Contracts: Law in Action  [What follows is the text from a section in Macaulay, Kidwell, Whitford and Galanter, Contracts: Law in Action, a casebook for the first year course which was published by LexisNexis books in 1994, and now is in a second edition. This material follows appellate decisions involving contract and restitution in family and family-like situations. These cases typically are grouped under headings such as offer and acceptance and consideration or contracts against public policy. We take a more functional view]

Contracts: Law in Action: Alternatives to Litigation

Alternatives to Litigation in Family Matters

We have looked at relationships between husbands and wives and between families and those who care for the old. Traditionally, courts said that litigation was an inappropriate way to deal with problems between spouses. Similarly, there might be better ways than litigation to compensate meritorious services to the elderly. During the 1970s and 1980s, there was much debate about "alternatives to litigation." Critics said that American courts were crowded. Litigation was costly and served to enrich lawyers. Public formal adversary procedures injured or destroyed long-term relationships. Radicals saw the American legal system as part of a system that was very different from our own resolve disputes. Critics accused the American legal system of being labeled "bargaining in the shadow of the law" which you have learned might play in this "affluent" alternative to litigation. Indeed, suggest that there is only one larger complex process.

Stories from other societies

Comparative approaches to law often open our eyes to the nature of our own legal system and assumptions on which it rests. Clearly, we do not ask you to read about African tribal law or social control in socialist societies because we think you are likely to make direct use of this information in your law practice.

1 David Trubek notes the irony:

We live in a strange time. High priests of our legal order are questioning the law. At ritual events and in official publications the legal elite has stopped celebrating the law and encouraging its use, and has begun to chastise the public for relying on the law and to condemn lawyers who encourage such popular vices. . . . In tones reminiscent of revival meetings, these high priests associate law with images of evil and its use with weakness and decadence.

There are a number of classic problems in comparative work. It is misleading to compare a formal, idealized version of, say, French law with the day-to-day reality of courts in Milwaukee or Chicago. Furthermore, we always have trouble defining the boundaries of what we want to call the legal system. What is part of government in a Chinese setting may be within the jurisdiction of family therapists and parish priests or rabbis in the United States. Consider the following materials in light of a broad view of American social structure, asking whether we have analogous institutions and looking for similarities as well as differences. Then ask whether it makes any difference if a social function is assigned to the public or private sector, insofar as those labels have any connection with reality.

James Gibbs' description of the Kpelle moot became an important source of inspiration for many seeking to reform the American legal system's way of coping with interpersonal disputes in families and neighborhoods. The Kpelle are a group of about 175,000 people who live in Central Liberia and adjoining regions of Guinea. They have a formal court system which is "particularly effective in settling cases such as assault, possession of illegal charms, or theft where the litigants are not linked in a relationship which must continue after trial." However, the court is "particularly inept at settling . . . matrimonial disputes because its harsh tone tends to drive spouses farther apart rather than to reconcile them."

For cases involving such continuing relationships, the Kpelle use a moot which is more effective than a court in many cases. Gibbs says the "genius of the moot lies in the fact that it is based on a covert application of the principles of psychoanalytic theory which underlie psychotherapy." First, the moot takes place before a group including the kin of the litigants and neighbors from the quarter in which the case is being heard. Second, it is held on Sunday, a day of rest, at the home of the complainant. Third, the complainant selects as mediator a kinsman who is a town chief or elder. Fourth, an introductory ceremony is held which focuses attention on maintaining harmony and the well-being of the group. Fifth, the proceeding is informal but structured. The complainant speaks but may be interrupted by the mediator or anyone else who wishes to challenge what is said or add to it. The mediator may fine those who speak out of turn--for example, he may order them to bring rum for all to drink. Sixth, the mediator and the others present will point out the various faults of both parties, and at the end of the proceeding, the mediator will express the consensus of the group. Seventh, the one mainly at fault will formally apologize to the other by giving token gifts which must be accepted; the one found less at fault will return a smaller token to signify acceptance of the apology.

Gibbs points out that the process results in an airing of all grievances between the parties. The process takes place in a familiar setting soon after the matter has come up and before positions have hardened. Both parties must consent to bring the matter to the moot although there is social pressure to consent. Fault usually is attributed to both sides. Those who participate in the moot know the parties and their history, and so they can judge behavior in its

2 A Peace Corps worker with experience in the area tells us that the pronunciation is something like "Gah-Bell-ah."
full context. They can see how what an outsider might view as trivial has significance in light of past events. Behavior is judged against traditional customary norms of the Kpelle that define the behavior of a good wife, a good son, a good cousin who is a neighbor and so on. Furthermore, the sanctions imposed are largely symbolic. They are not so burdensome as to prompt resentment. Both parties are re-educated by the reactions of relatives, friends and neighbors to their attitude and conduct. For example, Gibbs reports that a husband learned that the group viewed his customary mildly paranoid sarcasm as destructive of harmony in his marriage, and it did not accept his view of the situation. Presumably, he mended his ways. Disputants are coaxed to conformity by the granting of rewards. The major one is group approval which "goes to the wronged person who accepts an apology and to the person who is magnanimous enough to

Gibbs' conclusions include important qualifications often overlooked by Americans who advocate some version of Kpelle moots for the United States. First, Gibbs stresses,

A moot is not always successful . . . Both parties must have a genuine willingness to cooperate and a real concern about their discord. Each party must be willing to list his grievances, to admit his guilt, and to make an open apology. The moot, like psychotherapy, is impotent without well-motivated clients.

