LURKING IN THE SHADOW: THE UNSEEN HAND OF DOCTRINE IN DISPUTE RESOLUTION

RAY D. MADOFF*

INTRODUCTION

Mediation—the process through which a third party neutral assists parties in reaching their own agreement—has achieved a prominence in our legal system that belies its youth.[1] Earlier in the twentieth century, the use

* Associate Professor, Boston College Law School. A.B., 1980 Brown University, J.D., 1984 and LL.M. in Taxation, 1986 New York University School of Law. The author benefited from comments received at faculty colloquia at University of Connecticut School of Law, University of Maryland School of Law, University of Arizona James E. Rogers College of Law, and Arizona State University College of Law. The author would like to thank Avi Soifer, Mary Bilder, Dan Coquillette, Kent Greenfield, Phyllis Goldfarb, Jim Rogers, George Brown, Mike Cassidy, Jim Stark, Rosanna Cavallaro, Cal Massey, Susan Gary, Mary Radford, Jane Schacter, Sanford Karz, Jeffrey Sherman, and Robert Mnookin for their helpful comments and suggestions throughout this project and Meighan McCrea, Samuel Lieberman, and Gerald Mae for their excellent research assistance. I am grateful to Boston College Law School and the ACTEC Foundation for their support for this project.

1. The beginning of the current mediation movement is often tied to the 1976 Pound Conference "called to commemorate the 70th anniversary of Dean Roscoe Pound's dissertation on the public's dissatisfaction with the American legal system." KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 21 (1994). The subsequent meteoric rise in mediation has been associated with the 1981 publication of *Getting to Yes* by Roger Fisher and William Ury:

> Many of us had not heard of mediation before the publication of the national bestseller *Getting to Yes* by Professors Roger Fisher and William Ury in 1981. That book made people aware of an effective methodology for addressing conflict and provided elegantly simple principles of effective negotiation that could be applied to neighborhood disputes as well as international conflicts. Notions such as 'don't bargain over positions; separate the people from the problem; focus on interests, not positions; invent options for mutual gain; insist on using objective criteria; and develop your best alternative to a negotiated agreement (BATNA)' are now familiar to most in the legal profession, in business, and in many other fields where dispute resolution or conflict management is central.

Richard Chernick, *The Growth and Maturation of Mediation*, L.A. LAW., March 2002, at 8, 10.

of mediation was limited almost entirely to small disputes (which did not justify the expense of litigation) and labor disputes (which required quick resolution in order to avoid costly strikes and shutdowns.)[2] By contrast, mediation today is touted for disputes of all sizes and in all areas of the law, including probate,[3] family,[4] commercial lending and business,[5] criminal,[6] employment discrimination,[7] environmental,[8] legal malpractice,[9] medical malpractice,[10] and maritime law.[11] Indeed, such is the enthusiasm

2. KOVACH, *supra* note 1, at 19–20.

3. *See generally* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997); Ronald Chester, *Less Law, But More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173 (1999); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601 (2000).

4. *See generally* CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS (2001); DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD (Craig A. Everett ed., 1985); DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Ann Milne eds., 1988); O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978).

5. *See generally* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Leonard L. Riskin, *Two Concepts of Mediation in the FMHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21 (1993).

6. *See generally* Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479 (1994); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994); Sheila D. Porter & David B. Ells, *Mediation Meets the Criminal Justice System*, 23 COLO. LAW. 2521 (1994); Josefina Muniz Rendon, *Mediation in the Criminal Courts*, 35 HOUS. LAW. 42 (1998).

7. *See generally* Cindy Cole Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. MEM. L. REV. 1131 (1996); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305 (2001); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135 (1999); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996); Colquitt Meacham, *The Use of Mediation to Solve Employment Discrimination Complaints*, 28 B. B. J. 21 (1984).

8. *See generally* Richard C. Collins, *The Emergence of Environmental Mediation*, 10 VA. ENVTL. L.J. vi (1990); Carol E. Dinkins, *Shall We Fight or Will We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,398 (November 1984); Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENVTL. L.J. 210 (1993); Rosemary O'Leary, Tracy Yandle & Tamilyn Moore, *The State of the States in Environmental Dispute Resolution*, 14 OHIO ST. J. ON DISP. RESOL. 515 (1999); Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327 (1992); Lawrence Susskind & Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311 (1980).

9. *See generally* Mark Richard Cummisford, *Resolving Fee Disputes and Legal Malpractice Claims Using ADR*, 85 MARQ. L. REV. 975 (2002).

10. *See generally* Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement,* 60 LAW & CONTEMP. PROBS. 185 (1997); Max Douglas Brown, *Rush Hospital's Medical Malpractice Mediation Program: An ADR Success Story*, 86 ILL. B.J. 432 (1998); Kathy L. Cerminara, *Contextualizing ADR in Managed Care: A Proposal Aimed at Easing Tensions and Resolving Conflict*, 33 LOY. U. CHI. L.J.

for mediation, that one is hard pressed to find a legal area in which mediation is not actively encouraged. Despite such broad encouragement, its success varies widely in different fields of law. While in some areas of law it has achieved dominance, in others its development has been far slower. Two areas where this disparity is particularly puzzling are divorce and will contests. Consider the following typical disputes:

> A husband, engaged in an extra-marital affair, decided to leave his wife to continue his relationship with the other woman. The husband moved out of the family home and filed for divorce. Now his wife is furious and would like to make him pay for ruining her life.
>
> A widowed mother had two adult children. For the last year of her life, the mother moved in with one child while the other child lived far away. Shortly before her death, the mother changed her will. Whereas the will had previously divided her estate evenly between her two children, after the changes the will left everything to the child with whom she lived. After her mother's death, the disinherited child, suspecting some overreaching by her sibling, decides to challenge the will to claim her rightful share of her mother's estate.

These common disputes share many features, but are likely to be resolved in significantly different ways. Both involve highly charged emotional controversies among family members and litigation will require the unpleasant public disclosure of private facts. Moreover, there is a good chance that the parties in each situation have a variety of issues to work out between them, only some of which are legal in nature. Thus, both of these disputes appear to be good candidates for mediation, rather than judicial resolution. Mediation offers a confidential forum in which the parties can address their legal and nonlegal issues and fashion a result that is less destructive to their relationship and arguably more satisfying than the outcome of an adversarial court proceeding.

Mediation has become a widely used method for settling divorce disputes,[11] and based on this success, there has been great interest in encouraging the use of mediation to resolve will disputes. Academics and

547 (2002); Bryan A. Liang, *Understanding and Applying Alternative Dispute Resolution Methods in Modern Medical Conflicts*, 19 J. LEGAL MED. 397 (1998); Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429 (1992); Ann H. Nevers, *Medical Malpractice Arbitration in the New Millenium: Much Ado About Nothing?*, 1 PEPP. DISP. RESOL. L.J. 45 (2000).

