PARTICIPATION AND FLEXIBILITY IN INFORMAL PROCESSES: CAUTIONS FROM THE DIVORCE CONTEXT

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Based on open-ended interviews with the parties and lawyers in twenty-five informally settled divorce cases, this study finds that the informal process is often contentious, adversarial, and beyond the perceived control of one or both parties. Although settlement in some cases reflects flexibility, party participation, and true agreement, in most cases it reflects unequal financial resources, procedural support, or emotional stamina. Parties report settling issues such as child support according to nonlegal, situational factors—particularly their relative impatience to finalize the divorce—and mutual satisfaction with settlement terms is low. Our findings raise questions about the assumed value of informal settlement. However, we recognize that informal processing of divorce is structurally and institutionally inevitable (with or without evidence of its desirability), and we suggest that reform efforts must ultimately recognize *both* the inevitability and the limits of informal process.

I. INTRODUCTION

The overwhelming majority of lawsuits are settled without a formal trial. Informal settlement processes have been observed in a variety of legal settings, both civil and criminal, and these substantive studies of "negotiated justice" parallel broader theoretical debates about formal versus informal legal processes and about the desirability of "delegalization" in various contexts. Most literature in this area reflects ambivalence about the informal application of law. In analyses of criminal justice systems, for example, "bargain" justice is met with strong objections. As Church (1979) has noted, the current sys-

The research reported here was funded in part by Grant No. SES-8024543 from the National Science Foundation, Howard S. Erlanger and Marygold S. Melli, Principal Investigators, and by the Summer Research Program of the University of Wisconsin Law School, Madison. The opinions expressed are those of the authors, not the sponsors. Of the many colleagues who offered helpful comments, we would especially like to thank Dirk Hartog, Robert Kidder, and Stewart Macaulay.

LAW & SOCIETY REVIEW, Volume 21, Number 4 (1987)

tem of plea negotiation is in the unenviable position of being assaulted on one flank by civil libertarians concerned about due process violations and on the other by law and order advocates who argue that it undermines the intended stringency of criminal sanctions. Negotiated justice also raises concerns outside the criminal context. In his study of the negotiation of personal injury claims, Ross (1970) finds that situational pressures and unequal bargaining power can undermine both the substance and the procedure of formal law. Recent experiments with neighborhood justice centers and other community law projects have encountered similar arguments about the coercive and distortive possibilities inherent in informal processes (Abel, 1982).

In some legal contexts, however, informal dispute settlement is advocated as a process offering clear benefits to the parties involved in, for example, contract disputes between long-time business associates (Macaulay, 1963) and many employer-employee disputes. In these contexts, going to court is often perceived as the last resort, both because a judge is unlikely to appreciate the norms surrounding the case and because litigation is seen as a death knell to any future relationship between the disputants. Instead, less formalistic alternatives such as negotiation, mediation, and arbitration are considered appropriate.

A recent series of articles (McEwen and Maiman, 1984; Vidmar, 1984) and an exchange of notes (McEwen and Maiman, 1986; Vidmar, 1987) in this *Review* advance our understanding of informal processes by analyzing the possible effects of one form of informal dispute resolution—mediation of small claims disputes—on compliance with the outcomes. McEwen and Maiman argue that the consensual nature of negotiation and mediation produces greater compliance than does the command structure of adjudication. Vidmar acknowledges the influence of forum but contends that certain characteristics of the individual case (particularly the extent to which the defendant has already admitted liability) are equally if not more important in determining compliance.

In the course of this exchange, the authors make several important ancillary points about the nature of informal dispute resolution. In terms of the concerns of the present article, two of these points are most clearly seen in McEwen and Maiman's 1984 work. First, there is the variation among the types of informal dispute resolution mechanisms. McEwen and Maiman find, for example, substantial differences between compliance rates for disputes settled by negotiation rather than mediation. In their study, the rate of full compliance with outcomes is al-

most as low for negotiation as it is for adjudication (and much lower than the rate for mediation), while the rate of partial compliance is almost as high for negotiation as for mediation (McEwen and Maiman, 1984, Table 1). One must be cautious, then, about making generalizations about all informal processes.

Second, there is substantial variation *within* each type of informal dispute resolution. For example, although at some points in their theoretical discussion McEwen and Maiman essentially equate informal dispute resolution with consensual decision making, in the end they recognize that consensus is a variable, and one for which they have no indicator in their data. Finally, in their most recent statements, an important point of agreement emerges between McEwen and Maiman on the one hand and Vidmar on the other: McEwen and Maiman find that "forum types should not be confused with the processes that occur in them" (1986: 443); and Vidmar concludes that "if the mediation process that results in compliance is authoritative and coercive we should not ascribe consensual characteristics to it" (1987: 162–163). Both sides recognize, then, that the study of the *process* of decision making is critical to understanding dispute resolution. It is this process that we seek to illuminate here.

