to invite an additional interpreter of family, one who is an expert on the nature of family relationships and constitution, to circumscribe family boundaries.

Irving and Benjamin, as therapeutic mediators, profess to have such expertise. Their mediation model assumes that the nuclear family form is, and will continue to be, the type of family processed by the therapist-mediator. The notion of nuclear family undergoes a 'superliberal' adjustment.[27] Irving and Benjamin discard the notion of parental roles which is widely accepted

---

[25] M. Benjamin, "General Systems Theory, Family Systems Theories, and Family Therapy: Towards an Integrated Model of Family Process" in A. Bross, ed., *Family Therapy: A Recursive Model of Strategic Practice* (Toronto: Methuen, 1982) 34 at 47.

[26] *Ibid.* at 47 [references omitted].

[27] We refer to the adjustment as 'superliberal', a term borrowed from R.M. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 563, partly because TFM denies as authoritative feminist arguments for addressing the impact of structural inequality on women as a group. That denial in turn perpetuates the denial to women, upon separation, of the opportunity to restructure their lives towards more meaningful equality. TFM views separation as merely a step towards recombining and multiplying nuclear family. Spousal differences acknowledged by TFM are individual differences with, more recently, the addition of a few selective gender differences (see M. Benjamin & H. Irving, "Toward a Feminist-Informed Model of Therapeutic Family Mediation" (1992) 10 Mediation Q. 129 [hereinafter "Feminist-Informed TFM"). Focus on individual differences tells us that gender is indeed a production; it produces the simplistic idea that treating women and men as already equal will produce/reproduce equality.

in non-systemic approaches to family conflict,[28] and criticize differentiation on the basis of gender with respect to parental behaviour, skills and qualities:

> Sure, mothers can be supportive and nurturing. But they can also be angry, aggressive, incompetent, helpless, dependent and a lot of other things depending on the time of day, who [*sic*] they are dealing with and especially the patterns of interaction which constrain life in their family. Fathers, too, show incredible diversity. Some are strong and logical, others are not, and some are supportive and nurturing which does not make them mothers but is somehow not expected of fathers.[29]

Despite this rejection of roles, Irving and Benjamin still identify mother, father and children as the main actors in the family system, and do so in a society still dominated by men. Attention is given to extra-systemic family — particularly significant to single-parent families and the many nuclear families in which parents are not mutually supportive — only where such attention contributes to the problem-solving process, and regardless of how extra-family or nuclear members view family boundaries.

The superliberal progression of the family system beyond the static structure of the simple liberal family is marked by ever-moving and multiplying relationships. Within these relationships, the idea of determinants gives way to that of influences. In systems theory, influence signifies reciprocity. However, since external influence is presented in TFM as relevant only to the family's ability to cope with it, the theory never clarifies precisely who is influencing or making demands on the family. Thus, the important elements for TFM with respect to external demand are not just reciprocal influences, but rather the degree of the family's internal preparedness, and the extent of the family's internal response repertoire.[30] In the specific context of mediation, sources of external influence are discussed only if the family cannot cope with them despite the mediator's efforts to raise the family's level of preparedness and to extend its response repertoire. Even then, an external influence is admitted only so that it might be co-opted or

---

[28] Irving & Benjamin, *Family Mediation*, *supra* note 12 at 56-62, critique four dominant mediation models: structural, labour, social psychological, and strategic. Despite any use of and/or appeal to systems theory and concepts by these models, their individualist, rather than relational, perspectives on care prevent their being viewed by Irving & Benjamin as truly systemic. The major boundary-drawing of all four models is governed by the family mediation system's relational parameters, whatever the model's shortcomings regarding systems purity (or regarding Irving and Benjamin's interpretation of systems purity).

[29] *Ibid.* at 69.

[30] *Ibid.* at 70-77.

explicitly excluded.

Professing to follow Salvador Minuchin, Irving and Benjamin recommend excluding relatives — grandparents for example — by giving them the message that they should simply lend their power to their daughter or son in order to allow her or him to resolve problems.[31] This tactic is used in the full-length case study of Maria and John Smith reported by Irving and Benjamin. The report does not explain how the Smiths came to be referred to the mediator, but simply states that the couple was "referred for marital counselling following Maria's decision to separate from John."[32]

From Irving and Benjamin's report of the case study, Maria Smith makes it clear that she wants custody of the two children. John Smith admits to using sole custody, among other things, to threaten Maria. In order to ensure a rational custody decision, the therapist-mediator puts both clients into therapy. John's threats and difficulty in expressing himself indicate to the mediator that he is not sufficiently individuated from Maria emotionally to allow rational discussion and decision-making. However, the therapist-mediator requires a different justification for subjecting Maria to therapy, given her clearly articulated expectations of mediation and her future plans with a new husband. Consequently, she is assessed as needing therapy to enable her to separate emotionally from a 'controlling' mother, even though she explains that she has established close contact with her parents as a result of her separation.[33]

Apparently, therapy successfully raises the Smiths' preparedness for, and extends their ability to cope with, a demand for joint custody. However, when Maria's level of preparedness drops again, her mother is brought into mediation. "The potency of the coalition between daughter and mother was clear"[34] to the mediator: Maria and her mother thought it best for the children that they remain with Maria, and Maria's mother would interrupt John "by talking loudly to Maria in Italian."[35] By asking Maria's mother to lend some wisdom and authority to her daughter, the mediator "effectively allowed Maria to proceed with her initial inclination, to allow John access,

---

[31] S. Minuchin, *Families and Family Therapy* (Cambridge: Harvard University Press, 1974) at 95. Minuchin in fact recognizes the importance of "extra" family, but his focus is marital therapy for intact families, as distinct from separation mediation (see *Family Mediation*, *ibid.* at 183).

[32] *Family Mediation*, *ibid.* at 113.

[33] *Ibid.* at 113-29.

[34] *Ibid.* at 125.

[35] *Ibid.*

while blocking the grandmother from further interference."[36]

The basis for the therapist-mediator's conclusion that Maria's mother is controlling is not provided in Irving and Benjamin's report. We are told that Maria is "of Italian extraction"; John is "of English extraction". We are also told, however, that Maria's mother only accepted her daughter's new relationship when the parish priest assured her that the Smith marriage could be annulled.[37] Irving and Benjamin's constant references to Maria's Italian background, including the reference to the family religion, in no way indicate a concern for mediator or client understanding of how this cultural background might be connected, if at all, to the issue of custody. The references appear as innuendo and, whether or not they are aimed at readers' prejudices, they assuredly indicate that the therapist-mediator prejudged Maria's mother; that the strictly nuclear family is the preferred family arrangement, irrespective of the Smiths' mixed cultural backgrounds; and that mediator prejudgment has replaced mediator-client and client-client dialogue. We do not hear Maria articulate her view of her "origins" with respect to the inclusion of her mother in the mediated family. Nor do we hear John's voice. Rather, the case is an example of how the instrumental rationality of the family mediation system governs participation in the therapeutic approach and contributes to my assessment of TFM as a monological process.

. . . . . .

Christopher Moore's procedural model does not articulate a theory of family. It is, nonetheless, based on dominant assumptions about family organization and constitution. Further, while more sensitive than TFM to the possibility that clients may themselves know whom they want to include in family mediation, the procedural model makes it clear that the mediator should decide the issue.

Moore couples the mediator and the family through his emphasis on disputants as negotiators. Having created a temporary bargaining relationship, disputants usually extend that relationship to include the mediator "[w]hen [they] no longer believe that they can handle the conflict on their own and when the only means of resolution appears to involve impartial third-party assistance."[38]

---

[36] *Ibid.*

[37] *Ibid.* at 113, 115.

[38] *The Mediation Process*, *supra* note 13 at 6.

Moore identifies only one potential problem with respect to defining "family" for the purposes of participating in family separation and related negotiations. This sole example is perhaps indicative of his easy acceptance that the mediator need only deal with the superliberal nuclear family. He states that, while it is apparent that husband and wife participate in divorce negotiations, it is more difficult to identify the central parties to child custody cases revising visitation rights as "the second wife of the divorced husband may want to participate in negotiations."[39] Moore not only omits any argument regarding the inclusion of new spouses in mediation, he fails to explain how the procedural mediator might assist parties to settle disputes regarding negotiator boundaries.

Further, Moore asserts that the mediator should help the parties choose the participants rather than choosing them himself or herself, but then undercuts his assertion by listing the kind of participant whom *mediators* usually request. The list includes: participants with direct involvement in a dispute (as defined by their central interests in the outcome); persons with decision-making authority; persons who contribute positively to decision-making; and persons who will respect negotiating etiquette.[40] To the extent that these suitability criteria are insufficient to determine who is to be included, Moore sets out a governing principle that inclusion or exclusion of family members, friends, and other influences on parties' opinions should turn on the mediator's assessment of whether such influences will induce settlement: "[t]he mediator can often engineer the form and effect of associational influence."[41]

. . . . . .

Landau, Bartoletti and Mesbur's contracted responsibility model "balances" legal techniques and therapy techniques. Legal techniques blend individual contracts with the social contract, whereas therapy techniques encourage clients to take more personal responsibility for decision-making. Further, this model blends techniques in such a way as to ensure that the

---

[39] *Ibid.* at 105. Irving & Benjamin, *Family Mediation*, *supra* note 12 at 182, see a use for bringing the wife's "new intimate partner" into mediation because his presence shows the husband how much less fearful a figure the new partner is in the flesh than in fantasy. However, the new partner does not appear in any of the TFM case vignettes or in the full-length case study. Since, in the Smith case study, Maria's husband has threatened to harm her new partner, it is perhaps understandable that the new partner is not admitted to mediation proceedings.

[40] *The Mediation Process*, *ibid.* at 107.

[41] *Ibid.* at 274.

professional (*i.e.* the mediator) determines questions of family structure and of its mediation.