11. This is true not only in the United States, but in other countries as well. *See* THE RESOLUTION OF FAMILY CONFLICT: A COMPARATIVE LEGAL PERSPECTIVE (John M. Eskelaar & Sanford Katz eds., 1984).

practitioners alike have written about its value in resolving these disputes,[12] and some courts have established programs specifically geared towards encouraging mediation of probate matters.[13] Yet, despite these efforts, the use of mediation to resolve will disputes has lagged far behind its use in divorce. Judges and lawyers seem reluctant to use mediation to resolve will disputes, and many jurisdictions with well-developed mediation programs recognize that mediation is not commonly used to resolve will disputes. Even professional mediators have noted that will disputes are some of the most difficult disputes to resolve through mediation.

What accounts for this difference? One conventional explanation is that judges and lawyers involved with will disputes lack familiarity with mediation. This suggests that it is only a matter of time and education before mediation is used as commonly in will disputes as it is in divorce. The difficulty with this explanation is that it is counterfactual. In many cases the familiarity with mediation already exists. Family and probate law matters are commonly handled in the same courthouses by the same judges; lawyers handling significant will disputes often also have significant divorce litigation practices; and mediation programs run by many courts are, at least theoretically, as much geared towards the probate docket as towards the family law docket. Yet, in family law, mediation has become a dominant method for resolving disputes, whereas in will contests, it is practically an alien concept.

An alternative explanation commonly suggested to explain this disparity is that parties to will disputes often have such deep-seated feelings of anger against one another that it is almost impossible to get them to sit in a room together—let alone get them to reach an agreement. Yet this explanation is also ultimately unsatisfactory. While it is true that will disputes are often highly charged, many divorces ultimately resolved through mediation also involve similar levels of rancor.[14] Thus, while the level of emotion may play some role in the limited adoption of mediation in

12. *See generally* Gary, *supra* note 3; Chester, *supra* note 3; Radford, *supra* note 3; John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike against Potential Litigation*, CA. TR. & EST. Q., *available at* http://mediation-adr.com/gromala/estate.html (last visited Oct. 6, 2002).

13. Court sponsored mediation programs geared toward probate disputes have been established in counties in California, Georgia, Washington, and Texas as well as a limited number of other jurisdictions. *See* Ray D. Madoff, Mediating Probate Disputes: A Survey of Court Sponsored Programs (November 5, 2002) (unpublished manuscript, on file with author).

14. As one judge explained to me about why parties refuse to mediate their will disputes: "[T]he family members hate each other too much—it's like divorce!" Interview with Probate Judge in Boston, Mass. (Jan 12, 2002).

resolving will disputes, it cannot provide a complete explanation for the disparity in comparison to the use of mediation in divorce.

Theoreticians in the growing field of dispute resolution might add another dimension to this inquiry. Drawing on insights from psychology and economics, they address the question as to why settlement attempts fail.[15] Since there is some evidence that will disputes are more likely to go to trial than other disputes,[16] this literature may be particularly relevant. Under classic economic theory, parties should reach a settlement when there are settlement options that will leave both parties better off then they would be if they went to trial.[17] Yet, there are many cases where the parties fail to settle even when it is clearly in their economic interest to do so. A variety of factors have been found to contribute to this phenomenon. For example, sometimes there are problems of strategic bargaining, when the parties agree that there is a joint surplus but cannot decide how to divide it.[18] There are also psychological impediments: some evidence suggests that people are reluctant to settle if they believe that they are not being treated equitably.[19] Despite the breadth and rigor of this scholarship, it does not explain the discrepancy between the use of mediation in divorce and will disputes since all of the identified impediments appear to apply (or not) with equal force to both types of disputes.

One factor that has not been accounted for is the role of legal doctrine in shaping how people involved in the dispute conceive of the dispute and its appropriate mode of resolution. In this Article, I argue that legal doctrine—the statutes and case law governing a dispute—play an important role in encouraging parties and lawyers to engage in mediation or other forms of private negotiation. This builds on the seminal work *Bargaining in the Shadow of the Law*, by Robert Mnookin and Lewis Kornhauser, which examined divorce law through the lens of its impact on the negotiation process.[20] However, rather than looking at the impact of law *on* the negotiation process, this Article examines how substantive doctrinal

15. Some of this work is summarized in Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 142–47 (1994). For an excellent collection of essays on this subject, see BARRIERS TO CONFLICT RESOLUTION, (Kenneth J. Arrow et al. eds., 1995).

16. *See infra* note 61 and accompanying text.

17. *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417–20 (1973).

18. *See* Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 227–28 (1982).

19. *See* Korobkin & Guthrie, *supra* note 15, at 142–47.

20. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950–52 (1979).

law can affect *whether* parties resolve their dispute through judicial resolution or private negotiation, with or without a mediator.[21]

In this Article, I argue that there is a connection between substantive doctrinal law and the acceptance of alternative dispute resolution. In particular, I argue that the widespread adoption of mediation in divorce disputes would not have been possible without the changes in the substantive legal rules governing divorce brought about by the no-fault revolution. This transformation effectively changed the core story about divorce from one about guilt and innocence to one that minimized the importance of fault and instead created a complex forward-looking inquiry. This new regime effectively discouraged parties from seeking judicial resolution of their disputes and encouraged them to resolve their disputes through negotiation or mediation. The rules governing divorce stand in sharp contrast to the rules governing will contests. Largely unchanged in the United States over the last 200 years, wills law involves a backward-looking inquiry that focuses on testator intent and provides moral condemnation under a winner-take-all system, effectively encouraging parties to seek judicial resolution of their disputes.

This Article proceeds as follows: Part I provides an overview of the ways in which doctrine affects dispute resolution. Part II focuses on the specifics of divorce law and illustrates how changes in divorce law created a system that encouraged parties to resolve their disputes through negotiation or mediation rather than judicial resolution. Part III turns to wills law and shows how that doctrine encourages parties to seek judicial resolution of their disputes. Finally, Part IV argues that there is nothing inherent in the nature of wills that necessarily entails this desire for judicial resolution. By following the model of English wills law, states could amend their laws to encourage private resolution (and thus discourage judicial resolution of disputes), while only incrementally changing substantive rights. Although this model would only effect a small change in substantive rights, it would effect a more significant change in the core story associated with wills law. This transformation highlights deeper features of the relationship between doctrine and dispute resolution. Based on these findings, some may seek to amend substantive doctrinal law to promote private negotiations and mediation, whereas others may draw the conclusion that certain disputes do not lend themselves to negotiated settlements. I conclude with a few suggestions about the broader application of this work to other areas of the law.

21. *Id.* at 973–77.

Throughout this Article, I include portions of interviews with lawyers, judges, and mediators about their experiences with mediation in will disputes and divorce.[22] These excerpts have been added for the purpose of adding context to, rather than evidence for, the arguments, which will stand or fall on their own merit.

I. THE MANY ROLES OF LEGAL DOCTRINE

If contemporary law schools teach anything, it is that legal rules are rarely determinative for the result of a particular case. As such, it is easy for the cynic to view legal doctrine as nothing more than window dressing that is applied to cover up what really goes on in law.[23] However, to do so would be to miss the many important ways in which doctrine structures disputes and their resolution.