A. Negotiation in the Divorce Context

Divorce, which typically involves both long-term relationships and highly personalized disputes, is a context in which informal settlement has been widely encouraged. While divorce settlements must be ratified by the court, most writers agree that litigation itself is undesirable, particularly if the divorcing couple has children (Mnookin, 1984; Folberg, 1984; MacDougall, 1984). Mnookin and Kornhauser (1979: 956) make the important point that

> there are obvious and substantial savings when a couple can resolve distributional consequences of divorce without resort to courtroom adjudication. The financial cost of litigation, both private and public, is minimized. The pain of a formal adversary proceeding is avoided. Recent psychological studies indicate that children benefit when parents agree on custodial arrangements. . . . Finally, a consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court.

While in theory divorce presents issues that are well-suited to informal settlement, there is little empirical research on the

actual settlement process, and analyses such as Mnookin and Kornhauser's must necessarily rely in large part on untested assumptions about the nature of decision making in this context. To the extent that litigation is contentious, coercive, and superficial, it is clearly a poor method for resolving divorce disputes. But it is not obvious that informal processes offer substantial escape from these problems.

In this paper we explore the settlement process as it occurs in divorce and reexamine some assumptions about the advantages of informal settlement in this area. We focus on the informal settlement of financial issues, particularly child support obligations, looking at how divorcing parties arrive at settlement decisions and which factors influence this decision making. Our analysis is primarily conceptual. We analyze the nature of negotiation and try to determine what can be inferred from the fact that negotiation, rather than a different process, is used to resolve a dispute. We make no explicit comparison to other processes, and we do not intend to imply one. The fact that the process of negotiation proves not to be one of consensus and harmony does not mean that other processes are superior; it does dictate, however, that alternatives be compared on the basis of empirical understandings, not ideal typical characterizations.

B. Data

Our analysis is based on in-depth interviews with the parties and lawyers in twenty-five stipulated (i.e., informally settled) divorce cases as well as the court records pertaining to each settlement. All twenty-five cases involve minor children, and all were closed in Dane County (Madison), Wisconsin, in June or July of 1982. They were selected from all such cases closed during this period on the basis of participants' accessibility.[1] Altogether the data include forty-three party interviews and thirty lawyer interviews.[2] In addition to the respondents from these cases, we interviewed four family court judges who handled divorces in the county at the time of the study. By us-

[1] Many potential respondents had left the area or had unknown addresses when the sample was drawn, and the selection of respondents depended upon whether they maintained a local residence.

[2] In seven of the twenty-five cases, only one party could be located. In one case, a participating attorney had left the state; in six cases, one respondent was unrepresented. Eight lawyers had more than one client in the sample; three parties had more than one lawyer. The interviews were tape-recorded, and most lasted between two and three hours. The same issues were covered in all the interviews, although they did not follow a standard schedule and all questions were open-ended.

ing multiple reports on each case, plus the observations of judges from the jurisdiction, we hope to present a broad perspective on the dynamics of informal settlement and to enhance the accuracy of our account. Because our group of interviewees does not constitute a random sample and because in some cases not all participants could be interviewed, our analysis is necessarily exploratory. We believe, however, that it speaks to a number of issues raised not only by the phenomenon of divorce but also by "negotiated justice" in general and by the broader theoretical literature on informal legal processes.

II. ASSUMPTIONS ABOUT INFORMAL DIVORCE SETTLEMENT

Proponents of the informal process assume that two characteristics operate to the benefit of divorcing parties. One is the potential for flexibility: The informal setting can offer divorcing couples the opportunity to create personalized settlements—compromises that reflect the interests of each party (Mnookin, 1984; Folberg, 1984; MacDougall, 1984; Mnookin and Kornhauser, 1979). Of course, this flexibility is not unrestrained, since the court, representing the public, has significant interests in divorce outcomes as well, particularly with respect to child support. Although flexible, informal settlement is said to occur "in the shadow of the law" (Mnookin and Kornhauser, 1979), that is, within legal limits provided by judicial review. Thus, the informal settlement process has in part a "best-of-both-worlds" reputation, potentially combining the consistency of legal standards with the opportunity for flexibility and case-by-case decision making.

