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PRIVATIZING SAME-SEX "MARRIAGE" THROUGH ALTERNATIVE DISPUTE RESOLUTION: COMMUNITY- ENHANCING VERSUS COMMUNITY-ENABLING MEDIATION

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INTRODUCTION

Mary and Susan have lived together for five years. Two years ago, with the help of a mutual friend, Susan gave birth to Adrienne. But Mary soon decided she "couldn't pass up" a "great career opportunity" as a manager for a local gay and lesbian political organization. Susan decided to leave her teaching job in order to raise Adrienne full time. Increasingly, during the past year, Mary has felt "too crowded." Two months ago, she announced that she was leaving for a two-week vacation without Adrienne and Susan. She came back two days later.

Last week, Mary asked Susan to marry her. Although their state does not issue marriage licenses to same-sex couples, the local rabbi does perform such marriages.¹ Susan feels uncomfortable, and she is

1. Although no reported decision in the United States treats same-sex marriages as equivalent to other-sex marriages, many religions have performed such marriages. See, e.g., *Shahar v. Bowers*, 70 F.3d 1218, 1225 (11th Cir. 1995) (marriage by Reconstructionist branch of Judaism); Susan Dixon, *Rights of Survivor Lost in Battle over Trust*, HAWAII TIMES, Dec. 4, 1996, at 1 (reporting that two men were married in the West Hollywood Presbyterian Church by an ordained minister). See generally Marc Fajer, *Towards Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, YALE L. & POL'Y REV. (forthcoming 1997) (manuscript on file with author). There is some historical evidence that the church performed same-sex unions similar to marriage in early modern Europe. See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994). But see Philip Lyndon Reynolds, *Same-Sex Unions: What Boswell Didn't Find*, CHRISTIAN CENTURY, Jan. 18, 1995, at 49, 54 ("One cannot find support . . . for the validity of gay marriage within the tradition of the premodern church.").

not sure marriage is for her. But she does want to explore the possibility of formalizing their relationship in some way.

What should Mary and Susan do? Recently, many have focused on substantive and formal answers: have a wedding ceremony; register as domestic partner;² sign an agreement governing the relationship; form a limited liability corporation. Although other professions, such as psychology and accounting, may help with some aspects of this question, law has much to say about it as well. Lawyers may help same-sex couples draw up an agreement to structure their relationship, and may help them modify that agreement. Many other same-sex³ couples may invoke the substantive law of contract should they end their relationship and need to divide property or resolve other claims against one another, such as claims for support.⁴

2. See generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992). Several hundred organizations offer at least some benefits to the domestic partners of employees. See John Hendren, *Domestic Partner Plans Growing Trend Nationally*, PORTLAND PRESS HERALD, June 24, 1997, at 4C (KPMG Peat Marwick study shows 13% of all employers, and 25% of all employers with more than 5000 workers, offer domestic partner plans). For some current lists of such organizations, see, for example, LIZ WINFELD & SUSAN SPIELMAN, *STRAIGHT TALK ABOUT GAYS IN THE WORKPLACE* (1996); Partners Task Force for Gay and Lesbian Couples, *Domestic Partnership Benefits* (1997) (visited Aug. 9, 1997) <<http://www.buddybuddy.com/d-p.html>>.

3. This Article often refers to same-sex marriage and same-sex relationships rather than "gay and lesbian" in order to postpone a discussion about what it means to be "gay and lesbian" (if anything) other than that one is in a relationship with someone of the same sex. For rhetorical convenience only, I use the term "lesbian and gay" to refer to people who themselves are in same-sex relationships or could foresee themselves in such relationships. At least for purposes of preliminary discussion, one need not resolve larger theoretical questions. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing that it is not necessary to characterize lesbian and gay identity as "immutable" for purposes of constitutional protection under the Equal Protection Clause); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1753 n.1 (1996). In later parts, however, the Article does take on such larger questions. See *supra* text accompanying notes 61-76.

4. See, e.g., *Posik v. Layton*, 695 So. 2d 759, 760 (Fla. Dist. Ct. App. 1997) (enforcing a "support agreement much like a prenuptial agreement" between two women who were, as the court coyly noted, "close friends and more"); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107 (1996).

This Article emphasizes the appropriate *process* solution.⁵ What process should Mary and Susan use to organize their relationship? What process should they use to decide how to live, including choosing a legal arrangement, changing their relationship, and even terminating it?⁶ Many scholars think court decisions treat gays and lesbians unfairly, such as those denying adoption to gay parents.⁷ Some rather instinctively suggest that some form of alternative dispute resolution would be "better": take the process from the courts and privatize it.⁸ Others, however, fear that courts

5. Of course, as an abstraction, the distinction between process and substance is notoriously slippery. See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). For organizational purposes, I contrast a "substantive solution," which would involve the formal adoption of laws that recognize same-sex marriages or domestic partner benefits that give same-sex couples some benefits that married couples receive. See *infra* text accompanying notes 31-40 (substantive law of marriage and domestic partnership), and a "process solution" that would involve a choice of forum, particularly litigation in the courts from some other "alternative," such as mediation, see *infra* text accompanying notes 41-42.

6. For purposes of analysis, this Article considers efforts to draw up an agreement that affects a relationship that will continue in some form as examples of privatizing and mediating. As one mediator for lesbian and gay couples stated, "It's mediation anytime you're in a room with two people even if there's low conflict." Telephone Interview with Martina Reeves, Attorney/Mediator (Jan. 1991). For the purposes of working with a particular couple, however, labels such as mediation may impose too much of an adversarial mindset, as one of the founders of San Francisco-based Gay and Lesbian Alternative Dispute Resolution Services suggested:

When I see an intact couple, there may be mediation involved, but they don't see it as mediation: they come wanting to draw up an agreement. They don't see themselves in conflict. If I say, 'I'll mediate,' then it implies a level of disarray and may end up escalating the conflict.

Interview with Amy Oppenheimer, Board Member, Gay and Lesbian Alternative Dispute Resolution Services, in Berkeley, California (1991).

7. See, e.g., Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 630 (1996); COMMITTEE ON SEXUAL ORIENTATION BIAS, LOS ANGELES COUNTY BAR ASS'N, EXECUTIVE SUMMARY, reprinted in L.A. LAW., Nov., 1994, at 32; AD HOC COMM. ON SEXUAL ORIENTATION BIAS, LOS ANGELES COUNTY BAR ASS'N, REPORT, reprinted in 4 S. CAL. REV. L. & WOMEN'S STUD. 305 (1995) [hereinafter REPORT ON SEXUAL ORIENTATION BIAS].

8. Much of this suggestion appears in works specifically focused on same-sex couples. See, e.g., Suzanne Bryant, *Mediation for Lesbian and Gay Families*, 9 MEDIATION Q. 391 (1992); Isabelle R. Gunning, *Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas McIntyre's Article*, 13 MEDIATION Q. 47 (1995); Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691 (1976); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 521 n.65 (1990); *Gays' Baby Dilemma*, CHICAGO SUN TIMES, June 16, 1997, at 25 (noting that because "gay and lesbian activists say the court system is usually disappointing . . . because . . . judges and lawyers try to remedy gay problems from a heterosexual perspective," some lesbians and gays look for a "mediator familiar with gay and lesbian family issues") (internal quotation marks omitted). At least one book dedicated more generally to "family mediation" discusses private justice for couples:

Not every judge is biased against homosexuals, but it is difficult to anticipate how a particular judge will react. Divorce lawyers know that every judge harbors certain indi-

are better places for disadvantaged groups.⁹ One process solution proposes mediation of gay and lesbian couples by mediators who happen to be gay or lesbian (or, on some accounts, sensitive to lesbians and gays), or by gay and lesbian community mediation projects.¹⁰

vidual prejudices, which must be considered when presenting their cases. Parties who suspect that a family court judge may be hostile can avoid risking their case by reaching a private settlement with an impartial mediator.

ROBERT COULSON, *FAMILY MEDIATION: MANAGING CONFLICT, RESOLVING DISPUTES* 57-58 (2d ed. 1996).

9. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360 n.8 (1985). Although the authors do not explicitly discuss the way that mediation may disadvantage same-sex couples, they note that much of their analysis may apply to other historically disadvantaged groups. There is relatively little quantitative data on how well any disadvantaged group fares in various forms of ADR, let alone how ADR affects same-sex couples. One quantitative study of small claims actions in New Mexico concludes that there is relatively little difference based on race, gender, or Hispanic identity between monetary outcomes in small claims court when parties reach an agreement in mediation versus when the court awards a judgment. See Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 789 (1996). The study found that minority plaintiffs and white, non-Hispanics agreed, on average, to less money than the court awarded similar plaintiffs. See *id.* Although the study raises cause for concern, further research is needed to address the question of bias in mediations involving intimate relationships for at least two reasons. First, the mediations did not involve intimate relationships, which may have different dynamics for a variety of reasons. For example, some claim that women negotiators are more relational and concerned with an "ethic of caring." See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). The evidence is mixed at best for the proposition that women generally negotiate differently than men. See, e.g., Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 376-78 (1995); Carrie Menkel-Meadow, *Portia Redux*, VA. J. SOC. POL'Y & L. 75, 87-88 (1994) [hereinafter Menkel-Meadow, *Portia Redux*]. Nevertheless, the mere fact that individuals appear to negotiate with more concern for others, even if not true, may disadvantage women in negotiation. See Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992). Such an ethic of caring—or the perception of such an ethic—is more likely to present itself in disputes involving former intimates than in property disputes in small claims court. Exactly how this would affect same-sex couples deserves further attention.

Second, the study excluded any consideration of nonquantifiable parts of settlements. Such nonmonetary settlements represent a major appeal of negotiation over adjudication in general, and they may be far more prominent in disputes between intimates, which may involve such nonmonetary aspects as child custody, property with sentimental value, and, in cases of violence, stay-away orders. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 52-54 (1992) (discussing how parents might negotiate agreements that leave both parents better off than the judgment that a court would impose); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute?*].

10. See Gunning, *supra* note 8 (describing the history of such mediation projects in Los Angeles, New York, and San Francisco); Telephone Interview with Roberta Bennett (describing the founding of the Los Angeles gay mediation project); Interview with Amy Oppenheimer (describing the founding of the San Francisco-based Gay and Lesbian Alternative Dispute Resolution Services).

This Article uses the example of such "gay and lesbian mediation" to explore some more general questions about different understandings of mediation and dispute resolution. In particular, the Article addresses the question of the roles of individualism and community in mediation. A very narrow part of this general question is the "role of law" when people resolve disputes outside of litigation, whether through mediation, arbitration, negotiation, or some other hybrid process of ADR. This Article treats law as just one example, albeit a very important example, of the way in which community norms and values may affect the way individuals resolve disputes. In many standard accounts of mediation, for example, parties bargain "in the shadow of the law"¹¹ and treat law as one source of community norms; mediators often feel they may—and perhaps must—consider how a court might apply law to a particular dispute, such as how a court would divide a couple's property or determine responsibility for children that a couple raised.¹² This Article looks more broadly at the question of what other sources of community may apply in mediation.

There may often be a tension, quite often not articulated or even understood, between two very different understandings of the proper role of such norms: mediation as private ordering and mediation as community-enhancing. In a *private-ordering understanding of mediation*, a mediator simply teases out the parties' values and helps them craft a resolution that reflects their values. The implicit notion of such mediators is that parties can (and perhaps should) discover their own values and how they apply to problems; the values of law or other parts of a community are relevant only if a party wants to bring up such values. The implicit notion of the good mediator is one who mirrors the parties' values and helps work those values into an agreement about a particular dispute. The implicit notion of neutrality is that a mediator is neutral when the mediator is passive about raising values. Overall, the mediation should facilitate agreement which, among other things, means avoiding the kind of bias that couples like Mary and Susan fear.

A *community-enhancing understanding of mediation* regards mediation instead as a means of helping individuals order their activities and resolve

11. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

12. For a critical discussion of the attention that mediators pay to law as a norm as opposed to other sources of norms, see *supra* text accompanying notes 128–160 (indicating that mediators often mention what a court might do, but do not mention other sources of norms, such as what people in a relevant community might think).

their disputes consistent with the values of some relevant community.¹³ This is sometimes an explicit understanding of some alternative dispute resolution: a rabbinical court or lay Jewish court works to make disputants resolve their disagreements in accordance with Jewish law. A recent article similarly proposes ADR by the "Islamic community" as a way to enforce Islamic law in the United States.¹⁴ Such community-enhancing mediation involves two levels. At the more superficial level, community-enhancing mediation means that a particular body of principles, such as Jewish or Islamic law, or some less formal set of community practices, should determine the outcome of a particular dispute. This would mean that how a couple divides property and child care should reflect the norms or practices of the community. In a less obvious way, a second aspect is that the process of mediation reinforces the individuals' sense of connection to a particular community and may make the individuals, at some level of consciousness, think of themselves as members of that community so thoroughly that they themselves order their lives according to the norms of the community without any additional process.¹⁵ A Jewish disputant leaves a Jewish tribunal thinking and identifying himself as a Jew and,

13. See Sally Engle Merry, *Sorting Out Popular Justice*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 45-46 (Sally Engle Merry & Neal Milner eds., 1993). Merry theorizes a "communitarian tradition of popular justice," that "typically develop[s] in small[er] communities that are explicitly dedicated to maintaining a separate social order and moral code," such as Amish, utopian American communities, and Chinese-American communities. In forums within this communitarian tradition, such as Chinese-American family courts, "[c]ommunity norms rather than . . . legal rules . . . govern." *Id.* Such forums may lead to results that courts of the state would not issue; the results reflect the norms of the smaller community, not the larger state. See *id.*

14. See Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1 J. ISLAMIC L. 61 (1996).

15. Sol Roth describes how his vision of a Jewish community depends on how members of such a community think:

Fundamental to the existence of a community is the exemplification of certain attitudes by its citizens The community focus is primarily the cultivation of internal commitment to values by which the community defines itself. It may employ force and persuasion to accomplish its purpose—the rod in the classroom and ostracism in the public domain, for example—but its essential goal is the development of attitudes, the inculcation of commitment.

SOL ROTH, *HALAKHAH AND POLITICS: THE JEWISH IDEA OF THE STATE* 2 (1988) (emphasis added); see also SIMON AGRANAT, *Prologue to ISRAEL GOLDSTEIN, JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD OF AMERICA, 1930-1980*, at xxi (1981) ("Jewish juridical autonomy . . . has played a major part in preserving the separate existence and identity of the Jewish people as a religio-national entity."); ISRAEL GOLDSTEIN, *TOWARD A SOLUTION* 321 (1940) ("A Jewish medium for adjudication and conciliation is indispensable to every well-organized Jewish community, supplementing educational, philanthropic, religious and other institutions for the strengthening of Jewish consciousness, [and] inculcation of Jewish content") (emphasis added).

when faced with a problem in the future, may think, "As a Jew, what should I do?" or even "I am a Jew so, of course, I have to"¹⁶ The implicit image of both mediators and parties is that individuals are members of communities and/or should be members of communities.

I doubt that either the private ordering or the community-enhancing model of mediation is ideal. This is partly because this Article is not a strategy piece addressed to some elite lesbian and gay community decision-makers; different Marys and Susans may prefer some processes over others.¹⁷ More importantly, I doubt that either the private-ordering or

16. Many accounts of negotiation model it as though individuals have readily identifiable goals, such as increasing income, and then self-consciously try to maximize such goals. This notion is often highly individualistic; different individuals have different individual "tastes." See, e.g., GARY BECKER, ACCOUNTING FOR TASTES 3-4 (1996) (economists typically assume preferences are "independent . . . of the behavior of everyone else"); Colin Camerer & Richard H. Thaler, *Ultimatums, Dictators and Manners*, J. ECON. PERSP. 209, 209 (1995) ("Economics can be distinguished from other social sciences by the belief that most (all?) behavior can be explained by assuming that agents have stable, well-defined preferences and make rational choices consistent with those preferences."). One might hope such a model describes how people act in general (such as to make an aggregate model of how, for instance, inflation is tied to increases in wages), even if it does not describe how many individuals actually act. See RICHARD A. POSNER, OVERCOMING LAW 16 (1995) ("A market may behave rationally, and hence the economic model of human behavior may apply to it, even if most of the individual buyers (or buys) are irrational."). To the extent that this Article focuses on how well mediation serves the interest of actual individuals in each individual case, such an aggregate approach is less helpful. As I have argued elsewhere, often (though not necessarily always) individuals do not reason explicitly about the proper means to reach a particular goal; individuals think about who they are and then act the way they think such individuals should act. See Clark Freshman, *Re-Visioning the Dependency Crisis and the Negotiator's Dilemma*, 22 L. AND SOC. INQUIRY 101 (1997). Other authors, including Robert Baruch Bush and Joseph Folger, also believe that, in the process of negotiation or mediation, individuals may change their sense of self or otherwise change internally. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2 (1994) (individuals may develop "moral growth" through mediation). Bush and Folger, however, regard such moral growth as an internal attitudinal change rather than something that is necessarily reflected in changed behavior. Although they believe mediators will help parties reach a settlement just as often by focusing on such internal growth as focusing on solving problems, see *id.* at 107, they still see internal change as the important goal—so much so that their example of a "successful" mediation involves the parties to the mediation rushing forward with litigation. See *id.* at 107, 186-87. In contrast, this Article's approach to negotiation treats individuals' sense of identity and community as often intimately connected with what individuals actually do and the kind of agreements they actually reach.

17. In one account of civil rights, those individuals who are identified as "leaders" determine "priorities," so that one fights the right fight at the right time. For a nuanced analysis and limited defense of such a view, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1634, 1668 (1997) (arguing that lawyers doing cases affecting minorities should consult with professional civil rights lawyers on questions of legal strategy). During the struggle to try to bridge the legal gulf between whites and African Americans, leaders of the NAACP often made decisions about when to challenge particular kinds of laws; this included decisions to delay challenging rules that

community-enhancing understandings of mediation reflect the most valuable way to help couples like Mary and Susan structure their relationship and resolve personal disputes. The private-ordering understanding may neglect the many ways in which individuals may want to know how various communities they respect might understand their disputes. For example, Mary and Susan may be quite interested to know how other female couples share their income and expenses.¹⁸ At the same time, wanting to know how communities may understand disputes is not the same, as the community-enhancing account suggests, as surrendering one's ability to resolve disputes to those in positions of power (at least the power to resolve disputes) within those communities. And so even if they may be interested to learn if most such couples pool all their resources, they may want to do otherwise.