Legal rules affect dispute resolution in a number of significant ways. First, they establish the difference between a grudge and a claim. People may be angry or upset about any number of things, but only grievances that rise to the level of a legal claim can be aired before a judge. People have much greater leverage over this latter class of grievances because grievances that do not constitute legal claims can only be resolved through negotiation or mediation, whereas grievances that are also legal claims can be resolved through the courts, as well as through negotiation or mediation.[24]

In addition, the legal rules of standing establish which parties have a role in the dispute and therefore whose views need to be considered in structuring a resolution. As a result, standing plays an important role in dispute resolution. The number of recognized parties in a dispute establishes the number of people who have to agree to a settlement. The more players there are, the more difficult it is to reach a privately negotiated settlement. One of the reasons that divorces are relatively easy

22. These interviews were conducted in connection with a grant from the ACTEC foundation to study the use of mediation to resolve probate disputes.

23. As one legal realist described the work of a judge:

> [T]he vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause, and that the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.

Joseph Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L. Q. 274, 285 (1929). *See also* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 6 (1986)).

24. Although some might argue that any grievance can be converted to a claim provided the lawyer is clever enough and the client has enough money, this would be an overstatement.

to resolve through mediation, for example, is that only two people need to agree on a resolution.[25] If our legal system required approval from other parties (such as in-laws and friends) on whether a divorce should be allowed and on what terms, the disputes would be more difficult to resolve in a private negotiation.[26] In will disputes, expansive standing provisions make negotiated settlements more difficult to achieve. The relevant parties to a will contest include all of the people named in the will being submitted for probate, the people who would inherit the estate if the testator had died without a will, and in some situations, all of the people named under a prior will. Conversations with mediators suggest that even coordinating a time in which all of the parties can meet can often take several months.

Legal rules can also affect the negotiation process itself. As discussed by Robert Mnookin and Lewis Kornhauser, legal rules indicate an allocation that the court will impose if the parties fail to reach an agreement.[27] These rules create bargaining chips that the parties use in the negotiation process.[28]

Finally, and most importantly, legal rules frame a core story as to why the state is involved. This story reflects larger cultural values in that a legal claim recognizes that there has been a deviance from desired norms. The remedy reflects a view as to how to correct this deviance. The story of any given claim is outlined in the rules governing liability, but is often most salient in the applicable remedies. Law is a powerful tool for shaping how people think about their dispute. As one scholar has described it:

> Law provides a set of categories and frameworks through which the world is interpreted. Legal words and practices are cultural constructs which carry powerful meanings not just to those trained in the law or to those who routinely use it to manage their business transactions but to the ordinary person as well.[29]

25. "The dyadic relationship is, then, one eminently suited to mediation and often dependent on it as the only measure capable of solving its internal problems. Indeed, one may ask whether mediation in the strict sense is really possible in ordering the internal affairs of any group larger than two." Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 313 (1971).

26. Although it is common to consult older children of their views and to appoint a *guardian ad litem* to represent the interests of a minor in post-divorce arrangements, this input is essentially advisory in nature and differs from having standing as a party. For a discussion of the manner of eliciting the child's custodial preference and the role of *guardian ad litem*, see LEGAL RIGHTS OF CHILDREN 243–51 (Robert M. Horowitz & Howard Davidson eds., 1984).

27. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial." Mnookin & Kornhauser, *supra* note 20, at 968.

28. *See id*. at 968–69.

29. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN 8–9 (1990).

Although people are generally not readily conscious of it, as discussed below, legal rules play an important role in how the players in a dispute (including judges, lawyers and the parties) understand the dispute. This understanding, in turn, affects the players' ability and desire to negotiate a settlement outside the courtroom. In the next sections, I explore the relative stories presented by divorce and wills law doctrine and show how these stories affect people's choice of mode of dispute resolution.

II. MEDIATION AND THE NO-FAULT REVOLUTION IN DIVORCE LAW

Much of the impetus for bringing mediation to will disputes flows from the success of mediation in divorce law. Mediation has become one of the most common methods of resolving the issues surrounding divorce in this country. Yet in this Section, I agree that its flourishing in the realm of divorce would not have been possible without the major changes in the substantive rules governing divorce brought about through the "no-fault revolution." These changes swept the United States during the period between 1965–85.[30] They affected all aspects of divorce law, including: (1) the conditions under which divorce would be granted; (2) the standards for post-divorce financial arrangements, including alimony and property division; and (3) the determination of child custody.[31] These changes in substantive law have also had far-reaching effects on the way in which judges, lawyers, and even the parties themselves think about divorce disputes. Indeed, changes in divorce law illustrate how legal rules subtly, although effectively, discourage parties from seeking judicial resolution of their dispute and encourage private resolution of issues through negotiation or mediation. In particular, the new legal rules governing divorce disputes encourage private resolution of disputes by making judicial resolution less attractive to both the lawyers and the parties involved in the dispute.

A. DIVORCE LAW PRIOR TO MODERN REFORMS

Prior to modern reform, the stories of marriage and divorce embodied in the legal doctrines governing divorce were drastically different from the stories provided by the law today. Since marriage was construed as a life

30. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1472 (1992). For a full discussion of these changes, see generally Sanford N. Katz, *Prologue to the Millenium Issue*, 33 FAM. L. Q. 435 (2000).

31. *Singer*, *supra* note 30. See HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 2–3 (1988).

long arrangement generally terminated only by death, courts granted divorce only on the basis of serious misbehavior by either the husband or the wife.[32] Divorce was premised on the assumption that one spouse was guilty and the other spouse was innocent. The importance of this predicate finding was so great that if both spouses were found guilty, the divorce would not be granted.[33]

The determination of guilt also significantly affected post-divorce property settlements. If the husband was found guilty, his obligation to support his wife continued after the divorce in the form of alimony. If the alimony payments were insufficient, then a portion of his property could be awarded to the wife to assist in her support.[34] In community property states—in which the wife owned half of the husband's earnings acquired during the marriage—the innocent spouse was eligible for more than half of the community property.[35] If the wife was found guilty, she was not entitled to alimony and could not claim any of her husband's property.[36] This imposed significant hardship in a world in which women largely worked at home without compensation.

The determination of guilt could also affect child custody. As Martha Fineman explained: "[F]ault governed the availability of divorce and, by and large, custody questions were resolved by designating the innocent spouse at divorce and using the parallel doctrines of the best interest of the child and/or tender years."[37] Although custody was most often granted to the mother, she could lose custody if she was not the innocent spouse.

The pre-reform standards for divorce imposed a strong bias in favor of preserving the marriage. Individuals could not unilaterally file for divorce unless they could prove that their spouse was guilty of one of the

32. *See id.* at 4–5 (granting divorce in cases of adultery, physical and mental abuse, drunkenness, imprisonment, drug addiction, desertion, or insanity).

33. This was called the doctrine of recrimination; which first was replaced by the doctrine of rectitude (whereby the spouse who was found to be less at fault could be granted a divorce), and later abolished. *See* Marcus G. Raskin & Sanford N. Katz, *The Dying Doctrine of Recrimination in the United States of America*, 35 Can. B. Rev. 1046, 1048, 1051–52 (1957).

34. *See* JACOB, *supra* note 31, at 112.

35. *See id.* at 113.

36. *Id*. "In addition to providing a justification for dissolution of the marriage relationship, fault also functioned as an allocation device regarding children and marital assets, with the 'innocent' spouse receiving custody and economic subsidy through property distribution, child support, and alimony." MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 18 (1991).