The second characteristic of the informal process is that it allows parties to participate in decision making. This is related to the benefit of flexibility, in that participation is the method by which flexibility is achieved. But participation is also considered meaningful in its own right, for when the parties have more control over decisions, they are more likely to take responsibility for them; furthermore, they will be more satisfied with a self-imposed result than with one that is court imposed (Mnookin, 1984; Mnookin and Kornhauser, 1979). This is considered crucial in cases involving child support orders because child support non-compliance is a problem of major economic proportions (Garfinkel et al., 1983).

The desirability of these two features—flexibility and party participation—rests upon another, more fundamental but usually unstated assumption that both litigation and settlement are

viable options for divorcing couples. This implies that couples who settle informally have deliberately chosen to do so; that both parties desire settlement; and that the informal decision-making process involves negotiation of a mutually workable result. Thus, informal settlement has been characterized as a system of "private ordering" that generates consensual solutions consistent with the preferences of each spouse (Mnookin and Kornhauser, 1979).

III. INFORMAL SETTLEMENT: CHOICE OR CONSTRAINT?

As it has emerged in the literature, the concept of private ordering tends to evoke an image of cooperation, openness, and breadth of options that is inconsistent with observations about informal processes in a number of other substantive areas. For example, the negotiation process among disputants with drastically unequal bargaining power may be better characterized as a "power play" in which one party's options are highly constrained and in which settlement is reached by that party's capitulation to the demands of the other rather than as a process fostering cooperative development of a consensual solution.

The possibility of highly constrained settlement processes has perhaps received the most attention within the context of plea negotiations in criminal areas. According to some critics, plea bargaining is by its very nature highly constrained since the litigation alternative is so undesirable (Blumberg, 1967; Kipnis, 1979). These critics argue that the risks of trial, often exaggerated by court officials, remove the defendant's freedom to refuse unreasonable bargains, for "if the defendant is under such duress that he is incapable of refusing even an unfair offer, then his choice to plead guilty is coerced" (Brunk, 1979: 551). This argument applies especially in cases in which defendants cannot afford trial or counsel; for example, some parties may be poor but not so indigent as to qualify for state-subsidized counsel; for others litigation might impose severe financial hardships. In the plea bargaining literature, these problems are referred to as the "due process critique." Those who would like to abolish plea-bargaining contend that the high price placed on a formal trial denies due process, and so constrains the defendant's choice that it renders any bargain involuntary (Casper, 1972).

Highly constrained negotiations are not limited to the sphere of criminal justice, however; they are common in civil disputes as well. In the settlement of personal injury claims,

for example, Ross (1970) finds that the distribution of bargaining power favors the insurance company, which will usually suffer less than the claimant if no agreement is reached. Thus, the insurance company can afford to be conservative in negotiations, and a claimant who has incurred substantial expenses for medical or other services may be in no position to turn down an early settlement offer, even if this offer is less than the claimant's immediate losses and less than a court would likely award. Rosenthal (1974: 78–79) has similarly observed that "some clients are unwilling or unable to wait out the course of recuperative treatment or the making of an effective claim. They accept an early settlement bearing little relationship to the case value."

A. The Divorce Context

In divorce, as in other legal settings, one or both parties will feel substantial pressure to settle informally—irrespective of the terms—when a settlement is perceived as the only exit from the dispute process. Thus, divorce settlement encompasses a broad range of cases, not just those of cooperative couples seeking a mutually acceptable middle ground. The assumption that settlements represent an equitable balance of both parties' interests is not always valid.

The twenty-five cases in our sample were resolved without trial, yet in only eight cases did the informal settlement result from private party-to-party negotiation, and in only six of these eight did the parties report cooperating during their discussions (the other two couples said their negotiations involved threats, fighting, and intimidation). Over half of our formally "uncontested" cases in fact involved a great deal of contention. Negotiation between parties was bitter or nonexistent; terms were secured through threats and intimidation or pressure from attorneys or court personnel; and in each case at least one of the parties criticized the outcome.

Of course, there are limits to the satisfaction we can expect divorcing parties to exhibit. Divorce is typically a financial as well as an emotional disaster. As we discuss it here, satisfaction must be understood to be a relative concept. In the words of a veteran divorce lawyer:

> I have never seen an agreement that one person says, "This is absolutely perfect, this is great" and the other person is willing to live with it. It just doesn't happen; as a matter of reality, it is not there. Anything one person thinks is totally and completely fair to him or her, the other side is going to feel ripped off about. So

> I tell people from the very beginning that what we are going to end up with here is something they can live with, but it's not going to be perfect. Because it's not a perfect situation and it's not a perfect world. So we are just going to do the best we can . . . that's the standard (WL).[3]

Sixteen of the forty-three respondents in our study are extremely dissatisfied with their stipulations, and in only seven cases (28%) do both parties report being satisfied with the result. For most of our cases, then, the settlement does not equate with a mutually derived agreement; instead of reflecting the parties' interests, settlements more typically reflect the parties' relative stamina and vulnerability to the pressures of a prolonged dispute.