Second, Gibbs notes that courts have a complementary function to the moots. Courts declare rights. In the case of matrimonial disputes, they grant divorces which sometimes are the appropriate remedy. "The essential point is that both formal and informal dispute-settlement procedures serve significant functions in Kpelle society and neither can be fully understood if studied alone." Although Gibbs does not say so, Kpelle may accept the risks involved in going to the moot to avoid the greater risks involved in going to court.

Some socialist societies have [or had] popular courts or mediation committees which, among other things, deal with disputes among family members as part of a program designed to

One day, Li Erh-ma, chairman of a mediation committee in Nanking was at home, when another mediation committee member came running to tell her that three fights had occurred within the last two days at the home of Wang Ying and that she did not understand the cause of the trouble. The next day, after breakfast, Mrs. Li went to the

4 Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 California Law Review 1284, 1321-2 (1967). We do not know whether Lubman's example is typical of China today. A great deal has happened in China since he wrote this article.
Wang family's neighbors. She learned from them that Wang and his wife were living with Wang's mother and younger sister, that Wang's wife wanted her sister-in-law to do more around the house, and that Wang's mother and sister resented the wife's demands. Mrs. Li then went next door to the Wang house, where she found only Wang's mother, who was taking care of Wang's little children. Wang's mother admitted that she did not get along with her daughter-in-law. Mrs. Li said: "You and I are alike. I've been a mother-in-law and in the past, I, too, had a little of the old ideology, and always felt differently about my daughter and daughter-in-law. Now society is different, our ideology has changed a little, and we must treat daughter and daughter-in-law alike." Just then the daughter-in-law came home, and while Mrs. Li helped her prepare vegetables, she congratulated her on having a mother-in-law who helped, too. "They only come to eat and scold all day, and don't do anything," replied the wife. Mrs. Li explained that children were parent's responsibilities, and that younger and older generations owed each other respect. Later, Mr. Wang came home, and Mrs. Li helped the family hold a "family unity and reconciliation meeting" in which each member of the family discussed his or her errors.

Days later, Mrs. Li was still concerned about the Wang family, and she becam

Of course, one does not want to romanticize the socialist approach. Barry Reckford, a Jamaican playwright, wrote "Does Fidel Eat More Than Your Father" (1971), a book very favorably to the Cuban revolution. In it he discusses the Committees to Defend the Revolution and their block-by-block organization in Havana. He talked about the situation with a medical student who supported the revolution:

I said to him: "Do you feel any privacy on this block?"

"Well, everyone knows what you do, but you aren't part of a big horrible family; you do what you like... In this block I do what I like, and we all know who are the self-appointed spies. Go talk to Mrs. Blanco."

Are Kpelle moots and community courts consistent with American or British views of individual rights and privacy? What would the judges who decided Balfour v. Balfour say about such institutions? People from other parts of the world might have very different norms about privacy, families and communities. Can we say that European and American societies value privacy so greatly that people who live in them are not subject social control by their friends and neighbors? Does the answer turn on your social class?
All of us who have attended high school or lived in group residences know that there is such a thing as social control apart from the public legal system in our society. Nauta studied 196 women living in blocks of twelve adjoining houses in the eastern part of Amsterdam. The researcher asked for details of quarrels between neighbors, who quarreled with whom, why, and what happened exactly. We could interpret almost all the quarrels as sanctions against infringements of norms. The exerter of sanctions turned out time and again to be the controlling neighbor. Most of those controlled were younger, had lived for shorter times in the block, were more permissive, and worked more outside the home. Other women felt that they were being controlled by their neighbors although they avoided quarrels. Some withdrew from contact with neighbors, but many were dependent on their neighbors for assistance and sociability. It was easy to gossip about neighbors, and those with restrictive views about proper conduct felt under pressure to conform. You can make your own judgment about the extent to which you would find similar forms of social control in American apartment and suburban living. Insofar as you found something of this sort, how does it differ from Kpelle moots and the proactive work of Li Erh-ma?

"Alternatives" in American society

To what extent do we find institutions similar to Kpelle moots and community courts in the United States? Is it true that we can solve personal disputes only by withdrawal, violence or litigation? Suppose a middle or an upper middle class family faces marital difficulties. Is it likely that either the husband's or the wife's parents will play a role in trying to resolve the problems? Will neighbors play a role? What professionals might they call on? How might they go about coping with the problems? Might contract in some form play a part? Remember Miller v. Miller, on page Ch. 3 I 304.