37. *Id.* at 83–84. *See also "That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumptions*, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 127 (1992).

enumerated grounds.[38] However, the effect of these rules was more far-reaching in that even if both members of the couple wanted to divorce, they could do so only by resorting to fiction and fraud.[39]

This system presented a story about marriage and divorce in our society that underscored the state's interest in keeping marriages together. Because marriages were to continue until the death of one of the spouses, the state essentially enforced the marriage contract even if the marriage broke up. As Jana Singer described it:

> Under the fault-based system, the state not only asserted broad authority to define when divorce was appropriate; it also played a significant role in structuring the spouses' post-divorce economic relationship and the relationship of the ex-spouses to their children. In large part, this role was premised on the state's interest in enforcing the terms of the traditional marriage contract, in particular the husband's duty to support his wife and the wife's reciprocal domestic and childbearing obligations.[40]

Because the state had an interest in preserving the marriage, the story presented another central theme: the party responsible for its break up deserved punishment and the innocent party was entitled to a form of damages for her suffering. This view is reflected in the following decision from the Tennessee Supreme Court:

> Divorce is . . . not a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire, or in whatever manner the Court may deem to be fair and just under the circumstances. It is conceived as a remedy for the innocent against the guilty.[41]

This paradigm encouraged lawyers and parties to seek judicial resolution of the issues surrounding divorce. The traditional function of courts after all, is to determine what happened in the past and to apply legal standards to those determined facts. In doing so, courts also play a societal

38. *See* FINEMAN, *supra* note 36, at 19.

39. Jacob notes:

> In New York . . . an entire cottage industry sprang up to produce fraudulent evidence of adultery in order to meet the requirements of that state's archaic law, which permitted divorce only upon showing of adultery as late as 1966. In other states, couples were carefully prompted to say the correct words in court to substantiate allegations of mental or physical cruelty.

JACOB, *supra* note 31, at 7. *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 436–40 (1973) (depicting history of divorce in the United States).

40. Singer, *supra* note 30, at 1474 (citation omitted).

41. Brown v. Brown, 281 S.W. 2d 492, 498 (Tenn. 1955) (citing Brewies v. Brewies, 178 S.W. 2d 84 (Tenn. Ct. App. 1943)).

role of establishing a winner and a loser, often translated into popular consciousness as a tale of a victim and a wrongdoer. When the legal rules surrounding divorce required the establishment of a guilty and innocent party, and rigidly imposed results based on that determination, judicial resolution was the obvious, if not the only, way to resolve such disputes.

B. THE NO-FAULT REVOLUTION

Beginning in the mid-1960s, divorce law in the United States underwent a revolution.[42] Fault—which had been the determining factor for the existence and effect of the divorce—was rendered largely irrelevant through the enactment of no-fault divorce provisions.[43] These provisions (which often existed alongside traditional fault-based provisions) generally declare that a divorce will be granted if the marriage has suffered an irretrievable breakdown.[44] They were originally enacted to allow couples who wanted divorce to do so without resorting to fraud.[45] However, the effects of these changes were more far-reaching in that they allowed either spouse unilaterally to end the marriage. In less than thirty years, the changes largely eliminated fault as a relevant factor.[46]

The no-fault revolution also effected changes in the rules governing property distributions and child custody determinations. Property distributions and alimony are no longer based on the notion of preserving the obligations of marriage and of punishing the guilty while rewarding the innocent spouse. Instead, property distribution issues are resolved through equitable distribution statutes, in which each spouse is entitled to a share based on his or her financial and non-financial contributions to the

42. *See* Singer, *supra* note 30, at 1472. Singer notes that:

> The shift from fault-based to no-fault divorce took place in this country with remarkable speed. In 1969, California became the first state to eliminate fault-based grounds for divorce. . . . By 1985—only sixteen years after California's pioneering divorce legislation—not a single American jurisdiction retained a pure fault-based system of divorce.

Id.

43. *See* JACOB, *supra* note 31, at 1 ("Adultery and other marital misbehavior is no longer punished by the law of divorce. Indeed, the concept of fault has been banished.").

44. *See* Unif. Marriage & Divorce Act § 302(2), 9A Part I U.L.A. 200 (1998).

45. *See* JACOB, *supra* note 31, at 33–35.

46. Covenant marriages, enacted in a limited number of jurisdictions, reflect an interesting countermovement to the no-fault revolution. *See generally* Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31 (1999–2000); Tony Perkins, *Covenant Marriage: A Legislator's Perspective*, 12 REGENT U. L. REV. 27 (1999–2000); Katherine Shaw Spaht, *Marriage: Why a Second Tier Called Covenant Marriage?*, 12 REGENT U. L. REV. 1 (1999–2000); Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783 (1999); Kaja Perina, *Covenant Marriage: A New Marital Contract*, 35 PSYCHOL. TODAY, Mar. 2002, at 18.

marriage—similar to the unwinding of a partnership in business.[47] Alimony has been transformed as well from a permanent obligation to support the innocent ex-wife (until another man accepted that responsibility), to a temporary transitional payment intended to carry the former spouse (either husband or wife) until he or she becomes self-sufficient.[48] In many states, fault has been completely eliminated as a relevant factor in property division.[49] Even in those states retaining fault as a relevant factor, it is only one of many to be considered.[50]

The rules governing child custody also changed dramatically. Whereas the law prior to modern reforms often provided that child custody was to be awarded to the innocent wife, in the post no-fault world, child custody is awarded "in the best interests of the child."[51] This generally requires courts to consider a variety of factors including the wishes of the child and the parents, the child's adjustment to his home, school and community as well as the mental and physical health of all individuals involved.[52] The pattern has also shifted from awarding custody to a single spouse to a bias in favor of promoting the relationship of the child with both parents.[53]

These changes tell quite a different story about marriage and divorce. In this new story, the state no longer has a basic interest in preserving marriage and divorce is not perceived as an evil caused by a wrongdoer. The new story is that marriage is a private affair and that society is essentially indifferent as to whether any particular couple remains married. The rules governing divorce are based on the assumption that couples break

47. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 590–91 (1988).

48. *See* JACOB, *supra* note 31, at 125.

49. *See* JACOB, *supra* note 31, at 124–25.

50. The Massachusetts statute is an example of this type of law. It provides:

> In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

MASS. GEN. LAWS ANN. ch. 208 § 34 (West 2002).

51. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 7 (1992).

52. *See* Unif. Marriage & Divorce Act § 402, 9A Part II U.L.A. 282 (1998).

53. The causes and effect of this change in bias are discussed in FINEMAN, *supra* note 36, at 79–126.

up for a number of reasons.[54] The state is no longer interested in monitoring the validity of these reasons through an inquiry into what happened in the past. Instead, divorce is understood simply as an event with consequences that need to be managed. Therefore, rather than focusing on designating the wrongdoer, societal concern has shifted to the issues of whether the division of marital assets and arrangements for child custody are equitable, practical plans acceptable to all parties. This new story fits neatly with a mediation model for resolving disputes since mediation is a forward-looking inquiry designed not to evaluate fault and mete out justice, but instead to work on the issues underlying the dispute to achieve a satisfactory resolution for all parties.