B. Pressures to Settle Informally

The factors that induce settlement in other legal settings are amply present in divorce cases. For instance, in most families divorce severely disrupts the financial status quo, and financial divisions and obligations typically remain unresolved as the case is pending. There may also be a cash flow problem; many parties cannot afford to go to court or to continue paying attorneys as disputes wage on. A lack of financial resources prevented many respondents from even considering a formal trial:

> My attorney told me that if I had gone to court—I had already paid him $175—gone in there and started arguing with her about this and that, the judge would have thrown us out, and it would have cost us $75 to go back in. Every time he entered the court with me . . . it would cost me $75 [and] cost her $75 (H).

Financial pressures sometimes prompted a settlement even against an attorney's strong objections:

> My attorney was upset with me, he even wrote me a letter saying he was upset that I had agreed [to pay] $400 a month child support because he thought that was a high figure and we could do much better. At that time I was not interested as much in myself as I was in getting the damn thing over. I didn't want to go on and keep fighting—I think my attorney fees were already up to $1,700. . . . [The divorce proceedings] put me in such a financial bind . . . (H).

Within the settlement process, parties often exercised financial leverage against each other. One woman reports that she set-

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[3] Respondents are identified by roles: W refers to wife, H to husband, WL to wife's lawyer, HL to husband's lawyer, and J to judge.

tled only because her husband withheld temporary support payments:

> I had to say that I was signing this freely, which of course was a lie because at this point my mortgage payment was six days past due, and [his] lawyer was standing there with the check in his pocket saying, "Sign or you don't get the money" (W).

In addition to financial pressures, parties and lawyers also refer to a kind of social pressure to resolve divorce disputes without trial. The lawyers in particular describe a widespread professional belief that divorce litigation is traumatic and that good lawyers keep their clients out of court, especially in cases involving children. Most of the lawyers we interviewed say they feel responsible for encouraging informal settlement and will pressure parties to accept settlements that they, as attorneys, find reasonable:

> I personally feel that if a case does go to trial I have failed in some way. I have not found the right compromise. I have not been creative enough. And I have not been persuasive enough to get the thing resolved short of litigation (WL).

Some attorneys also say that if they cannot persuade their client to accept a certain settlement, they arrange for a four-way meeting between clients and lawyers or a pretrial conference before the family court commissioner. As one lawyer explains:

> Then they are faced with the other person and it makes them all of a sudden see the reality of the situation and it is not a game anymore. It is also so uncomfortable that they want to get it over with (HL).

External pressure to settle may become more direct as a hearing date approaches. One judge says that if parties are supposed to have a stipulation but don't, he threatens them with significant delay in finalizing their divorce:

> I'll say, "Look folks, you've got three-quarters of an hour left before I go on to something else. If you can settle, we'll go on to court and get this thing over with today. Otherwise, you can have a date [far in the future]" (J).

Our interviews with the parties indicate that pressures from lawyers and judges can be quite effective, for it is difficult to continue to press demands without procedural support. One woman's comments are particularly illustrative:

> I said to [my lawyer], "You cannot make me sign those papers . . . you're talking about 14 years of my life. . . . I'm still carrying on the responsibility for two kids . . . and if I stay [in the house] till the kids are out of school I'll owe [my husband] $26,000." And [my law-

> yer] said to me, "It's already been typed up. If you want to stop it now, fine. Go get yourself another lawyer, see how soon you get in court. If you want to stick around and fool around with that jerk, do it. . . . I won't have anything to do with it." Well, I was worn down. . . . I cried through the whole thing, I could hardly say yes, I could hardly sign it. I walked out of there and cried for probably two weeks straight (W).

Besides financial and procedural pressures, which are well-documented in most informal settings, the divorce process provides other, context-specific pressures as well. Ending a marital relationship is a consuming enterprise, and perhaps more than any other legal context, divorce is infused with extreme personal emotion. In some cases, parties may want nothing more than to terminate their marriage as soon as possible. A number of respondents report settling strictly out of impatience to end the process; others were involved in new relationships and wanted a quick settlement so they could remarry; some were simply eager to return to some semblance of a stable life style. Not only does divorce typically result in the total upheaval of both parties' personal lives but it also affects children and may strain parent-child relationships. For some a prolonged dispute is simply intolerable for this reason, and they settle because they have reached, as one respondent calls it, a "folding point":

> You know, after you go on with a divorce for two years, there is a folding point. I guess this is where I folded—and it ended up it was $13,000 I owed him . . . (W).