Suppose a working class or poor family has the kind of ongoing dispute described by Lubman. Do we have any equivalent to Li Erh-ma? What do police do with family disputes when the neighbors call them? Parnas tells us,

If the victim and offender are both present when the police arrive and the victim has not sustained serious injury, the police, depending upon the circumstances of the incident and their own individual inclination, may use one or more of the following procedures: mediation; referral to private or public agencies; threats of arrest or other forms of indirect sanctions; voluntary, temporary separation of the disputants; the threat of filing cross-complaints; refusal to arrest except on a warrant.

Of course, police in a smaller city might act differently from police in a major metropolitan center. What differences are there in the approaches which we might expect from American police in a family disturbance and Li Erh-ma?

5 Nauta, Social Control and Norm Restrictiveness: Some Results of an Inquiry into Neighbour Relationships, 10 Sociologia Neerlandia 233 (1974).
7 The role of police in family disputes is controversial. Many argue that battering husbands...
Some groups in American society run their own "private legal systems," and often they deal with family matters. For example,

**Jewish Conciliation Board (JCB):** The JCB, established in New York City in the early 1920's, is an interdenominational Jewish court of arbitration. It currently handles close to one thousand widely varied cases yearly. The majority of the cases are family and marital problems: children refusing to support elderly relatives; financial responsibilities in second marriages; and typical husband-wife problems that seem to be leading the couple down the road to divorce. . . . The Board also deals with minor problems between Jewish businessmen and with miscellaneous problems between individuals.

From the close to one thousand cases that are brought to the JCB each year, only 8 1/2 per cent actually go to trial. A look at the Board's procedure explains why.

The first step in bringing a problem before the Board is an interview with the executive secretary in the Board's office. Many of the cases brought are not proper for adjudication; some are merely personal problems that require a helping hand and not a court. Nobody is ever turned away. If possible, the troubled person is sent to a government or private agency where assistance is available. If not, there is still an open and sympathetic ear at the JCB which often is very useful.

For those complaints that are fit for adjudication, the party coming to the Board fills out a complaint form after the interview. This is given a case number, put into the Board's file and a copy sent to the other party who is asked to come to the office to explain his side. If the party refuses to come, follow-up letters are sent. Although there is no way to force parties to appear, they usually do. When both parties appear at the Board's office together, mediation by the executive secretary is attempted. In many cases, face-to-face confrontation plus the prodding and logical and objective view of the mediator is all that is needed for agreement. If this is not successful, the case then goes on the docket. Before any case is officially taken up by the Board of judges, a signed submission agreement is required. This makes the JCB's decision legally binding.

The method used by the judges in deciding cases is *mishpat shalom*, a judgment of peace. It has been described as a combination of "a paragraph of (Jewish) law and human intuition." The three judges provide the human intuition as well as the law, so in theory the outcome is sensible, logical and equitable. The method has also been described as "an act of conciliation. We try not to say 'you are right, you are wrong.' Rather we try to convince the parties to do what is proper." The fact that these decisions are rarely, if ever, appealed is perhaps proof enough that the method is successful.

ought to be arrested and jailed rather than subjected to slaps on the wrist. Often, however, the battered wife needs the husband's income and faces difficult choices.
In a recent session, the practical effects of the Board's philosophy were clearly seen. Four marital cases were before the Board. Two of those cases were concluded with the complaint being withdrawn, the parties kissing and making up in the courtroom. In another case, the husband and wife were sent to a marriage counsellor with certain conditions, and in the fourth case, the wife was sent to a free treatment center for necessary psychiatric help.

The JCB has no machinery to enforce its decisions, and none is usually necessary. If one of the parties is reluctant to abide by the decision, a letter from the Board is usually enough to make the party comply. If a very rare happens, these letters are the winning party can sue in civil court for his award and the court will enjoin

Sitting on each case is a board of three judges, a rabbi, a businessman and a lawyer, chosen by the executive secretary. Where necessary, a psychiatrist may sit on a case in order to give the judges the benefit of his professional knowledge. Since many people who come to the Board are disturbed and need professional guidance, this innovation is quite helpful.

There are court sessions about every two or three weeks with a few cases heard at each session. When the parties come to court, the hearings are quite informal. The parties present their own side in an informal manner, and the lawyer-judge handles any of the necessary legal issues. Witnesses appear and are questioned and cross-examined informally by the judges. When the parties finish their stories, they leave the room and the judges discuss the case. A decision is then reached and written up by the lawyer-judge. The decision is then read to the parties and put in the Board's files. A complete record of all cases is kept, including a transcript of the trial.9

Calls for new approaches and the practice of law

Apart from the many "private governments" found in American society, people often

9 Trubek says "there are five accounts of the 'turning away from law' that strike me as especially fruitful. They suggest it could be:"
Calls for mediation rather than adjudication

Even if we cannot help parties find a way to continue a long-term relationship, they may need help in finding a way out of one. The following article examines the now popular idea that mediated settlements are better than litigation for all concerned when marriages end. It also suggests some of the problems with trying to move away from power and legal coercion towards consent as a way of dealing with questions that arise when marriages end.