With respect to the legal emphasis on individual contract, the retainer contract between clients and mediator expresses the right of the mediator

> at any time to include in the mediation the child(ren) or any other significant third party, such as a new partner, grandparents, other relatives, legal counsel, a chartered accountant, or other significant involved persons as the mediator deems necessary.[42]

For its part, the therapy-mediation blend has, according to Landau, Bartoletti and Mesbur, brought about an awareness that there really is no such thing as a single-parent family, at least not in the broken marriage context.[43]

The mediator's legal right to select participants implies a corresponding client duty to accept that selection. Indeed, the model's non-recognition of the single-parent family implies a belief in the superiority of professional knowledge of what constitutes family. This non-recognition is reflected in the fact that significant caregivers' inclusion in the mediation process is secondary to the inclusion of new partners. Further, the notion of professional knowledge as superior is reflected in Landau, Bartoletti and Mesbur's intimation that only the mediator, to the exclusion of the parties, would meet with any additional participants.[44]

If grandparents (or other relatives or friends) are treated by the mediator as secondary to new partners, if clients are not even included in certain meetings, and if clients are not informed of these facts before signing the retainer contract, the validity of the contract is questionable. To the extent that the mediator and the client's minds meet regarding participant selection, the contracted responsibility model gives little indication that they do so before the retainer contract is signed. Minds which meet other than coincidentally seem to do so, rather, as a consequence of therapist-mediator tactics. These tactics purport to encourage client responsibility for decision-making, but actually exclude the client's knowledge of and participation in funda-

---

[42] Landau, Bartoletti & Mesbur, *supra* note 15 at 213, 216. The provision reads similarly in Landau, Bartoletti & Mesbur's samples of both closed and open mediation contracts (apart from omitting a chartered accountant in the latter). Since open mediation allows mediators to include in their recommendations to the court (*i.e.* their assessments or reports) any information they consider relevant to the issues mediated, Landau, Bartoletti & Mesbur's retainer contract for open mediation can be, and is, used alternatively for assessment without substantive changes.

[43] *Ibid.* at 10.

[44] *Ibid.* at 60.

mental aspects of such decision-making.

B. Distinguishing Therapy and Mediation

Another group targeted by mediation's exclusionary tactics is therapists. The mediation process is threatened by a client's therapist insofar as the mediator's psychological beliefs and therapeutic practices are inconsistent with those of the therapist.

A client's therapist is regarded by Landau, Bartoletti and Mesbur as external to the mediation process. Coming under the heading of "other significant involved persons" for the purposes of the retainer contract,[45] the therapist's contribution is governed entirely by the mediator. The mediator, by means of a telephone call, obtains from the therapist "information about [children and parents'] emotional needs, family relationships and other matters relevant to parenting arrangements."[46] In other words, the therapist merely provides data to the mediator, when asked by the mediator, for processing by the mediator. Limited in this way, the therapist's emotional support or counselling of the individual client remains outside the mediation process. Further, the data implies that the data the therapist provides is insulated from objection by the client, while its processing is insulated from objection by the therapist. Treating the therapist as an outsider is consistent with the importance placed by Landau, Bartoletti and Mesbur on blending mediation with family therapy objectives and techniques. The blend can be used to ensure that in mediation, as in family therapy, the individual is subsumed within the family; that upon the breakdown of marriage "there really is no such thing as a 'single parent' family."[47]

The blend simultaneously ensures that mediators can practise therapy while representing mediation as distinct from therapy. According to Landau, Bartoletti and Mesbur, "[f]amily mediation can be represented best as the flip-side of the professional coin to family therapy,"[48] and the mediator is to be understood as educator, fact-gatherer and communicator.[49] Richardson

---

[45] See text accompanying *supra* note 42.

[46] Landau, Bartoletti & Mesbur, *supra* note 15 at 60.

[47] *Ibid.* at 10.

[48] *Ibid.* at 9.

[49] *Ibid.* at 65-68. Landau, Bartoletti & Mesbur's ambiguity or confusion with respect to mediation as partly therapy is shared by the Attorney General's Advisory Committee. The Committee reports that "[w]hile the process is not psychotherapy or counselling, it may include gaining the understanding that personality, anger or other motivations are part of the underlying problem or conflict" (*Advisory Committee Report*, supra note 3 at 22).

sums up the mediation-therapy distinction: "In short, in a legal system in which cases, except for a most vexatious minority, have beginnings and endings, it is much easier to sell mediation than conciliation counselling."[50] He concludes that any shift in Canada from a therapeutic counselling model "is more one of terminology than of approach, since to date the field remains more exclusively the preserve of those trained in the mental health disciplines."[51]

. . . . . .

While Landau, Bartoletti and Mesbur's position on mediation and therapy is ambiguous and confused, Christopher Moore's position is self-contradictory. He both acknowledges and rejects the proposition that procedural mediation is therapy. This acknowledgement appears necessary to explain the fundamental subjects and methods of his interventions. His rejection no doubt better enables him also to sell his services.

On the one hand, Moore refers to several tenets of psychology, tenets which he adopts and adapts to his procedural approach. He states that "[n]egotiation has long been recognized as a psychological process," citing as support the work of social psychologists Rubin and Brown who identify over 500 studies on negotiation which examine individual psychological variables and group dynamics.[52] Further, Moore devotes a full chapter of his book to conciliation, which he considers to be an ongoing process throughout mediation and

> essentially an applied psychological tactic aimed at correcting perceptions, reducing unreasonable fears, and improving communication to an extent that permits reasonable discussion to take place and, in fact, makes rational bargaining possible.[53]

On the other hand, Moore seems anxious to dispel any suspicion that therapy might be part and parcel of what he practises. "Mediation is not a therapeutic process," he states, adding that if therapist involvement in negotiations is acceptable to all parties and of assistance to disputants with emo-

---

[50] Richardson, *supra* note 12 at 16.

[51] *Ibid.* at 46-47. In Richardson's opinion, the approach to mediation in Canada should remain therapeutic.

[52] *The Mediation Process*, *supra* note 13 at 124, citing J. Rubin & B. Brown, *Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975).

[53] *The Mediation Process*, *ibid.* at 124, citing A. Curle, *Making Peace* (London: Tavistock, 1971) at 177.

tional and psychological problems, then it may benefit the mediation process.[54]

Moore's position on therapist involvement is consistent with his position on extra-family involvement. He does not discuss the criteria which must be evidenced by a disputant desiring the involvement of his or her therapist. However, in order to protect cooperation and integration, he does caution against unrestricted involvement of a client's therapist. The protection of cooperation and integration is thus more important to the mediation procedure than is a disputant's own assessment of her or his needs.

. . . . . .

Irving and Benjamin openly acknowledge that family mediation is also therapy.[55] The TFM mediator is expressly and unabashedly also a therapist, although whether she or he is so described to clients is not clear. The authors identify mediators' narrow understanding of the notion of therapy as the underlying factor in the debate about whether mediation is also therapy. Some mediators equate therapy with traditional psychotherapy (*i.e.* with practices aimed at producing insight combined with personality transformation) but not with practices aimed at behavioural change. Failure to acknowledge both kinds of practices as therapy is problematic, considering that many family therapists explicitly reject personality transformation or the achievement of insight as goals of their own practices.[56]

Irving and Benjamin's alternative view is that family mediation "is explicitly therapeutic insofar as it addresses emotional issues *as deemed necessary*."[57] Although this frankness is preferable to the furtiveness or ambiguity of most mediation theorists, their attraction to therapy is an endorsement of their own expertise (*i.e.* of the mediator's own opinion of when therapy is necessary and of the form it should take). Like Landau, Bartoletti and Mesbur and Moore, Irving and Benjamin substitute their knowledge for that of the client's therapist, and, of course, for that of the individual client. Indeed, if the interventions of an independent therapist in any way conflict with

---

[54] *The Mediation Process, ibid.* at 108-109.

[55] For a discussion of the importance of therapy, see *Family Mediation, supra* note 12 at 80-81.

[56] *Ibid.* at 53, 80-81. Joan Kelly, a member of the Ontario Attorney General's Advisory Committee on Mediation in Family Law, is cited by Irving & Benjamin as one who equates therapy with psychotherapy (J.B. Kelly, "Mediation and Psychotherapy: Distinguishing the Differences" (1983) 1 Mediation Q. 33 at 34-35). The differences of which she writes also reduce to a central distinction between direct and indirect therapy.

[57] *Family Mediation, ibid.* at 53.

those of the TFM mediator, the therapist is to be made aware of how she or he is contributing to family dysfunction.[58]

Psychological tactics are deeply imbedded in human communication. To focus on where and how mediators draw boundaries between mediation and therapy is to focus on their evasion of the extent to which therapeutic techniques are used in mediation. If clients are unaware that they are contracting for therapy, and if the public is unaware that government is promoting, and in some cases enforcing, therapy, neither separation contracts, nor the social contract on which they are based, can be valid.

C. Separating Law and Mediation

Law is also an integral part of our communications. Whether or not the mediator is a qualified lawyer; whether or not professional codes of conduct demarcate mediation from legal practice (on the basis of a narrow and positivist understanding of "advice"); and whether or not mediators observe those ethical codes, the mediator is dealing with issues of law. Such issues are not restricted to group convention;[59] they are also regulated by the legal rules and boundaries of the state. By choosing tactics over advice as the preferred means of contributing to client decisions about legal issues, mediators mask their value judgments and the systemic partiality of their interventions.

How do the three mediation models exclude or admit lawyers in their practices? With respect to the contracted responsibility model, Landau, Bartoletti and Mesbur state that it is "the duty of every mediator to advise clients to obtain independent legal advice."[60] Since the roles of lawyer and mediator are strictly demarcated in Canada, the professional acts either as lawyer or as mediator.[61] Unlike the contracted responsibility model, Moore's procedural model contemplates the presence of lawyers in mediation sessions. He believes that mediators should encourage parties to consult their lawyers before, during and after negotiations. This contemplation is, however, accompanied by the fear that since "[l]awyers are generally trained to develop a case for a particular solution or position [, they] may couch set-

---

[58] *Ibid.* at 182-83.

[59] That is, to the area created in the modern state by what Kathryn O'Donovan refers to as law's "deliberate absence" (K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1984) at 201).

[60] Landau, Bartoletti & Mesbur, *supra* note 15 at 148.

[61] *Ibid.* at 149-50. This is so, even when the professional acting as mediator is a qualified lawyer.

tlement options in terms of right and wrong solutions."[62] In other words, lawyers may challenge the very basis of mediation. Moore does not suggest how his fear affects lawyer participation in mediation.

Several critics of family mediation practices have drawn attention to problems arising from an appeal to and reliance upon independent legal advice. Premised on a superliberal understanding of equality in family law,[63] independent legal advice "will in many cases function to hide inequality" and as a consequence make exposure of inequalities in the family and mediation process more difficult:

> [I]ndependent legal advice assumes a level of equality between the parties that makes the information and the advice meaningful in terms of the wife's ability to act on them. Informing a person of the legal and economic consequences of a document and giving her or him advice on whether the document adequately protects her or his rights and interests is pretty much an empty exercise if the person has substantially less bargaining power than the person with whom she or he is trying to reach an agreement. Independent legal advice provides protection in direct disproportion to the need for protection.[64]

. . . . . .