> Yes, I was very disappointed. I don't think [the settlement] was right . . . but at that point I really wanted to get out of the divorce. I wanted to quit paying the attorney and get this thing finaled out. It gets pretty heavy, you lose your sense of being. . . . You're really put down (H).

C. *The Emotional Intensity of Nonmutual Divorce*

Although disputes in other informal settings are subject to financial, procedural, and emotional pressures, the informal divorce process is arguably unique in its vulnerability to the idiosyncrasies of interpersonal conflict. Nearly every lawyer we interviewed distinguished divorce from other types of cases, observing that divorce was by far the most emotionally draining area of their practice. As one lawyer quipped, "Divorce is 99 percent psychotherapy, 1 percent law." The very intimacy that supposedly makes divorce well-suited to informal resolution may instead hamper rational negotiation of terms. As one practitioner observes:

> Your client in a personal injury action, they generally don't know the person who ran them over. Their only contact with them was for that brief fleeting moment when they were hit by the car. And they probably haven't seen them since, and maybe will never see them again. They therefore don't have much of an opportunity to generate strong emotional feelings toward them. They may be very dissatisfied with what happened, the fact that they ended up being injured, and went through pain and suffering and all of this and it was that person's fault. But generally speaking, a large dose of money is going to cure a lot of [that]. I have never had a personal injury case where the client has said at any time during the proceedings, you know "that person is a real son-of-a-gun and I don't care about the money, I don't care about anything. I just want you to get him. I want to go to trial and stand up and tell the whole world what a rotten driver he or she may be." . . . If you switch over to a divorce action, obviously the parties know each other. . . . In the vast majority of cases, they have strong feelings (HL).

Even in other legal actions involving long-term relationships, such as contract disputes in business, the negotiation context may be qualitatively different than it is in divorce. One lawyer points out that

> in business and such, the major tool is your ability to walk out, but in divorce, you are going to have to have a resolution someday. . . . And in divorce the concept of fairness arises whereas in business it doesn't make any difference, because it just doesn't apply. I mean if you want to buy some real estate you don't have to give them a fair price, you can just offer them half of what you think it is worth. . . . If he agrees, fine; and if he doesn't, fine (HL).

The emotional intensity of divorce is particularly evident when the decision to end the marriage is not mutual. Like financial and procedural pressures, emotional pressures can affect parties differently; one party may be eager to settle while the other is reluctant to proceed. The ground for divorce in Wisconsin is an "irretrievable breakdown" of the marriage. Clearly, if one party wants out of the marriage, this requirement is met; thus, there is no guarantee that divorce is a mutual decision. In a number of our cases, while one party was extremely impatient to finalize the divorce, the other party wanted nothing less than a "day in court"—a chance to vilify the initiating spouse. These emotional conflicts can color the whole settlement process:

> [The time frame of a divorce] . . . depends upon the emotional states of the parties. . . . One of the things

> that becomes apparent often is that when proposals are submitted to one of the parties and there's a great deal of discussion about whether it should be this way or that way and eventually there's an agreement to most things but then the proposal is rejected on some minor point. Just offhand, rejected. If that happens a couple of times with the same party, I become curious as to whether or not that person's agenda is really to get a divorce. . . . It's coming too close to having the divorce completed and the real agenda is NOT to get a divorce. But you can't always pick up on that, and [so you don't want] to advance a case too quickly, when one of the parties is not yet accepting (WL).

Similar observations have led Griffiths (1986: 155) to observe that "lawyers and clients are in effect largely occupied with two different divorces: lawyers with a legal divorce, clients with a social and emotional divorce."

D. Implications for Informal Processes

The existence of these pressures in divorce is difficult to reconcile with the widely held notion that contested divorces are confined to the courtroom whereas informal settlement is reserved for parties who "agree." Instead it seems that informal settlement in divorce, as in other legal settings, is often subject to substantial constraint. It may be perceived by the parties as a matter of necessity rather than choice.[4] Direct negotiation may not even occur, and when it does it may be contentious, superficial, and adversarial. Some informal settlements may be no less imposed than judgments at trial. Cooperative negotiation of the dispute to a mutually satisfactory outcome, based on offer and compromise, is the exception rather than the rule. As a result, the positive consequences of informal settlement must be considered variable rather than certain. It is in this context that we wish to reexamine the role of flexibility and participation in the settlement process.