Mediating a Less Hostile End to a Marriage
Judy Klemesrud

When Carol and Donald Krug of Westbury, L.I., decided to end their marriage in 1977, they were determined to avoid a court battle that would turn them into adversaries and which, they thought, might generate antagonism and hostility that could last forever.

"We had seen this happen to divorcing couples who had two lawyers battling it out," said Mr. Krug, 44 years old, a professor of sociology at Wagner College in Staten Island. "We didn't want it to happen to us."

So the Krugs went to see John M. Haynes, a divorce mediator, who is also an associate professor at the School of Social Welfare, State University of New York in Stony Brook. They saw him six times, and he worked out custody arrangements for the Krug's two teen-age children, child support and a division of property.

A year and a half later, when the divorce was filed, the Krugs saw Mr. Haynes two more times to work out the final agreement, in which Mrs. Krug was awarded the family house and Mr. Krug the upstate vacation home.

(i) a tactic designed to accomplish a concrete set of political goals;
(ii) a defensive move by the legal profession to co-opt and control popular movements which threaten the profession's economic interests;
(iii) a response to the need to legitimate the legal system by offering new ideals that hold out new promises of fairness after others have been exposed as shams;
(iv) an effort to create an atmosphere in which the role of law in America could be altered; and
(v) a way to introduce a new form of social control that is more pervasive and powerful than formal law.

See Trubek, Turning Away From Law, 82 Michigan Law Review 824, 830 (1984). Consider these five accounts as you read the materials that follow.
"The whole procedure was very calm," said the former Mrs. Krug, 43, who is now Carol Kelly, and works as a counselor for displaced homemakers in Levittown, L.I. "I had no anxieties about the process whatsoever. There wasn't any hostility, because

Mediation is the latest trend in divorce. In this process, a couple works with a trained mediator--usually a lawyer, social worker or psychologist--to make joint decisions, rather than hiring two lawyers to slug it out in the traditional adversarial procedure. . . .

Donald C. Schiller of Chicago, chairman of the American Bar Association's Committee on Divorce Law and Procedures, said: "Mediation is like a new drug. You never know what the reaction is going to be. It may cure some of the early symptoms, but two years down the line it may kill you."

He added that one of his biggest worries about mediation was that the person doing the mediating would not make each party aware of his or her rights. "Say a mediator tells the wife that she's entitled to 50 percent of everything," he said. "That may make her feel good, but what if she is actually entitled to more than half? That could be very damaging to her."

Most divorce mediators use one of two methods to do their work: a nonlawyer mediator will do the early part of the mediation, trying to keep a lid on the couple's emotions, and then recommend that both parties hire separate lawyers to take their divorce agreement to court; or a nonlawyer mediator will work in conjunction with a lawyer, who draws up the agreement for both parties and takes it to court.

Whatever method is used, mediation is normally cheaper than the adversarial divorce--usually about half the cost. Mediators' fees usually run between $50 and $100 an hour, compared with $200 to $300 for lawyers. . . .

Why do couples choose divorce mediation? "The two sexes have entirely different motives," said Jessica Pearson, a Denver sociologist who is conducting two major studies of divorce mediation, one a national survey and the other in Colorado.

Miss Pearson said that after studying 120 Colorado couples who used mediation and 120 Colorado couples who used the adversarial method, she had concluded that men chose mediation because they felt their chances of winning in court were "pretty low." The women who chose mediation, she said, did so because they felt the court was not an appropriate forum for divorce, "and they wanted a warmer way of settling the dispute."

She said that the study . . . also shows that 55 percent of couples who try mediation come up with agreements; that couples who mediate are more satisfied with
their divorces than those who rely on the courts, and they are more likely to agree to joint
custody of children, as opposed to a single-parent custody arrangement. . . .

Alternative dispute resolution and the practice of law

The following material deals with areas other than family disputes. Nonetheless, it
suggests that lawyers regularly play roles other than that of court-room advocate. We can ask
whether lawyers in family disputes also play the part of mediator. Macaulay studied lawyers and
consumer protection laws.10 He found that lawyers played the roles of gatekeeper who teaches

Attorneys who became more involved in a case might find themselves playing the part of
go-between or informal mediator. They may telephone or write the seller or creditor to state the
consumer's complaint. The very restatement of that complaint by a professional is likely to make
it a complex communication. On one level, the attorney is reporting a version of the situation
which may be unknown to the seller or creditor. This may be true even where consumers have
complained before seeing a lawyer. The lawyer may be able to organize a presentation so that
the basis of the complaint is more understandable, and transform the presentation so that it is
more persuasive. The report comes from a lawyer, and this is likely to give the complaint at least
some minimal legitimacy. The lawyer is saying that he or she has reviewed the buyer's or
debtor's story, the assertions of fact are at least plausible, and the buyer or debtor has reason to
complain if these are the facts. The lawyer is more likely than the consumer to talk to someone
who has authority to do something about a problem. A tacit threat always lurks in the
background. Lawyers are people who can make trouble if others do not want to negotiate a
settlement.