There are three core features of modern divorce law that encourages the use of mediation: (1) the issues in divorce law are governed by vague standards in which there is broad judicial discretion; (2) the inquiry is primarily forward-looking in nature; and (3) the opportunity for moral vindication has been largely eliminated.

Divorce law is noted for its vague standards and the broad discretion given to judges to resolve disputes. As Mnookin and Kornhauser noted: "[E]xisting legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop that is clouded by uncertainty."[55] This imprecision in the law combined with the broad discretion granted judges makes "the law"—and thus the role of the lawyer—less central to the resolution of the dispute.

One lawyer I interviewed described the arbitrariness of the law governing divorce and the usefulness of mediation for these disputes as follows:

> The rules are very subjective, and therefore if you can get clients to arrive at common ideas early on you can save an enormous amount of legal fees. Whereas in courts you are talking about judges deciding about whether a particular individual who has been married for 30 years is more or less deserving of getting a 50%, 45%, or 40% share of the other person's income and those judgments are based on all kinds of stuff about the contribution to the marriage, did they do anything that would harm the marriage or what did they contribute in the past. And there are so many factors and they are so subjective that you just know

54. This view is reflected in lyrics to the classic rock song: "There ain't no good guys, there ain't no bad guys. There's only you and me and we just disagree." Dave Mason, *We Just Disagree*, *on* LET IT FLOW (Sony 1977).

55. Mnookin & Kornhauser, *supra* note 20, at 969.

> you are going to have an enormous cost and the outcome is going to essentially be an arbitrary decision by someone who doesn't know anybody who may have got it wrong and there is no recourse because it is all factual and so it is judgment on the facts. No court of appeals is going to overturn it. There's a high risk that you are going to get screwed, whereas with a mediation at least you are going to have input into the process and you can say 'no.'[56]

Divorce law also differs from traditional legal disputes in that it is forward rather than backward looking in nature. Traditional legal work involves developing the facts of a past event and arguing for results based on the application of legal rules to those facts. But the issues surrounding divorce—including property distributions, alimony, and child custody—have become almost exclusively forward-looking in nature. Rather than being focused on what happened in the past, divorce law requires a judge to consider what solutions would work well in the future. The prospective nature of the law in this area conforms naturally with the ethos underlying mediation which assumes "(1) that all parties can benefit through a creative solution to which each agrees; and (2) that each situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it."[57]

Finally, divorce law, with its diminished emphasis on fault, removes the possibility of moral vindication from the equation. People settle their claims with reference to what they could achieve in their best alternative to a negotiated agreement ("BATNA").[58] Many people go to court to find vindication. They want a judge to say that they were right and the other person was wrong. In the divorce context, however, with its varied factors and diminution of fault as a relevant factor, they are not going to be able to achieve that goal. Even though a party to a divorce may go to a lawyer asserting claims of moral worth (I was good, my spouse was a bad person), one of the important aspects of a divorce lawyer's job today is to effectively explain to the client that this is not a dispute about right and wrong, but is instead about working out how things will be divided in the future. As one lawyer interviewed in *Divorce Lawyers And Their Clients* described this process: "[In] most divorces nowadays, although there are a

56. Interview with attorney in Boston, Mass. (Nov. 7, 2001).

57. Leonard L. Riskin, *Mediation and Lawyers*, *in* DIVORCE MEDIATION: READINGS 25, 44 (Leonard L. Riskin ed., 1985). This is in contrast to the two fundamental assumptions of lawyers (1) that disputants are adversaries, and (2) that disputes may be resolved through application of a third party of some general rule of law. *Id.*

58. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97 (Bruce Patton ed., 1991).

lot of emotions involved, and allegations of 'he said' and 'she did' and things like that, it really comes down to an accounting problem."[59]

This is reflected in the comments of a lawyer I interviewed who said:

> Many divorce cases involve hurt feelings over personal conduct issues and people are looking for personal vindication in some judge to publicly say that their spouse is guilty of some extramarital wrong . . . . That's not a reasonable expectation as to how the system works, because the judicial system does not deliver vindication. It delivers results that are based on the evidence. The [equitable distribution and alimony statute] doesn't really permit a judge to punish one spouse or the other spouse for extramarital conduct, but it permits the judge to hear evidence that pertains to conduct as well as the other statutory factors and to assess that information in fashioning a result that makes sense and is equitable. Typically, it is not a punishment. What they do is, they understand that there is human frailty involved, they weigh it appropriately and they try to focus on the future as opposed to the past.[60]

III. WILLS LAW AND DISPUTE RESOLUTION

There is some evidence that will disputes are more likely to be resolved by a judicial decision (made by a judge or jury) than by private negotiation. Empirical work in this area is difficult since probate records are maintained on a county-by-county basis. Moreover, probate courts are notoriously under-funded and the records are frequently in disarray. Nonetheless, one study that looked at probate court records over a nine-year period found some startling results. Looking at all will contests that were resolved over the period, the study found that close to forty percent of them were resolved through a trial decision by a judge or jury.[61] These figures are significantly different from the findings of a study of civil litigation generally in state and federal courts which found that fewer than eight percent of cases are resolved by trial.[62] Although the empirical data on will contests is subject to sampling error, this finding that will contests are more likely to be resolved by judges, conforms with anecdotal evidence from lawyers and judges involved in these disputes, who consistently told

59. AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 65 (1995).

60. Interview with attorney in Boston, Mass. (Jan. 9, 2002).

61. Thirty-six percent of the cases were resolved through out of court settlement and twenty-one percent were dismissed either voluntarily or involuntarily. *See* Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 619 (1987).

62. *See* David Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983).

me that will disputes were more likely to go to trial than other disputes. What accounts for this likelihood of cases being resolved through court rather than through private negotiation? There are three features of will contests that make these disputes less likely to settle: (1) the role of testator intent; (2) the opportunity for moral condemnation or vindication; and (3) the all-or-nothing nature of the remedy.

A. THE ROLE OF TESTATOR INTENT

The touchstone for American wills law is freedom of testation. This is the notion that people are (and should be) able to dispose of their property at death however they choose. The idea is of mythic stature in wills law. It is central to the popular understanding of wills, and it permeates all aspects of the legal doctrine governing wills. When wills are interpreted, the interpretation takes place in the context of testator intent. Even the rejection of a will is often premised on the notion of fulfilling the testator's intent. For example, undue influence, one of the most common grounds for rejection, is described as an influence impeding a testator's true intent.[63]

This dominance of testator intent in wills law acts as a significant impediment to nonjudicial resolutions because not all views can be present at the negotiating table. The person whose "will" is in dispute is dead. In addition, to the extent that people feel they are representing the decedent's views, they are often particularly unwilling to yield their positions.