IV. REEXAMINING FLEXIBILITY

Once informal processes are recognized as including contentious and unwilling disputants, the flexibility offered by the process is no longer an obvious virtue. While generosity and creative compromise are certainly possible, the discretion af-

[4] Some would argue that the fact that one settles out of necessity does not make the result coercive or unfair and that in *any* bargain each party's willingness to pay a certain price or settle for a certain amount is a function of that party's needs and preferences. However, we are not so much criticizing the results that obtain under a system of negotiation as we are challenging the

forded by informal settlement is double-edged. Opportunities for desirable or benevolent flexibility are unavoidably opportunities for undesirable flexibility as well; the outcome depends on the circumstances of settlement and the relative bargaining power of the parties. Plea bargaining, for example, can be used either to show leniency to a first offender or to avoid full judicial scrutiny of a weak case (Casper, 1979; Heumann and Loftin, 1979). Claims negotiation can be used to secure at least partial recompense in cases of hazy or shared culpability, but it also might be used to pressure a small settlement from a plaintiff with a strong case (Ross, 1970).

In divorce, the same flexibility that allows generosity and creative arrangements also allows emotional intimidation, asset-hiding, and the exertion of financial leverage. For example, a number of women report that they accepted poor settlement terms because their husbands were threatening custody battles:

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

Even in the absence of outright threats, the "flexibility" of the informal setting invites the intrusion of nonlegal considerations into what are ostensibly legal decisions. In our interviews, settlement decisions regarding matters such as support were typically attributed to the parties' emotional attitudes and relative eagerness to end the process. Parties who were impatient to settle sacrificed property and support rights to satisfy a more immediate desire to end the process; a reluctance to settle, on the other hand, worked to the party's benefit in terms of settlement outcome. As in other negotiation settings (see, e.g., Ross, 1970: 47; Rosenthal, 1974: 96), a lack of cooperation often prompts more generous settlement offers or a reduction in demands from impatient negotiators. The comments of one husband illustrate this:[5] "She did not want the divorce, so she basically . . . was not negotiating at all. She just basically said, 'This

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image of that process as one based on bargaining to a mutually agreeable settlement. This critique is important because of the implications that have been drawn from the prevailing imagery.

[5] A more detailed analysis based on all cases in which there were sufficient data, albeit based on a small *N*, indicates striking differences in awards depending on the relative willingness of the parties to agree to the divorce. See Melli, Erlanger, and Chambliss, 1985.

is unfair, I don't like it, and I don't want to talk about it' " (H). Frustrated by the delay and by his spouse's reluctance to bargain, this man made concessions, attempting to draft an offer that could not be refused:

> It had dragged on much too long. . . . [my lawyer] advised me at first that I was being generous. And I said, "Well, let's just do this, if that's the case, fine. That means we can force them to settlement" (H).

A. The Limits of Procedural and Substantive Safeguards

In divorce, the problems of the informal process are theoretically counteracted by the requirement of judicial review. The "shadow of the law" argument implies that while flexibility and cooperation may not occur in every case, at least all cases will be subject to legal constraints, first, because parties will negotiate with legal expectations in mind, and second, because of the review process itself, when judges will presumably refuse to ratify one-sided or unworkable arrangements. Mnookin and Kornhauser (1979: 968) write:

> 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. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.

Yet there are some problems with this argument, as to both the efficacy of review and the existence of endowments that review requirements are said to create. First, as Mnookin and Kornhauser (1979) acknowledge, the existing review process is widely considered to be a "rubber stamp," with harried judges eager to finalize any arrangements made by the parties. In our interviews, the need for court ratification was typically dismissed as an insignificant concern, as one client commented: "I'd heard that if things are settled when you go to the judge, then it's a relatively pro forma appearance. And that's exactly what it turned out to be" (H). Thus, the general view is that as long as issues are settled, the judge will accept whatever decisions the parties present. As one of the judges remarked: "If they know what they're doing, even if it's out of line, then it's not my job to change their decision. . . . I don't know if I have ever changed an amount [for support] set by a couple" (J).