When they talk with the seller or creditor, lawyers often learn what their clients did not
tell them about the situation--there usually is another side to the story. However, lawyers may be
able to reach a settlement if they do not ask for too much. Good lawyers know how much is too
much. They may say that they understand the seller or creditor's position. They have an angry
client who will make trouble for both of them unless the lawyer can come up with something to

11 We can also distinguish styles in playing these roles. For example, Neustadter studied lawyers
handling individuals seeking relief from debts in bankruptcy. Some lawyers sought to counsel
clients and explain all options open to them. Others created a routine and mass processed clients
through the legal system as quickly as possible. See Neustadter, When Lawyer and Client Meet:
Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Office, 35
calm down the client. The seller or creditor may blame poor employees for "the misunderstanding." Ideally, the lawyer and the seller or creditor will fashion a solution that both looks good to the client and does not hurt the seller or creditor very much. For example, a used car dealer might offer to take back a car with which the lawyer's client is dissatisfied. However, the dealer is unlikely to offer to refund the purchase price. Rather, the dealer might offer to take the car plus an additional amount of money in exchange for another car on the dealer's lot. The net price paid by the client will be far less than the asking price for the substitute car. Nonetheless, the dealer may still be able to profit on the entire transaction.

Once a lawyer obtains such an offer, the next step is to sell it to the client. The client may want to fight to the Supreme Court, but the lawyer must persuade the client that the settlement is fair and litigation would not be profitable. Often enough, the client takes the settlement but remains unhappy with the lawyers' services. The client thought he or she had rights and expected vindication. Instead, all the lawyer produced was a deal.

Why don't lawyers accept all clients who come to their offices and immediately turn to litigation? Would we expect lawyers to treat family matters much as they treat consumer protection questions? Insofar as the practice of law often involves negotiating settlements, what role do legal rules and procedures play? Consider the following excerpts from Professor Galanter's article and ask why legal educators want to stress doctrine and adjudication rather than what he calls "litigotiation?"

**Worlds of Deals: Using Negotiation to Teach about Legal Process**
Marc Galanter

[The phrase]...alternative dispute resolution strikes me as revealing something about the tacit picture of the legal world which permeates American legal education. It links negotiation with alternatives and implicitly juxtaposes them to something unspecified. Alternatives, we may ask, to what? To adjudication, to courts. Even while affirming that negotiation is important, the title reflects the view that negotiation (and mediation and so forth) occupy the outer edges of the legal realm--they are peripheral to the real thing, adjudication in courts; they are soft as opposed to the hard core of legal doctrine. Negotiation is something apart from the real law that occupies legal educators.

This picture is misleading in several ways. It implies that negotiation (and other so-called alternatives) are infrequent, new, unproven, marginal. But the gravitation to the mediative posture by judges and other decision makers armed with arbitral powers is surely one of the most typical patterns of disputing on the American scene--as an examination of our courts and administrative agencies will attest. The linking of negotiation to "alternatives" to litigation is misleading in another sense. On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only as light exaggeration to say that it is litigation. There are not two
distinct processes, negotiation and litigation; there is a single process of disputing in
the vicinity of official tribunals that we might call *litigotiation*, that is, the strategic
pursuit of a settlement through mobilizing the court process. Full-blown adjudication
of the dispute—running the whole course—might be thought of as an
infrequently-pursued alternative to the ordinary course of *litigotiation*. I do not
minimize its importance: adjudication remains a compelling presence even when it
does not occur.

The courts are central to the *litigotiation* game because of the "bargaining
endowments" they bestow on the parties. What might be done by (or in or near) a
court, that is, gives the parties bargaining chips or counters. Bargaining chips derive
from the substantive entitlements conferred by legal rules and from the procedural
rules that enable these entitlements to be vindicated. But rules are only part of the
endowment conferred by the law—the delay, cost, and uncertainty of eliciting a
favorable determination also confer bargaining counters on the disputants.
Everything that might affect outcome counts—all the outcome for the party, not just
that encompassed by the rules. The ability to impose delay, costs, risk,
embarrassment, publicity comes into play along with the rules. Rules are important
but they interact with a host of other factors in ways that do not correspond to the
nearly separated background and foreground of the law school classroom.

The settlement process is not some marginal, peripheral aspect of legal disputing
in America; it is the central core. Something like 90 percent of civil cases are settled
(and of course many more disputes are settled before reaching the stage of filing).
Lawyers spend more time on settlement discussions than on research or on trials and
appeals. Most of the other activities that lawyers engage in in the course of
cases are connected to or focused on the settlement process. All the activities associated
with settlement, negotiation and litigation are not separate processes, but are
part of a single process: negotiation because the law and courts are but one
part of the

The world of negotiation [is] made up of different bargaining arenas. By this I
mean some more or less bounded constellation of lawyers (and in some cases other
actors such as insurance adjusters or detectives or judges) who interact with one
another in connection with the settlement (and occasional adjudication) of particular
kinds of cases in a particular locality. They share (more or less) expectations and
understandings about procedures, applicable norms, outcomes. In a particular locality
there may be a personal injury bargaining arena, a medical malpractice bargaining
arena, a family law arena, an antitrust arena and so forth. Individual lawyers may
participate in one or several; lawyers may be comfortably familiar with a certain arena
or find it strange and intimidating. Such arenas may be more or less differentiated
and more or less bounded. A lawyer may spend his whole working life in a single
arena in which everybody knows everybody, one's reputation in the arena is a prime
concern, and everybody knows what every case is worth. (I gather that criminal law
in some middle-sized cities approximates this.) Or an arena may be diffuse--one may constantly encounter antagonists who are strangers, with little concern about reputation and little shared knowledge about standards and benchmarks. An arena may deal with cases that are exhaustively researched and investigated, or with cases that are too small to support much investment in generating information.