In TFM, only the lawyer who is "tremendously helpful to mediators ... as a member of the mediation team" is welcomed;[65] the lawyer who hinders the mediation process is effectively excluded. Lawyers are said to complicate the process in three ways. They may be "induced" into the family system as caring friends or father figures; they may perceive that the mediator is taking control of their clients; or they may perceive mediation as "undermining 'their' clients' rights and perhaps significantly reducing what they might otherwise have gotten through the courts."[66] Irving and Benjamin state that in the first two instances — in situations of induction or misperception — lawyers will withdraw from TFM when they understand, respectively, that their induction hinders the process or that their role is simply complementary to that of the mediator. In the third instance, when lawyers

---

[62] *The Mediation Process*, *supra* note 13 at 108.

[63] That is, an understanding of equality which denies feminist arguments any significant authority (see discussion, *supra* note 27) and which is the subject of M. Fineman's family law critique, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

[64] Majury, *supra* note 2 at 148.

[65] *Family Mediation*, *supra* note 12 at 181-82.

[66] *Ibid.*

behave as possessive individualists, they must be confronted with the danger to client self-determination caused by their efforts to undermine the mediation process; they must be told to keep out.[67]

Irving and Benjamin's position with respect to lawyers is predictable given that they reject the adversarial system as a means of resolving family conflict, and consequently enclose family conflict within the space of mediation. Chief among their many criticisms of legal action is the court's unwillingness and inability to address key emotional issues.[68] Irving and Benjamin consider emotionally charged family problems to be ill-suited to the court's rational, analytical process, the search for facts being "complicated by adversarial procedures and rituals which powerfully shape the way ... events are portrayed."[69] They note that pressure tactics, manipulation, concealment or distortion of facts, and competitive strategies are also encouraged in the adversarial system.[70] "[C]onflict over money, property and child custody all become symbolic defenses against pain while the underlying emotional issues remain unresolved."[71] In the authors' opinion, legal action might be useful only when no other method has proven effective.[72]

Irving and Benjamin's discussion of Maria's parents, however, provides a telling example of how ritual and other manipulative forms of mediation — the very characteristics the authors criticize in law — pervade TFM practice. Irving and Benjamin seem incapable, like Landau, Bartoletti and Mesbur and Moore who ritualistically present mediation-as-consensus as the alternative to law-as-competition,[73] of differentiating between just and unjust

---

[67] Irving & Benjamin fail to consider whether lawyers may be acting in clients' rather than their own interests, a fact Martha Bailey notes in her review of the authors (M. Bailey, Book Review of *Family Mediation: Theory & Practice of Dispute Resolution* by H. Irving & M. Benjamin (1989) 3 C.J.W.L. 303 at 311). Lawyers' interests and what is achieved through the courts may have nothing whatsoever to do with possessive individualism.

[68] *Family Mediation*, *supra* note 12 at 40.

[69] *Ibid.* at 38-39.

[70] *Ibid.* at 39.

[71] *Ibid.* at 40 [references omitted].

[72] *Ibid.* Some "balanced" mediators are not as forthright as are Irving & Benjamin in expressing the similar assumptions on which their practices are based. Landau, Bartoletti & Mesbur, *supra* note 15 at 22, assert that a growing set of opinions and body of evidence, supported by legislation, point away from litigation for resolving family disputes, except as a last resort.

[73] Balanced mediators tend to present their practices and the adversarial system as complementary. Whether complementary or oppositional, however, mediation is an alternative procedure to representational negotiation by lawyers and to judicial determination. What gets lost in these complementary/alternative/oppositional stances is the fact that lawyers and judges are those who come to be regarded as the complements or alternatives to mediators. This is made clear in the *Advisory Committee Report*, *supra* note 3 at 87, which, in discussing mechanisms for sorting out

competitive practices, and between good and bad reasons for competition. As the suggested alternatives to law demonstrate, they do not deal with dissent any more rationally than does law. Dichotomizing assent and dissent, they simply seek to exclude the latter.

Controlling mediators use their power to assert a prerogative to decide whether mediation or litigation is to be preferred.[74] By producing decisions about family organization as a choice between consensus and competition, and by producing consensus as the telos of the family system, mediation becomes the rational choice. This self-serving rationality ignores feminist critique of family mediation, which places great importance on the adversarial system as presently the only means by which formal attention is given to gender, race, class and other discriminatory bases which determine the family.

The adversarial system does not, of course, give adequate attention to those bases. Equality rights constitutionally entrenched in the *Canadian Charter of Rights and Freedoms*,[75] although intended to remedy, if not eliminate, the effects of systemic inequality, are interpreted by the judiciary to construct "yet another version of the ideology of equality."[76] However, mediators who dismiss feminist critique on the basis that it completely supports the flawed adversarial system miss the point of much of that critique.[77]

---

unsuitable mediation clients, points to "the need for alternative conflict resolution intervention (*e.g.* litigation, arbitration)."

[74] Girdner, *supra* note 8 at 146, identifies this method of control.

[75] Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[76] K.A. Lahey, "Feminist Theories of (In)Equality" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 82. See also J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485. There are, of course, area- and case-specific exceptions which demonstrate a commitment by some judges to redressing at least some injustices resulting from systemic discriminatory practices. Literature evaluating the contributions of Madame Justice Bertha Wilson, written both before and after her retirement from the Supreme Court of Canada, is illustrative. See *e.g.* S.M. Noonan, "What the Court Giveth: Abortion and Bill C-43" (1991) 16 Queen's L. J. 321; M.J. Mossman, "The 'Family' in the Work of Madame Justice Wilson" (1992) 15 Dalhousie L.J. 115.

[77] Lenard Marlow and S. Richard Sauber, for example, devote much of their text to pointing out the inconsistencies, false consciousness, and general wrongheadedness of (especially feminist) critics of mediation. They advance the thesis that divorce problems should be viewed by the mediator from the standpoint and within the value system of a mental health professional, and somewhat naively demonstrate a sense of dismay that anyone could regard family issues as in any sense political. They even intimate that mediators who attempt to respond positively to challenges with respect to legal rights renege on their professional and ethical responsibility (L. Mar-

Feminist critique of mediation in support of the adversarial system is selective of what is considered favourable in that system. We wish to expand, by whatever means are available, public spaces within which to challenge the liberal state's operation of a public/private boundary. Owing to the boundary's operation in support of mediation, vital family/workplace issues of justice are depoliticized and reprivatized.[78] Those who suffer most as a consequence of privatization are also those most efficiently and effectively silenced by privatization.

D. Conclusion

To exclude lawyers in particular, but also others who may not conceal their inclination to favour a culturally disadvantaged client (for example, therapists and extra-family), is to exclude any challenge to the notion that family and consensus are more important than the individual and dissent. By ignoring the oppressive supra-systemic effects on family interaction, mediation adopts a tactic which disempowers families and individual members, yet serves a self-legitimating function. It is the mediators' power which this tactic protects; power to master the family system and "to derive the maximum advantages"[79] from the family mediation system by neutralizing challenges which other actors may raise.

The problem is recognized and formulated in sociological analyses of systems theory as the "dissociation of problem-producing and problem-processing arenas."[80] A first principle of mediation, if autonomy and responsibility are to be used meaningfully in relation thereto, must be to refuse this process of dissociation in the face of challenge and complexity, to

---

low & S.R. Sauber, *The Handbook of Divorce Mediation* (New York: Plenum, 1990) at 104-19, 154).

[78] On the home as a crucial site for learning (in)justice, Susan Moller Okin has this to say:

> Unless the households in which children are first nurtured, and see their first examples of human interaction, are based on equality and reciprocity rather than on dependence and domination — and the latter is too often the case — how can whatever love they receive from their parents make up for the injustice they see before them in the relationship between these same parents? ... [U]nless the household is connected by a continuum of just associations to the larger communities ... how will they grow up with the capacity for enlarged sympathies such as are clearly required for the practice of justice? (S.M. Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989) at 99-100).

[79] *Discipline and Punish*, *supra* note 6 at 142.

[80] H. Willke, "Three Types of Legal Structure: The Conditional, the Purposive and the Relational Program" in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (New York: Walter de Gruyter, 1986) 280 at 289.

refuse to insist on cooption or exclusion.

II. Partitioning Parents and Children

> Disciplinary space tends to be divided into as many sections as there are bodies or elements to be distributed.
>
> Foucault[81]

The principle of 'enclosure' is not constant, as argued in the previous section: selective inclusion and exclusion of relatives, therapy, and law contribute to the functioning of family mediation. Nor is enclosure a necessary or sufficient condition for organizing disciplinary space.[82] Mediation, in theory and practice, also spaces subjects by means of intra-systemic boundaries. Like the boundary separating nuclear from other kinds of family, the boundary separating parents and children is valued for its susceptibility to manipulation or, in current systems speak, its flexibility.

This section examines how each of the TFM, procedural and contracted responsibility models theorizes relationships between separating parents and their children, and operates the spaces between them in practice.

A. Children's Theoretical Importance

1. Quantitative over Qualitative Parenting

A hierarchy of power is not a popular notion in family systems theory. According to that theory, a hierarchy of power, as commonly understood, is a linear metaphor derived from individualism and is inconsistent with the reciprocal nature of interaction between parents and children. Attached to the notion of parental power is the implication that parents have power over children while children have no such reciprocal capacity. Instead, family systems theory maintains that the parental or executive sub-system should be understood as influencing the child or sibling sub-system.[83]

In their family systems approach, Irving and Benjamin maintain that TFM is based on a special concern for children's interests. They state that children's interests are often correctly viewed as paramount by family mediators, and that the mediator's job is to advocate for the larger family sys-

---

[81] *Discipline and Punish*, *supra* note 6 at 143.

[82] *Ibid.*

[83] Benjamin, *supra* note 25 at 45.

tem "and especially for the children."[84]

The manner in which the TFM practitioner discovers children's interests is problematic, to say the least. The bulk of Irving and Benjamin's book indicates that children, as speaking and acting subjects or as subjects-in-becoming, are hardly considered. Children are used, rather, to endorse both the principle of formal equality between mothers and fathers, and the mediated shared-parenting procedure for realizing that principle. The omission of children from the TFM theory of functional and dysfunctional family interaction indicates that Irving and Benjamin have little regard for children as subjects. As a result, TFM theory is concerned almost exclusively with patterns of inter-parent behaviour. The authors only discuss the relationship between children and separating parents long after a full explanation of the central tenets of TFM theory and practice.