The hypothesis that endowments will structure the bargaining process because parties will bargain with judicial review in mind is also problematic. First, it assumes parties have access to legal information, or at least to information about their

judge's expectations regarding child support and property division. The parties we interviewed received most of their legal information from their attorneys. Thus, to the extent that formal endowments exist, they are subject to attorneys' interpretations, which potentially alters the entitlements created by the law. At the very least, then, we would argue that the shadow of the law is being cast by the lawyers, who declare their expectations of judicial behavior. As Sarat and Felstiner (1986) have shown, such pronouncements about judges can reflect the lawyer's strategy in the lawyer-client relationship as much as any objective fact.

Perhaps more fundamentally, the existence of consistent formal criteria for decision making is itself debatable. Several of the lawyers we interviewed report that they have difficulty discerning court standards and that they cannot predict the outcomes of court processes.[6] Some lawyers also indicate they feel uncomfortable trying to advise clients about what is fair or what to aim for in a given divorce case. One lawyer remarks: "So much of it is judgmental. . . . [Clients] ask questions like 'Is it fair?' and I just want to say—forgive my language—'Well, shit, I don't know, I'm just guessing like you' " (WL).

Even the lawyers in our sample who do think there are set standards and who do say they can predict outcomes differ in their opinion of the content of those court standards; obviously, they cannot all be correct. Some lawyers attempt to "divide hardship," that is, to make each parent absorb equal deficiencies of income. Others measure the adequacy of support by looking at the custodial parent's budget, trying to make sure the custodian can make ends meet, or by looking at the supporting parent's ability to pay. Still others focus on a flat amount of support per child. Many lawyers also stress that their settlement strategy in any given case depends heavily on who is representing the other spouse. Thus, it is doubtful that parties receive consistent legal information and advice.

Over 90% of divorce cases, according to most estimates, are settled through stipulation, and it is the rare case that is completely litigated. This fact opens the possibility that the shadow of the law, which presumably constrains negotiating parties, is instead cast by them. In other words, in litigation, judges may be following the patterns they see in informal settlements rather than the other way around; thus instead of "bargaining

[6] Sarat and Felstiner (1986) find a similar absence of "standard answers" in the jurisdictions they studied, and suggest some of the ways in which this situation might affect the nature of the lawyer-client relationship.

in the shadow of the law," one should refer to "litigating in the shadow of informal settlement." Even one who accepts the logic of this argument might still defend the endowments assumption. One could say that what matters is not some abstract analysis about who sets the patterns but rather the participants' *perceptions* of that process. Parties who feel constrained will act as if they are, whether or not they in fact are.

To our respondents, however, legal constraints are decidedly less important than the other pressures we have discussed; many parties even disregarded the advice of their attorneys. For instance, in some cases in which the client was impatient to settle, the lawyer's dissatisfaction with the terms was ignored:

> My lawyer . . . wanted to wait until fall to make sure, to try to get a better handle on if [my husband's] business was successful. He thought my name should remain on it as part-owner. . . . I really wanted to get out of it, and didn't want to just mess around. I mean [he may have been] right—[but] I didn't care who was right at that point, and I still don't. It was more important to get out of the marriage (W).

While lawyers are often accused of stirring up trouble in divorce cases, it is clear that in some cases, they are unable to do so even when they think it is necessary to protect their client's interests. Against custody threats and other tactics, a lawyer's reassurances and support may be insufficient to keep clients from folding, as one lawyer explains:

> Her husband was using the threat of a custody issue to keep his payments down and she was insisting that I follow that approach. In other words, I take it very easy on him and as I recall, even from the beginning, no support [was] ordered. . . . She wanted me to forget about the father's responsibility to the children as far as money goes. . . . She was such a basket case. . . . He had just frightened her to death (WL).

Thus, even if the "shadow of the law" is a factor in informal settlement decisions, it is not the only factor, and its impact should not be overestimated.

V. REEXAMINING PARTICIPATION AND CONTROL

Like flexibility, party participation and control are double-edged in divorce; once we see that the informal process embraces a significant amount of contentiousness and is highly charged emotionally, we can recognize that the advantage of participation by the parties is variable rather than a constant.

In his study of attorney-client interaction, Rosenthal (1974)

discusses client passivity as an important limit to the participatory model he advocates. In our interviews, client passivity was most often linked to their shock or reluctance over the divorce. For example, one woman described her situation as follows:

> He was the sort of man who told me he loved me four times a day. But, he met another woman that fall. And I never suspected a thing. . . . So anyway, he left. I was so totally blown away I just—he set down all the rules. . . . I was in no position either emotionally nor did I have the experience required to run my divorce (W).