I therefore propose a rather different model of mediation designed to tease out the kinds of preferences and values that individuals would express if they were given information about different values and different options and were encouraged to consider seriously these different values and options. I call this, rather infelicitously, *community-enabling mediation*. Such a process enables individuals to make informed choices about the kinds of communities they value and what weight, if any, to give to the norms such individuals may associate with that community. As discussed more fully in Part V, this would mean that a mediator would expose Mary and Susan not just to what other women couples do, but also what other Jewish couples do, as well as what other groups of individuals do. Susan and Mary might choose to mimic the most popular practices of women couples, Jewish couples, or some other couples; they might largely construct their own arrangements. Whatever their choice, it would be relatively informed.

restricted marriage, namely the laws that actually criminalized white and African-American persons who married each other. See MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 164 (1987); cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing Henry Hart's unpublished letters criticizing the Supreme Court's dismissal of a 1955 challenge to Virginia's ban on white-African American marriages as based upon unprincipled reasoning); see also *SAME-SEX MARRIAGE: PRO AND CON* 144 (Andrew Sullivan ed., 1997) (comparing debate about challenges to miscegenation laws and debates about same-sex marriage).

Individuals sometimes identified as gay and lesbian leaders, including attorneys for gay and lesbian rights organizations, initially turned down the opportunity to litigate same-sex marriage in Hawaii, but offered support after individual litigants had some success. See Rubenstein, *supra*, at 1637-38.

18. See *infra* text accompanying notes 140-141.

I. OVERVIEW AND APPLICATION TO OTHER COMMUNITIES

To preview, then, the Article principally explores two main dangers with gay and lesbian mediation, dangers very likely similar for other dispute resolution mechanisms specifically designed for other groups, such as Jewish mediation services, arbitration for a particular industry, and so on. The first danger is that parties to such processes may not know what they are getting into because the two appeals of such community dispute resolution fora—to promote private ordering and to enhance the community—will often be in some tension. Part II of this Article sets the background for this potential danger by contrasting the two visions and showing how mediators might so fully assume one vision that they wholly neglect the other—without making that clear to parties like Mary and Susan. This should help mediators consider the extent to which they share each vision and how to explain it to parties, it should assist parties in making more informed choices about mediation processes, and it should help teachers of mediation expose students to consider critically the different kinds of mediation. Part II also situates the Article within the well-reported controversy about whether states should recognize same-sex marriages and the theoretical controversies about identity and essentialism associated with post-modernism, pragmatism, and Critical Race Theory.¹⁹

The second danger is that both visions are incomplete, primarily because they do not adequately consider the role of different potential identities and communities. The private-ordering vision implicitly assumes that the only source of bias or discomfort is some particular identity, such as “homophobia”; the community-enhancing vision implicitly assumes that the only community that should be furthered is a community based on one characteristic or value of the parties, such as *the* lesbian and gay community. More generally, apart from the particular context of same-sex relationships, the private-ordering vision, in general, places too little emphasis on the potential importance of different communities; the community-enhancing vision, in general, places too much weight on enhancing one aspect of community when parties might value other communities as well.

19. Although these questions of identity are often associated with Critical Race Theory, they are also associated with questions of identity other than race. This has led Martha Fineman to suggest the broader term “perspective scholarship.” See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 25 (1995) (“Perspective scholarship . . . adds the possibility of color and texture to the legal palette by introducing diverse and often divergent viewpoints based on the social and cultural experiences of race, gender, class, religion, and sexual orientation, for example.”).

Part III considers the question whether community mediation will serve individual interests better, particularly the ability of individuals to engage in private ordering. Part IV considers the question of how community mediation may relate to community interests, particularly the way in which community mediation may enforce community norms and fix individuals' commitment to existing communities.

Part V sketches out a different role for dispute resolution: community-enabling mediation should be designed to allow individuals to make informed decisions about how to organize their lives and intimate relationships by exposing them to competing norms, including competing communities. Unlike community-enhancing mediation, this will not *necessarily* enforce existing community norms, nor strengthen the way individuals think of themselves as committed to the communities that claim them among their members. Instead, this vision of mediation facilitates new relationships and arrangements that may better fit individual needs. In any event, even if individuals choose to follow existing community norms, that choice will be an informed one, consistent with the value placed not merely on community but on community as a product of the informed decisions of individuals.

A word up front about the scope of the ideas introduced here: I try to develop a model of what process we use to structure relationships between individuals or groups and other individuals and groups, as well as the kind of mediation that best helps facilitate those relationships. I think the model works well for a variety of relationships. In working from the example of same-sex relationships to a general theory, I follow Robert Mnookin and Lewis Kornhauser's pioneering work that used the example of divorce to outline a general theory of what role law plays when parties reach an agreement. Some might have thought divorce law a rather narrow area from which to extract general observations about the shadow not just of divorce law but "*the shadow of the law.*"²⁰ Nevertheless, their scholarship

20. Although Robert Mnookin and Lewis Kornhauser's work has been widely extrapolated to discuss the role of laws on many negotiations, the text of their article is quite modest in its claims, even expressing reluctance to conclude that divorce laws cast a strong shadow on every aspect of every couple's married life:

In addition to affecting couples' bargaining behavior at the time of dissolution, divorce law may also influence a broad range of prior family decisions, for example, when, whether, and whom to marry; the number, timing, and spacing of children; the allocation of resources during marriage; and whether and when to divorce. These effects, however, seem more speculative and remote. Many believe that people decide to marry and raise children without any consideration of the legal standards governing divorce dispositions. At any rate, given the present state of knowledge, both theoretical and

went on to dominate the field, becoming one of the most cited law review articles of all time.²¹

The analysis of lesbian and gay mediation in this Article also may apply to many other kinds of communities and varieties of ADR. First, same-sex relationships often involve individuals who could be described as "different" in a wide variety of ways. In a world in which all sorts of differences become more and more usual—whether differences between corporate culture in organizations from different countries that must work together, or workplaces involving individuals from different cultural, linguistic, racial, and other backgrounds—this is an important example of a more general social condition (often called the "postmodern condition").²²

In ways similar to how this Article suggests that differences of perspectives, experience, and value may make it hard to speak of a singular gay and lesbian community, it may be difficult to speak of other communities as

empirical, concerning the effects of legal rules on behavior, this article does not attempt to trace out more general, long-term effects.

Mnookin & Kornhauser, *supra* note 11, at 951–52 n.4.

21. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996) (reporting that their article was cited 357 times in law reviews, making it the twenty-third most frequently cited article of all time).

22. See, e.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 34–35 (1995) (The breakdown of prior existing communities based on such things as a sense of place or geographic community may lead people to "resort to fierce assertions of 'identities' in order to know/invent who, where, and what they are."); Jonathan Simon, *Inevitable Dependencies: A Comment on Martha A. Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 5 COLUM. J. GENDER & L. 152, 165 (1995) (book review) (Postmodern conditions make it hard to identify cultures based on old features such as a stable geography: "It is difficult to imagine how Durkheim would even locate 'France' today, with its economy determined by German bankers, and its increasingly multicultural and multilingual population."). The idea of such diffuse postmodern conditions, unlike relatively abstract philosophies of postmodernism, "takes seriously the concrete features of lived experience," but does not assume that one will get closer to some transcendent, true, or authentic description of experience. See *id.*

one, be they based on personal characteristics (such as the idea of people of color, African Americans, and Jews) or commercial attributes²³ (such as "the" garment industry).

Second, relatively little law restricts the scope of how individuals can organize same-sex relationships. In a relatively narrow sense, this typifies the condition of many individuals and their "families" now that only a minority of the population resides in so-called nuclear families.²⁴ It also more generally typifies the way that other organizations may face looser requirements about organization, including some new organizational forms. Ultimately, the more general currents and tensions discussed here may apply to a wide range of activities when individuals and groups order, reorder, and sometimes dissolve relationships with other individuals and groups. How does a law partnership decide to divide up its valuable reputation (often characterized as goodwill) if some partners want to break with other partners? How does an organization resolve disputes about what help,

23. For a description of how arbitration allows private trade groups to enforce laws and norms that such trade groups make, see Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 848 (1961) ("Obviously, when a trade group develops its own rules of law, it requires as deciders of disputes persons who are acquainted with the standards it has developed. Since this knowledgeability does not reside in the judges of any formal legal system, the drive toward institutionalized private machinery is reinforced."). The problematic aspect to such private law making and norm making, however, is that those making laws and norms may make them for those who do not choose such laws and norms in a meaningful sense and/or who are treated equally and respectfully by such norms. Cf. Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679, 697 (1996) (noting that Silicon Valley lawyers may help create Silicon Valley norms, including norms about what is an acceptable conflict of interest for an attorney representing multiple parties to the same deal, that conflict with norms of wider communities, such as relevant provisions of legal ethics).

24. See Curtis Morgan, *Living in the 90s: Typical Households Lose Ground to Broader Kinds of Togetherness*, MIAMI HERALD, Nov. 27, 1996, at 1B (showing that only 25.5% of households live in families with married parents and children, according to the Census Bureau 1995 Current Population Survey).

if any, the organization will offer to those within it who want to care for children, parents, siblings, or others?²⁵

II. CONTEXT: POPULAR AND THEORETICAL DISCOURSES

This Article arises in the midst of a rich context. A small part of that context is the particular debate about how same-sex couples should treat each other, and how the state should treat them. This is often characterized rather narrowly as the same-sex marriage debate.²⁶ The larger part of this context is theoretical. Part of that context involves theories about how individuals fit into their communities—often associated with ideas such as communitarianism, civic republicanism, and citizenship. It is more popularly associated with buzzwords like individualism and community. Another part of this debate involves the question of how individuals define communities, particularly the way that even the seemingly least controversial definitions of groups, such as women, may mask very real differences, such as differences based on race, class, sexual orientation, and so on. This controversy, highlighted by scholars associated with Critical Race Theory, is often called “essentialism” for the way that it defines a group based on some subset, such as women based on the experiences of white women, as if the experience of white women were the essential experience. Because both the private-ordering vision and community-enhancing vision may regard some reason for Susan and Mary to seek mediation designed for those like they (to avoid bias against “them”; to promote “their” community), it is crucial to understand how such theories complicate which “they” is most like Mary and Susan.

A. Context, Part One: The Same-Sex Marriage Debate

How should same-sex couples organize their relationships and resolve relationship disputes? One occasion for asking this general question now is

25. Martha Fineman has proposed that society and law (through mechanisms such as tax law) should help individuals care for dependents, or individuals who *physically* cannot care for themselves. See FINEMAN, *supra* note 19, at 131–32. This is a fascinating and powerful idea and an idea that may, regardless of how much any court or legislature treats it, inform how organizations set up benefits policies and how individuals divide up their own time and resources. See Freshman, *supra* note 16.

26. Although two recent books also include some information on same-sex relationships in general, both use “marriage” in the title. See SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); SAME-SEX MARRIAGE: PRO AND CON, *supra* note 17.

that many same-sex couples are inching closer to a judicial declaration that Hawaii's own constitution compels it to offer same-sex couples the same marriage that the state offers to couples when the two parties are of different sexes.²⁷ The Hawaiian case, however, is only a small part of a larger landscape.

Contemporaneous with the push to same-sex marriage, there has been an increasing and parallel privatized regime of same-sex couples on three fronts: domestic partnership plans that treat same-sex couples like different-sex married couples; private agreements by same-sex couples; and gay and lesbian mediation designed to resolve disputes involving same-sex couples. Many think privatizing means moving responsibility for something, such as railroads, from the state to nonstate entities.²⁸ Many organizations have adopted spousal equivalent or domestic partner policies that extend treatment afforded married couples to persons who qualify as domestic partners—13% of all employers and 25% of employers with more than 5000 workers, according to a 1997 KPMG Peat Marwick survey.²⁹ Privatizing same-sex marriage also means the way many couples themselves—though the numbers are not easily accessible—have reduced their relationship to agreements and have turned to ADR providers and courts to give effect to these agreements.³⁰ In effect, such employers, couples, gays themselves,

27. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding case to the trial court to determine whether state recognition only for different-sex couples satisfies strict scrutiny); *Baehr v. Muike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996) (holding that limiting marriages to different sex couples does not satisfy strict scrutiny); see Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Although popular accounts largely focus on how legislators have considered such questions in the United States, some courts and tribunals, here and abroad, have held that organizations and governments must treat same-sex couples the same as married different-sex couples, even if the state does not recognize same-sex marriages. See, e.g., *Gay Teachers Ass'n v. Board of Educ.*, 585 N.Y.S.2d 1016 (N.Y. App. Div. 1992) (affirming municipal court's denial of motion to dismiss complaint seeking equal benefits for same-sex couples); *Grievance of B.M.*, No. 92-32 (Vt. Labor Relations Bd., June 4, 1993) (requiring equal benefits for unmarried same-sex couples and married opposite-sex couples).

How much effect this will have on those couples and couples not in Hawaii depends on thorny questions beyond the scope of this Article, such as: When may states avoid their obligation to treat same-sex marriages in Hawaii the way they treat opposite-sex marriages? This is the so-called conflict of laws or recognition of official state acts question. When may the federal government deny benefits to such same-sex marriages, such as often favorable tax treatment, that it affords to opposite-sex marriages?

28. See e.g., George L. Priest, *Introduction: The Aims of Privatization*, 6 YALE L. & POL'Y REV. 1, 1 (1988) ("Privatization refers to the shift from government provision of functions and services to provision by the private sector.").

29. See Hendren, *supra* note 2.

30. We know some agreements exist when parties go to court to enforce them. See *supra* note 4. We have less of an idea exactly how many agreements are made but never litigated, or litigated but resolved through settlement or unpublished decisions.

and gay and lesbian mediation assume the function of defining their relationship rather than simply looking to how the state treats them.

It is tempting to think that all of this privatization is merely a compromise,³¹ a settling for something that is less than incorporation into the existing marriage regime.³² Certainly some political figures³³ and members of the popular press³⁴ have treated domestic partnership as such. A fairer representation is that some same-sex couples would, for example, pay less tax if they were treated as married, and others would pay more.³⁵ And

31. Some of the suspicion of privatization may reflect an excessive association of privatization as a concept with particular advocates of privatization, such as political conservatives, and particular kinds of privatization, such as those that are inattentive to the less advantaged. Compare Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6, 32-33 (1988) (stating that "privatization as a political practice" often means a "transfer of wealth" from one racial or ethnic group to another), with Priest, *supra* note 28, at 4 (commenting that "Starr's survey views privatization from the excessively narrow prospect of current U.S. conservative political support").

32. For a very interesting exchange that explores privatizing same-sex relationships through the substantive law of contract, compare Ertman, *supra* note 4 (offering qualified defense of the value of privatizing), and Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235 (1996) (offering a qualified defense of privatization) with Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169 (1996) (criticizing privatization), and Alan K. Chen, "Meet the New Boss . . .," 73 DENV. U. L. REV. 1253 (1996) (criticizing privatization).

33. After the Hawaiian Supreme Court remanded a suit seeking to end Hawaiian officials' refusal to issue marriage licenses to same-sex couples for a lower-court determination whether the refusal satisfied strict scrutiny, see *supra* note 27, the Hawaiian Governor proposed a compromise that would continue to deny marriage licenses but would offer domestic partnership with equivalent rights to same-sex couples. See Richard Halloran, *Hawaii Faces Crucial Round in Same-Sex Marriage Debate*, ORLANDO SENTINEL, Aug. 25, 1996, at G1.

The Hawaiian legislature rejected the suggestion that Hawaii "get out of the business" of marriage. Instead, it proposed a compromise: a constitutional amendment, subject to ratification by voters, that would give the legislature the power to exclude same-sex couples from marriage. See H.B. No. 117, 19th Leg. (Haw. 1997), and a domestic partner-type bill, styled as a "reciprocal beneficiary bill" that would give certain rights and privileges to two people who cannot marry—including not only same-sex couples but, for example, "a widowed mother and her unmarried son." H.B. No. 118, 19th Leg. (Haw. 1997).

34. See, e.g., Ellen Goodman, "Postpone the Hawaiian Wedding," MIAMI HERALD, Dec. 8, 1996, at 3L ("Domestic partnership—once a far out notion of an everything-but-marriage commitment with its benefits and responsibilities—is now the conservative alternative."); "Aloha to Life Partners," MIAMI HERALD, Dec. 13, 1996, at 34A (editorial in favor of Florida legislation to recognize a "domestic contract" as "common ground" to be found between those who seek same-sex marriage and those who "react viscerally" to talk of same-sex marriage).

35. For any two given individuals, the two may pay more tax if they file as married, or they may pay less tax if they file as married, depending on how much each makes. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472-73 (1996) (describing how marriage disadvantages many couples if both earn wages but advantages couples if only one earns wages). See generally Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991) (describing the range of tax consequences, including not only income taxes but also estate taxes upon death).

one might also be tempted to think that domestic partnership is a kind of substantive compromise, an acquiescence to the idea that same-sex marriage cannot be justified in a public debate on substantive terms.³⁶ To view domestic partnership—and privatization of same-sex relationships generally—as a compromise raises serious questions of political strategy (why settle for less?) and antidiscrimination (why does separate but equal seem more acceptable for gays and lesbians than it does for African Americans and women?).³⁷

Many people consider privatization arguments all the time, but there is a particular reason to think about privatizing same-sex marriage. In many contexts, the more one favors simply merging same-sex couples into the existing laws and institutions of marriage, the harder it is for others to privatize. Many employers that now treat domestic partners as spouses claim to do so because same-sex couples cannot marry; to win same-sex marriage may often mean to lose the ability to structure relationships in the more flexible ways that domestic partnership definitions may allow.³⁸ It would be nice if, as some proponents of marriage suggest, one could have a choice—be single, be a domestic partner with benefits and burdens, be married with benefits and burdens³⁹—but there is a strong likelihood that, the more marriage becomes legal in various states, the fewer organizations will allow domestic partnership. Thus, the question of whether an individual supports marriage or domestic partnership may involve a choice of

36. Michael Sandel makes the case most strongly:

The problem with the neutral case for toleration is the opposite side of its appeal; it leaves wholly unchallenged the adverse views of homosexuality itself. But unless those views can be plausibly addressed, even a court ruling in their favor is unlikely to win for homosexuals more than a thin and fragile toleration.

MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 107 (1996). For a critique of Sandel's argument, see *infra* text accompanying notes 168–169; see also RICHARD POSNER, *SEX AND REASON* 313 (1993) (referring to domestic partnership as an "intermediate solution" because "public hostility to homosexuals . . . is too widespread to make homosexual marriage a feasible possibility"); Ertman, *supra* note 4, at 1114–15 (referring to same-sex recognition through contract as a "purgatory" and "resting place . . . while they wait to achieve public rights").

37. See *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that Virginia cannot keep women out of a state military college by building a military college for women).

38. See, e.g., BARBARA FRIED, *DOMESTIC PARTNER BENEFITS: A CASE STUDY* 31 (1994) (emphasizing that a strong reason to provide domestic partner benefits is that same-sex couples cannot get state recognition for their marriages).

39. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 79 (1996) ("[I]t is not completely clear that the choice has to be made" between domestic partnership and same-sex marriage.); Chambers, *supra* note 35, at 476 ("The opportunity for legal marriage, at the very least, provides a choice to opposite-sex couples whether to marry or not, a choice from which lesbian and gay couples could benefit . . .").

competing strategies. This choice is similar to the way in which elite African-American litigation organizations chose a strategy that may have made it more difficult to achieve certain outcomes later. Just as the push for formal equality may have made it harder for African Americans later to seek autonomy for African-American institutions, such as traditionally African-American schools,⁴⁰ so, too, "success" in "gaining marriage rights" may limit the ability for lesbians and gays to structure alternatives to marriage.

The relationship between the choice of substantive law (marriage, domestic partnership, or something else) and process law (adjudication or mediation) is also complicated for other reasons. To a large extent, one must—at least by omission—decide the process question regardless of the outcome of substantive debates about marriage or domestic partnership. Whether there is marriage, domestic partnership, or some form of contract as a substantive matter, parties largely may choose whether such substantive issues get addressed in court or in some form of ADR. State-recognized marriage and children present complications. If the state recognizes a marriage, then couples who want the state to recognize a second marriage need a court, not some alternative process, to enter a divorce decree, although ADR may help lead to a settlement that courts adopt after cursory review.⁴¹ If there are children involved, then some jurisdictions give courts exclusive authority to make decisions affecting children, although, as with divorce, the courts may approve what the adults agree to through some ADR process.⁴²

40. See TUSHNET, *supra* note 17. For a provocative recent critique of integration, see generally ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* (1996); see also *supra* note 17.

41. See Mnookin & Kornhauser, *supra* note 11, at 954–55 (noting that courts vary in how thoroughly they will review an agreement between a married couple before approving it as part of a divorce decree).

42. See *Sporleder v. Hermes*, 471 N.W.2d 202, 204 (Wis. 1991) (denying any rights to the nonbiological mother even though she and the biological mother signed a co-parenting agreement with a mediation clause), *overruled by Holtzman v. Knott*, 533 N.W.2d 419, 424–37 (Wis. 1995) (holding that a court could consider visitation on the basis of a co-parenting agreement); see also Ertman, *supra* note 32, at 1138–42 (discussing how courts have applied contract law to same-sex couples); Elizabeth A. Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R. 5TH 69 (1996) (noting that courts often enforce arbitration agreements on issues of spousal support, but frequently require some review of decisions affecting children).

Of course, it is unclear how often someone in a same-sex relationship would want or need a court to order some ADR process. Parties may often have numerous incentives to choose alternative to courts, and lesbians and gays may have the additional desire to avoid publicity and to (at least sometimes) find less biased third parties than judges. See Mnookin & Kornhauser, *supra* note 11, at 984 (commenting that even if a court will not force parties to abide by an agreement,

B. Context, Part Two: The Communitarian Vision of ADR

To understand the appeal of the community-enhancing vision of mediation, one should appreciate the larger appeal to community in popular and legal discourse. Anyone who reads a newspaper knows that individualism gets a bad rap these days. People who call themselves community leaders want us all to think about communities and relating to each other. We spend too much time bowling alone.⁴³ And even when we get together, or think about each other, we think and talk as individuals about things like "my rights" rather than "our community." Some philosophers see a similar problem. We build philosophical systems by thinking about the needs of individuals and what individuals might agree to. This is Sandel's famous critique of Rawls' theory of justice: He wants us to accept as fair the kind of agreement that we think individuals—what Sandel calls "unencumbered selves"—would reach.⁴⁴ Like-minded legal scholars want to think and talk and imagine about our "republic." Such republican thinking looks to the community and how we may develop our individual capacities and our virtue by relating to our community, which then has its own communitywide virtue.

This community talk is a dreamy and heady picture. Its sentiments, if not its full vocabulary, inform one way of thinking about same-sex relationships. Indeed, these sentiments make us want to rename same-sex relationships as marriage. Especially those who see or at least profess to see same-sex as "virtually normal,"⁴⁵ equivalent to different-sex couples in every way, regard marriage as a link—often even as the very last step—in blurring same-sex couples into a generic American community—or at least a community in which the gender of one's romantic partner is irrelevant. Others see (or envision) different kinds of community: some, for example, invoke a community such as "lesbian feminists" and imagine the kind of mores and rules that should inform such relationships;⁴⁶ others imagine a community of friends, not romantically involved, but with a similar sense

the parties may do so because they value their relationship, their reputation for honoring agreements, or the "embarrassment of renegeing").

43. See Robert Putnam, *Bowling Alone*, 6 J. DEMOCRACY 65 (1995) (suggesting that individuals spend too little time in group and community activities, as illustrated by the decline in persons bowling in leagues).

44. See generally SANDEL, *supra* note 36; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

45. See ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1995).

46. See Bonnie J. Engelhardt & Katherine Triantafillou, *Mediation for Lesbians*, in *LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES* 327, 329 (Boston Lesbian Psychologies Collective ed., 1987).

of their identity as lesbians and gays;⁴⁷ and some imagine a community of persons providing the care that an individual cannot physically provide for herself. This is Fineman's proposal to abolish legal recognition for any marriage, and instead recognize and privilege relationship based on a person caring for someone who cannot physically care for herself, such as a parent for a child, or a child for a disabled relative or friend.⁴⁸

These are serious disagreements about any community that has a claim to describe same-sex relationships,⁴⁹ but one might also construct a common appeal to privatizing same-sex relationships. By ending the state's monopoly on marriage, at least as to same-sex couples, privatizing *may* offer the best chance for such communities and community leaders to shape how same-sex couples organize and lead their lives. In short, *an* appeal of privatizing is not "State, let *me* alone," but rather "State, let *us* alone." It is thus writ small the implication by Rawls that at least some communities may have overlapping reasons to have a relatively minimal state that does not define every aspect of the good life.⁵⁰ This is the potential of community-enabling mediation in Part V. On the other hand, community in practice may also mean the way community enforces its norms on those it claims as members—even if those members do (or should) want some other community.⁵¹ This is the danger of community-enhancing mediation in Part IV.

C. Context, Part Three: The Private-Ordering Vision of ADR

Private ordering is an established ideal of legal process scholars: Individuals can and should often structure relationships and resolve

47. See SIMON LEVAY & ELISABETH NONAS, CITY OF FRIENDS 31–32 (1995) (describing the history of companionate homosexuality in history and how it may sometimes be hard to draw a distinction between "friends" and "lovers").

48. See FINEMAN, *supra* note 19.

49. See *infra* note 60.

50. See JOHN RAWLS, POLITICAL LIBERALISM 155 (1993) (persons may support political institutions but "recognize values and virtues belonging to other parts of life").

51. Marc Galanter makes this point very well:

Although by definition indigenous law may have the virtues of being familiar, understandable and independent of professionals, it is not always the expression of harmonious egalitarianism. It often reflects narrow and parochial concerns; it is often based on relations of domination; its coerciveness may be harsh and indiscriminate; protections that are available in public forums may be absent.

Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 25 (1981); see also *supra* text accompanying notes 11–17.

disagreements without turning to the state.⁵² The kinds of specialized dispute resolution projects that have been established in New York, Los Angeles, and San Francisco⁵³ to resolve disputes involving lesbians and gays resemble the kinds of specialized tribunals that Henry Hart and Albert Sacks discussed in their famous legal process materials.⁵⁴ In some ways, private ordering goes at least as far back as John Stewart Mill. Individuals are individuals, individuals have different needs, and happy individuals need to be individuals who can grow differently with different interests and needs.⁵⁵ Private ordering nests with a variety of public purposes as well. Private ordering might also get the "right" solution because it involves local knowledge, what actually happens in a particular trade, industry, or workplace.⁵⁶ Individuals closer to the scene might get the facts right better than distant, general jurists.

So, too, the private-ordering impulse pushes to privatizing same-sex relationship. The feared central power is not a foreign land, but local and national governments that have treated lesbians and gays badly, or even violently,⁵⁷ criminalizing sex between people of the same sex, and denying

52. Much of what Henry Hart and Albert Sacks say about the theoretical potential and practical limits of crafting rules for arbitration apply to crafting the rules for a mediation:

Within broad limits . . . private parties who submit an existing dispute to arbitration may write their own ticket about the terms of submission if they can agree to a ticket. There is an old story about the girl who, dreaming, found herself threatened by an ominously male character, and said tremulously, "Wh-what are you going to do now?", only to receive the answer, "How do I know, lady? This is *your* dream." The arbitration of an existing dispute is the parties' dream, and they can make it what they want it to be.

The trouble is that it takes time and money to draft elaborate private laws Only in the most exceptional circumstances can a private disputant stop to negotiate and draft a complete constitution, together with a substantive and procedural code, for the governance of his private court.

HART & SACKS, *supra* note 17, at 310.

53. See Gunning, *supra* note 8, at 48-49 (listing gay and lesbian community mediation projects).

54. See HART & SACKS, *supra* note 17.

55. See JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 126, 136 (H.B. Acton ed., 1972) (Past interpretations of experiences may be accurate, but not applicable, to a particular individual with different needs and wants.).

56. See Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 11 ([P]arties may be better off with arbitration than court because "[a]rbitrators . . . are compelled to acquire a knowledge of industrial processes, modes of compensation, complex incentive plans, and job classifications"); Mentschikoff, *supra* note 23.

57. See *supra* note 7. See generally Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

jobs to those deemed gays and lesbians.⁵⁸ So, too, officials got local knowledge wrong, assuming, for example, that lesbian and gay parents might molest children, when reliable data indicated heterosexuals and homosexuals had no significant difference in such activities.⁵⁹ And so, too, some might say the state got wrong the institution of marriage. A marriage modeled on a man and a woman might not fit two women or two men.⁶⁰

D. Context, Part Four: The Tension Between Communitarian and Private-Ordering Visions

Although the private-ordering and communitarian visions of ADR both point to privatizing same-sex relationships, the overlapping impulses also mask a profound disagreement. Think again of Mary and Susan. There are many ways to approach their relationship and disagreements; many solutions they might choose. The rhetoric of mediation may not give them a full sense of their choices. Do Mary and Susan have a pathology—a problem “merging”—or a different way of ordering their relationship? Many psychologists might suspect there is a problem with “merger,” with Mary and Susan becoming “one” rather than “respecting” each other’s “boundaries.” Others might see Mary and Susan as enacting a different approach to relationships, a way that reflects the gendered way in which women tend to grow closer than men. These two attitudes imply different legal arrangements, such as a carefully measured and nuanced division of assets and responsibilities to guard against merger or a more general com-

58. I say presumed to be gay rather than merely gay because individuals often discriminate against persons who never tell the discriminators that they are gay; rather, the discriminators assume the individuals are gay because they fit stereotypes of homosexuality. In particular, men are often labeled gay when they do not act like stereotypical men, and women are labeled lesbians when they do not act like stereotypical women. See generally, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against “Other” Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 265–66 (1990).

59. See, e.g., AMERICAN PSYCHOLOGICAL ASS’N, LESBIAN AND GAY PARENTING (1997); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 L. & SOC’Y REV. 133, 152–56 (1991); Shapiro, *supra* note 7.

60. See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1541 (1993) (“Everything in our political history suggests that a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage . . . [including] grossly hierarchical, gendered marriage.”).

mitment to shared assets and income that values their common commitment and life.

So I worry about Mary and Susan. I think they deserve to understand the competing ways that they could organize their relationship, ways that reflect different values of different communities—including communities that Mary and Susan may need to create in the future.⁶¹ There is a good chance that these real choices will get buried in the rhetoric and discourse of whatever process they choose. Imagine what many mediators trained as therapists might tell them:

You know, it's not an uncommon problem, especially with two women. You grow up being told that women need to be understanding and relationship oriented. And then you feel drawn to other women, who, being women, have heard the same messages. You wind up beginning to lose yourself. You may hear that many others in the women's community, whether lesbians or not, whether with friends or with lovers have the same problem. That's only natural, but you need to learn to separate sometimes. It's healthier. So you really need to keep some of your finances individually, not mix everything up. And frankly, Susan, maybe you don't want to share your baby with Mary.⁶²

61. This Article addresses the way in which parties may not understand the range of views that mediators have about the role of bias and community in mediation. This is part of a more general question of whether parties fully understand the various practices that may get labeled as various forms of ADR. See Kimberlee K. Kovach, *What Is Real Mediation, and Who Should Decide*, 3 DISP. RESOL. MAG. 5, 8 (1996) ("Many parties, participating in mediation for the first time, will believe that whatever the mediator does is part of mediation."); Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). Increasingly, people question, "Do lawyers have a duty to inform clients about alternatives to litigation?" without discussing just what it would mean to tell clients about alternatives to litigation. Compare Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?*, 48 ARB. J. 8 (1993) (discussing in general terms whether disciplinary rules or malpractice liability may require a lawyer to tell clients about "alternative dispute resolution"), with NATHAN CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 365-70 (1996) (providing an outstanding introduction to how a lawyer might counsel a client about the varieties of ADR).

62. Consider how one psychotherapist explains her "therapeutic strategy" for therapy for lesbians:

Definite values about relationships form an underlying ethic in many lesbian relationships: openness of emotional expression, mutual nurturing, sensitivity to the other's needs, and a willingness to be vulnerable. These are gender-related values, entwined in women's psychological and cultural development. Respect for individuality is also valued, but it can be at odds with those other values that encourage connection over separateness. When one woman moves in the direction of greater independence and

And imagine what a mediator trained to be sensitive to the values of the lesbian community might say:

You know, it's not an uncommon problem. You're two women growing up in a heterosexist and homophobic society. Heterosexist because it just assumes what's best for you is whatever is best for a man and a woman. And homophobic because it feels uncomfortable with, or even hostile to, any relationship between two women that doesn't involve a man. So, Susan, when you want to be apart, that's you listening to that heterosexism, the idea that you have to be like the kind of nagging wife and kind of aloof husband you saw on TV. That's not a lesbian relationship. Lesbian relationships are closer. You're going to have to accept that and mourn the loss of that Ozzie and Harriet picture. This is the time when couples like you really need to come together. You don't need more than one checking account or to keep track of who put in what. And Adrienne is both of yours, no matter what the law might say.

Neither mediator script lets the couple appreciate the dilemma they face, what I have elsewhere called the "contemporary negotiator's dilemma": How do individuals want to identify themselves and the communities that they value?⁶³ Instead, each mediator tells the couple what is natural and normal versus a problem and pathological.⁶⁴ And each script has legal

separateness, she often feels guilty or anxious over her "selfishness" or "coldness" that has allowed her to turn her back, even temporarily, on her partner's needs. *She feels she is violating that ethic of lesbian relationships.*

Beverly Burch, *Psychotherapy and the Dynamics of Merger in Lesbian Couples*, in CONTEMPORARY PERSPECTIVES ON PSYCHOTHERAPY WITH LESBIANS AND GAY MEN 61-62 (Terry S. Stein & Carol J. Cohen eds., 1986) (emphasis added). I am not using Burch's chapter as the equivalent of the dialogue in the text, but as an example of the kinds of overemphasis on traditional relationships that she herself also discusses:

The observation that merger is frequently a problem in lesbian relationships is relatively recent; yet it has proved to be so useful that it is already in danger of being overworked. . . . Lesbian relationships are often closer than other coupled relationships. This is natural, even predictable, outcome of women's desire and capacity for emotional connection. Lesbian relationships will look and feel different from other relationships. Their emotional intensity may be misunderstood or interpreted pathologically if we assume they should reflect the norms of heterosexual relationships.

Id. at 69.

63. See Freshman, *supra* note 16.

64. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 766 (1988) ("Mediation advocates often characterize [women's] opposition to shared custody as pathological."); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1568 (1991) (Women's concerns are often treated as some kind of pathology in mediation.). See generally Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated At Birth?*, 95 COLUM. L. REV.

implications: the first script may lead to an agreement that keeps assets separate as "healthy"; the second script may lead to an agreement of shared assets as "normal for lesbians."

Although much of this Article deals with same-sex couples, my concerns apply to all individuals who live in a world in which we may feel torn between communities, including communities we can only imagine. I worry that some couples may not make informed decisions about how they want to relate to their intimate partners and how they want to resolve disputes because of similar assumptions about how people *like them* in other ways *do things* or what the *realities* of such people *are*. And so I worry very much about the suggestion that the "culturally competent" way to help an Asian couple in Canada resolve differences is to let the couple hear from an Asian social worker about how other Asians deal with family life in Canada.⁶⁵ I am glad that people may get information to help them make informed decisions, and that information certainly might include how other people who share some similar history or background conduct their lives, or the values of various communities. In the best case scenario, however, inviting input from only one community, such as an Asian community, biases decisions in favor of adopting such values rather than that of a rival community, such as a community of women.⁶⁶ That's the least troubling scenario, but I worry that such an "expert" or a similar "culturally sensitive" mediator might say something like:

A lot of white people don't understand how our people handle things. White people keep trying to make men and women act completely the same. Our people understand that men and women each have their place. The good thing about mediation is that you don't have to do what white people do. You can respect our heritage and our people and live and prosper the way our people have lived and prospered for thousands of years.