So, preparing to negotiate involves not only acquiring generalized skills, but learning to read the landscape, to dope out the features of the bargaining arena. It is crucial to know whether you are dealing with people who are concerned to deal with you again, whether deals are standardized here or custom made, and what expectations are shared about the process and outcome.

**Effectiveness of mediation**

William Felstiner is a leading student of dispute resolution. He organized what we know about mediation into twenty-four propositions.\(^{12}\) We will look at some of them to get an idea of what the process involves. Mediation is a process in which parties to a dispute use a third party who does not have power to dictate an outcome. Mediators act in a number of ways: They can suggest new solutions to parties; they can help parties recharacterize events; they can separate parties and act as go betweens, translating their concerns into less emotional language.

Susan Silbey and Sally Merry\(^{13}\) observed over 40 different mediators in 175 mediation sessions held in three different programs. They found that mediation seems to range between a bargaining process conducted in the shadow of a court to a communication process which resembles therapy in its focus upon exploring and enunciating feelings.

Obviously, some mediators will have a degree of power over one or both parties. Mediators may have power to retaliate against one who blocks a solution to a problem--for example, a trial judge may attempt to aid lawyers settle a case. If a client seems to be acting in bad faith and demands a trial, the judge may not be able to forget the refusal to reach a mediated solution when the judge makes decisions in the case. Mediation may be an alternative to something unpleasant. If the parties cannot reach a settlement, one or both may risk retaliation by the other or his or her friends. One form of retaliation is a law suit; another is a complaint to the police. A mediator's influence may be subtle. The parties may want to please or look good before a mediator. This is likely to be true when they select a respected person to play the role.

Mediation should not be romanticized. Mediators can define problems, suggest solutions and open communication. This may help resolve problems or it may only underscore that the disputants' objectives are incompatible. Some successful mediators help parties fool themselves by redefining situations. "The past will be formulated retroactively to rationalize the present." Mediators may manipulate parties and misrepresent situations. Mediators may succeed by claiming the right to judge the parties. The Jewish Conciliation Board uses respected business


\(^{13}\) Mediator Settlement Strategies, 8 Law & Policy 7 (1986).
leaders and rabbis whose views matter to the parties who agree to appear before the group. Some, but not all, clients will accept their lawyers' suggested solutions because they do not want to appear unreasonable to a lawyer, who represents established views of proper behavior. Mediation can involve a good deal of coercion, and the parties may agree to a settlement as the best of the available bad solutions.¹⁴

When is mediation likely to work? When is it likely to fail? Felstiner begins his work by looking at the normative aspect of the dispute. Following a classic article by Aubert,¹⁵ he notes that conflicts of values are less likely to produce mediated agreements than conflicts over interests. For example, Lee Marvin probably could have saved money by agreeing to pay Michelle the amount awarded by the trial court for rehabilitation rather than paying his lawyer to take the case to the appellate court. However, Marvin reportedly saw the matter as a cause. He thought women should not have claims to money just because they lived with a man.

Felstiner also points out that the claim may be but a surrogate for a real dispute. If the underlying causes are rooted in patterns established by years of coping, mediation will not address them. What seems to be a reasonable solution to a relatively minor problem, will not touch the real difficulty if the minor problem is but part of a much larger balance sheet of interpersonal debts. The Balfours and the Millers are unlikely to become warm caring people concerned with each other as a result of two or three mediating sessions. In short, mediation is not deep psychotherapy.

Mediation is difficult when there are many parties. Lawyers often tell stories about clients who would have been willing to settle claims against others but who were pushed into litigating by their spouses. If many know about a dispute, considerations of pride and reputation may make it difficult for some people to back down. Felstiner says that success requires some rough status equality between the parties. Mr. Balfour, for example, had no apparent reason to

¹⁴ See Bedlin and Nejelski, Unsettling Issues About Settling Civil Litigation, 68 Judicature 9 (1984). In contrast, Janet Rifkin argues,

Although critics of mediation charge that it may keep the less powerful party from achieving equality and equal bargaining power, it is not so clear . . . how this operates in practice. These objections to mediation are inextricably tied to the view that the formal legal system offers both a better alternative and a greater possibility of achieving a fair and just resolution to the conflict. The general assumption that the lawyer can "help" the client more meaningfully than a mediator is part of the problem with this view. In many instances, although new substantive rights or legal protections are realized, patterns of domination are reinforced by the lawyer-client relationship, in which the client is a passive recipient of the lawyer's expertise. This is particularly true for women clients, for whom patterns of domination are at the heart of the problem.
mediate his dispute with Mrs. Balfour. He had the money, he had left her, and the situation as it stood pleased him. He had already earned the disapproval of relatives and friends as a result of separating from his wife. He was unlikely to reap much goodwill by participating in mediation.