Another significant barrier to meaningful client participation is, as Rosenthal notes, that clients who are accustomed to traditional professional-client interactions may spend little time or effort selecting and evaluating the attorneys upon whom they rely. Evidence of such nonselectivity exists among our respondents: Some selected their attorney from the yellow pages or from advertisements; many hired a lawyer based upon location or the recommendation of a friend who had not been that lawyer's client. Moreover, only two respondents report interviewing more than one lawyer when they initially sought legal advice, and although a number of clients express dissatisfaction with their attorneys, very few discharged the lawyers they had hired. This nonselectivity is sometimes regrettable, even from the lawyer's perspective:

> [I might say to a client,] "You know, I think you would be much happier with another attorney, you don't seem to agree with the way this is being handled and you know, there would be no hard feelings," and amazingly half—more than half—80 percent of the time they say, "Oh no, I'm very happy with what you're doing, I want you to keep being my attorney." [But] a lot of times you have the feeling when they leave that . . . they are not really happy . . . (WL).

Moreover, while for some parties participation is prevented by their nonassertiveness, for others it is their lawyers who discourage participation. Despite the ethic that lawyers should advocate their client's interests, some attorneys have difficulty asserting demands they view as unreasonable. Their goal in divorce advocacy may be to protect the interests of everyone to some degree; they may also see "unreasonable" advocacy as damaging to their professional reputation. Similarly, lawyers may be unwilling to allow clients to self-inflict financial sacrifices just to speed the settlement process; for example, the impatient client who wants to concede everything is likely to encounter attorney resistance. In all these situations, the result is

the same: The satisfaction that would come from making one's own decisions will be lacking when parties are unwilling or unable to participate or are discouraged by their lawyers from doing so.

VI. CONCLUSION: A COMPLEMENTARY IMAGE OF INFORMAL PROCESSES

The purpose of this paper is to temper the prevailing image of settlement as the negotiation of an agreement by showing that "settlement" and "agreement" are not synonymous terms. There is settlement—but not agreement—when contentious parties sign unsatisfactory stipulations out of impatience, frustration, or emotional distress. Neither the agreement image nor the settlement image tells the whole story, although each tells an important part of the story and both must be incorporated into discussions of informal dispute resolution.

Although procedural constraints and situational pressures are considered extremely problematic in plea bargaining as well as in some theoretical analyses of informal processes, they are often underplayed in analyses of divorce settlement. In the divorce literature, the tendency has been to view the informal process as a normatively superior, deliberately chosen method of dispute resolution. We argue instead that informal settlement is normatively neutral. Since it encompasses not only parties of equal resources, but also those of unequal or essentially no resources, the logic of its outcome is inherently neither more nor less fair than that of formal processes.

While we have taken the position that the nonlegal pressures affecting informal settlement merit reemphasis, we do not mean to imply that divorce disputes should return to the courts. There are at least two reasons why they should not. First, divorcing parties themselves strongly resist the litigation of divorce disputes. The couples we interviewed clearly view informal settlement as the most efficient—the cheapest and fastest—way to get divorced, despite its varied failings. And, as we have noted, this was often the bottom line in the decision to settle informally.

Secondly, the attorneys we interviewed show great resistance to the use of litigation to resolve divorce disputes, for they recognize that courts in many ways are ill-equipped to make decisions in this area. As one observer has suggested, making custody and property decisions in a thirty-minute hearing is like performing brain surgery with a meat axe (Neely, 1984).

Finally, and most important from a practical perspective,

the use of informal processes in divorce settlements is so prevalent that it must be taken as a given in any consideration of reform. The overwhelming majority of divorce disputes, over 90 percent by some estimates, are settled by the parties. Therefore, reform must be directed at improving the informal processes rather than at substituting a more formal, and probably less desirable, one. Accepting the prevalence of the informal procedure structures the central issue in evaluating that process. As Lazerson (1982: 121) writes: "The question that needs to be addressed is not whether informalism is good or bad but which of the two adversaries it will favor." In divorce, this means that settlement processes must be reexamined for the actual dynamics they exhibit rather than for the standards they are supposed to follow. Inequities in postdivorce economics are well documented. Typically, child support awards are grossly inadequate, covering less than half the expense of providing a child with even a minimal standard of living. In many cases, a mother and her children are expected to live on less than the father has for himself (Cassetty, 1983; Weitzman, 1985). The observation that informal processes mirror preexisting power relations between the disputants is highly relevant; in some cases informal settlement simply structures the capitulation of the weaker party. All this results in an inescapable conclusion: There are no easy answers in the reform of divorce any more than in criminal justice or other legal processes. But it is clear that we cannot reform the divorce process until we observe the actual dynamics of the procedure by which it is accomplished.

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