Although some such speeches may invoke thousands of years of community (such as Jewish communities), and some may focus on hundreds of years of similar experiences (such as the experience of slavery by African

1568, 1589-91 (1995) (criticizing the way that some scholarship does not take seriously the views of scholars outside of historically preferred groups—including African-American women such as Patricia Williams—but rather dismisses such women themselves for some kind of pathology).

65. See Allan Barsky et al., *Cultural Competence in Family Mediation*, 13 *MEDIATION Q.* 167 (1996).

66. See Christine A. Littleton, *Does It Still Make Sense to Talk About 'Women'?*, 1 *UCLA WOMEN'S L.J.* 15 (1991); Richard Rorty, *Feminism and Pragmatism*, in *POSTMODERNISM AND LAW* 19 (Dennis Paterson ed., 1994).

Americans), the speeches may create a false sense of necessity—a necessity to choose only such older, more “appropriate” values.⁶⁷

I think same-sex couples deserve a process that lets them think through this conflict and lets them make informed decisions about their future, as individuals and as constituents of various communities. This is the process I outline in the last portion of this Article, a process I rather infelicitously call *identity-enhancing mediation*.

E. Context, Part Five: Essentialism and Defining Communities

Both the private-ordering and community empowerment rationales hold a great deal of attraction, and involve a great deal of value, but both teeter on two related tensions: How do we know what the “gay and lesbian community” is? If we want to give effect to private ordering and avoid bias, how do we know that a particular same-sex couple shares more in common with a particular gay or lesbian person or community than with some other person or community? Perhaps Susan and Mary only worry about homophobia and what other lesbians do, or perhaps they worry about class bias and want to know about Jewish practices, too. If we want to serve the interests of a community, as a community, how do we know which community has the best claim to represent or regulate a particular couple? As with much scholarship after the 1980s, this concern partly reflects the essentialist critique associated with Critical Race Theory. Just as African-American women could question whether feminism crafted by white feminists fit African-American women, so, in a parallel way, persons of color or poorer persons may question whether “the” gay and lesbian community best serves the interest of such persons.⁶⁸

67. I do not think that arguments about the way that values of a larger group may not fit the experience of a smaller or otherwise less-valued or powerful group are wrong or suspect. But see Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1904 (1996) (asserting that “minority scholars have fewer degrees of freedom than their white counterparts” because anyone expressing a view “deviating from the one true racialist faith, their reward is the public flogging once reserved for apostates and other degenerate reprobates”). Rather, I think that such arguments are a valuable part of a larger discussion of what aspects of which communities a given individual finds valuable.

68. See LEVAY & NONAS, *supra* note 47, at 151–73; cf. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585–635 (1997); Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 277–78 (1996) (“Each individual is influenced by a number of subcultures and sources of diversity at any one time.”); Frank Valdes, Presentation to American Association of Law Schools Workshop on Sexual Orientation Issues (Oct. 1996).

My concern with the difficulty of identifying the relevant source of bias and the relevant community only partially tracks that kind of essentialist critique. First, that kind of essentialist critique is itself subject to the same criticisms that it imposes on others. If the essential community cannot be X because it neglects the experience of persons who are plausibly X and Y, then all we need is a Z to come along and question that critique.⁶⁹ This is not a fatal flaw in one reading of the essentialist critique. A postmodern reading of the essentialist critique would be that every notion of identity is subject to some form of this kind of criticism.⁷⁰ This does not mean that the essentialist critique is merely an intellectual play-

69. As Mark Kelman has suggested, once one shows that a given category could be subdivided by one additional characteristic, as Harris famously did by separating black women from all women, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) [hereinafter *Race and Essentialism*], the question arises why one should not add additional characteristics to further divide the identified:

If Harris is read to suggest only that one can always construct increasingly accurate demographic groups to predict, probabilistically, how the subgroup's respondent will tend to view a social event, I find nothing the least bit problematic in her claim. If this were her claim, though, I see no reason why she wouldn't test *all* the sociological predictors of "attitude" (religious belief, income, party affiliations and so on) in deconstructing the needlessly large category, "women."

Mark Kelman, *Reasonable Evidence of Reasonableness*, in QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES 169, 180 n.10 (James Chandler et al. eds., 1994); see also Martha Minow, *Not Only For Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 656 (1996) (the idea of "multiple, intersecting groups . . . implies ultimately that each person is alone at the unique crossroad of each intersecting group"). Harris herself recognizes a similar point and invites criticism that her own views may be essentialist in some problematic way. Harris, *supra*, at 585; see also Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR. AM. L. & POL'Y REP. 207, 212 (1995) ("identities are always fluid, dynamic, and multiple"). Kelman identifies another interpretation of Harris' critique of essentialism: "[T]he essentialism Harris attacks could be understood as demanding that all actors in a category have identical beliefs given only an epistemology that centralizes viewpoint as the ultimate validator." Kelman, *supra*. To the extent that one adopts such a uniform viewpoint description, as Roth does implicitly of the Jewish community, *supra* note 15, then it makes sense that people in such a community would not face any bias—but that is only because of the way one has defined the community! See Minow, *supra*, at 674 ("All of us have been betrayed at times by those who claim to be like us.").

70. See Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991).

[T]here is always waiting to be made a pragmatic judgment about whether now is a good time to place feminist jurisprudence, say, or critical race theory, under critical inspection. All jurisprudences have structural instabilities that poststructuralists could address, and practical liabilities and limitations that pragmatists could address. It is always open to question whether addressing them is, at the moment, a useful thing to do.

Id. at 1045; see also GARY MINDA, POSTMODERN LEGAL MOVEMENTS 4 (1995) ("Postmodernists do not claim that they can successfully avoid the predicaments and paradoxes they have found Moreover, the existence of predicament and paradox in the texts of postmodernists, as well as those in the texts and discourse of everyone else, are seen by postmodernists as part of the 'situation' they call the postmodern condition.") (internal citation omitted).

thing, a game of scholarship for scholarship's sake. A pragmatic reading of the essentialist critique, which I advance here, is that one needs to be sensitive to think about the appropriate identity for the particular task at hand:⁷¹ when we are trying to construct a system for resolving disputes that avoids bias affecting X, we want a notion of X that helps us address that kind of bias, even if, for other purposes, there might be a version of X that was more useful, or more authentic, or otherwise valuable. And so we might define someone as, for instance, lesbian for some purposes, but a person of color for others. Similarly, much of the essentialist critique depends on the notion that the categories themselves have less content than we imagine. This is the social construction–historical contingency argument: in other times and other places, people did not even sort people into X or Y. We discovered race only relatively recently; same-sex practices were not always identified as some particular, stable identity like homosexuality;⁷² the idea of people of color may displace to some degree Black as a race or Hispanic/Latino as an ethnicity. By extension, one may imagine that our notions of the relevant categories of bias, including the identification of bias involving any same-sex couples as homophobia, may be a social construction that no longer best fits the needs of same-sex couples today. I mention these frameworks—essentialism, Critical Race Theory, postmodernism, pragmatism—primarily to situate my discussion in various contemporary legal movements.⁷³

71. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 73–74 (1989) (noting that postmodern scholars are “never quite able to take themselves seriously because [they are] always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves”). As I suggest below, this fluidity leaves open rich possibilities for exploring the potential and limits of the ways in which we can understand one another free from bias, although, as with any notion in our postmodern condition, these possibilities are necessarily tentative and subject to change. See FINEMAN, *supra* note 19, at 54 (“I’m interested in exploring whether it is possible to have an affirmative politics of difference that defines groups and classifications tenuously, whereby group identification is recognized as politically necessary but is also seen . . . as ‘ambiguous, relational, shifting,’ without ‘clear boundaries’ that bind people in ‘all circumstances for all time.’”).

72. See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 101–02 (1990); IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263 (1995); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 *YALE J.L. & HUMAN.* 161 (1996).

73. To some degree, the idea that the kind of identity we discuss may vary with circumstance predates these more recent movements. Gordon Allport’s famous study of prejudice also makes a similar point: “[I]n group memberships are not permanently fixed. For certain purposes an individual may affirm one category of membership, for other purposes a slightly larger

The second related point is that, however novel and insightful the essentialist/social construction critique might once have been, and however useful it may be to play it out in new areas, it might be time to also start thinking about such issues in new ways. We know that identity is not fixed in time and place; we know that a community may not really have the best claim to represent the interests of a particular individual. What is to be done?⁷⁴ Elsewhere, I and others have tried to trace out the ways in which what we once thought of as "different" forms of discrimination against "different" groups may often have related sources and related solutions.⁷⁵

All these contexts inform why I worry about how to define communities and identities for two purposes. One is simply to avoid bias and

category." Allport also implies that the definition of "groups" may be a function of particular societies at particular times:

The minorities problem springs from the existence of fairly well defined "out-groups" disliked by those who control the political and other organs of power in society. Such dislike arises not because the members of the groups have done or threatened acts harmful to the community, but because membership in the group is itself considered a cause for distrust or even hostility. These unpopular groups are often called "minorities," and the dominant group "the majority"; and for the sake of convenience that terminology is followed here, even though the "minority" can be and sometimes is a numerical majority.

GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 11 (25th Anniversary ed. 1979); see Louis Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1, 2 (1942).

74. The fact that much of the work on bias, essentialism, and understanding has focused on limits is not a limitation of such scholarship, but rather is a reflection of an understandable stage in the development of a richer understanding of bias and the ways to overcome it: one may very well seek to understand that which one eventually wishes to overcome. Nevertheless, given the urgency with which one wants to overcome bias, it is understandable that some have demanded quicker, more certain, more "objective" accounts of how descriptions of bias may further efforts to overcome bias. Cf. MINDA, *supra* note 70, at 245 (1986) ("A practical strategy for fostering constructive engagement across the frontiers of race, class, gender, and language needs to be developed. New neopragmatist and ironist criticism offers no new vantage points for analyzing and confronting these problems as the monolithic forms of jurisprudence fragment and break down."). As Carrie Menkel-Meadow has observed, building on the work of Pauline Rosenau in classifying various strands of postmodern thought, some "nihilistic postmoderns" may question any account of knowledge, and "affirmative postmoderns" may emphasize instead the variety of ways one can know things, such as appeals to "empathy and affective, as well as rational, ways of knowing." See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 *WM. & MARY L. REV.* 5, 15-16 (1996) (citing PAULINE M. ROSENAU, *POST MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS* (1991)).

75. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139, 151-52; Clark Freshman, *supra* note 58; Francisco Valdes, *Diversity and Discrimination in Our Midst: Musings on Constitutional Schizophrenia, Cultural Conflict, and "Interculturalism" at the Threshold of a New Century*, 5 *ST. THOMAS L. REV.* 293 (1993); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-connectivities*, 5 *S. CAL. REV. L. & WOMEN'S STUD.* 25 (1995).

otherwise facilitate private ordering. The second is to think about community as a relevant source of norms or practices that couples may want to consider in how they structure their relationships, change their relationships, and sometimes end their relationships. In part, this may only be because such norms help them structure their relationship as a couple (private ordering); in part, it may also be because such individuals also want to follow community norms (community-enhancing). In the next part, I consider the ways that privatizing may fulfill the private-ordering vision. My tentative answer turns out to be a skeptical one: many forms of bias may be related, and may be best understood in a privatized context, but others may only be deceptively similar and may require careful consideration to avoid in any context. In Part IV, I push claims about "community" mediation even further, not just about whether this or that community accurately represents what particular individuals say they want now, but also whether such expressed preferences deserve respect. In the final part, I argue that the best process to organize and regulate relationships is one that goes beyond express preferences to help parties make informed decisions about the ways they want to organize their lives, including the kinds of norms and the kinds of communities they want to value. As may be apparent, the arguments below are severable: one may agree with my critique of the limits of private ordering, but reject my criticism of mediation that enhances existing communities; regardless of what one thinks of the critiques of either vision, one may accept or reject my own outline of community-enabling mediation.

III. DOES MEDIATION FACILITATE PRIVATE ORDERING?

The impulse to private ordering may be understood as a secular faith. Its basic creed:⁷⁶ The individual has the ability to set up his life with other individuals in ways that fit the individual's needs as well as possible. This creed has a modern faith in an individual's ability to know what he wants, with whom he wants to spend time, to what he wants to devote his energy, and so on. Much recent scholarship on alternative dispute resolution implicitly questions this creed. Individuals do not always negotiate as well as they might to get what they want or, perhaps, need.⁷⁷ This scholarship

76. See generally SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981) (describing the American "creed").

77. Because we sometimes look at what individuals say they want and other times at what we think they need, I provisionally use the term "ends." See *infra* text accompanying notes 233-237.

emphasizes "barriers" that individuals face in trying to accomplish their ends. Some detail psychological processes that make it hard for individuals to judge different options rationally, such as a tendency to avoid losses more urgently than to seek gains of equal value.⁷⁸ Some emphasize lack of information, such as the inability to tell whether those we deal with are being truthful.⁷⁹ And some of this scholarship emphasizes barriers involving how parties relate to each other, such as the tendency to discount solutions that adverse parties offer ("Consider the source!").⁸⁰ All of this scholarship is quite valuable. Nevertheless, the notion of "barriers" reinforces a part of the secular creed. If the creed simpliciter says, "Parties can know their own interests and achieve them," then the creed-cum-barriers says, "But for certain types of barriers, parties can know their own interests and achieve them."⁸¹

To explore such a vision of negotiation, this part considers whether same-sex couples would order their lives better—free from bias and inefficiency—if they used gay and lesbian community mediation. This part in turn considers several possibilities: that such mediation involves less animus because such mediators will not be homophobic; that such mediation will be better because such mediators "understand" gay culture—an argument that raises the danger that what a mediator understands is a culture that a party does not fully embrace; that such mediation will be better because, regardless of how well parties escape animus and substantive bias, at least the parties will negotiate better because they will (however mistakenly) feel "safe." Finally, this part considers what we should understand as "mediator neutrality" when individuals may feel drawn to several communities—at

78. See BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995); Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118 (1996) ("I do not question the basic premise that litigants try to achieve the best possible outcome, but I do question their ability to identify the most favorable options when risk and uncertainty are involved.").

79. See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323 (1994) (indicating that mediators could be used to overcome parties' tendency not to disclose their true bottom line, leading to inefficient bargaining); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 522-34 (1994) (suggesting that clients may use lawyers with ethical reputations as a means to overcome the distrust among any given party that the information from some other party is not accurate).

80. See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 78, at 28 ("The very offer of a particular proposal or concession—especially if the offer comes from an *adversary*—may diminish its apparent value or attractiveness in the eyes of the recipient.").

81. Cf. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

least if they are exposed to full information about such communities and their values.

To preview, I wind up skeptical of just how well gay and lesbian mediation will let couples engage in private ordering for two principal reasons. First, although gay and lesbian mediation may remove bias in the sense of anti-gay animus, it may not eliminate animus based on other characteristics of some people in same-sex relationships, such as their race or class. At a minimum, this point should trouble those in same-sex relationships who might face bias based on such characteristics; it may also trouble those who might not face such bias themselves, but find such bias disturbing.⁸² Second, gay and lesbian mediation may overemphasize legal values and neglect values of various communities. This overemphasis of legal values may characterize much mediation, but it is particularly troublesome when, as with lesbians and gays, the relevant legal values may not have reflected lesbian and gay needs.

Skip and Charles

Skip and Charles met at Harvard Law School, where both got high enough grades to be put automatically on Harvard Law Review. In many long hours in the library, Skip and Charles soon found out they both went to well-known prep schools, that both their fathers were managing partners of prominent Northeast law firms, and that both of them played hockey and lacrosse. (Some classmates might have described them both as white and Episcopalian, but Skip and Charles never noticed such things.) They also discovered, eventually, that both of them found other men attractive, including each other.

Several years later, they decided to move in together. Careful as always, they discussed how they could formalize their relationship. After doing their own research, each consulted with separate attorneys, and they drafted a complex agreement, spelling out the expenses they would share equally, detailing the known resources of each, and how they would divide such assets and future assets and income if they decided to change their relationship or even end it. They also agreed to a clause that stated: "In the event of any disagreement between us that we cannot resolve by ourselves, we agree not to go to court but instead to seek mediation by a mediator affiliated with a gay and lesbian community mediation project or, if none is then in existence, by a mediator

82. See Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1150-51 (1989) (describing "surrogate victims").

who is gay. In the event mediation does not produce an agreement within one month, either of us may elect to have an arbitration by a different person with the same qualifications as the mediator."⁸³

A. Animus and Private Ordering

Have Skip and Charles made a good process choice? Many accounts of gay and lesbian couples detail horrible, homophobic-sounding court decisions.⁸⁴ Others report casual homophobia even in cases that do not involve issues of sexual orientation:

One lesbian attorney wrote that, after she shook hands with the clerk of the court, a government official "commented to the clerk of the court, knowing that I was a lesbian, 'How can you stand her putting her hands on you?'"⁸⁵

A number of accounts often rather casually suggest that some other process, such as community mediation, might reduce "bias" or "prejudice."⁸⁶

To begin with, one should understand the kind of judicial bias that privatization tries to avoid. Of course, Skip and Charles may have generic reasons for favoring alternatives to the courts, such as a general belief that courts cost more money, have less flexibility in fashioning remedies, or take too long to make decisions. All of these propositions have been debated, and this Article is not the occasion to assess them. Rather, the focus here is not on the decision by Skip and Charles to seek some alternative to court, but to seek an alternative that is conspicuously gay. And, as part of a same-sex couple in a society that historically stigmatizes same-sex couples, Skip and Charles may have a more intense interest in keeping their dispute private, which is a generic appeal of ADR.⁸⁷

83. Although this vignette may seem excessively narrow, it reflects the view that many who came to "the gay community" were not as wealthy or well off as people like Skip and Charles. See KATHY WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 129 (1991) (observing that many who were disappointed in appeals to the gay and lesbian community "associated community strictly with wealthy gay men, who were neither representative of nor identical with the totality of gay people").

84. See *supra* note 7.

85. *Report on Sexual Orientation Bias*, *supra* note 7, at 319.