When children are eventually discussed, it is clear that their interests are to be understood on the basis of the Toronto Shared Parenting Project,[85] and of other selected studies. Data from the Project shows shared parenting in a favourable light. Since Irving and Benjamin state that the vast majority of the "shared parents" chosen for the project were characterized "by mutuality before and after their divorce,"[86] favourable results are hardly surprising. Of concern, however, is the authors' attempt to base their arguments on those results. From the favourable findings regarding shared parenting in the context of pre- and post-divorce mutuality, Irving and Benjamin proceed to argue for a legal presumption of shared parenting without reference to pre-divorce mutuality: "[S]hared parenting promotes joint co-parental involvement and decision-making as well as fiscal responsibility." As their argument progresses, the element of post-divorce mutuality is also discarded and whether child custody may become a matter of contention between sharing parents is apparently irrelevant: "[T]here is still a greater *degree* of parent-child contact within a shared parenting, as opposed to sole custody arrange-

---

[84] *Family Mediation, supra* note 12 at 54. The *Divorce Act, 1985*, S.C. 1986, c. 4, s. 16(8) states:

> In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[85] Funded by the Social Sciences and Humanities Research Council, Ottawa. The Project was initiated by Irving & Benjamin in 1981 and conducted over four years (*Family Mediation, ibid.* at 193-94). It is cited by many as evidence of the virtues of joint custody. For a critical analysis of its findings, see Bailey, *supra* note 2 at 81-83.

[86] *Family Mediation, ibid.* at 194-95.

ment."[87]

The authors also draw on Joan Kelly's work[88] to support their statement that "a statutory presumption of shared parenting should include giving judges the authority to order it even when the parents disagree."[89] They fail to draw attention to the ambiguous conclusions of Wallerstein and Kelly's major study of post-divorce custody relationships.[90] Wallerstein and Kelly state that joint legal custody "may" provide the legal structure of choice for those parents "able" to reach an agreement and "willing" to give children's needs priority or significance in decision-making.[91]

Wallerstein and Kelly also note that many non-custodial parents withdraw from their children "in grief and frustration"[92] as a consequence of their lack of legal rights to share in major decisions concerning their children's lives. This withdrawal is seen as only partially supporting the greater choices afforded by joint legal custody.[93] Irving and Benjamin do not critically analyze the kind of relationship parents have with their children — whether care, companionship or power over them is of primary importance — when major decision-making withdrawal becomes the reason for parent withdrawal.[94] Nor do they explore the way child experts promote abstract

---

[87] *Ibid.* at 204.

[88] J.B. Kelly, "Further Observations on Joint Custody" (1983) 16 U.C. Davis L. Rev. 762.

[89] *Family Mediation, supra* note 12 at 205.

[90] J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1980).

[91] *Ibid.* at 310.

[92] *Ibid.*

[93] *Ibid.*

[94] See E. Kruk, "Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce" (1990) 30 Fam. and Conciliation Courts Rev. 81. Kruk endorses mediation and related counselling services as an effective alternative for the majority of divorcing families, to adversarial means of resolving custody/access disputes. In arriving at this position, he relies on reports from a study in which he compared "contact" and "disengaged" post-divorce fathers. The studies indicated that fathers with the highest levels of involvement with, attachment to, and influence on their children during the marriage became disengaged, in 90% of cases, as a result of obstruction by ex-wives. These fathers felt that the antagonistic nature of the post-divorce relationship between spouses had been aggravated by the adversarial approach of the legal system. Conversely, fathers who had been at the periphery of their children's lives during marriage remained in contact after divorce. These fathers stressed the importance of the support and encouragement of their ex-wives, and were more likely to report lawyer behaviour as helpful, as both helpful and hindering, or as having no effect on their relationships with their children.

Kruk links these results with the "homogeneous" approach to custody taken by the adversarial system (custody for caring mothers; access for financially supportive fathers). In doing so, he

and universal sympathy for the grief and frustration of fathers, and how this can rebound on mothers. Susan Boyd's analysis[95] of *Tyndale* v. *Tyndale*[96] is illustrative. In that case, a mother lost custody to the father on the basis that he could lose interest in the children were she to be granted custody. The father "only really became a father to the boys after the separation;" but the mother is considered "sufficiently strong in her own right to handle the situation even though she does not have custody of the children and will continue to be a mother to the children."[97]

Wallerstein and Kelly further state that in viewing joint legal custody as reasonable, they differentiate between joint legal custody and joint physical custody. They renounce evenly divided child sharing in favour of unequal physical custody. However, they do not adequately probe the problems of joint legal custody — of joint decision-making power over major aspects of children's lives — where physical sharing is unequal. They ultimately conclude with the observation that, due to the centrality of both parents to the psychological health of children, "where possible divorcing parents should be encouraged and helped to shape post-divorce arrangements which permit and foster continuity in the children's relations with both parents."[98] Attention has been drawn to the distinction between continuity of contact with both parents and the amount of time spent between them in their children's adjustment to divorce.[99] Critics have also noted the absence of conclusive evidence in more recent research that children's adjustment is linked with the type of custody arrangement.[100]

---

fails to explore the implications of his reliance on reports of fathers only. His argument suggests a one-dimensional acceptance of the idea that women and lawyers are overpowering when fathers want to continue being involved with their children, and are cooperative so long as fathers remain on the periphery. Kruk does not consider that a desire for controlling power may be a possible basis for the deprivation experienced by disengaged fathers. Neither does he value narration by wives (or children) of their experiences with respect to contact and disengaged fathers.

[95] S.S. Boyd, "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge and Kegan Paul, 1989) 126 at 144.

[96] (1985) 48 R.F.L. (2d) 426 (Sask. Q.B.) [hereinafter *Tyndale]*.

[97] Boyd, *supra* note 95 at 144, quoting *Tyndale*, *ibid.* at 428-29.

[98] Wallerstein & Kelly, *supra* note 90 at 310-11.

[99] See *e.g.* C.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" (1988) 2 Int'l J. L. & Fam. 106 at 109.

[100] See Bailey, *supra* note 2 at 84, referring to research conducted by the Center for the Family in Transition, and to its paper by J.R. Johnston *et al.*, "Ongoing Post-divorce Conflict in Families Contesting Custody: Does [*sic*] Joint Custody and Frequent Access Help?" (Paper presented to the Annual Meeting of the American Orthopsychiatric Association, 30 March 1988) [unpublished]. In their analysis of the misuse of social science data in the custody debate, Martha

As we have seen, Irving and Benjamin promote shared parenting. In doing so they emphasize quantity over quality. Further, in apportioning children between their parents, they focus on post-divorce child care in a way which disconnects it from pre-divorce child care. This process fails to consider why a fathers' rights movement against employers who do not provide workers (men as well as women) enough time and flexibility for child care, does not seem to enjoy as high a profile as a fathers' rights movement which complicates many women's child care responsibilities.[101]

Family systems theory represents intra-systemic boundaries as complex and fluid.[102] In isolation from other aspects of systems theory, this representation should provide a framework for allowing children's interests to be appropriately dealt with on a case by case basis. The TFM retainer contract also has that potential in so far as it does not make shared parenting an agreed goal of mediation.[103] However, it may be inferred from Irving and Benjamin's case reports that it is fathers' interests which are served by systems complexity and fluidity, that if a father enters mediation demanding a share of child custody, he will get it; if he enteres mediation demanding only access, again he will be accomodated.[104]

Fineman and Anne Opie stress the tendency of those arguing for joint custody to make generalizations which ignore the import of, and essential information contained in, qualifications noted in studies such as that of Wallerstein & Kelly (M. Fineman & A. Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce" (1987) Wisconsin L. Rev. 107).

[101] In the Smith case, the mediator extracts from Maria Smith an undertaking to help the husband from whom she is separating acquire the necessary fathering skills (*Family Mediation, supra* note 12 at 113-29). In a case study undertaken by Tina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L.J. 1545 at 1563, a mother has to cope with the effects of the care given to her child, Kenny, during a period with his father. Instead of being under his stepmother's care as his father had promised, Kenny has been in unlicensed daycare where corporal punisment is regularly used by the teacher. Kenny had not previously been subjected to corporal punishment, to which his mother is vehemently opposed. He becomes violent and aggressive with other children for the first time in his life. In response to raising the issue in a request for sole custody, Kenny's mother is told by the mediator that the whole incident is past history and she must now recognise that the parent who has the child is responsible for choosing daycare. She must learn to give up control.

[102] Benjamin, *supra* note 25 at 49.

[103] *Family Mediation, supra* note 12 at 266-70.

[104] In the Smith case, *ibid.* at 113-29, the only "full-length case study" reported by Irving & Benjamin, both Maria and John Smith want custody of their daughters. A shared-parenting arrangement is eventually produced which gives more of the children's time to John than to Maria, despite his long-distance truckdriving job and the fact that his own parents, unlike those of Maria, are dead. In the Faulkner case vignette, the most detailed of three TFM "case vignettes", and the only one in which custody is in dispute at the outset of mediation, Mr. Faulkner wants access. He

2. Fault as Infantasy

The presentation of children's best interests is also problematic in Landau, Bartoletti and Mesbur's contracted responsibility model. Clause 3 of the retainer contract states:

> 3. It is agreed that the best interests of the child[ren] will be the primary consideration for:
>
> resolving the issues of custody and access,
> and
>
> developing a shared parenting plan.[105]

The wording of this clause makes shared parenting part of the process of resolving the twin legal issues of custody and access. Children's best interests are, in fact, the "primary consideration" only *within* the shared-parenting resolution. What justification is offered by the authors for giving priority to shared parenting?

Drawing on mental health research, particularly that of Wallerstein and Kelly,[106] Landau, Bartoletti and Mesbur cite the common reactions of children to separation in general, and the different stages of development at which specific reactions occur. They appear to find in Wallerstein and Kelly's work three general problem areas with respect to children's needs: an inability to accept separation; fear in younger children that they are responsible for the marriage breakdown, and anxiety in older children about their own future relationships; their witnessing of or other involvement in parents' destructive behaviour.[107] Following Wallerstein's independent work,[108] Landau, Bartoletti and Mesbur itemize the tasks children must therefore learn to perform in order to deal with these problems. They must

---

demands an access arrangement irrespective of his daughters' skating lessons and practice, an activity which has meant the involvement of his wife, and which has purportedly made Mr. Faulkner "who holds a managerial position" feel completely shut out of the family. As part of the access arrangement reached, Mr Faulkner will not prevent his daughters from "minimal necessary skating practice" when they are with him for extended periods of time (*ibid.* at 188).

[105] Landau, Bartoletti & Mesbur, *supra* note 15 at 213. The open mediation contract states in paragraph 2, *ibid.* at 216, that "the Mediator will perform a complete evaluation in order to arrive at recommendations for a parenting plan that will be in the best interests of the child."

[106] *Supra* note 90.

[107] Landau, Bartoletti & Mesbur, *supra* note 15 at 66-68.