For a mediation or negotiation to be successful, people must be willing to change their original positions. The theory of mediation is that by creating an opportunity for parties to communicate with each other, they gain a greater understanding of each other's views, thus becoming more willing to change their positions. The emphasis in wills law on the testator's intent is particularly problematic in this context because the

63. *See* Wingrove v. Wingrove, 11 P.D. 81, 82–83 (1885) ("It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. . . . [It is not] undue influence unless the testator is in sucha [sic] condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it.'"). This notion of freedom of testation is mythic in another sense as well—while freedom of testation is the story that we tell ourselves about wills law, the application of these doctrines to actual cases differs from the story in that to the extent that someone makes a will that does not conform to societal norms, there is a much greater likelihood of the will being rejected on one of the technically permissible grounds. *See e.g.*, Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 610–13 (1997) (arguing that the undue influence doctrine effectively acts as a form of family protection); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37 (1996) (arguing that courts enforce moral norms by manipulating doctrines designed to root out wills that lack testamentary intent and by selectively imposing the strict compliance doctrine).

person whose views are most relevant to the legal dispute—the decedent—cannot participate. As one mediator, describing the difficulties of mediating will disputes explained, "[T]here is a shadow at the table who can't speak and can't inform the discussion."[64]

The focus on testator intent creates another significant impediment. To the extent that parties feel that they are standing up for what the testator wanted, they often assume a strongly positional approach to the dispute, making them less likely to consider settlement. As one probate judge explained:

> People take a very principled approach to these types of disputes. If they were provided for under the will then they might say "mother or father decided to leave me all the money. I am going to carry out their wishes." Or if they were left out of the will, they say "I can't believe that mother or father would have intended this. I am going to carry out what I know his [sic] wishes are."[65]

This view is mirrored in a mediator's comment explaining the difficulties of mediating will disputes:

> Everyone has a belief about what the parent wanted—"Dad would have wanted this." "This is what Dad would have intended." The kids view their role as making sure that the family continues to exist as it should in accordance with the perceived parent's wishes. What this means is that the kids don't have to take responsibility for their own positions.[66]

The centrality of testator intent in will disputes thus seriously impedes private resolution of the dispute.

B. THE OPPORTUNITY FOR MORAL CONDEMNATION OR VINDICATION

One of the fundamental factors that motivates people to seek legal solutions to their problems is the opportunity for moral vindication. As those experienced with the legal system acknowledge, this is rarely granted in real life disputes. However, a will contest is one area in which such vindication is possible. The reason for this is that moral judgments are central to will disputes. Disputes that on one level are about money are

64. Telephone interview with mediator (Sept. 7, 2001).
65. Interview with probate judge (Jan. 17, 2002).
66. Telephone interview with probate judge (Sept. 7, 2001).

quickly converted to claims of moral worth. Positions become polarized and this works powerfully against private settlement of disputes.[67]

Consider our typical fact pattern and the will dispute it could generate: A widowed mother has two children. One lives at or near home and takes care of the widowed mother toward the end of her life; the other lives across the country. Mother changes her will toward the end of her life to give everything to the local child who took care of her, disinheriting the child who lives out of town.[68] The out of town child feels that it is unfair that she gets nothing from her mother's will so she goes to a lawyer who tells her that she may have a claim that the care taking child exerted "undue influence" over her mother.

The mediation literature suggests that there are many reasons why this type of dispute ought to be well served by mediation.[69] Litigation is likely to be extremely expensive and highly destructive to the relationship between the siblings. Additionally, it does not provide an opportunity for the siblings to work out any of the additional nonlegal issues between them. For example, the at-home sibling may want the other sibling to recognize the sacrifices that he endured in taking care of their mother. The sibling who lives far away may want to be assured that the will does not reflect that their mother loved her less. Although these issues are not central to the legal claim, they may be vital to resolve in order for the siblings to have a good relationship in the future.

67. There is a certain irony to this because the likelihood of polarization can itself be used as an argument in favor of mediating will disputes. However, by the time a claim has been filed, it may already be too late.

68. This is an abridged version of the following fact pattern developed for discussions on the value of using mediation to resolve will disputes:

> A mother dies leaving her son 80% of her residuary estate. Her daughter, who believed she was going to get 50% of the estate, contests the will. The son claims the their mother changed the will to compensate the son for his care during the prolonged illness leading to the mother's death. The daughter, who was geographically distant, felt that her brother froze her out of family matters and now is taking her inheritance too. The daughter feels that the will reflects that her mother did not love her equally, and that her brother, by failing to keep in touch, distanced her mother from her. On the other hand, the brother feels that he was abandoned by his sister and saddled with enormous responsibilities in taking charge of his mother's affairs. His marriage fell apart during his mother's illness, and his sister never even acknowledged the hardship he endured. Now the brother and sister are fighting over what she should receive under her mother's will.

Lela Porter Love, *Mediation of Probate Matters: Leaving A Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J 255, 255 (2001) (paraphrasing a hypothetical Susan Gary developed for use at the annual meeting of the A.A.L.S. on January 7, 2000 for the Joint Program of the Sections on Alternative Dispute Resolution and Donative Transfers, Fiduciaries and Estate Plannings, based on the case *Larson v. Naslund*, 700 P.2d 276, 277–79 (Or. Ct. App. 1985)). *See also* Susan N. Gary, *The Greatest Heritage Is the Love of a Family: The Larson Case and the Mediation of Probate Disputes*, 1 PEPP. DISP. RESOL. L.J. 233, 233–35 (2001).

69. *See* Gary, *supra* note 68, at 236–38; Love, *supra* note 68, at 256–57.

The allegation of undue influence is basically a claim that the at-home child exerted so much control, that the mother wrote a will in his favor that she otherwise would not have written. Undue influence, in conjunction with lack of mental capacity, is the most common ground for overturning wills. The desire to share a portion of their mother's estate has now been changed—courtesy of the legal rules—into a different story. Now it is a story that the mother probably *wanted* her property to go to both children equally, but that the at-home child did something wrong and overcame her mother's wishes, causing her to write a will that she otherwise would not have written.

This conversion to a legal claim has the effect of inflaming the dispute and polarizing the siblings. The at-home child (previously "the good one" for taking care of mother) is now demonized for overcoming the will of the mother. The away child (possibly feeling guilty for not living closer to her mother) can claim victim status. This creates substantial difficulties in resolving this dispute because the claim has been transformed from a claim about money, to a claim about gut-level principles. Note how different this is from divorce today, in which a party may go to a lawyer asserting claims of moral worth (I was good, my spouse was a bad person), and yet the lawyer in effect explains that this dispute is not about right and wrong, but only about how to practically and equitably dissolve the relationship.