Silbey and Merry point out,

The movements which supported the creation of mediation as an alternative to law for interpersonal dispute resolution claimed that a continuing relationship would provide a firmer and more just foundation for settlements than legal considerations. However, little attention was devoted to distinguishing the types of continuing relationships. . . . Although society means that we are bound in relationships, not all relationships, not even all continuing relationships, are based on shared values, shared interests, or a concern with the quality of that relationship. In fact, in modern society most relationships are functional, not intimate, and settlement of differences or avoidance of disputes is based simply upon a desire not to fight. . . . Therefore, to the extent that . . . relationships are effective rather than affective, therapists will become bargainers.16

Consider the following report in light of Felstiner's comments about mediation, and contrast the process with Gibbs' report of the Kpelle Moot:

Judge Settles Dance Tiff

MIAMI, March 30 -- Litigation over the control of artistic creation involving a local modern dance company has been settled under the pressure of a circuit court judge after a day long trial.

At issue was the right of Freddick Bratcher, former chief choreographer and co-director of the Fusion Dance Company, to retain control over eight dances he created while employed by the group. . . . In recent months . . . Mr. Lord [president of the company] and Mr. Bratcher began having serious disagreements over the artistic direction of the group. On March 8, Mr. Bratcher was suddenly dismissed and Mr. Lord became artistic director.

The two sought judicial redress: Mr. Bratcher asked the Circuit Court to prohibit Fusion from performing his dances; and Mr. Lord, stating that Fusion had a right to perform them, petitioned the court to enjoin Mr. Bratcher from obstructing their presentation, scheduled later next month in Palm Beach.

16 Silbey and Merry, § supra, at 29-30.
On Friday morning, the entire dance company appeared in the courtroom. Circuit Judge Moie J.L. Tendrich, before beginning trial, asked if for the good of the community the dispute could not be amicably resolved.

Neither side showed sign of conciliation and Mr. Lord began testifying. About 90 minutes later, Judge Tendrich interrupted the testimony, called the two lawyers to the bench and, indicating that he had had enough of the Fusion's internal problems, strongly suggested that they should work out an agreement.

Later that afternoon, the agreement was reached. Judge Tendrich, complimenting the two sides, entered it into the court record.

The settlement gives Mr. Bratcher the right to supervise the presentation of his three dances in Palm Beach, and after April 30 all rights to his eight works. Also under the pressure of the judge, one dancer, who had resigned from Fusion in solidarity with Mr. Bratcher, agreed to dance in Palm Beach.

Both sides appeared pleased with what one dancer called a "ceremonic intervention" by the judge.

What role did the judge's "ceremonic intervention" play in the mediation efforts of the lawyers for the two factions of the Fusion dance company? Efforts at mediation by judges are common. Often their invention is direct rather than "ceremonic." Many judges today are proud of their skill at persuading parties to settle. Why were they unable to resolve the matter before bringing it to court? There is no report of what happened after the hearing. Do you suppose that the judge's intervention was actually a "ceremonic" one? Why did the judge become involved in the dispute? Was the judge always a neutral and praiseworthy figure in the settlement process? What was the "ceremonic intervention" by the judge likely to have accomplished? What were the parties likely to have made of the judge's intervention?

In a more civilized society, the extensive rationing of adjudication by price and queue would not assure wrongdoers that they always could "settle" and profit from their wrongs. In this society, a right would be something that one gets, not merely something that one has. People would know that they could not take their disputes to court and hope to settle them cheaply and quickly. In this society, a right would be something that one gets, not merely something that one has. People would know that they could not take their disputes to court and hope to settle them cheaply and quickly.
the courts and that the courts would resolve them. With this assurance, people might be less likely to take their disputes to the streets or to the subways. [p.1859]19

Does it reflect a modern value relativity that hesitates to find one right and the other wrong?

Compensating care for the old

We talked with officials familiar with the probate and administration of estates in Dane County, Wisconsin. They told us that care for the elderly poses common problems. While they

19 See, also, Fiss, Against Settlement, 93 Yale Law Journal 1073(1984)("Settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.")
Of course, the lawyers have to persuade their clients to settle. However, these matters involve family members who seldom are eager to battle each other if they can work out anything acceptable to everyone. Families do not want to wash their dirty linen in public. Family members may feel guilty about allowing a sister or brother to care for their elderly parent. If handled properly, lawyers can use this guilt in suggesting a settlement that pays for care. If the estate is large enough, payments for services will be a deduction against the gross estate when they calculate the estate tax. The parties can see the government paying part of what extra is given to the brother or sister who cared for the elderly parent. Lawyers, themselves, can push hard for settlements. They can explain both the law and the equities of the claim in such a way that most relatives will accept that a settlement may be best for all concerned. It would seldom pay for a lawyer to encourage taking a family fight through litigation. Few potential heirs can pay large fees, and a contingent fee would make economic sense only when there is a good chance of winning a large sum against a wealthy estate.