[108] J.S. Wallerstein, "Children of Divorce: The Psychological Tasks of the Child" (1983) 53 Am. J. of Orthopsychiatry 230.

acknowledge the reality of the marital rupture, resolve the loss of an intact family unit and accept the permanence of the divorce; resolve anger and self-blame, and achieve a realistic hope regarding their capacity for interpersonal relationships; disengage from parental contact and distress, and resume their customary pursuits.[109] Parents, for their part, should pool their efforts to help their children: they "need to learn to focus on the needs of the children, *rather than* on the fault of the other spouse."[110] The authors fail to question the intent, meaning and consequences of the simplistic dichotomies they use to conceptualize custody issues. Instead, they stress the importance of focusing the parties "on realistic, objective criteria, *rather than* [on] each party's position, which may be based on emotional factors, such as a desire for revenge for a matrimonial fault."[111]

Surely the three general problem areas emphasized by Landau, Bartoletti and Mesbur indicate a need for children to understand why their parents have separated, where fault does and does not lie on an individual and systemic level, and the differences between constructive and destructive responses. How can children ever hope to understand separation and form lasting relationships when they are insulated from confronting such issues? Mental health and behavioural science principles as applied to mediation, make child division the focus of separation, equate constructive expression of conflict with consensus, and replace understanding with denial.

3. Adulteration as Maximization

Moore does not theorize children's interests. His discussion of mediator approaches to custody appears to assume that it is not necessary to articulate children's interests independently of a belief that parents generally know what is best for their children. That belief distinguishes a process-oriented mediator from a substance-oriented one, or, in other words, the mediator as orchestrator from the mediator as deal-maker. Deal-makers believe they should intervene to influence the substantive outcome of parent negotiations if children's interests are violated or ignored. In this way, deal-makers advocate the unrepresented interests of children. Orchestrators, by contrast, believe parents have no need for expert guidance; they need only procedural assistance to solve the problem at hand. Moore professes a strong leaning

---

[109] Landau, Bartoletti & Mesbur, *supra* note 15 at 66-67.

[110] *Ibid.* at 66 [emphasis added].

[111] *Ibid.* at 79 [emphasis added]. On the dominant social science meaning of realistic critcria, see Fineman & Opie, *supra* note 100.

towards the process or orchestration end of this continuum.[112]

So stated, Moore's position becomes the classic exposition of so-called mediator neutrality: coming from nowhere before the process, and going nowhere after it, mediators simply intervene to ensure that the process functions. Moore does not acknowledge that problem-solving assistance is always based on a particular view — within the mediation movement, this implies a specific, political view. This view has serious consequences for family reconstitution, insofar as parents are co-opted by an appeal to expertise unaccompanied by any acknowledgment of the mediator's political position. Consequently, mediator impartiality as between the two clients, when it exists, is purely coincidental.

Since procedure and substance are inseverable, although distinguishable, Moore needs a theory of children's interests. By this, I suggest that he needs to think out such a theory. Moore's practices with respect to children, a discussion of which carries over briefly into the next sub-section, do in fact work within a theory; however, his theory is essentially flawed because of its underdevelopment. He needs a theory for the additional reason that his leaning towards, rather than idealized occupation of, the process pole of his continuum contemplates a residue of children's interest for which the mediator is responsible.

B. Practising Children's Best Interests

In Moore's consensus approach to bargaining, which is lodged in the ideology of the mediation movement, the aim is generally "to create a solution that maximizes the satisfaction of all parties' interests". Narrowed to custody, the aim translates into "maximiz[ing] the opportunity for relationship with the child."[113] Moore's belief that parents know best their children's interests must, of course, be integrated into his maximization aim, along with the residue of children's interests inherent in his unidealized approach. Thus when each parent demands sole legal custody, Moore reframes the problem as one of "how each parent can maintain an acceptable and nurturing relationship with the child."[114] To ensure achievement of the maximization goal, the mediator then has each parent list the activities she or he wants to share with the children. These activities are traded off against those of the

---

[112] *The Mediation Process*, *supra* note 13 at 40-42.

[113] *Divorce Mediation*, *supra* note 13 at 266.

[114] *Ibid.*

other parent in such a way as to minimize scheduling conflicts.[115]

Mediator input in Moore's procedural model steers parents towards a shared-parenting outcome. It does so without reflection on the questions whether consensus bargaining and shared parenting procedures are in the child's best interests, and whether parents are best informed of the meaning and consequences of the procedure.

. . . . . .

Informing parents of the implications of choosing mediation is particularly pertinent to the contracted responsibility approach. This is because the mediator presumes to know better than the clients what is in the best interests of the children, while at the same time off-loading responsibility for custody decisions onto those clients. Landau, Bartoletti and Mesbur's strained articulation of how a mediator may manoeuvre parents from custody and access disputes to shared parenting agreements illustrates the problem of integrating parent responsibility into a presumption that the mediator knows best. For example,

> the mediator might determine whether the parents agree that the best interests of the children ought to be the primary criteria for evaluating a solution, as opposed to whether one parent wins or loses. The mediator could spend some time with the parents identifying what is meant by "best interests of the children". For example, the parties might agree that: ... Children should spend considerable time with both parents, in keeping with the children's needs, stage of development and wishes and with the ability and willingness of the parents to spend time with the children.[116]

It appears that the mediator's decision could result from conduct which the adversarial system disallows: asking leading questions.[117]

Since Landau, Bartoletti and Mesbur's retainer contract gives the media-

---

[115] *Ibid.* See also *The Mediation* Process, *supra* note 13 at 176. Trade-off of multiple variables is a central aspect of the labour model of family mediation relied upon by Moore. See J.M. Haynes, *Divorce Mediation: A Practical Guide for Therapists and Counselors* (New York: Springer, 1981) at 74-76.

[116] Landau, Bartoletti & Mesbur, *supra* note 15 at 78.

[117] Irving & Benjamin, both with social science backgrounds, take a one-dimensional, oppositional stance against rules of evidence/procedure (*Family Mediation, supra* note 12 at 38-40, 43). Landau, Bartoletti & Mesbur, two of whom are lawyers, appear satisfied to ignore this aspect of law and the absence of such protections in mediation, without any kind of argument for doing so and instead rely on the ethics of mediation associations.

tor the right to include children at any time in the mediation process, the problem of manipulative suggestion may be compounded. The authors stress the correct procedure for conducting meetings with children in the presence of their parents, and in fact state that the mediator should make it clear "that the parents will be making the decision for the children, that is, that neither the children nor the mediator will be making the decision, but that it is important for the parents to have input from the children in arriving at a decision."[118]

Since the mediator aims to manoeuvre parents into agreeing with her or him that shared parenting coincides with the children's best interests, the desirability of shared parenting will not only be the presumption according to which parental decision-making takes place, but it will also become the presumption according to which children's input is interpreted by their parents. The ensuing vulnerability of children in the face of adult interpretation is demonstrated in the TFM practices discussed below.

. . . . . .

Returning to Irving and Benjamin's Toronto Project, the enormity of their leap in logic from pre- and post-divorce mutuality to a legal presumption of shared parenting is hardly diminished by the fact that all data concerning the children in their Project is based only on parents' perceptions. The authors acknowledge this fact, adding that the data "thus may not coincide with the children's actual experience."[119]

Consistent with this disregard of children as speaking and acting subjects — and echoing TFM practice with respect to external influence — is an invitation to children to participate in mediation sessions only where their physical presence is essential as "a last ditch effort to get around an impasse."[120] Children are otherwise only present on a purely symbolic level.[121] This means that even in their absence, they can still exert an important influence in therapy:

---

[118] Landau, Bartoletti & Mesbur, *supra* note 15 at 58.

[119] The authors say that some children's results were omitted from the sample of 395 respondents because of limited resources (*Family Mediation, supra* note 12 at 195).

[120] *Ibid.* at 180.

[121] Irving & Benjamin's use of the notion of children's symbolic presence in mediation draws on the Palo Alto Mental Research Institute's family therapy methods, which tend to restrict physical presence to one or few members of the family system, and on the notion of 'family ghosts' or deceased family members who continue to influence the family's value system (*ibid.* at 179).

> [W]e call the children into our mediation sessions by spending a good deal of time talking about them. How old are they? what do they look like? how do they behave? how does each parent interact with them? have they any funny quirks? special strengths? do they have pictures of them? what do the parents want for their future? — these are all questions we might ask that have the effect of symbolically recreating the children in mediation. They are there just as palpably as if they were present in the flesh.[122]

Even when children are physically present, the techniques used to discover their wants, combined with mediator interpretation of their responses, appear too infused with shared-parenting metatheory to allow for an accurate assessment of how the children themselves think and feel. The Smith case study is again illustrative. Maria and John's ten- and six-year-old daughters are interviewed in the presence of both parents as well as grandparents. The reader is not told what exactly is asked of the girls, nor how they reply. The reader knows only that "both express the wish to spend time with their dad."[123] Through the control of the mediator, time with their father becomes every weekend (beginning at five p.m. Friday and ending at seven p.m. Sunday), as well as one afternoon and night weekly, and half of the school holidays. This is decided despite the facts that the father is a long-distance truck driver, and that the maternal grandparents are the only grandparents still alive.[124] Since inclusion of children in the process appears to be only a manipulation of them, the presupposition that professional mediation is necessarily, or even often, the more just of the available procedures for dealing with custody disputes must be questioned.

C. Conclusion

The best interests standard plays a more or less prominent role in each approach to mediation, but what does it mean? Its indeterminacy becomes obvious when the boundary partitioning parents and children is examined. Consensus bargaining, contracted responsibility and TFM boundaries all shift as the proponents of each model try to overcome the inevitable incoherence of practices purporting to be objective and neutral. But while mediation's disciplinary space "permit[s] circulation", it also "provide[s] fixed positions".[125] Whether children's interests dominate or are subjected to those

---

[122] *Ibid.*

[123] *Ibid.* at 125.

[124] Compare (and contrast) the Faulkner case vignette in which mediator interpretation of the children's comments ("They didn't really want to stop skating, but neither did they want to have to choose between their parents") is translated into mother custody and father access, which was what Mr. Faulkner had wanted from the outset (*ibid.* at 188).

[125] *Discipline and Punish*, *supra* note 6 at 148.

of a particular parent, they are consistently integrated into the interests of mediation, which usually correspond to the interests of shared parenting. Beneath the banner of children's best interests, mediation reduces the complexities of accounting to and for children by rationalizing interaction with them.

III. Circulating Parental Partuers

> In discipline, the elements are interchangeable, since each is defined by the place it occupies in a series, and by the gap that separates it from the others ... Discipline is an art of rank, a technique for the transformation of arrangements. It individualizes bodies by a location that does not give them a fixed position, but distributes them and circulates them in a network of relations.
>
> Foucault[126]

Systems theory effects a shift from the traditional individualist perception of entities to one which stresses relationships between entities or individuals.[127] The previous two sections have shown that the shift is largely fictional with respect to the entity of the nuclear family and to its parent/child sub-systems. This is because individual autonomy is also largely fictional. Liberalism is selective as to who has autonomy, and those selected in any particular situation are generally those from whom the selectors stand to benefit most. Dominant family mediation practices, informed by systems theory, favour the nuclear family unit or entity over other kinds of family and favour mediation over any other means of dispute resolution.