86. See *supra* note 8.

87. Advocates of mediation for lesbians and gays emphasize the importance of privacy: "Because it maintains privacy, mediation may be even more appropriate for dispute resolution involving lesbians and gay men than for similar disputes involving heterosexuals. Many gay people live two separate lives—one in public and one in private." Bryant, *supra* note 8, at 391. Apart from such purely individualistic concerns, individuals may want to keep disputes with

Most likely, however, couples like Skip and Charles would choose to draft the gay ADR clause that they did because they fear anti-gay bias. Their most basic fear is crude animus: the courts will be so overwhelmed by a reaction to their same-sex relationship that it will muck up the facts. The idea behind this kind of bias is that an individual decisionmaker does not accurately perceive basic facts;⁸⁸ couples like Skip and Charles want the same basic treatment.⁸⁹ To the extent that the argument for gay and lesbian mediation is an argument for freedom from bias, it parallels some of the arguments for other identity-based dispute resolution systems, such as Jewish lay arbitration in areas in which Jews face intense prejudice.⁹⁰

All this gives individuals like Skip and Charles a reason to try to avoid judicial bias by looking to another forum such as gay and lesbian community mediation. But will Skip and Charles face similar bias in medi-

same-sex partners private (or not) because of the way they think it will affect a larger lesbian and gay community. See Part IV *infra*.

88. See, e.g., Shapiro, *supra* note 7, at 660 n.211 ("Bias leads judges to ignore evidence contrary to their beliefs or to reach conclusions in the absence of evidence."). Some people assert that the very notion of "bias" or "prejudice" depends on a notion that there is some truth "out there" that is independent of the perspective and interpretations of various persons. See Cass Sunstein, "On Finding Facts," in QUESTIONS OF EVIDENCE, *supra* note 69, at 196 ("There really are facts, and truth, and objectivity, at least for purposes of everything we ought to care about. The very notion of bias—not a dispensable motion—makes sense only with some such assumptions."). In custody cases, for example, this view would imply that picking one person to raise a child rather than another is in the "best interests of a child." Although many accounts of bias, particularly in the area of bias affecting lesbians and gays, speaks this language of "bias" as getting the facts wrong, I disagree that we can only say there is "bias" if there is deviation from the "truth." We can still believe that there is no truth (or at least no truth knowable to human-kind) and believe in bias. We may believe that "bias" is procedural, when the procedures for establishing "facts" do not give individuals a fair opportunity to present their version of facts and a fair opportunity to have those considered. See Kelman, *supra* note 69, at 176 (expressing some confidence that "one may (at least claim to) believe that there are ultimately no 'true' propositions about either 'external facts' . . . or values, but believe that existing institutions will unduly discount the beliefs of oppressed people unless we self-consciously alter their natural tendencies"); cf. DENNIS PATTERSON, LAW AND TRUTH 163 (1997) (even if the way we speak of truth does not correspond to some transcendent truth, it "does not mean that we cannot come up with better and worse ways of carrying on our practices").

89. Of course, many not as virtually "normal" as Skip and Charles may not want sameness of treatment; they may want to redefine normalcy itself to reflect their needs, such as needs as women. See, e.g., MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY 20–22 (1991); Littleton, *supra* note 66, at 33 n.84.

In a sense, the community-enhancing notion of mediation discussed in the next part is an institutional response to critics of formal equality: A different notion of equality is defined by some subcommunity, and that subcommunity enforces its different notion of equality through its own processes, such as community mediation.

90. 1 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 35 n.106 (Bernard Auerbach & Melvin J. Sykes trans., Jewish Publication Society, 1994) (noting that some argued that Jews should take their disputes before lay Jewish tribunals rather than courts because of the "fairness of the judges").

ation? To answer that question, we need to understand the ways in which bias may disadvantage some individuals in mediation. There are several possibilities. One way that mediation may incorporate bias is the way in which parties themselves may be encouraged to recreate biases. Standard mediation questions designed to get one party to step into the shoes of another may, Isabelle Gunning fears, entrap parties in frameworks ("cultural myths" as she calls them) that may make it hard to advocate on one's own behalf.⁹¹ According to Gunning's recent critique of bias in mediation, a mediator's usual method of mirroring the language and values of the parties may lead the mediator to incorporate biased frameworks. If Skip and Charles had different incomes or assets, one might imagine a mediator who listened to the wealthier one invoke self-reliance and suggest to the other, "I think what you're saying is, 'A man has got to take care of himself.'" Another way to describe how such bias infects a bargaining process is to think of the mediator as reinforcing some role type for the parties: you are, for instance, a man, and a man has to do what a man has to do.⁹² The bias may be quite insidious because it may be hard for a party to invoke responses such as, "Well, I have a different conception of who I am," or "Well, I have a different conception of what a man should do." A second related way in which the mediator's bias may disable a process is by making a party feel so uncomfortable and under-valued that the party does not meaningfully participate in mediation.⁹³ Perhaps the party will never say enough to reach an agreement; perhaps the party will "agree" to get out of an uncomfortable situation, but then not follow through on his "agreement." A third variation is that the real issue is not what the mediator does, but how the parties regard him: if one party thinks the mediator and

91. See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 79.

92. See Freshman, *supra* note 16 (describing how a notion of "doing what one has to do" may depend on the ways in which an individual is able to redefine how he thinks about which "one" of competing identities or roles he adopts).

93. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1586 (1991); FINEMAN, *supra* note 89, at 167. Mediators often favor joint custody of children and react to women who want sole custody—perhaps because "[t]he prospect of a continued relationship with an ex-spouse may be too horrifying to contemplate"—as if the women have some psychological problem or ill motive. See *id.* Mediators sometimes assume mothers are "clinging and overly dependent on their roles as mothers"; sometimes mediators assume the women are "greedy" and using children to get more money; other times mediators think women are "vindictive" and "use the children to get back at their ex-husbands." *Id.*; see Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 937-38 (1997) (indicating that mediators sometimes make direct suggestions of good outcomes and sometimes "evaluate[] by making and articulating a judgment that the party is acting sick as a ploy to advance her position").

the other party share some essential characteristic, such as race, the party with a different race may feel so uncomfortable that she performs poorly in the mediation.⁹⁴

The first two critiques might be addressed by educating mediators as to certain stereotypes and language and behavior that may be interpreted as demeaning or stereotyping.⁹⁵ The third critique often pushes toward some form of identity-matching, such as ensuring that mediations between Latinos involve Latino mediators rather than merely those sensitive to Latino cultures. This same division also applies to discussion of gay and lesbian couples. Although there are only a few published works that specifically address the condition of lesbians and gays in mediation, one published exchange reflects this split: some think those who mediate with gay and lesbian couples should learn more about gay and lesbian culture; others think there is a need for mediators to be lesbians and gays themselves, or at least interact with lesbian and gays in some personal way.⁹⁶ This same debate also occurs in scholarship on therapy, some of which suggests that gays and lesbians should have gay and lesbian therapists, and other schol-

94. See LaFree & Rack, *supra* note 9, at 786 (discussing that when two nonwhite mediators mediated a small claims case, there were significantly different results from cases in which one or more mediators were white). I thought about this expectation more during the live UCLA Symposium on Alternative Dispute Resolution, which is embodied in this volume of the *UCLA Law Review*. During her talk, Carrie Menkel-Meadow mentioned how women seem relieved when they learn that she will be the arbitrator in their cases.

95. The most recent National Institute for Trial Advocacy training materials for mediators unambiguously favor greater training for mediators in different cultures, but does not unambiguously address whether mediators must be screened so that they share certain identity characteristics with parties. See MARK D. BENNETT & MICHELE S. G. HERMANN, *THE ART OF MEDIATION* 115-16 (1996). On the one hand, one might interpret the manual as leaving identity-matching open because it states, "[W]e do know that there is a problem [with different outcomes for members of different groups] which cannot be dismissed by saying that a good mediator can mediate anything." *Id.* at 116. On the other hand, the manual emphasizes short term solutions and the need for more empirical work "to explore the causes of disparate outcomes in mediation and to learn what interventions might ameliorate or erase this phenomenon." *Id.*

96. Compare Gunning, *supra* note 8, at 50 (emphasizing that mediators for lesbian and gay couples should have a "textured and personal understanding of lesbian and gay lives" by interacting with lesbians and gays rather than just reading social science data on lesbians and gays), and Teresa V. Carey, *Credentialing For Mediators—To Be or Not To Be?* 30 U.S.F. L. REV. 635, 637 & 637 n.7 (1996) (West Hollywood mediation project in a largely gay community told a heterosexual mediator that he could not perform mediation for lesbians and gays), and Telephone Interview with Martina Reeves, Attorney/Mediator (Mar. 1991) (stating she did not think such mediators had to be lesbian or gay, but she would worry if mediators "never hang out with lesbians or gay men"), with Douglas McIntyre, *Gay Parents and Child Custody: A Struggle Under the Legal System*, 12 *MEDIATION Q.* 135, 143-45 (1994) (emphasizing that mediators for lesbians and gays should study social science data on lesbians and gays).

arship that suggests that gays and lesbians should have therapists familiar with gay and lesbian cultures.⁹⁷ For the remainder of this Article, I will bracket this discussion and use lesbian and gay mediation to refer to mediation that aims to be fair and effective for same-sex couples, whether or not the mediators themselves are lesbian or gay.

As applied to same-sex couples, lesbian and gay mediation promises the best chance to avoid animus with "virtually normal" couples like Skip and Charles, who are unlikely to be viewed through any bias other than homophobia. This is good news for Skip and Charles, but it may be less reassuring to others in same-sex relationships. A wealth of new scholarship on gays and lesbians of color, and of different classes, and a more general appreciation of how such "intersections" of discrimination operate, make it hard to believe that any lesbian or gay mediator will provide a safe and effective environment for mediation for every same-sex couple.⁹⁸ One gay man of color describes the question starkly: "As a gay man of color I find certain aspects of my identity empowered and fortified within the space of the ethnic family while other aspects of my identity are negated in that very space I fall in between what seems to me a split between the racially

97. Compare, e.g., Reese M. House & Elizabeth Holloway, *Empowering the Counseling Professional to Work with Gay and Lesbian Issues in Counseling Gay Men and Lesbians*, in COUNSELING GAY MEN & LESBIANS: JOURNEY TO THE END OF THE RAINBOW (Sari H. Dworkin & Fernando J. Gutierrez eds., 1992) ("all counselors have gay and lesbian clients"), and Donald L. Mosher, *Scared Straight: Homosexual Threat in Heterosexual Therapists*, in GAYS, LESBIANS, AND THEIR THERAPISTS 187 (Charles Silverstein ed., 1991) (describing how a heterosexual therapist says he "managed to change to work effectively with gay men and lesbian women"), with, e.g., Harold Kooden, *Self Disclosure: The Gay Male Therapist as Agent of Social Change*, in GAYS, LESBIANS AND THEIR THERAPISTS, at 142, 146 (commenting that because there are few gay male role models, "[f]or many gay males, psychotherapy with a gay male therapist . . . is their first experience toward making the transition to adult manhood"), and Minow, *supra* note 69, at 650 (describing "a gay person who wanted a gay lawyer").

98. See, e.g., Hutchinson, *supra* note 68, at 583-613 (on lesbians and gays who may also be some combination of poor, African-American, and Hispanic); Valdes, *supra* note 68 (African Americans and Hispanics); Ruthann Robson, *To Market, To Market: Considering Class In the Context of Lesbian Legal Theories and Reforms*, 5 S. CAL. REV. L. & WOMEN'S STUD., 173, 173-74, 178-84 (1995) (class). For a therapeutic perspective on such differences, see COUNSELING GAY MEN & LESBIANS, *supra* note 97, at 114-75 (chapters on Asian Americans, Latinos, African Americans, and persons with physical disabilities). Although coupling between persons of different races has increased, such coupling remains less common than one would expect if race were not a factor in coupling. Rachel Moran, *Interracial Intimacy* (unpublished manuscript, on file with the author). Despite the numerous publications on intersectionality, many studies of court bias, as Resnik notes, simply ignore intersections and choose to study bias without looking at intersectionality. Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 975 (1996).

marked family and the white queer."⁹⁹ Consider a more complicated scenario:

Mary and Susan: Part 2

Recall that Susan and Mary lived together for five years, Susan gave birth to Adrienne, but Susan then took a job at a local gay and lesbian political organization, leaving Mary to take care of Adrienne. Recall that the couple considered getting married by a local rabbi.

Three years later. Susan leaves her work at the political organization and takes a job in a Fortune 500 corporation. Susan decides that she wants to live apart from Mary, and would prefer Mary not to raise Adrienne. Susan decides that, however much she likes equality and tolerance as a goal, she does not want Adrienne to have the burden of explaining why she has "two Mommies." But Mary insists that she would like to continue to care for Adrienne, and she would like Susan's financial support to do so.

B. Bias Beyond Homophobia: Whose Community? What Bias?

Susan and Mary did not agree in advance to use a gay and lesbian mediation process; should they choose such a process now? At first blush, the argument for lesbian and gay mediation might seem even stronger than for Skip and Charles. After all, Skip and Charles did not have children, about whom courts show particularly egregious treatment of lesbians and gays. It would be tempting to suggest that Susan and Mary, to avoid bias because judges would perceive them as lesbian, should let some kind of gay and lesbian mediation process facilitate their agreement about Adrienne, or, if they still cannot reach an agreement, to enter a binding decision.

In more specific ways than Skip and Charles, Susan and Mary may fear a court will treat them unfairly in making decisions about their child. Both might fear that, if a court were aware of the prior same-sex relationship, it might deny both Susan and Mary custody, awarding custody to another relative. So a decisionmaker might decide in otherwise equivalent cases, for example, that those who are primary caretakers for a child deserve at least some visitation rights, but might deny Susan any such visitation

99. FEAR OF A QUEER PLANET xvii (Michael Warner ed., 1993) (internal quotations omitted); see also GEORGE C. PAVLICH, JUSTICE FRAGMENTED: MEDIATING COMMUNITY DISPUTES UNDER POSTMODERN CONDITIONS 152 (1996) ("[C]ommunity mediation might become part of a range of democratic practices through which people are able to formulate social identities that best capture the particular oppressions they must face on a daily basis.").

rights. Similarly, a court might not make Susan provide any financial support to Mary to care for Adrienne, even if a court would make a husband in the same position as Susan provide support.

Although gay and lesbian mediation may well help avoid such biases if Skip and Charles had a child, Susan and Mary face a more tangled web of prejudices. Mary may fear that a judge would see her as irresponsible because she was only a full-time mother, not engaged in market work. If Mary had not worked in the past, or lacked advanced education, she might fear that the judge's bias would also be class-based, a prejudice that it was irresponsible to devote herself to mothering.¹⁰⁰ Thus, pure anti-gay bias may not be what full-time mothers like Mary fear most. Instead, she may fear that her full-time mothering will be valued less than the wage-earning work that Susan does.¹⁰¹ On the other hand, Susan may reasonably fear that a judge might value her less because he saw her as a stereotypically ambitious person who neglected hands-on mothering.¹⁰²

Even for Susans and Marys who do not have children, class-related questions may also arise. One mediator described a mediation between two women, one wealthier and one from a working-class background, over the division of a house when they ended their relationship. The wealthier woman had contributed more money toward the house. In the first mediation, the women "worked out an agreement that made sense for them" on splitting the profits. Later, however, the parties agreed to meet again when the profits from the house fell short of their expectations. In both mediations, the "give and take" involved acknowledging the contribution of the working class woman and also her partner in not simply charging rent. "The solution they chose," the mediator concluded, "had nothing to do with law, but what felt good emotionally for them."¹⁰³

100. See Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339 (1996). See generally Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 32 (1990) (describing the way white women law students at a gathering "seemed barely aware of the significance of class and racial divisions among women").

101. See FINEMAN, *supra* note 19, at 9 (commenting that one should refer to caretaking rather than caregiving because "[n]urturing work should not be assumed to be 'given' as a gift, to either the dependent or the society that benefits from the 'caregivers' sacrifices").

102. In sociological terms, a factfinder may stereotype all women as fitting only one stereotype, such as Mother or Iron Maiden, a domineering, cold autocrat. See Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89 (1990). In psychological terms, a factfinder may only view women through schemas that incorporate such assumptions about women. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

103. See Telephone Interview with Martina Reeves, *supra* note 96.

Another problem Susan and Mary may face is how courts treat affection. It might be easy to conclude that at least *that* kind of bias is really just because Susan and Mary are in a same-sex relationship.¹⁰⁴ It is often unremarkable when men and women show affection for each other in front of children: a father refers to a girlfriend, a father holds hands with a girlfriend—these are not the kinds of things even reported in cases, let alone weighed for judicial significance. When a man shows affection for another man, or a woman refers to the fact that a woman is a “girlfriend,” then these activities may be recognized as events,¹⁰⁵ and sometimes to the degree that courts will make custody decisions on such encounters that would be unremarkable if the participants were of different sexes.¹⁰⁶

Even when it comes to distorted views of what constitutes appropriate affection in front of children, some gays and lesbians may face other forms of biases as well. The stereotype of hypersexuality is not merely a preconception of gay men but also of people of color.¹⁰⁷ In addition, with two women, because stereotypes of lesbians do not include the same degree of hypersexuality as stereotypes of gay men, the *only* (or predominant) relevant stereotype of hypersexuality may be the stereotypical assumption that those who are poorer, less white, or both, are more hypersexual.¹⁰⁸

Byron and Saul

Byron is a sixty-year-old heart surgeon who works long hours. He often hires sex workers (also known as prostitutes). He begins to feel close to Saul, a twenty-something sex worker, and suggests that Saul give up his work and move in with him. Saul also has some feelings for Byron, but he does not want to lose his independence. Byron's attorney drafts an agreement that says Byron will support Saul in return for

104. See Shapiro, *supra* note 7.

105. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 587–90 (1992).

106. See, e.g., *Chicoine v. Chicoine*, 479 N.W.2d 891, 892–93 (S.D. 1992) (holding that the trial court abused its discretion in letting mother have visitation rights when the mother and a woman were “affectionate toward each other in front of the children, caressing, kissing and saying ‘I love you’”); Shapiro, *supra* note 7.

107. See, e.g., Hutchinson, *supra* note 68, at 569 (describing stereotype of “hot” Latin male); cf., e.g., Allen, *supra* note 100, at 29–30 (describing the need for role models for women of color to deal with sexual harassment in the academy); Crenshaw, *supra* note 75, at 157–60 (describing abuse of women of color because of their perceived sexual availability).