C. CENTRALITY OF THE RULE OF LAW—ALL-OR-NOTHING NATURE OF WILL DISPUTES

Will disputes are distinctly legal in nature. Judicial resolution of these disputes involves a backward-looking inquiry in which judges are thought to apply clearly established rules to a set of facts. If the judge misapplies these rules, the lawyer can appeal to a higher court. This is similar to many other areas of the law, but is unlike divorce law which is generally perceived by lawyers to be a system in which judges apply standards, but not rules, to reach results which try to be fair, but are not necessarily right. This difference is conceived of by some lawyers involved in both divorce and will disputes not just as a qualitative difference in law, but as a distinction between legal and nonlegal disputes. As one lawyer said in describing the differences between the law governing domestic relations and the law of wills:

> In domestic relations it's strictly a fact pattern. There's not much law in domestic relations really, it's a factual situation. In probate situations there is [sic] volumes of law depending on the particular issue. For

> instance, [on the question] can a copy of a will be accepted for probate by the judge? —there is a substantial body of law on that.[70]

These differing conceptions of the role of law affect attorneys' views of their own roles in the dispute, and therefore, their own assessments of the appropriateness of mediation. Lawyers view legal questions as their particular bailiwick. They are extremely reluctant to shift these cases to mediators. Even when they recognize that there are strong emotional components that could benefit from mediation, their role as legal advisors is often paramount. The following portion of an interview with a lawyer about using facilitative mediation illustrates this viewpoint:

> *Interviewer*: There's a school of thought that says what a mediator should really be doing is facilitative mediation, where you leave the law behind and everybody tries to come to some sort of resolution where they ask what do they really want to get out of this dispute. Have you had any experience with that, where that's been done, rather than evaluative mediation?
>
> *Attorney*: I've read about it, but I've never participated in it and confess to you it makes me uneasy even thinking about it.
>
> *Interviewer*: Why?
>
> *Attorney*: Because my sense as a lawyer is that I'm being hired to do several things. I'm being hired to be an advocate. I'm being hired, because of my experience and ability, to tell this person what's going to happen when we go to court. But to get into a mediation where you are talking about people's feelings and what would make them feel good, I just feel that's getting off into an area of psychology that, while I think I can be an amateur psychologist in my negotiations, I'm not comfortable in dealing with trying to reach a result that makes people feel good.[71]

The all-or-nothing nature of will disputes may also play a role in encouraging lawyers and parties to seek judicial resolution of their disputes. Under current law, probate judges have limited authority in fashioning remedies to will contests. They can either uphold the will or reject it and have the property pass under the rules of intestacy—or by the terms of a prior valid will, if one exists.[72] The dispute resolution literature suggests that this all-or-nothing nature of the remedy in will disputes

70. Interview with attorney in Boston, Mass. (Jan. 11, 2002).

71. Interview with attorney in Boston, Mass (Dec. 5, 2001).

72. A court may strike a portion of a will for undue influence with the remainder of the will left to stand if those portions can be separated without defeating the testator's intent. Alan R. Gilbert, Annotation, *Partial Invalidity of Will May Parts of Will Be Upheld Notwithstanding Failure of Other Parts for Lack of Testamentary Mental Capacity or Undue Influence,* 64 A.L.R. 3d 261 (1975).

should encourage resolution of disputes because it would cause risk averse parties to be more willing to settle.[73] However, it is also possible that an all-or-nothing remedy encourages lawyers and parties to seek judicial resolution by removing one aspect of uncertainty that normally exists under judicial resolution, thereby highlighting the legal nature of the dispute.

Judicial resolution of most legal disputes involves two components: (1) establishing a winner and (2) fashioning a remedy. In most cases, an evaluation of the risks of litigation—and the relative attraction of a negotiated settlement—involves assessing both (1) the likelihood of winning, and (2) the likelihood of receiving a remedy significantly better than that which might be achieved through a negotiated settlement. Litigation of will contests is unusual, perhaps even unique, since the rules provide no discretion to the probate judge to fashion a remedy. Thus the probate judge can either uphold the will (in which case the property passes to the beneficiaries named in the will) or reject the will (in which case the property passes to the legal heirs of the decedent). The court cannot create a remedy that deviates from one of these two polar choices.

One effect of this all-or-nothing system is that it highlights the legal nature of the dispute. Lawyers and parties easily understand they have only limited power to control judicial discretion. If a judge's discretion in fashioning a remedy is limited, however, the lawyers and parties may place greater emphasis on their own understanding of the case. Therefore, they may feel that they have greater control over the outcome. This theory is supported by psychological research suggesting that people are likely to overestimate their abilities as well as their degree of control over a situation.[74] Thus, the all-or-nothing nature of the remedy in wills law could further act to encourage parties to seek judicial resolution of their disputes instead of a negotiated settlement because they feel they have more direct control in the ultimate outcome.

IV. TOWARDS A LESS CONTENTIOUS WILLS LAW

Is it possible to make our wills law more conducive to private resolution of disputes, and if so, what would the effects be of making such a change? Changing the substantive rules governing wills law to avoid the

73. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

74. *See* Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 111 (1997) (reporting that "well over half of survey respondents typically rate themselves in the top 50 percent of drivers, ethics, managerial prowess, productivity, health and a variety of desirable skills") (citations omitted).

impediments to private resolution discussed above would be an important step in decreasing contentious litigation and increasing private resolution of will disputes. This could be accomplished by changing the rules governing will disputes to: (1) diminish the role of testator intent; (2) reduce the moral tone of the inquiry; and (3) reduce the role of law by adopting vague standards and giving probate judges broad discretion to resolve disputes.

What would such a wills law actually look like? One interesting example worthy of consideration is the discretionary regime in English wills law known as the Family Maintenance Statute.[75] English wills law is the original source of wills law in the United States and the two systems remain remarkably similar in many respects. Both have a stated ideal of freedom of testation, and both generally share the same formal requirements for executing or revoking a valid will.[76] Yet English law differs from wills law in the United States in one key respect. While both systems provide for freedom of testation, for decades now, English law has provided a limited exception to this right through its family maintenance statute. This statute allows certain people to make claims against a decedent's estate for their support.[77] The right to make such a claim is open to a fairly broad class of individuals including the decedent's spouse, former spouse, child, current or former-step child, and any other person maintained wholly or partly by the decedent at the time of the decedent's death.[78] The amounts paid under these provisions are somewhat limited since the purpose of these distributions is to provide for reasonable maintenance.[79] In making a family maintenance determination, an English court is directed to consider numerous factors, including: the financial resources and needs that the applicant currently has and is likely to have in the foreseeable future; the size and nature of the decedent's estate; any

75. Family maintenance statutes were first enacted in New Zealand in 1900. Testator's Family Maintenance Act, 1900, N.Z. Stat., no. 20. This served as the basis for the current testate succession laws in Australia, several of the Canadian provinces and England. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 121 n.125 (1994). England adopted their first family maintenance statute in 1938. *See* Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, ch. 45 (Eng.). For a detailed discussion of the law of England, see ALEXANDRA MASON & MARIAN CONROY, SPENCER MAURICE'S FAMILY PROVISION ON DEATH *passim* (7th ed. 1994).

76. *See* JANET FINCH, LYNN HAYES, JENNIFER MASON, JUDITH MASSON & LORRAINE WALLIS, WILLS, INHERITANCE AND FAMILIES 20–38 (1996).

77. *See* Inheritance (Provisions for Family and Dependants) Act, 1975, ch. 63, § 1(1) (Eng.).

78. *Id*.

79. *Id*. at ch. 63. Justice Oliver noted that:

> [I]n regarding the circumstances and applying those guidelines it always had to be borne in mind that the Act, so far as it related to applicants other than spouses, was an Act the purpose of which was limited to the provision of reasonable maintenance. It was not the purpose of the Act to provide legacies or rewards for meritorious conduct.