Within the parent sub-system, known as "the marital dyad",[128] family mediation favours the husband over the wife. It does so by again emphasizing the relationship or space between the spouses. This emphasis is partly a consequence of tactics already discussed (*i.e.* of giving primacy to the mediated nuclear family and to parents which prevents an individual spouse being viewed as distinct and as the centre of many different relationships). The emphasis is partly more direct. In this section, I first show how a shift in the concept of causality in systems theory directly focuses attention on that space. An understanding of causality as circular underpins the practices of each model and displaces the idea of linear causality. Viewing causality as circular reduces individual spouses to an interactional space that is gen-

---

[126] *Ibid.* at 145-46.

[127] Benjamin, *supra* note 25 at 39.

[128] *Ibid.* at 48.

der-neutral.

Secondly, I demonstrate how all three models treat asymmetry in a marital relationship as complementarity, whether or not asymmetry is willed by the subordinated spouse. Viewing asymmetry merely as complementarity leads to viewing conflict merely as dysfunction. When understood benignly as dysfunction, conflict may simply be "resolved" under the guidance, or, more accurately, through the tactics,[129] of the family expert.

A. Surface or Two-Dimensional Causation

Systems theory, as Benjamin explains it, only applies the traditional cause-and-effect perception of the world to mechanical systems; an application of that perception to living systems such as the family is therefore considered inappropriate.[130] The traditional perception is conceptualized in linear terms, whereby outcomes can be predicted on the basis of knowledge of the quantified characteristics of relevant entities. This perception is thus rejected by systems theory in the context of human systems because it does not account for those entities' relational nature. Nor does it account for the fact that "any causal connection between past and present states of the system diminish [*sic*] to the vanishing point" as relevant events and processes accumulate over time.[131] Consequently, causality has come to be viewed as circular in nature. In this light, causality purportedly reflects what systems theorists understand as the necessary discontinuity and irreversibility of change within complex systems. Circular causality or recursivity "involves simultaneous, mutual causal processes whose locus is in the 'space' between interacting system members rather than within them, either in their past or the present."[132]

The coordination of parts and processes is a central tenet of systems analysis. Thus, mediators apply mechanical, biological, and social concepts

---

[129] I understand "tactics" as a mode of action whereby the value of reflective knowledge, such as may be implied by the notion of guidance, is subordinated to that of technical skill. The effect in mediation is simultaneous enhancement of mediator control and concealment of this fact.

[130] Benjamin, *supra* note 25 at 40.

[131] *Ibid.*

[132] *Ibid.* at 41. The systems conceptualization of causality has developed through several stages of dominant scientific understandings of human development. From the seventeenth century to the latter half of this century, those stages have elaborated a mechanical model of man, an organic model of man, a process model of social interaction, and, drawing on "pure" and social sciences, a systems model of interaction at all levels of organization. A number of principles and processes are unified in what is now known as General Systems Theory (GST) (*ibid.* at 37).

to the interaction of separating spouses. In doing so, they bind the family with the family mediation system in a "psychocyberbioepistomology" of family dispute resolution.[133]

From that epistemology, Irving and Benjamin invoke a melange of thermodynamics imagery[134] to explain how emotion and reason operate in the space between spouses. To outline briefly the background of the Smith case study, as reported by the TFM mediator, Maria's interaction with her family intensified when John, with whom she had only had fleeting moments of closeness, refused to respond to her complaints concerning his neglect and her growing loneliness. Having formed another relationship in which she saw the potential for the family life she wanted, and having overcome her mother's objections to the new relationship, Maria told John of her intention to separate. Although John had not been close to Maria, he nevertheless felt at home and at ease in her presence. Completely unprepared for their break-up, he pleaded for a second chance, accused her of selfishness, and confessed that he was unable to cope alone. He also threatened to harm her lover and thought aloud of suing for sole custody. In their assessment of the relationship Irving and Benjamin state:

> [I]t appeared that the relationship between John and Maria was characterized by an approach-avoidance pattern. Close for a time, they would then separate to the point where one or the other began to feel uncomfortable when they would come together again. Such oscillation between closeness and distance had initially been relatively rapid, with short intervals between one pole or the other. But over time, the rate of oscillation had slowed, the periods of closeness becoming shorter and shorter and the periods of distance became longer and longer. Most recently, they had become so long, that one partner, Maria, felt herself forced to try to change things; when her efforts to bring her husband closer failed, she turned elsewhere.

---

[133] This compound term is used by G. Teubner, "After Legal Instrumentalism? Strategic Models of Post-Regulatory Law" in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (New York: Walter de Gruyter, 1986) 299 at 308. Teubner borrows this term from S. Beer, "Preface to Autopoiesis" in H. Maturna & F. Varela, eds., *Autopoietic Systems* (Urbana: University of Illinois Press, 1975).

[134] In accordance with the second principle of thermodynamics, disorder and differences in "homeostatic" or closed systems are levelled down through a process called entropy. Initial conditions determine the equilibrium state of such systems. In open systems, by contrast, order and complexity can be increased by the import of "negative entropy", the transfer of matter as found, for example, in the life system process. A time-independent state of "equifinality" may be attained independent of initial conditions, and determined only by system parameters (L. von Bertalanffy, "General Systems Theory — a Critical Review" in W. Buckley, ed., *Modern Systems Research for the Behavioral Scientist* (Chicago: Aldine, 1968) 11 at 18). In systems theory, the family is regarded as an open system (Minuchin, *supra* note 31 at 50).

> In this context, the behavior of John and Maria became reasonable.[135]

By conceptualizing the spouses' behaviour as a mechanical oscillation between closeness and distance or as a positive/negative feedback loop of approach/avoidance, Irving and Benjamin diminish the distinctive behaviour of each spouse.[136] In addition, they do not address the distinctive causes of the behaviour. Causes, behaviour and persons all merge in a single pattern of interaction to which is applied a single standard of reason. This manoeuvre — collapsing causality into a single pattern of interaction — is also used in both "balanced" models.

In Christopher Moore's procedural model, the interactional space of the spouses' negotiations mixes exchangeable interests in an ever-expanding pie. While Moore views the causes of conflict as multiple, diverse and intertwined,[137] he considers the major cause of marital disputes to be conflicts of interest.[138] Substantive benefits, procedural dynamics and psychological needs, in combination, are the three categories of interest over which such disputes usually take place. The spouse as negotiator attempts to maximize the satisfaction of his or her interests and to minimize the negative impacts of competing interests.[139] Teaching parties to negotiate effectively is one of the mediator's major tasks.[140]

Following Fisher and Ury, Moore delineates two major negotiation procedures between which parties choose: positional or interest-based bargaining.[141] The win/lose mentality of positional bargainers prevents them from perceiving their interests as interdependent with their spouses'. Positional

---

[135] *Family Mediation, supra* note 12 at 114-15.

[136] The feedback loop refers to telenomic, or goal-directed, systems. In such systems, output behaviour is compared to a goal or value and reintroduced as input. Information about a difference is then utilized to direct subsequent output behaviour. Negative (or variety) feedback tends to reduce deviation from the system's goal and thus to maintain patterns within specified limits. Positive (or constancy) feedback tends to increase deviation and to alter the prevailing pattern (Benjamin, *supra* note 25 at 49). Whether John and Maria's interaction is better described as a negative or a positive feedback loop will depend on the stage at which the description is applied. In accordance with cybernetics theory, it is more accurately described as positive before Maria acts to change the situation, and as negative when she acts.

[137] *Divorce Mediation, supra* note 13 at 252.

[138] *Ibid.* at 264.

[139] *Ibid.* at 255.

[140] *Ibid.* at 266.

[141] R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin, 1991) at 40.

bargainers adopt particular settlement options, on the assumption that both sides will give incrementally until they reach an acceptable settlement range. This often results in "compromise settlements based on the division of resources or of child custody that are not the best solution for anyone."[142] The interest-based bargainer, with a win/win attitude, does not assume that the resource at issue is necessarily limited. The task of the mediator is to foster this attitude, by focusing husband and wife on their respective needs, the interests they hold in common, and on what Moore calls non-competing or complementary interests which have "trade-off" potential.[143] Moore's purpose in making compatible or complementary interests explicit is, among other things, to build "a habit of agreement".[144] The procedural notions of compatibility and complementarity, and accordingly the kind of agreement to which the procedural model habituates clients, will be explored in the next subsection.

Landau, Bartoletti and Mesbur do not develop a theory of causation in their contracted responsibility model. The model nonetheless circulates clients in the interactional space created by the expertise of the mediator. The retainer contract, signed by husband, wife and mediator, carries the header "Re: (clients' names)". Throughout, it refers to clients indiscriminately as "the parties" or as "the husband and wife."[145] Similarly, the listening and communication technique promoted by the authors teaches separating spouses to

> [accept] *the fact that each person is entitled to his or her own perception of a situation.* That is, rather than putting the mediator in the position of judging who is right or wrong, who is lying or truthful, both parties need to accept that they may perceive situations differently and therefore may feel and act differently.[146]

Thus, circular causation underlies the logic of both contractual and behavioural manoeuvres in this model.

---

[142] *Divorce Mediation, supra* note 13 at 266.

[143] *Ibid.* at 267.

[144] *The Mediation Process, supra* note 13 at 198.

[145] Landau, Bartoletti & Mesbur, *supra* note 15 at 213 (closed mediation contract), 216 (open mediation contract).

[146] *Ibid.* at 77. Note how entitlement and need — representing realms of discourse described by Foucault as heterogeneous or incompatible, yet capable of operating together to explain the global functioning of normalization — are used indiscriminately in this passage (see "Two Lectures", *supra* note 19 at 107-108).