Nonetheless, there are a few cases battled through trials and appeals. For example, consider Estate of Steffes, 95 Wis.2d 490, 290 N.W.2d 697 (1980), which is summarized on page ___ Ch. 3. The briefs and record on appeal show that Mary Lou Brooks met Virgil Steffes at a bar in Patch Grove, Wisconsin, where she worked as a bartender. Both were married to others, and Brooks agreed to move to his farm in Mt. Hope, Wisconsin. Both Patch Grove and Mt. Hope are small rural towns in the southwestern corner of Wisconsin. Mary Lou Brooks worked helping run the farm, and Steffes called her "my hired man, Mabel!" When he became ill, she exerted great effort providing nursing care for him. Virgil Steffes gave Mary Lou Brooks colts and calves which she raised and sold; Christmas and Mothers Day gifts; and two automobiles. He told others that he intended to leave the house and the farm to her by will, but he died without making such a will. Steffes' wife had died before his death, and Mary Lou Brooks had begun divorce proceedings shortly before he died.

At the time Ms. Brooks approached a lawyer, Wisconsin had not recognized Marvin v. Marvin. There were dicta in an older decision saying that a woman who lived with a man outside of marriage had no property rights upon his death or at the end of their relationship. She also enjoyed no rights to compensation for services rendered. Ms. Brooks did not have enough money to finance a major test case. We can assume that her lawyer took the case on a contingent fee contract, calling for a fee of one-third of whatever was recovered from the estate. Thus, instead of seeking a share of Virgil Steffes estate under a Marvin v. Marvin theory, Ms. Brooks claimed only $29,200 for two years services at $40 a day. Virgil Steffes' gross estate was about $733,000. Furthermore, any payment for Ms. Brooks' services would decrease the amount of estate tax due.

The personal representative of the estate was Virgil Steffes only living son, Terry Steffes. He lived in Illinois. A niece and nephew also survived Virgil Steffes. The estate was

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20 This would be the customary arrangement in smaller Wisconsin counties such as those where her lawyers practiced. If our assumptions are right, the lawyers received about $4,866, and Ms. Brooks recovered about $9,733, of the $14,600 award. Virgil Steffes died in July of 1976; the trial took place in June of 1977; and the Supreme Court of Wisconsin issued its opinion in April of 1980. All involved had to wait about four years to be paid.
represented by a prominent lawyer who practiced in the county adjoining Steffes' farm. Neighbors from the farming community testified for Ms. Brooks at trial, and the transcript suggests that the trial judge was sympathetic to her claim. (Students from the area tell us that the local view was that while Ms. Brooks should not have left her husband and children, she was a hard worker who stood by Steffes as he died of cancer.) He awarded her $14,600. This represented two years of services at the rate of $20 per day.

The estate appealed. Its lawyer wrote a brief attacking Ms. Brooks' claim. Much of the tone of the brief is suggested by the following excerpt:

[Brooks] left her home, her husband, her two children, . . . she moved in with decedent . . . never returning to perform her duties as a wife and mother. Whatever the arrangement or relationship may have been, it was illicit from its very inception and continued in all of its aspects as an improper arrangement, association or relationship.

The Supreme Court of Wisconsin affirmed the judgment, with a dissenting opinion. The expenses of trying and appealing the case had to be paid by the estate.

It would be difficult to recapture all of the judgments made by Mary Lou Brooks, Terry Steffes and their lawyers, from when she first decided to approach a lawyer to when they argued the case to the Supreme Court of Wisconsin. However, what factors suggest that they might have reached a settlement? What factors are likely to have blocked settlement and moved the case into litigation and an appeal? To answer these questions, what would you want to know about the relationship between Mary Lou Brooks and Terry Steffes, the kinds of people who live in Crawford and Grant Counties, the lawyers and the trial judge, a Supreme Court of Wisconsin?

Notice that had they settled the case, the Supreme Court of Wisconsin might not have had an opportunity to express its views on Marvin v. Marvin. Can we say that whatever Mary Lou Brooks' interest, the refusal of those who represented the estate to settle thus served the interest of all the citizens of the state? Would you make this argument if you think or thought that Marvin v. Marvin was wrongly decided and the Supreme Court of Wisconsin reached the wrong result in the Steffes case? The customary settlements in the family services cases often undercut the policies of form and the presumption that services rendered by family members are gratuitous. Does this suggest that such settlements are undesirable? Or does it suggest that we should remove all formal requirements from the statutes and common law? Too often they are but traps for the few who cannot settle their cases because of reasons having little or nothing to do with the policies that such doctrines should carry out. Do these common settlement practices undercut the ideal that the law ought to treat people in equal positions equally? Most people receive