MASON & CONROY, *supra* note 75, at 25.

physical or mental disabilities of the applicant; and any other matter, including the conduct of the applicant or any other person, the court may consider relevant.[80]

The family maintenance regime is similar to the regime now governing divorce law in the United States.[81] It includes, for example, a forward-looking inquiry, vague standards, broad judicial discretion and a reduction in the role of fault. One can easily imagine that parties operating within the family maintenance regime would be more likely to fashion their own settlement because a judicial determination would not implicate hot-button issues such as testator intent. Judicial resolution would not provide moral vindication because the role of fault is so minimized. Also, due to the vague standards and broad judicial discretion, the parties could have only limited confidence in their ability to get a better result through a judicial determination.

To what extent would a system such as the English family maintenance statute change substantive doctrinal wills law? To be sure, enacting a family maintenance statute would somewhat limit the degree of control that people have over the disposition of their property at death. It would grant judges the authority to make dispositions from the decedent's estate to support individuals who may not have been provided for in the will. However, seen in the context of the limitations on freedom of testation that already exist in the United States, the effect of this change would be one of degree, rather than kind.

Existing wills law in the United States already limits freedom of testation, explicitly and implicitly, in a number of significant ways. The most direct limitations on freedom of testation are imposed on married individuals, although the most significant limitations are those that are imposed indirectly on all individuals.

Limitations on freedom of testation are imposed on married individuals directly through marital property laws and more subtly through federal tax statutes. Marital property laws impose limitations on freedom of testation in both community and separate property states.[82] In

80. *See* Inheritance (Provisions for Family and Dependants) Act, *supra* note 77, at ch. 63 § 3.

81. It is also similar to English divorce law. The legislative history makes this connection directly by suggesting that the court's discretion to award a share awarded to a surviving spouse "at least . . . should be as wide as its powers to order financial provision on divorce." MASON & CONROY, *supra* note 75, at 2.

82. The community property system is in place in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin has adopted the Uniform Marital Property Act,

community property states each spouse has a fifty percent ownership interest in all property acquired during the marriage. Therefore, upon death, each spouse can only control the disposition of her separate property and half of the community property. In separate property states, spouses are limited in their ability to control the disposition of their property at death through formal elective share statutes. If a married testator in a separate property state disinherits her spouse, the spouse can make an election against the estate for a portion of the decedent's estate. In states that have adopted the most recent version of the Uniform Probate Code, this election can affect as much as fifty percent of the decedent's property.[83]

Federal tax laws provide additional significant limitations on an individual's ability to control the disposition of property after death by providing that married participants in a qualified retirement plan must transfer those plan assets to a spouse unless the spouse consents to an alternate disposition.[84] It is not uncommon for retirement benefits to represent the single largest asset in a decedent's estate, so the effect of this provision is substantial.[85]

A person does not need to be married in order to be subject to limitations on freedom of testation. Wills law itself provides even more significant, albeit indirect, limitations on freedom of testation. Although wills law explicitly refers to the value of freedom of testation, an individual can only be certain of being able to exercise this freedom to the extent that she provides for her family or otherwise writes a will that conforms to societal norms.

Extensive literature describes the ways in which the doctrines of undue influence and lack of mental capacity have been imposed when the testator has disposed of her property in a way that fails to conform to societal norms.[86] In *The Myth of Testamentary Freedom*, Melanie Leslie

which is substantially similar to the community property system. The other forty-one states are separate property states.

83. *See* UNIF. PROBATE CODE §2-202(a) (amended 1993), 8 Part I U.L.A. 102–03 (1998).

84. *See* 26 U.S.C. §§ 401(a)(11), 417 (2000).

85. *See* RAY D. MADOFF, CORNELIA R. TENNEY & MARTIN A. HALL, PRACTICAL GUIDE TO ESTATE PLANNING 555 (2001).

86. *See generally* Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529 (arguing that relaxing the strict standards of testamentary capacity and undue influence will lead to a breakdown of the standards); Joseph W. deFuria Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200 (1989) (showing courts' likelihood of applying undue influence doctrine when it views the relationship as meretricious); Michael Falker, Comment, *A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity*, 2 CONN. L. REV. 616

shows how courts are even willing to apply the formal requirements of wills (for signature and two witnesses) in such a way as to reject wills that fail to meet a testator's familial duty.[87] Application of these doctrines in this way substantially limits freedom of testation. The effect of the application of these doctrines is to reject the will in its entirety and, instead, to transfer the property to the decedent's spouse and blood relatives through intestacy statutes. In contrast, the limitations on freedom of testation that would be imposed by a family maintenance statute are in many ways less significant than those already in place since family maintenance statutes only apply to the extent that the relevant person needs money for support. Indeed, enacting family maintenance statutes may *increase* freedom of testation by reducing judicial use of other doctrines (such as undue influence and lack of mental capacity) to address wills that courts believe to be unfair.

Regardless of the minimal impact of English family maintenance statutes on actual freedom of testation, it is unlikely that states will adopt such provisions in the near future. While the adoption of a system such as the family maintenance statute would cause only an incremental change on existing freedom of testation, its effect on the core story of wills law would be far greater. At its heart, wills law tells a story about individual rights which essentially says that (1) people have the ability to control their property at death, and thus the ability to exert their power after death, and (2) people bear no obligation to others (with the exception of their spouses).

Statutes such as the English Family Maintenance Statute directly contradict these tenets. These statutes explicitly send the message that an individual's property is not entirely her own to do with as she pleases. Rather, her family and other dependents have some claim to the property. As such, adoption of this type of provision would change the central wills narrative, and transform it from an individualistic to a communal account.[88]

(1970) (asserting that the disposition of a will should not be considered as evidence of testamentary capacity or lack of it); Madoff, *Unmasking Undue Influence*, *supra* note 63 (arguing that undue influence doctrine acts to protect families from disinheritance); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91 (1953) (suggesting that juries be eliminated in will contests due to their inability to rationally deal with testamentary capacity and undue influence). *See also* Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 243–48 (1981) (showing how the doctrines of undue influence and lack of mental capacity can limit testamentary freedom of homosexual testators).

87. *See* Leslie, *supra* note 63, at 236–37.

88. Some of the difficulties in legal recognition of community values are discussed in AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

V. CONCLUSION

Mediation—with its promise of less contentious, less expensive resolution of disputes—has been widely recommended for disputes in all areas of the law. Yet, its successes have not been as uniform. While it has flourished in some areas (most notably in divorce and child custody disputes) it has met with much greater resistance in others. This is particularly puzzling for areas of the law, like will disputes, where mediation would seem to provide so many benefits. This Article has sought to explain this conundrum by showing the ways in which legal doctrine—the statutes and case law applicable to a particular dispute—plays an important role in lawyers' and parties' willingness to accept the mediation model.

The analysis in this Article is not limited to will disputes and divorces. I have also identified features of law that encourage parties to resolve their own disputes. These features include: a forward-looking inquiry, a reduction in the role of fault, adoption of vague standards, and broad judicial discretion. To the extent that there is a desire to encourage negotiation and mediation of disputes, legislatures should consider systems with these features. To be sure, there will be costs associated with such changes. These provisions encourage settlement, but simultaneously send another message as well—that is, that getting along is more important than right or wrong.