B. Causation in the Service of Domination

Within the conceptual shift from linear to circular causation, Gregory Bateson of the Palo Alto school identifies two patterns of family interaction which transcend the clinical/non-clinical distinction. He does so in terms of the "marital dyad", while acknowledging that both patterns can operate among any number of participants. He states that the marriage relationship is characterized as "symmetrical" insofar as behaviour which both partners regard as similar is linked in such a way that more of the behaviour in one stimulates more of the same in the other. The relationship is characterized as "complementary" if the behaviour of each partner is dissimilar, yet still linked to reciprocal stimulation.[147]

Benjamin's presentation of Bateson and other theorists suggests that it is difficult to identify the origin or source of reciprocal stimulation. The question of whose behaviour first determines the other's depends simply on "where one chooses to break the continuity of process. One might just as well start with variable B as a determinant of subsequent changes in variable A."[148] In his discussion, Benjamin also draws attention to family systems theorists' recognition that relationships of 'dominance' and 'submissiveness' exemplify complementarity. Benjamin does not indicate, however, whether those theorists distinguish between asymmetrical relationships which are complementary and those which are not. Similarly, Benjamin himself fails to make this essential distinction. Like 'complementary', the terms 'dominance' and 'submissiveness' may go so far as to suggest willed support of a power hierarchy, or at the very least, a passive acceptance thereof. Using these expressions to generalize about asymmetrical relationships obscures the fact that relationships of domination and subordination may be entirely unwilled.[149]

---

[147] G. Bateson, "The Cybernetics of 'Self': A Theory of Alcoholism" (1971) 34 Psychiatry 1, cited in Benjamin, *supra* note 25 at 44.

[148] Benjamin, *ibid.* at 41, quoting J.C. Coyne & R.S. Lazarus, "Cognitive Style, Stress Perception, and Coping" in I.L. Kutash *et al.*, eds., *Handbook on Stress and Anxiety* (San Francisco: Jossey-Bass, 1980).

[149] Drawing on M. Walters, "A Feminist Perspective in Service Delivery Systems" (The Family Therapy Practice Center, Washington, D.C., 1986) [unpublished], M. Laurie Leitch gives, as an example, social scientists' inappropriate use of complementarity to explain family dynamics. Their characterization of mothers as over-involved in family life and fathers as peripheral thereto implies that "the mother must change while the father has only to enter — to save the family from the excesses of the mother." The message given to the mother is that less of her is better, a message that corresponds to the devaluation of women in spheres outside of the family (M.L. Leitch, "The Politics of Compromise: A Feminist Perspective on Mediation" in D.T. Saposnek, ed., *Ap-*

Symmetry and asymmetry are the preferred terms for distinguishing power relationships in Christopher Moore's procedural model. Complementarity surfaces, however, as the fixed idea around which Moore circulates asymmetrical power. Even in his presentation of more extreme forms of asymmetry, he avoids suggesting that in treating the problem, conflict may be read as something other than a simple impasse in allegedly complementary relationships.[150] Moore solves the problem of mediating asymmetrical power, which he considers the norm in many family disputes, by projecting the interests of each party onto a single plane or into a causal circle of a relationship of exchange. The objective is "to minimize the negative effects of asymmetrical power relationships on the negotiation process."[151]

The procedural model sees one kind of asymetrical power conflict as a perceptual problem. This occurs where "the spouses do not have equal power, but the weaker party, by bluffing or through a misperception by the stronger, has made the other believe that they do have a symmetrical relationship."[152] It must be noted, however, that Moore's discussion of bluff refers only to bluff which is "ill-timed or inappropriate."[153] To deal with this type of misrepresentation, the mediator works with the bluffing spouse simply to minimize the impact and to prevent retaliation.

The procedural model treats the bluffing spouse as gender-neutral, even though women most often occupy the weaker position with respect to property and conjugal violence, and therefore with respect to just settlement of custody. Given the systemic nature of gender inequality, it might be germane for Moore to consider why a mother, as distinct from a father, might try to bluff and why Moore thinks the procedural response should be to retreat to prevent retaliation.

Other problems of asymmetry arise where the stronger, again gender-neutral, party pursues a manipulative and competitive path, ultimately

---

plying Family Therapy Perspectives to Mediation (1986-87) 14/15 Mediation Quarterly 163 at 170-71).

[150] Moore says that conflict is a fact of life that results in bargaining impasse. Bargaining impasse only becomes dysfunctional in the absence both of participants' ability to devise efficient and effective cooperative problem-solving procedures, which depends on their laying aside distrust and animosity, and of availability of solutions which will at least partially satisfy all participants' interests (*The Mediation Process*, *supra* note 13 at ix). Moore's procedures for laying aside distrust and animosity expose the priorities in his efficiency and effectiveness discourse.

[151] *Divorce Mediation*, *supra* note 13 at 269.

[152] *Ibid.*

[153] *Ibid.* at 270.

seeking a win-lose outcome, and similarly where the bases of the parties' power are very different. The procedural model deals with a competitive, stronger party by urging both parties to treat the relationship as symmetrical. The only rationale offered for this tactic — a variation on the theme of bluff — is that it maximizes benefits and lowers costs. Costs and benefits are to be understood as the mediation movement understands them: greater costs are associated with hiring an attorney, while greater benefits are associated with hiring a mediator. Where the bases of parties' power differ greatly, Moore suggests the appropriate intervention is to blur or obscure the asymmetry in order to promote cooperation on the basis of doubt. The tactic is commonly referred to as "keeping the parties off balance."[154] Client deception and self-deception, which promote both cooperation on the basis of doubt and mediation as a greater benefit than litigation, are thus acceptable bluffs. Though the procedural model professes mediator neutrality, its apparent comfort with bluffing does not address why, in a neutral process, any kind of bluff is required.

Finally, in cases "where the discrepancy between the means of influence is extremely great,"[155] Moore advocates managing the power relationship to allow for productive exchange. Productive exchange involves, among other techniques, encouraging the weaker, gender-neutral party to make realistic concessions.[156] Further, the procedural model understands reality only in terms of capital, *i.e.*, funds, and consequently, also in terms of the qualified attorneys and access to case law that funds can buy.[157] Within that discourse, "realistic" concessions will most often be those made by women to the reality/objectivity of business and professional men.[158]

---

[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

[157] Power is defined by Moore, *ibid.* at 268, in terms of these variables.

[158] This is a fact well understood by Judge Richard Neely who writes in support of the primary caretaker rule in West Virginia law (R. Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 Yale L. & Pol. Rev. 168).

Donald Saposnek also appeals to objectivity in his strategic model's functional perspective of behaviour, according to which "[w]ith very few exceptions, there are no angels or devils in custody and visitation disputes. There are only double conspiracies, in which both parties play their respective complementary parts in the ongoing conflict" (D.T. Saposnek, "Strategies in Child Custody Mediation: A Family Systems Approach" in J.A. Lemmon, ed., "Successful Techniques for Mediating Family Breakup" (1983) 2 Mediation Q. 29 at 47). The objectivity of this and other pronouncements flows, according to Saposnek, from the view that family members' attempts to meet their needs are not intrinsically good, bad, honest, dishonest, right, or wrong, but function merely to influence others (*ibid.* at 30). Agreement among family mediation participants with respect to goals and boundaries — a fundamental precondition for objectivity —

Moore fails to critically pursue questions of gender in relationships of exchange, and, in turn, fails to understand the dynamics of family domination. He states that the cause of structural conflict lies in the organization of a relationship and in the patterns of interdependence that emerge from it. Power is a variable which affects structure and which must be understood "*not* [as] a characteristic of a person *but rather* [as] an attribute of a relationship."[159] Consistent with the systems focus on the "space-between", Moore's dichotomy prevents him from locating the underlying sources of the problem. "Separate the People from the Problem"[160] is the command which the procedural mediator obeys.

. . . . . .

The stronger party's right to dominate through generalized complementarity is also secured in Landau, Bartoletti and Mesbur's contracted responsibility model. Under the terms of the contract, the mediator, who will on occasion meet individually with the husband and wife, "may share any information or concerns arising during the mediation process with either party."[161] Regardless of the information's content, neither husband nor wife, nor anyone acting on his or her behalf, "will take any fresh steps in the legal proceedings between the parties with respect to those issues that are being mediated."[162] By forbidding novel legal action, the mediator may disseminate information without putting the mediation process at risk. This manoeuvre ingeniously provides legal support for mediation as an information-sharing process, while simultaneously ensuring that a client is legally bound to complete the mediation sessions, whatever the impact of the new information.

On an informal level, the model assumes that parties are able to negotiate on relatively equal terms, and thus asymmetry is generalized to mere difference. No mention is made of any agent who may have promoted differ-

---

is not a precondition of Saposnek's brand. It appears in Moore's procedural model, only to disappear on closer examination.

[159] *Divorce Mediation*, *supra* note 13 at 268 [emphasis added].

[160] Fisher & Ury, *supra* note 141 at 17.

[161] Clause 11, found only in the closed mediation contract (Landau, Bartoletti & Mesbur, *supra* note 15 at 214). The provision is unnecessary in open mediation.

[162] Clause 10 in the closed mediation contract, *ibid.;* clause 13 in the open mediation contract, *ibid.* at 218.

ence as a means of domination, and who may continue to do so.[163] When the spouses *do* figure as persons, distinct from the space between them, the authors present their dominance and submissiveness as "difference in personality".[164] Antagonism or unwillingness is thus conceptualized as a psychological problem that can be mediated, not as a basis for client-inspired legal action. Conceptualized in this way, antagonism or unwillingness can thus be overcome by positive reinforcement "whenever the weaker spouse demonstrates more assertive behaviour" and "whenever [the more dominant spouse] demonstrates co-operative behaviour."[165]

In addition, under the terms of the retainer contract, the client parties have the duty to "make full disclosure of all relevant information reasonably required for the mediator to understand the issues being mediated."[166] There is no corresponding duty on the mediator, despite the fact that Landau, Bartoletti and Mesbur emphasize the need for, and indeed, the existence of, mediator impartiality. The retainer contract does not require the mediator to supply clients with the information necessary to understand the implications of having a mediator deal with the issues. In fact, the contract makes it the clients' responsibility to discover these implications by consulting a lawyer:

> The parties are strongly advised to obtain independent legal advice, particularly prior to signing any written Agreement to ensure that they are fully informed of their legal rights and obligations and the legal implications of such an Agreement.[167]

Martha Shaffer notes that lawyers are ineffective as client protectors when they are excluded from mediation sessions. Her comments, although made in reference to the final settlement agreement, are applicable also to the retainer contract. She points out that it is virtually impossible for a lawyer to judge the fairness of the mediation process which led to the creation of a settlement agreement. While an agreement can be reviewed for obvious breaches of the law, a lawyer cannot tell whether one of the parties was in-

---

[163] Characteristic of much of their reasoning, Landau, Bartoletti & Mesbur's rationale for power imbalance, *supra* note 15 at 88, takes the form of a list: lack of information; difference in education; difference in intellectual ability; difference in verbal ability; difference in culture or language; difference in age; difference in socioeconomic status; difference in the availability of a support system.

[164] *Ibid.*

[165] *Ibid.* at 89.

[166] Clause 7 in the closed mediation contract, *ibid.* at 213; clause 6 in the open mediation contract, *ibid.* at 217.