108. See, e.g., Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438–39 (1991).

*Saul helping around the house and escorting him to various parties.¹⁰⁹
Byron and Saul have a falling out when Byron learns that Saul has
continued to see some men for money.*

C. Substance and Private Ordering: The Problem of Thick Procedure

The procedural bias paradigm set out above assumes that those claiming bias and those supposedly biased share the same substantive values, but the biased cannot get past their bias to see the underlying facts. The procedural bias chorus is: "Can't you see? Don't you understand?" Feminist critiques of mediation identify a different kind of bias, a thickness of procedure that makes it much easier to bring about certain substantive outcomes than others. For example, express law says that courts should award sole custody in some circumstances, but mediators often make those who request such custody (typically women) feel so awful that women "agree" to joint custody;¹¹⁰ express law states that the mere fact of same-sex orientation and, in some jurisdictions, even same-sex acts does not render a potential parent less fit, but, as a procedural matter, appellate practice will uphold trial court decisions denying custody to lesbians or gays even when there is no competent evidence that the parents are unfit.¹¹¹ The criticism of procedure is not really an attack on procedure as such, but rather how procedure in practice embodies contested normative views.¹¹² Thick procedure is a real problem for same-sex couples—not just in courts, but in alternative processes as well. "Thick procedure," in general, means that the choice of procedures, including the configuration of decisionmakers as judges, mediators, and so on, in fact channels parties to agree to certain substantive arrangements.¹¹³

One form of thick procedure that may involve many privatized same-sex relationships involves contested issues about contract formation. In some instances, same-sex couples may reduce an agreement to writing, and

109. This vignette is based on an interview with a therapist, who requested that identifying characteristics be changed to protect the identity of his patient.

110. See FINEMAN, *supra* note 89, at 156–57.

111. See Shapiro, *supra* note 7, at 630–32.

112. Cf. Mark Kelman, *A Rejoinder to Cass Sunstein*, in *QUESTIONS OF EVIDENCE*, *supra* note 69, at 199, 202 ("We suppress the fact that we really do differ on what our normative conceptions are . . ." and instead cling to "unshakeable beliefs in frequently unproven and unprovable 'facts.'").

113. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* § 60, at 396 (1973) (describing a theory of justice that depends on arranging institutions that facilitate a range of possible substantive goals and therefore presupposes only a "thin conception of the good").

parole evidence rules may exclude some evidence about intent.¹¹⁴ On the other hand, many same-sex relationships may depend on oral or implied-in-fact contracts.¹¹⁵ Just what oral statements jurors (or judges acting as fact-finders) find credible, and just what facts imply what agreement, may depend on visceral reactions to what particular parties value and do.

Though most attention to bias involving same-sex couples focuses on custody, bias may also involve issues of fault and determinations of support. One familiar kind of fault at common law involved one spouse having sexual relations with someone other than the spouse. Black letter law in most states says that fault plays relatively little role in financial issues such as property division and support payments.¹¹⁶ And, in same-sex relationships recognized by contract law, provisions about sex are probably not enforceable because courts often say sex cannot be consideration for a contract.¹¹⁷ Nevertheless, such fault may enter judicial determinations covertly.¹¹⁸ For example, a partner who violates the norms of fidelity may be judged to be generally less credible.¹¹⁹

Consider Saul's situation. Saul has a written agreement with Byron, and the written agreement formally does not depend on any promises that Saul will have sex with Byron or refrain from having sex with others. When Byron tries to enforce that agreement, however, he may have difficulty. A gay or lesbian mediator might be interested in discussing how

114. See Ertman, *supra* note 4, at 1137-40 & 1139 n.130 (merger clause). For an example of such a contract, see LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 316-19 (1981).

115. See Ertman, *supra* note 4, at 1141-42; Paul Freud Wotman, Panel Comments at the American Association of Law Schools Joint Meeting of Sections on Contracts and Sexual Orientation Issues, in San Antonio, Tex. (Jan. 1996).

116. See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 29 (1985). Recently, although some state legislators have tried to reintroduce the concept of fault into divorce statutes, these efforts generally have not been successful. See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 613-14 (1997); Laura Gatland, *Putting the Blame on No-Fault*, ABA J., April, 1997, at 50, 52. But see Kevin Sack, *Stricter Marriage Pact Gets Big Boost*, N.Y. TIMES, June 24, 1997, at 1, available in 1997 WL 7841248 (reporting that Louisiana adopted law allowing couples to elect either a marriage that would allow no-fault divorce or a "covenant marriage," which would limit the grounds for divorce).

117. See, e.g., *Bower v. Weisman*, 650 F. Supp. 1415, 1424 (S.D.N.Y. 1986); *Marvin v. Marvin*, 557 P.2d 106, 113-14 (Cal. 1976).

118. See MACCOBY & MNOOKIN, *supra* note 9, at 95 (reporting that "there is evidence that in the private negotiation that occurs at the time of separation, 'fault' is indeed considered, at least with respect to the transfer of money and property").

119. Cf. PAVLICH, *supra* note 99, at 175 n.31 (In a mediation between a husband and wife, the mediator asked the husband if "he was 'seeing' anybody else, '... another woman, perhaps?'").

Saul and Byron feel about the overall relationship, including Byron's resentment that Saul was intimate with other men. There would be a good chance that the mediator might share some of Byron's feelings about sexual exclusivity. Some might characterize that perspective as a set of shared assumptions about monogamy or relationships.¹²⁰ Others might suspect that the feelings involved a lingering discomfort at same-sex intimacy, what some might call "internalized homophobia." In any event, Saul might not feel comfortable with the mediator and might interpret his communication, both verbal and nonverbal, as judgmental. This might lead Saul to forego some of the benefits he would have gotten under his agreement with Byron because Saul might feel less capable of insisting that Byron pay him accord-

120. The assumption that same-sex relationships should resemble the monogamy that is at least a formal feature of contemporary marriage is often associated with the notion of "virtually normal" gays and lesbians. See SULLIVAN, *supra* note 45. Sometimes, as in Sullivan's work, an author will explicitly say he thinks monogamy is a worthy norm. Often, however, the defense of monogamy is not explicit, but rather a subtextual idea, often in images of how gays and lesbians live or want to live:

[G]ays and lesbians are not interested in merely "being gay" (whatever that means): they are interested in engaging in conduct: making love, forming relationships, dating, displaying photos of partners in the workplace, wearing wedding rings, living together in rental units, holding hands in public and otherwise expressing desire, affection, and commitment.

Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236, 249-50 (1996).

It is both a problem and problematic to figure out how many gays and lesbians share some norm of monogamy and/or actually practice monogamy. It is problematic because there are different definitions of who is gay and lesbian. A relevant part of that problem is how one classifies persons who do not consider themselves gay, but who engage in some sexual activity with persons of the same sex. Many men who get paid by the sexual encounter do not think of themselves as gay. See DONALD J. WEST & BUZ DE VILLIERS, *MALE PROSTITUTION* 22-32 (1992). In addition, people from different national origins may be less likely to identify as gay. Some accounts of Mexican culture, for example, report that the word *mayante* "designates the active masculine participant in a homosexual pairing but does not connote him homosexual." JOSEPH CARRIER, *DE LOS OTROS: INTIMACY AND HOMOSEXUALITY AMONG MEXICAN MEN* 11 (1995). Apart from such problematics, it is a problem to get descriptions of behavior because individuals may report behavior that they think a surveyor wants to hear; individuals may also fail to report behavior accurately because they themselves repress memories of behavior that does not conform to their perception of societal norms. See Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GEN. L. & POL'Y 207, 209 (1995).

With these caveats in mind, much evidence suggests that relatively few gay men practice monogamy. See Jay P. Paul et al., *The Impact of the HIV Epidemic on U. S. Gay Male Communities*, in *LESBIAN, GAY AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES* 366 (Anthony R. D'augelli & Charlotte J. Patterson eds., 1995) (although a majority of gay men agree "It's best to be monogamous," a study reports "the percentage of relationships that were monogamous remained less than 10 percent at most times"). But see Larry McFarland, *Male Couples in Context: Issues for Therapeutic Consideration* (1997) (visited Aug. 8, 1997) <<http://www.buddybuddy.com/mcfarla-1.html>> (discussing studies that suggest more male-male couples are sexually exclusive since the spread of HIV).

ing to their agreement. In effect, then, the mediation involves a thick procedure that, de facto, exacts a penalty for those who, like Saul, violate a norm of monogamy. In theory, one also might imagine a reverse scenario: mediators who share norms of non-monogamy and who may treat those who value monogamy as unreasonable, politically incorrect, or psychologically not well.¹²¹ In either scenario, however, parties might object that they did not realize that the choice of gay and lesbian mediation as a forum (or as a process) would subject them to particular norms. And in either case, parties might not object because the norms operate through the way in which a mediator may pathologize, such as characterizing differing views as symptomatic of "internalized homophobia."

In addition, a mediation between Saul and Byron might combine some of the forms of animus discussed above. Saul is younger than Byron, and he may face certain bias because of his relative youth.¹²² On the other hand, there is evidence that older gay men may not be valued very highly by other gay men, young and old, which may disadvantage the older Byron in the mediation. Likewise, in many such situations, the younger person may also be a person of color or of a different social class, or less well educated or able to perform in a verbally intensive mediation.

D. Perceived Animus, Private Ordering, and Therapeutic Mediation

The previous subsections have considered the ways in which the impulse to avoid procedural bias involving same-sex couples does not necessarily require gay or lesbian mediators because the relevant sources of bias may depend on other real or perceived characteristics of such couples, such

121. Walters, for example, fears that much of the recent queer theory that treats sexuality as a postmodern, ever-changing thing is based on the experience of gay men of a certain period who engaged in sex with many different persons and who may not have known sexual partners well. Susanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830, 850 (1996) ("Now gay male sex and its histories become the very model of radical chic: the backroom replaces the consciousness-raising session as a site of transformation.").

122. Some believe that the AIDS epidemic has exacerbated tensions between younger and older gay men:

Historical changes in the gay community as a consequence of the AIDS epidemic have contributed to a "generation gap" between older and younger gay men. Every generation feels the need to assert its independence from previous generations, yet the highly threatening nature of AIDS may have intensified the younger generation's motivation to separate themselves from their gay elders . . . Young men have expressed feelings ranging from envy to bewilderment to disgust in reconciling the differences between their experience and that of the earlier generation.

Paul et al., *supra* note 120, at 376.

as race, poverty, and so on. This raises the question whether perhaps gay and lesbian mediation facilitates private ordering because same-sex couples *think* that homophobia is the most relevant form of bias and that gay and lesbian mediators will best understand them.

Much psychological literature suggests that practicing therapists, who may practice a kind of couples therapy that is a form of mediation,¹²³ think lesbian and gay men have better therapeutic experiences with other lesbians and gay men.¹²⁴ To the extent that one views a process of mediation as therapeutic, regardless of agreements reached, then this therapeutic literature would be consistent with gay and lesbian mediation (at least to the extent that it suggests better therapeutic results when same-sex couples have lesbian or gay mediators).¹²⁵

The strongest argument for gay and lesbian mediation, then, may be that couples who feel comfortable that lesbian and gay mediators are free from bias—even if they are sometimes mistaken in this belief, as the previous subsections suggest—may reach better agreements.¹²⁶ Part of this "better" assessment may depend on the notion that parties are more satisfied or, the closely related notion, that there will be better "compliance," largely because the parties feel more satisfied. This is a common theme of

123. See Engelhardt & Triantafyllou, *supra* note 46, at 332–41 (describing mediation involving a therapist and an attorney); Telephone Interview with Roberta Bennett, *supra* note 10 (plans to offer mediation to same-sex couples involving a therapist and an attorney); see generally Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RES. 1, 42 n.123.

124. See William Holahan & Sue A. Gibson, *Heterosexual Therapists Leading Lesbian and Gay Therapy Groups: Therapeutic and Political Realities*, 72 J. COUNSELING & DEV. 591, 594 (1994) (surveying various views about the importance of gay and lesbian identity and familiarity with lesbians and gays and concluding that "[a]lthough it is surely desirable for gay and lesbian groups to be led by experienced group therapists who are lesbian or gay . . . , this condition is not necessary for clients to have a beneficial group therapy experience."); see also *supra* note 97.

125. See Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1757–58 (1994) (emphasizing that one of the reasons that parties may find arbitration therapeutic is because they find it comfortable); see generally BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* 385–88 (1997) (negotiation and ADR may serve therapeutic role).

126. Several people who discuss various efforts to establish lesbian and gay community mediation discuss how they perceived a need to create an environment in which lesbians and gays "feel safe." Engelhardt & Triantafyllou, *supra* note 46, at 328 (an attorney and a therapist who founded a lesbian mediation project in Boston state:

[o]ne of the reasons this process [of lesbian mediation] is so important is that courts are unable to deal with conflicts between lesbians without "punishing" the participants for their homosexuality. Hence, gay people do not generally have access to courts without the attendant fear of being found out. A lesbian mediation service is unique because it provides an additional level of safety for the participants.)

Center Quality of Life Programs (last modified Aug. 1, 1996) <<http://www.gaycenter.org/quality.html>> (stating that the independent Lesbian and Gay Mediation Service, founded in New York in 1990, affiliated with the Lesbian and Gay Community Center to, among other things, "provide a safe space for clients").

much scholarship and popular press about mediation, but it is a view that I largely reject below in sketching out a concept of community-enabling mediation.¹²⁷ To preview that argument briefly, I suggest that a mediation is more valuable if it leads parties to consider the range of possible ways of structuring their relationship, including the potential views of a variety of communities. So, to the extent that couples merely self-report satisfaction, or one infers satisfaction from compliance, one will not necessarily know that the couples have chosen the kind of relationship that is best for them.

A second and more difficult argument to consider is that couples who falsely believe that gay and lesbian mediation will be fairest and most "safe" will feel free to be more creative about problemsolving, including choosing the kind of relationship that is best for them. This argument is particularly difficult because the kind of elaborate community-enabling mediation I sketch out below may require more time and emotional commitment than some other forms of mediation. Thus, there may be a tradeoff between the ultimate goal to consider all forms of relationships and communities, which would not necessarily put gay and lesbian identity at the center, and the willingness of couples to engage in that kind of process with someone with whom they do not feel complete comfort.¹²⁸

E. The Limits of Passive Neutrality in Postmodern Conditions

For the reasons discussed above, individuals in same-sex relationships may want (and/or need) to know more about a process in which lesbians and gays will be involved: different people in same-sex couples may have other identifications based on such things as race, class, ethnicity, disability, age, and just plain views of the world. One would hope for an understanding of the role of the mediator that would help individuals juggle these different commitments—and let them try on other commitments and values they might find valuable. Instead, descriptions of ideals of mediation and mediation practice often betray a notion of passive neutrality. For

127. See *infra* notes 227–238 and accompanying text.

128. A final consideration is whether it violates principles or laws of antidiscrimination to give effect to a couple's belief that only a lesbian or gay person may mediate their dispute. This is a serious question and deserves full treatment elsewhere. In many jurisdictions, the *legal* answer will be easy: many courts do not see discrimination against lesbians and gays as illegal discrimination; in other jurisdictions, statutes or court decisions do prohibit such discrimination. See generally, e.g., *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1625–30 (1996) (surveying state laws that prohibit discrimination on the basis of sexual orientation).

purposes of this Article, the most important feature of passive neutrality is its theory and practice¹²⁹ of passive norms: mediators try not to describe values, principles, and norms—with the striking exception of legal norms that often include predictions of what a court might do.¹³⁰

Passive neutrality disables and impoverishes mediation practice in at least three ways. First, by giving legal norms special attention, it empowers those who can best articulate legal arguments, either because they have more legal rights and/or because they are better at making legal arguments.

129. Like many practices of mediation, passive neutrality may differ from expressed ideals. One of the most comprehensive studies of a wide variety of mediators by a wide variety of academics from different disciplines discussed how various mediators shape mediations:

[W]e turn the spotlight on the mediators as the pivotal players. Mediators are not passive participants in any sense. Rather they actively construct the ways a dispute will be handled They participate in the definition of the problem, choreograph the agenda and meetings, exercise control over communication and information, and have direct input into the types of agreements that are possible.

DEBORAH M. KOLB AND ASSOCIATES, *WHEN TALK WORKS: PROFILES OF MEDIATORS* xiv (Jeffrey Z. Rubin ed., 1994) (emphasis added).

130. Another aspect of passive neutrality is the practice of passive emotion: the notion that the mediator is only neutral if the mediator shows no emotion, or at least a compressed spectrum of emotion. One middle-aged, white male mediator in San Francisco who offers his mediation services for a fee, exemplifies passive emotion. He recognizes that some gays and lesbians may feel uncomfortable if he mediates: "We're in an era when people in various minority communities are suspicious of anybody who's a white male. For example, two black men could walk in and say, 'I don't want to deal with this white dude.'" Interview with a San Francisco mediator (1991). That mediator's complaint is that the suspicion of bias is applied unfairly, casting suspicion only on white men: "I think a lesbian, feminist, separatist should recognize that she, too, is going to bring her trip into the mediation—that's part of the problem. It's an attitude that looks one way but not the other." He identifies a particular test for identifying bias; which equates bias with a very strong reaction by the mediator: "Mediators really need to know limits. If a problem stimulates a strong reaction in you, you can't mediate. You can't be a neutral Knowing one's neutrality boundaries is the most important thing."

Passive emotion may have a close affinity with the experience of relatively privileged status in a society in two ways. First, those perceived with certain traits, such as those perceived as women or effeminate men, may be labeled emotional for traits that would be characterized more favorably in men, such as "going with one's gut" or "laying it on the line." See FINEMAN, *supra* note 19 (women); Grillo, *supra* note 93 (women); see generally Case, *supra* note 58, at 28–30 (society may not value traits associated with women, such as higher pitched voices, whether they occur in women or men); Menkel-Meadow, *Portia Redux*, *supra* note 9 (traits associated with men are valued more as good lawyering qualities than traits associated with women). Second, the experience of feeling emotion and anger may track a generally different experience because those from relatively disadvantaged groups may harbor more anger and resentment because of the various kinds of indignities—such as being called "too emotional." See Peggy C. Davis, *Law as MicroAggression*, 98 YALE L.J. 1559 (1989). On the other hand, there are those who believe that relatively privileged people in same-sex couples—those who would not face any bias if they were not lesbian or gay—may harbor more anger because they have lost the privilege they grew up expecting. See John C. Gonsiorek, *Gay Male Identities: Concepts and Issues*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES* 24, 27 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

Second, passive neutrality may cramp couples' ability to engage in private ordering because individuals may not have enough sense of the alternative ways they might structure their lives and alternative values they might try to apply. Third, even if couples might arrive at the same arrangements, those arrangements might be more valuable (to them or others) to the extent they were chosen after a process of considering alternatives rather than built upon a sense of false necessity.