[167] Clause 4 in the closed mediation contract, *ibid.* at 213; clause 3 in the open mediation contract, *ibid.* at 216.

ordinately disadvantaged or was unduly pressured during the mediation process.[168] The lawyer needs to understand the retainer agreement essentially as an article of faith in the mediation process. Unless the lawyer endeavours to understand it as such, and is prepared to say so to the client, his or her advice will provide even more protection for unwilled asymmetrical relationships than will mediation without independent legal advice.[169]

. . . . . .

Irving and Benjamin appeal to focal neutrality[170] to explain why they do not assume a clear ethical responsibility to remove gender barriers to meaningful client participation. They maintain that the issue of unequal negotiating power is ethically contentious because "the mediator's willingness to accept standards of conduct or fairness ... foreign to him or her" is at stake.[171] Their statement implies that standards which are not foreign to the mediator are those which operate within the familiar overarching standard of formal equality, at least as understood and applied by behavioural experts. Placing dominant/submissive patterning along a gender line is antithetical to the TFM variety of neutrality.[172] Even though TFM is rendered "feminist informed"[173] by an expansion of its value base, it offers little hope for significant change. Much feminist critique comes from legal scholars characterized by Benjamin and Irving as arguing "on the basis of principle, logic, and evidence, *rather than* clinical experience."[174] Since TFM mediators inform themselves on the basis of this dichotomy, feminist values selected for incorporation into their model could be expected — as a matter of logic — to be those values most amenable to synthesis with TFM clinical practice.

It is thus not surprising that violence, which can be analyzed in a clinical setting, is evaluated in the new feminist-informed TFM. The new TFM also expands the notion of assessment processing to include an explicit inquiry into "recent and regular" occurrences of violence and/or inappropriate touching; the use of standardized detection instruments; and other means of

---

[168] Shaffer, *supra* note 2 at 188.

[169] Majury, *supra* note 2 at 149.

[170] The TFM ethic of neutrality is explained as "focal neutrality", or neutrality which is case- and context-specific. That is, different interests are given priority according to the particular case, or to a specific phase or stage within the case. In this context of particularity, priority is given on the basis of "desert". "Desert" referring in behavioural science to need in opposition to right.

[171] *Family Mediation*, *supra* note 12 at 54-55.

[172] *Ibid.* at 85.

[173] See "Feminist-Informed TFM", *supra* note 27.

[174] *Ibid.* at 134.

scrutiny and screening.[175] However, the authors conclude that "given violence that is current and ongoing (regardless of its severity), our experience is that these couples always fail to meet our admission criteria, and so are routinely referred out."[176] TFM's brand of focal neutrality appears most reluctant to allow legal redress for any but the most abused of abused women.[177] Benjamin and Irving's approach, in effect, prolongs and compounds the abuse. Furthermore, feminism itself appears to be conflicted over the appropriate use of mediation where the relationship has been abusive. Consequently, theorists like Irving and Benjamin have ample opportunity to rearticulate feminist arguments in their own terms, since "there has yet to be a definitive statement of the feminist position."[178] However, in making that point, the authors miss a central aim of feminist legal theory and practice: "[T]o disrupt the impulse towards unifying and over-generalized theory [without which disruption] the recognition of women's specificities will become part of the unshakeable hegemony of legal theory."[179]

TFM instead continues to emphasize more straightforward patterns, such as approach/avoidance and repetitive conflict.[180] This emphasis side-steps more complex issues, including the nature of human violence. In addition, a focus on those patterns avoids client challenge to therapeutic mediator authority.[181] Returning to the Smith case study, TFM circulates John Smith's

---

[175] *Ibid.* at 146.

[176] *Ibid.*

[177] Having come to the preliminary conclusions that no one was being harmed by mediation in Ontario; that the process was voluntary; that legislation was in place for dealing with violence; and that mediating abuse was to be distinguished from mediating "family law" issues in cases where abuse was experienced, the Committee in effect recommended that mediation accommodate abuse. Extensive scrutiny, screening, and "safeguards" — extended abuse — constituted their response to concerns raised by the Ontario Women's Directorate (*Advisory Committee Report, supra* note 3 at 74-80, 86-87).

[178] " Feminist-Informed TFM", *supra* note 27 at 130.

[179] Kathleen A. Lahey, "On Silence, Screams and Scholarship: An Introduction to Feminist Legal Theory" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 319 at 328.

[180] J. Folberg & A. Taylor, designers of the social psychological model critiqued by Irving & Benjamin, also overtly apply approach-avoidance theory in their work, J. Folberg, & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (San Francisco: Jossey-Bass, 1984) at 59-60. Neither group of authors explains why we need rules originating in a mechanical model of man, no matter how sophisticated their development, to govern how we think about Western marriage and procedures for resolving some of its problems.

[181] Irving & Benjamin draw attention to the fact that, while unconscionability might be a consideration for some mediators, fear of the husband's dropping out might incline others to avoid acting in accordance with any ethic of empowerment (*Family Mediation, supra* note 12 at 54). Feminist-informed Irving & Benjamin state: "it remains unclear on what principled or ethical ba-

accusations, threats and appeals for a "second" chance with Maria's well-reasoned desire to change the relationship. The therapist-mediator encourages Maria and John to reminisce about earlier, more mutually satisfying days, in order to "discover" whether there is a chance of reconciliation (perhaps momentarily forgetting Maria's clear expression of plans to the contrary), and to confirm a suspicion that Maria still had to separate from her parents (perhaps also forgetting that she decided to remarry first and then confronted her mother's opposition). On finding that "Maria would have none of it ... She wanted a divorce!",[182] the mediator claimed that Maria's anger prevented Maria from seeing what was in the children's best interests. Tapping past happiness failed to conjure conciliation, but had produced anger, which then became a reason to place Maria in a therapy program.

In therapy, competing explanations of Maria's anger emerge. The therapist sees it as a result of the mother's interference, whereas Maria attributes it to John's neglect. These competing views could be transformed into complementarity and ultimately consensus, by using several techniques simultaneously, such as separate caucusing, building trust, reframing, and symbolic use of the children. During a separate caucus which put John safely out of earshot, Maria is told that John needs Maria's help to become a good father. The therapist-mediator asks, "Would she be willing to provide it *for the sake of her children*?"[183] Irving and Benjamin add that "[f]ramed in this way it was difficult for Maria to say no."[184] Guilt, said to play no part in mediation, is precisely what this tactic is designed to evoke.

Consequently, Maria's rational expression of her past and her needs is converted into pathological anger inspired by her mother. Maria is worked on to enlist her in John's cause. John's reasons for his anger with Maria are also enlisted — in his own cause. Further, John's threats of harm are ignored in this example of complementarity; in contrast with Maria, he need not feel guilty.[185] Treating John's anger merely as a sign that his emotional separation from Maria is far from complete, the mediator bases John's therapy sessions

---

sis intervention should occur, thus avoiding both the appearance and the reality of arbitrariness" ("Feminist-Informed TFM", *supra* note 27 at 137).

[182] *Family Mediation*, *ibid.* at 116.

[183] *Ibid.* at 120.

[184] *Ibid.*

[185] This blame, inappropriately placed on Maria, is recognized by feminists as a pertinent example of the misuse of complementarity by experts. Within the context of abuse, the concept is also used to accuse the victim of provocation or, in incest, to blame wives for sexual and other inadequacies (Leitch, *supra* note 149 at 170).

on the need to 'normalize' his responses to the separation. John, we are told, needs to be affirmed as a person, a person who has felt betrayed and who has been a caring father.[186] Not surprisingly, these tactics of affirmation also take place during a separate caucus and under the heading of building trust, similar to the orchestration of Maria's cooperation by allowing her to doubt John's adequacy.[187] Ultimately, TFM reinstates, in the privacy and confidentiality of separate caucusing, what has traditionally been an overt and public affirmation of fathers' lack of emotional care and censure of female irrationality.

C. Conclusion

The substitution of complementarity for asymmetry is a consequence of the ideology of formal equality, which professes objectivity, neutrality, and an appeal to reality. Mediators resort to the comforts of treating women and men as formally equal, on the pretext that individual differences operate within and across these groups. By treating men and women as formally equal, mediation avoids having to redress systemic misuse and abuse of women.

Conclusion

> The trouble with modern theories of behaviorism is not that they are wrong but that they could become true, that they actually are the best possible conceptualization of certain obvious trends in modern society.
>
> Arendt[188]

The mediation of family separation disputes is held out to the public as an empowering process which is based on client autonomy while emphasizing client responsibility. This article has sought to investigate how autonomy, responsibility and related concepts are to be understood if the good faith of those who hold out family mediation as empowering is to be preserved.

An examination of the organizational boundaries and goals in three representative approaches to family mediation shows that autonomy and re-

---

[186] *Family Mediation*, *supra* note 12 at 118.

[187] The caucus, a common mediation technique, is also used in the procedural and contracted responsibility models.

[188] *Supra* note 1 at 322.

sponsibility are not viewed by any of these models from a standpoint which values inter-subjectivity and dialogue. The practices of those models are designed, rather, to ensure the maintenance of the mediation system: from the point of view of the 'control centre', to ensure the maintenance of self. Women are unable to speak in their own voices and to be heard within that system. Based on the idea that "the individual is truly social and society truly psychical,"[189] mediation grants clients little in the way of an identity separate from the family in mediation and little ability to reason without mediation intervention.

Critical analysis of TFM and the procedural and contracted responsibility models shows that, despite distinctive emphases, each applies similar techniques rooted in liberalism and in the economy of the mediation system: contracted responsibility, consensus bargaining, and behavioural therapy.[190]

Systems theorist von Bertalanffy oversimplifies criticism of a systems model. He represents that criticism as nothing but fallacy. He claims that it treats systems propositions as the whole explanation of any particular system, "mar[ring] not only theoretical history, but the models of the mechanistic world picture, of psychoanalysis and many others as well."[191] A less obvious, but equally serious, problem is the assumption by those who apply systems propositions to human groups that they need only be aware of other variables, or give them play within systems parameters. This article argues in support of the proposition that Foucault's conclusions with respect to the mechanical model of man are applicable to systems theory as it has "progressed" to the present day and is "operationalized" in family mediation:

> La Mettrie's *L'Homme-machine* is both a materialist reduction of the soul and a general theory of *dressage*, at the centre of which reigns the notion of 'docility', which joins the analysable body to the manipulable body. A body is docile that may be subjected, used, transformed and improved.[192]

---

[189] W. Buckley, *Sociology and Modern Systems Theory* (Englewood Cliffs, N.J.: Prentice-Hall, 1967) at 44.

[190] In the shift from liberalism to superliberalism, which for Benjamin is a shift from individualism to system, the poles of the continua join to form a circle.

[191] Von Bertalanffy, *supra* note 134 at 30.

[192] *Discipline and Punish*, *supra* note 6 at 136.