We should carefully consider what types of values inform a mediation: is it solely the parties' values or some other set of values such as "the law," the community, the industry, and so on?¹³¹ Most agree that mediators do not simply facilitate settlement and discussion according to the express values of the parties.¹³² This happens in at least two related ways. First, mediators channel discussion toward certain types of values rather than others by expressing varying degrees of approval or disapproval for certain values. Second, mediators may use certain kinds of values as limits on the kinds of agreements possible, such as expressing disapproval for agreements that vary "too much" from what a court might do.

Of all the possible values to bring to a mediation, it is not entirely clear why mediators invoke legal values, let alone predictions of courtroom outcomes. Many mediators and scholars of mediation¹³³ accept rather quickly that mediators should give special treatment to legal principles and legal outcomes. The strongest view is that the mediators should let parties know what a court would do.¹³⁴ An intermediate view is that mediators

131. Riskin distinguishes between those mediators who "facilitate" settlements and those who "evaluate" settlements. Riskin, *supra* note 61, at 24. According to this typology, evaluative mediation "assumes that the participants want and need her [the mediator] to provide some guidance as the appropriate grounds for settlement—based on law, industry practice, or technology." *Id.*

132. See *supra* note 129; see also text accompanying notes 91–94.

133. Scholarship on ADR sometimes privileges legal norms less explicitly in the way that it structures research and scholarship. In a comprehensive yet concise typology of approaches to mediation, Riskin, for example, defines "narrow" mediation as mediation that focuses on "litigation" issues and broader mediation as focusing on "other" issues. See Riskin, *supra* note 61, at 19 ("In very narrow mediations, the primary goal is to settle the matter in dispute through an agreement that approximates the result that would be produced by the likely alternative process, such as a trial, without the delay or expense of using that alternative process."). In making litigation "narrow," the implicit assumption is that litigation is the unavoidable core and inevitable as a possible source of norms, and all other sources of norms are more peripheral.

134. The Commission on Qualifications of the Society of Professionals in Dispute Resolutions draws an implicit distinction between legal norms and principles and other norms and principles. SOCIETY OF PROF'LS IN DISP. RESOL., QUALIFYING NEUTRAL'S: THE BASIC PRINCIPLES: REPORT OF SPIDR COMM'N ON QUALIFICATIONS 18 (1989). Its standards explicitly for mediation recommend that a mediator be able to "help the parties identify principles and criteria that will guide their decisionmaking." But its more general standards that describe the

should tell parties that they should familiarize themselves with relevant legal principles and what a court might decide in similar cases.¹³⁵ The weakest version of this approach is that lawyers should warn parties if they "give up" what mediators perceive as their "legal rights" or what a court would likely award.¹³⁶

To varying degrees, each of these positions privileges legal outcomes and legal norms over other conceivable norms. A typical article on mediation raises the danger that, if a party is "uninformed," then she may feel cheated.¹³⁷ This general account makes enough sense and is the model for informed consent in other professions, such as medicine. The curious aspect is that accounts often treat information about what a court would do

"knowledge of the particular dispute resolution process being used" mention two special roles for knowledge of legal norms and practices:

In mediation, knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration;

Where parties' legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum.

Id. at 19; see also Andrew S. Morrison, Comment, *Is Divorce Mediation The Practice Of Law? A Matter Of Perspective*, 75 CAL. L. REV. 1093, 1134 (1987) (stating that "the lawyer divorce mediator should inform the parties how the local custom and laws would apply in their case").

135. See FLA. R. CIV. P. 10.090(b) (1997) ("When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel."). It is interesting that the Florida rules otherwise generally provide that "[a] mediator shall assist the parties in reaching an informed and voluntary settlement[.]" but do not define what "information" about community practices or other values—if any—are necessary to make an "informed" decision. FLA. R. CIV. P. 10.060(a) (1997). The text of the rule implicitly assumes couples need to know about rights—even if they can't afford to go to court—but do not need to know about community values—even if such values would give them valuable ideas. Apart from the text of the rule, however, Florida's Mediator Qualifications Advisory Panel has interpreted the mediation rules to preclude the mediator from introducing any values, even legal rights. Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need For Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 968–69 (1997) (discussing panel opinion that a mediator may not even ask why a party in a wrongful death action did not seek damages for loss of consortium).

In contrast to Florida's mediation rules, the Model Rules of Professional Conduct for lawyers recognize that clients may be less interested in purely technical legal advice than in broader moral and ethical considerations—the kind of considerations that this Article has associated with, among other things, community norms. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1[2] ("Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant") (emphasis supplied). Nevertheless, the Model Rules yoke this concern to a concern with legal outcomes by noting that "moral and ethical considerations . . . may decisively influence how the law will be applied." *Id.*

136. See, e.g., Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 133 (1985) ("A person who has been fooled, intimidated, or cajoled into believing that his legal rights do not exist, has not made an informed and free choice to trade off those rights.").

137. See *id.* at 133–34.

as the only relevant information. To varying degrees, such approaches recommend a lawyer make a special effort to compare what the parties say to what a court might do, and should do so more thoroughly and more consistently than referencing: (1) what members of the community of one or more parties would value or do; (2) what one or more parties might do after considering the values of various communities; (3) what social science research might suggest.¹³⁸ In effect, this often means parties may never consider such other values.¹³⁹ For example, a mediator who was not limited by a notion of passive neutrality might tell a couple seeking help with a cohabitation agreement that many same-sex couples choose to pool their assets in a joint account;¹⁴⁰ she might even direct the couple to scholarly articles that considered whether such pooling of assets might tend to keep a same-sex couple together in a way similar to lawfully recognized marriages involving heterosexual partners.¹⁴¹

The passive neutrality defense of privileging predictions about what a court might do is that parties want to know what a court might do.¹⁴² One often-cited account of legal negotiation simply states that individuals

138. Of course, as discussed further below, introducing what a "community" values may be problematic depending on how one defines a community. It is *less* of a problem, however, if one discusses several different values and practices of different groups of individuals. How an expert may introduce information without overwhelming parties with his views, however, remains a problem, whether these views be based on law or social science. See *supra* note 93.

139. See AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* 126 (1995) (when lawyers predict what courts will do, it "relieves both lawyer and client of the moral responsibility for figuring out what is fair and of communicating that in a persuasive way to the other side"). Although this passage from Sarat and Felstiner presumes that parties "figure out what is fair" individually, the passage more generally is consistent with the idea that emphasis on what a court does limits what parties can do on their own, be that adversarial or problem-solving negotiation.

140. See BETTY BERZON, *PERMANENT PARTNERS: BUILDING GAY & LESBIAN RELATIONSHIPS THAT LAST* 261-62 (1988) (noting that a "variety of options for money management are possible" and listing "a few of the most common"). Some may wonder if there is a danger in allowing mediators to discuss "common" options and/or social science data because different professionals might characterize the information in different ways. This seems sensible enough, but this does not distinguish such descriptions from descriptions about likely legal outcomes about which lawyers frequently disagree. See *infra* text accompanying notes 153-154.

141. See L.A. Kurdek, *The Dissolution of Gay and Lesbian Couples*, 8 J. SOC. & PERS. RELATIONSHIPS 265 (1991). This example assumes that the parties would value staying together. See Paul et al., *supra* note 120.

142. See *id.* at 122 (divorce clients often ask what a court would do); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 13 (1986) ("When parties resist settling, mediators often make statements about the parties' alternatives. Since most cases were referred by the court, it is the logical alternative to a mediation settlement."); see Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34-35 (1982) (parties may be influenced by inaccurate assumptions about what a court would do).

want to know what a court will do because it is asserted that a court will apply the law if the parties do not reach an agreement.¹⁴³ In a certain formal sense, this may be true, if one makes a bold assumption: absent an agreement, parties can and will litigate to judgment. This bold assumption, however, may not be warranted. As a general matter, empirical work suggests that only a small percentage of disputes filed are resolved by court judgment.¹⁴⁴ Moreover, the relevant number may not all be disputes, but all disputes of the relevant type. As Janet Alexander suggested in the case of securities class actions, litigation to judgment may not be an alternative because there is a nontrivial chance of a horrible outcome or horrible damage from the process of trial, such as adverse publicity.¹⁴⁵ Similarly, with many family law disputes, litigation to judgment is not an option for such things as the feared consequences on children or the emotional turmoil on the married parties themselves.¹⁴⁶

143. See Condlin, *supra* note 136.

A settlement is attractive or not primarily in comparison with alternative dispositions. In dispute-negotiation the principal alternative is a decision by a court. In settling, each side compares a proposed agreement against its prediction of what a court will do, minus the transaction costs of having a court do that.

Id. at 80.

144. The usual figure cited is that something less than five percent of cases go to trial. JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 218 (2d ed. 1996). Therefore, the most likely alternative to a particular form of ADR is not what a court would do, but some other way that the parties would reach an agreement, such as through negotiation or some ADR process, or what would happen if the parties just did nothing. See Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's 'Value-Added' for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 6 (1996) ("Viewed in proper perspective, mediation and other third-party processes are alternatives not to court, but to unassisted settlement efforts . . ."); see also RICHARD L. ABEL, *Introduction to 1 THE POLITICS OF INFORMAL JUSTICE* 9 (Richard L. Abel ed., Academic Press, Inc. 1982) (advocates of "informal justice" deploy various "rhetorical devices" including "false comparisons," such as when "[m]ediation is compared with adjudication . . . but most mediated cases would have been handled by negotiation").

On the other hand, the 95% settlement statistic exaggerates the irrelevance of judicial decisions. The number excludes the substantial number of cases that judges resolve by motion, such as motions to dismiss for failure to state a claim and motions for summary adjudication or summary judgment. See MURRAY ET AL., *supra* ("About one-third of the cases never get beyond the complaint and answer stage, being dismissed upon request of the parties . . . or upon a summary judgment order"); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1521-22 (1995) (more recent statistics on cases dismissed on motion). And in some cases, parties may settle based on what they think a court would do. See Mnookin & Kornhauser, *supra* note 11.

145. See Janet Cooper Alexander, *Do The Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

146. See, e.g., Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context*, 21 L. & SOC'Y REV. 585, 593 (1987) ("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.").

So, too, disputes between same-sex couples may fall into a category of cases involving parties that heavily disfavor litigation.¹⁴⁷ Part of this fear, as discussed above, may stem from a concern of bias and animus because gays and lesbians remain classic out-groups.¹⁴⁸ Indeed, one of the most frequently cited appeals of alternative dispute resolution for lesbians and gays is that it is more private than litigation. Part of this appeal for secrecy may also reflect concerns about the group, such as a desire to present an image more appealing to powerful groups, often defined as the majority.¹⁴⁹

Apart from the notion that mediators should inform parties about the law because it is an alternative to agreement, some people identify law as a "norm" or principle.¹⁵⁰ Precisely why law is a norm, or more particularly why it is a norm different from other many other sources of norms, is not always clear. One implicit argument is that law may be a special norm to the extent that it is the outcome of democratic processes. As Carrie Menkel-Meadow notes, however, it is not well articulated why that claim should trump the claim that agreements should reflect the values of the parties.¹⁵¹ Moreover, some emphasize that marriage, which evolved historically in the context of male subordination of women, does not provide an attractive pedigree for twentieth-century same-sex couples.¹⁵²

Finally, one might imagine that mediators discuss legal arguments and likely legal outcomes because they are easier to predict and discuss than the norms or practices of communities. I am quite sympathetic to the claim that it is difficult to say what a community "does" or "believes"—particularly because it is hard to define the contours of any

147. See *supra* note 8.

148. On out-groups, see, for example, Lusky, *supra* note 73, at 2.

149. For a discussion, see *infra* Part III.F.

150. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES 89 (1981) (law as a potential principle to resolve a dispute); Gary Freedman, The Role of Law in Mediation (unpublished materials, on file with author).

151. See Menkel-Meadow, *Whose Dispute Anyway?*, *supra* note 9.

152. See Polikoff, *supra* note 60. There is some evidence that there were socially recognized unions of same-sex couples many years ago. See *supra* note 1. Even assuming that some ceremony recognized such unions, it does not follow that the institution of marriage reflected the needs or practices of the small number of same-sex couples who obtained such ceremonies.

community.¹⁵³ Therefore, there will always be arguments about what the relevant community is, and what the relevant community believes. But the difficulty with defining what a relevant community believes is not obviously more difficult than defining what a court is likely to do, let alone what a court *should* do. As one study of divorce lawyers indicates, lawyers often doubt they can predict what a court will do; those who think they can make such predictions often disagree with each other about how courts will rule.¹⁵⁴

In light of all the generic questions about why mediators introduce law into mediations, and the more specific questions about why marriage law might inform mediations involving same-sex couples who cannot marry, I was surprised to find some empirical evidence that mediators do in fact use divorce law in mediating same-sex couples. Katherine Triantifillou, who wrote a pioneering piece on lesbian mediation in 1987, now refers same-sex couples to one of three heterosexual mediators that she trusts.¹⁵⁵ Although she decided to refer couples to these mediators because she

153. See Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993). What one might characterize as a community "consensus," another might characterize as a product of power and historical struggles. See *id.* at 363-64; *cf. id.* at 371 ("In short, a focus on consensus simply cannot deliver what it promises: a relatively uncontroversial basis for legal rules and decisionmaking."). How hard it is to define a community may depend—in part—upon why one seeks to define the community. Implicitly, Rubenstein's recent scholarship on gay and lesbian litigation assumes that it is easier to identify the community of gay and lesbian litigators than it is to identify the entire gay and lesbian community for the purpose of having a democratic vote on what goals the community should pursue in litigation. Compare Rubenstein, *supra* note 17, at 1656 (referring to the difficulty in having a democratic vote because of the "ambiguous contours of the 'communities' at issue"), with *id.* at 1680 (emphasizing the need to confer with a community of "professional civil rights litigators").

154. See Erlanger et al., *supra* note 146.

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.

Id. at 599.

155. Telephone Interview with Katherine Triantifillou (Feb. 13, 1997).

trusted their competence as mediators and their lack of homophobia, she discussed one unintended consequence: heterosexual mediators who often handle heterosexual divorces view same-sex mediations through the "prism of divorce law":

Everyone has a view of what a family is, and what a contribution to the family is. It depends on how you view the marital enterprise. If you see two guys as individuals, you may see things one way. If you see two guys as part of a marital enterprise, you may come down the other way.

...

Having gay people go to straight mediators means mediators view them jointly in the marital enterprise, through the prism of divorce law, and will apply those kinds of concepts.¹⁵⁶

Oddly, then, same-sex couples may find themselves bargaining in the shadow of the law of divorce even if there is little evidence courts apply divorce law to unmarried same-sex couples.¹⁵⁷ This might mean that such couples, for example, agree to split all assets earned during their relationship, even if a court would not order such a split.

Ultimately, one of the weaknesses of the passive neutrality model is that it may fall short in leaving room for individuals to consider possible values they would like to apply apart from legal values. In particular, passive neutrality may not give couples enough opportunity and encouragement to consider how to apply communities' values that they find meaningful to their situation. Passive neutrality may very well give couples informed consent about the alternative they would face if they could afford to have a court decide their dispute. But it gives little glimpse of the various other visions of how they might lead and reorder their lives.¹⁵⁸

156. *Id.* Triantafillou herself expresses ambivalence about the way that such mediation may have such unintended consequences. Like many in same-sex relationships, she questions whether same-sex couples really want the substantive law of marriage and divorce to govern such relationships. *See id.*

157. I say "little" evidence because one attorney reported that courts may be willing to infer from evidence of couples' registration as domestic partners that they each intended that a court would apply some version of divorce law if they were to separate. Panel Comments by Paul Freud Wotman, American Association of Law Schools, Joint Meeting of Sections on Contracts and Sexual Orientation Issues, San Antonio, Tex. (Jan. 1996).

158. One particularly important question about mediator neutrality is the treatment of various manifestations of homophobia and anti-gay bias. Larry Brinkin, who mediated gay discrimination cases in San Francisco, where discrimination based on sexual orientation is illegal, noted that many lesbian and gay people did not recognize what he saw as discrimination, such as being discouraged from putting pictures of a partner on an office wall. Interview with Larry

A second disadvantage is that the practice of passive neutrality changes the power between parties to a mediation. Just as Mnookin and Kornhauser thought that law—or arguments about what the law is—could serve as an endowment for parties to a negotiation, so might arguments about what a community values and how a community might respond to settlements.¹⁵⁹ One mediator described how one woman invoked community in a mediation with her same-sex partner: "I hear people refer to the community ethic. One woman said, 'If I settle for that, people in the community will think I'm a sucker.' It became a question of how they'd represent things to the community".¹⁶⁰

Although such examples raise hope that private mediation may provide some alternative to public marriage, an excessive attention to law may impede that role. A mediator's attention to legal issues, language, and legal concepts may further entrench parties who want to cling to what they perceive as strong legal positions. Although this may be true whether mediation occurs in order to structure a relationship when parties want a "marriage-like" commitment, or when partners make a significant joint decision, such as parenting a child, it may be especially important when parties terminate a relationship. In these earlier stages of a relationship, parties may not be thinking about courts as "an alternative" but about different ways of agreeing about how to live their lives together. When parties terminate a relationship, however, attention to courts may increase and—as many reports of those working with divorcing couples and my interviews with mediators suggest—couples may begin to wonder if they will end up in court. So long as courts will not recognize same-sex marriages, this may mean, as a practical matter, that it will often be quite hard to see community mediation as a process alternative for same-sex couples upon

Brinkin (Jan. 1991). "People," Brinkin said of lesbians and gays, "are often not as strong as you want them to be. I try to make them feel more comfortable. I try to let them know discrimination is absolutely wrong—morally, ethically, and legally. In short, I try to empower them." *Id.* Since Brinkin practices in a city that bans such discrimination, he is merely following the familiar mediation practice of mentioning legal rights. In other areas, however, including many areas of child custody, the "legal" part of this argument would be less clear—making it all the more important to consider what role, if any, mediators should have in raising other values that characterize such discrimination as wrong.

159. Let me be clear: I view appeals to community as one way that parties may advance their views and one way that they may order their lives. I do not rest on the far stronger view that parties may *only* make arguments if they are situated within some community. See, e.g., ROBERT C. POST, CONSTITUTIONAL DOMAINS 14 (1995) ("[P]ersons who do not already have an identity are incapable of meaningful choice. Choices have significance only within the context of an anterior commitments.").

160. Telephone Interview with Carole Spears (Mar. 1991).

separation—except for those same-sex couples that have the foresight to document any agreement about their relationship.¹⁶¹

F. Summary: The Limits of Private Ordering

To sum up this Article's look at private ordering: Private ordering holds out the idea that gay and lesbian mediation will free couples from judicial bias and provide a safe space for creative problem solving. Sometimes this is a very plausible claim. In particular, when the primary source of bias that parties do and should fear is some form of homophobia, then mediation designed to eliminate homophobia may help. Even apart from whether couples will face less bias in gay and lesbian mediation, couples may feel more comfortable and reach better solutions merely because they feel more comfortable.

On the other hand, there are two important limits to the vision of private ordering. First, individuals may face other forms of bias that are not equivalent to the vision of the gay and lesbian community or experience that a mediator shares. Sometimes this will be because of other forms of animus, based on such things as race, class, ethnicity, disability, and age, in all their permutations and intersections. Other times the bias may include a dimension of thick procedure that reflects different substantive values, such as values about monogamy. Second, even if individuals do not face bias, mediation may only expose individuals to a relatively cramped set of values that might inform how they order their lives. Mediators, particularly lawyer-mediators, may help couples consider legal values and legal alternatives, but may neglect possible values of communities that couples might find valuable.

161. As one mediator explained, "The nonbiological mother knows if it ends up in court, she will get nothing—there's a lot of pressure to give in when there's disagreement." Telephone Interview with Martina Reeves (Mar. 1991). Similarly, Shelia Kuehl was also quite skeptical of mediation as an alternative to court. "I'm not a fan of mediation," Kuehl said. Telephone Interview with Shelia Kuehl (Mar. 1991) (then director of Women's Law Center and now California House Speaker Pro Tem). "Mediation presupposes two people with equal power able to argue for and articulate their own self-interest. Where one person holds all the legal cards, it's a very difficult prospect: one person having all power and the other person saying, 'Be a nice person.'" *Id.* Kuehl estimated that, in 90% of all same-sex relationships, one person will "hold all the cards." Kuehl speculated that the only counterweight in such circumstances might be the stronger party's fear of being exposed as gay—being "outed," but quickly added that a mediator in such a situation "might then find herself in a dynamic she wouldn't want." *Id.* On the other hand, there is evidence that other out-groups submitted cases to private community courts. See *infra* text accompanying notes 184–189 (use of community dispute resolution by Jews).

IV. DOES MEDIATION SERVE COMMUNITY INTERESTS?

Is gay and lesbian mediation better for the gay and lesbian community than going to court or some other alternative? This part examines two possible arguments. The first set of arguments are privacy arguments: the gay and lesbian community will be better off if disputes between gays and lesbians are discussed privately rather than discussed in a larger population. Although much of this part discusses the specific context of same-sex couples, much of what follows relates to the more general question concerning how a set of individuals resolves disputes when members of a larger community dislike them. In such instances, including those in same-sex relationships in the United States today, it may be tempting to keep all disagreements from the larger public because information about those disagreements (or the disagreements themselves) might further contribute to the group's unpopularity.¹⁶² The second principal argument also applies to other groups: should disputes involving members of a group be resolved according to the norms and values of that group or according to larger community? Whether private dispute resolution simply applies the same law as public dispute resolution but with somewhat different procedures (such as those designed to eliminate some forms of bias), or whether it applies different substantive norms is an important question for any private system of justice. Unfortunately, as discussed below, private justice may sometimes apply different norms when parties may not be aware of this.

A. Community Interests and Privacy

1. Keeping Everything Private: Not Scaring the Horses

One set of arguments for privatizing assumes that the less heterosexuals know about gay and lesbian relationships, the more likely it is that the public will support better treatment of lesbians and gays. The underlying

162. Although this subsection conflates the decision to have a specialized community forum with the decision to have a private community forum, it is possible to have a specialized community forum that is open to the public. The Jewish Conciliation Board of New York was designed as a community dispute resolution forum, but was open to the public. See ISRAEL GOLDSTEIN, *JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD, 1930-68*, at 91 (1981). The Board, however, declined to let its live proceedings be broadcast. *Id.* at 97. But see JAMES YAFFE, *SO SUE ME! THE STORY OF A COMMUNITY COURT* 11 (1972) (popular account suggesting that a major appeal of Jewish Conciliation Board was to protect the reputation of the Jewish community by keeping disputes within the community out of the public eye).

sentiment is, as the saying goes, that one should not do anything that would "scare the horses." In the strongest versions, such arguments favor keeping lesbian and gay relationships private without qualification; other arguments may suggest instead that privatizing may be appropriate now, but they leave open a transition to more public arguments in the future;¹⁶³ finally, some may explicitly view marriage as a long-term goal, but privatization as a short-term priority, much as some advocates for African Americans and others saw restrictions on interracial marriage as a short-term necessity.¹⁶⁴ Such arguments draw support from considerable survey research on public attitudes toward lesbians and gays. Most recent surveys show that overwhelming proportions of the public think gays and lesbians should have the same opportunities to get the same jobs and live in the same places as heterosexuals. But when surveys ask about attitudes toward gay and lesbian sexual activities, large portions of the public continue to think gay and lesbian sex is morally suspect.¹⁶⁵

In contrast to these various arguments to keep gay and lesbian relationships private, some argue that there should be more publicity about lesbian and gay relationships for the sake of the gay and lesbian community. Jane Schacter, for example, has argued that the publicity surrounding gays and lesbians who seek to care for children promotes positive images of lesbians and gays.¹⁶⁶ Similarly, Andrew Jacobs argues that gays and

163. See, e.g., Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994). But see Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 42 (1994) ("Determining when Americans are 'ready' for a particular constitutional decision is complicated at best.").

164. On the strategy to defer challenges to laws prohibiting persons of different races from marrying, see note 17 *supra*; see also Rubenstein, *supra* note 17, at 1636 n.64. On the parallels between restrictions requiring people to marry persons of the same race and restrictions allowing marriage only to persons of different sexes, see Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988). For a condensed version of the argument, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 154-58 (1996).

165. See, e.g., Brad Knickerbocker, *Gay-Rights Advocates Step Up Campaigns*, CHRISTIAN SCI. MONITOR, Aug. 12, 1994 (reporting majority supports "gay lifestyle"). But see Fajer, *supra* note 163, at 42 n.19 (noting that "antigay advocates often use 'gay lifestyle' as a shorthand for loveless, promiscuous lives").

166. See Jane Schacter, "Counted Among the Blessed": *One Court and the Constitution of Family*, 74 TEX. L. REV. 1267 (1996); see also Fajer, *supra* note 105, at 649-50. One sees traces of the pull to public debate and public discussion of lesbians and gays as well in H.L.A. Hart's famous exchange with Devlin over the rights of lesbians and gays in the United Kingdom:

If in our own day the "overwhelming moral majority" has become divided or hesitant over many issues of sexual morality, the main catalysts have been matters to which the free discussion of sexual morals, in the light of the discoveries of anthropology and psychology, has drawn attention. These matters are very diverse: they include the harmless

lesbians who win the right to care for children help "[assimilate] gays into the arguable core of the American family archetype: motherhood."¹⁶⁷

From one perspective, these arguments about privacy may represent an exaggerated fixation on the courts.¹⁶⁸ Both sides of the keeping-it-private argument tend to equate publicity with courts deciding cases, and privacy with any other process. Of course, there is a sense in which court decisions, particularly decisions of the Supreme Court, make media coverage more likely. Similarly, there may be a tendency for academics, particularly law professors, to pay more attention in course coverage and publications to matters that courts resolve, rather than private processes such as mediation.¹⁶⁹ Nevertheless, newspapers and other media have also discussed same-sex couples even without reporting on pending legal decisions. In other words, one might conclude that privacy arguments about same-sex marriage represent a simple misunderstanding about the relative role of the courts in shaping public attitudes more generally.

character of much sexual deviation, the variety of different sexual moralities in different societies, the connection between restrictive sexual morality and harmful repression.

H.L.A. HART, *LAW, LIBERTY AND MORALITY* 68 (1963). I think Hart's remarks only show traces of more recent arguments because it is unclear whether Hart thought the "overwhelming moral majority" was persuaded by reading the more academic sounding studies to which he alludes or some other more detailed accounts of lesbian and gay life.

167. Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument over Gay Rights*, 1996 WIS. L. REV. 893, 936. On the power of mother as an image in contemporary American life, see FINEMAN, *supra* note 19; Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141 (1995).

168. Sandel considers the argument that one may make arguments about respect for lesbians and gays outside of litigation. See, e.g., SANDEL, *supra* note 36, at 107. In his view, however, this argument "underestimates the extent to which constitutional discourse has come to define the terms of political discourse in American public life." *Id.* at 108. Sandel's argument illustrates the way in which arguments about privatizing same-sex relationships implicate much larger claims about how much courts' actions affect society more generally. Although Sandel's important work deserves a much fuller treatment than the occasion for this Article permits, it is worth noting that his claim is a claim about national "discourse," not a claim that what courts do changes attitudes of the public more generally. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 178-79 (1991) (noting that although many credit the *Roe* decision with an increase in women's ability to have abortions, the larger growth in abortion came in the years prior to *Roe*).

169. Many criticize this emphasis on what courts publish rather than what individuals and institutions do. See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075 (1993). More specifically, Galanter notes that, when discussing negotiation, we may pay too much attention to the shadow that courts cast and too little to the shadow that other institutions and practices cast. See Galanter, *supra* note 51, at 17 (stating that shadows are also cast by institutions and practices other than courts, such as "home, neighborhood, workplace, business deal [sic] and so on"); cf. *id.* at 22 ("If we have lost the experience of an all-encompassing inclusive community, it is not to a world of arms-length dealings with strangers, but in large measure to a world of loosely joined and partly overlapping partial and fragmentary communities.").

From another perspective, however, the keep-it-private arguments represent competing visions of community. One vision of same-sex couples imagines that such couples desire the "acceptance" of some other, larger community. The communitarian philosopher Michael Sandel frames the question as one of acceptance versus tolerance.¹⁷⁰ Privacy, Sandel contends, will merely win tolerance but not true acceptance. The rhetoric of "tolerance," however, implies a kind of compromised expectations, something that is less valuable than acceptance. Acceptance, however, is not without its problems. Often, acceptance implies that a more powerful group deigns to accept a less powerful group; it does not mean that two equal groups accept each other. The problem with the acceptance vision, then, is that it implies that the decision of a dominant group to accept is a relevant question. Even if the dominant group expresses "acceptance," it still may perpetuate a sense of privileged position. To take a quite mundane example, when a professor asks students to call her by her first name, she may not only create an air of informality but also may underline her own power: she set the terms for conversation and titles, albeit choosing informality.¹⁷¹ For similar reasons, many now worry that the process of coming out—communicating to people in one way or another that one is gay—may reinforce the idea that loving someone of the same sex is something that must be explained and accepted/forgiven/understood by someone who loves persons of a different sex.¹⁷²

170. Michael Sandel contrasts the "neutral case for toleration" with a notion of some "fuller respect" for gays and lesbians:

The problem with the neutral case for toleration is . . . [that] it leaves wholly unchallenged the adverse views of homosexuality itself. But unless those views can be plausibly addressed, even a court ruling in their favor is unlikely to win for homosexuals more than a thin and fragile toleration. A fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live.

SANDEL, *supra* note 36, at 537.

171. Compare what Richard Rorty says about the role of men in the struggle for women's equality:

But I do not want to say that men have the power to make full persons out of women by an act of grace, in the way in which sovereigns have the power to make nobles out of commoners. On the contrary, I would insist that men could not do this if they tried The utopia I foresee, in which these practices are simply forgotten, is not one which could be attained by an act of condescension on the part of men, any more than an absolute monarch could produce an egalitarian utopia by simultaneously ennobling all her subjects.

Rorty, *supra* note 66, at 53 n.44.

172. Some emphasize the way that a strategy of trying to show that gays and lesbians are "virtually normal," see SULLIVAN, *supra* note 45, may perpetuate the idea that those who are less virtually normal deserve some lesser respect or even legal rights. See, e.g., Steven Seidman, *Queer Pedagogy / Queering Sociology*, 20 CRITICAL SOC. 169, 170 (1994). But see Walters, *supra* note 121, at 853 (criticizing Seidman for assuming that coming out necessarily means coming out

In light of the difficulties with an acceptance framework, one might try to envision a community in which, over a somewhat large relevant range, society, at least in public life, respects many different individuals rather than deciding whether some individuals or activities should be "accepted." Instead of seeking acceptance of some characteristics, one might seek a world in which some characteristics were no longer relevant. This seems to be the kind of model that explains how attitudes toward "miscegenation" evolved: instead of arguing that relationships between people of "different" races was good, one argued that the racial labels one attached were irrelevant to how one characterized the relationship, at least from a legal point of view.¹⁷³ One might imagine a community of irrelevance of various sorts. One such wider community would be a community in which certain characteristics no longer mattered. In discussing women in society, for example, Rorty says the best society may be one in which individuals are as indifferent to the question of whether someone—even their own child—is a man or a woman as they are to the notion whether a child is "noble or base." The notion of noble or base means nothing to many North Americans, but it once preoccupied people of the Middle Ages.¹⁷⁴ Mary Anne Case has made a similar point by suggesting that discussions of gender may someday be as irrelevant as another notion from earlier times: individuals have some essential humor, manifested in physical and moral qualities, such as melancholic.¹⁷⁵ Ultimately, rather than envisioning a sub-community that accepts some community, one might imagine that certain differences did not matter, at least for purposes of whether persons were worthy of respect. For example, we recognize that parents describe their children by listing their hair color or their profession, but we do not think parents should love brunettes more than blondes or lawyers more than doctors.¹⁷⁶ And if not every community may transcend the judg-

as virtually normal in a way that stigmatizes others). In addition, others argue that coming out as gay perpetuates the idea that all gay people would be normal but for their attraction to persons of the same-sex; this neglects the way that, for example, people of color may continue to face racism. See Hutchinson, *supra* note 68, at 603–04.

173. See KOPPELMAN, *supra* note 164, at 157.

174. See Rorty, *supra* note 66, at 50. Consider, too, how Rorty discusses same-sex attraction: To realize how far away such a future [in which the sex of a child is irrelevant] is, consider . . . Sedgwick's point that we shall only do justice to gays when we become as indifferent to whether our children turn out gay or straight as we are to whether they become doctors or lawyers. Surely she is right, and yet how many parents at the present time can even imagine such indifference.

Id. at 50 n.41.

175. See Mary Ann Case, Remarks at Law & Society Meeting in Glasgow, Scotland (July, 1996).

176. See Freshman, *supra* note 16, at 124; see also Minow, *supra* note 69, at 665–66.

ment of relationships between adults, then perhaps at least the state could withdraw from such judgments.

2. Keeping Some Things Private: "Good"/"Effective" Arguments

Apart from these relatively general arguments about public disputing and private disputing, another set of arguments for privatizing focuses not on general social discomfort with lesbian and gay sex, but rather on more particular kinds of arguments made in court. The general form of such arguments is that Argument X should not be made in public, particularly in courts, because Argument X will undermine the interests of the gay and lesbian community. One example of such an argument is Halley's argument that gay and lesbian litigators should not argue that homosexuality is biologically determined because such arguments—even if accurate by scientific standards, which Halley doubts—would encourage bad social outcomes, such as genetic testing for employment or even for purposes of identifying gay and lesbian unborn children that could be aborted.¹⁷⁷ In a recent variation on this general argument, some have questioned the kinds of arguments that lesbians should make in custody cases. In an increasing number of lesbian relationships, one woman gives birth to a child that she and her female partner raise together; when such couples no longer wish to live together, the question of which woman has what rights and responsibilities over the child arises. In one highly publicized case, an attorney argued against rights for the nonbiological parent, actress Amanda Bearnse.¹⁷⁸ The attorney, who had previously gotten referrals from the Los Angeles Gay and Lesbian Center, argued generally that nonbiological parents should have few, if any, rights—an argument that would undermine many lesbians and gays who considered the biological children of their

177. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 523 (1994). But see Yoshino, *supra* note 3, at 1832–33 & 1833 n.356 (arguing that, among other things, scientific studies that purport to show sexual orientation is relatively fixed and biologically based may result in "empathy gains," although Yoshino says he is "agnostic" about the claim that "homosexuality is immutable"). For a general defense of the use of expert lawyers to decide effective legal arguments, see Rubenstein, *supra* note 17. See generally Fajer, *supra* note 1 (advocates for same-sex marriage should make arguments that respect many lesbians and gays).

178. See Katie Cotter, *The Parent Trap*, ADVOC., Feb. 4, 1997, at 29, 34.

partners to be their own children as well.¹⁷⁹ As a result of the publicity, the Los Angeles Gay and Lesbian Center ended all referrals to the attorney.¹⁸⁰

What this argument illustrates in part is the implicit contest over various ideas of community. Those who condemn the attorney implicitly envision a community that makes no distinctions between birth parents and other parents. This is not the only image of a community. There may be compelling reasons to imagine a community that treats birth parents differently from other parents. In a sense, then, many arguments about "good" legal arguments shade into the question of what kinds of values should be enforced which becomes the question of whether community mediation should enforce community norms.¹⁸¹

B. Enforcing Community Norms Through Community-Enhancing Mediation

The last section suggested that competing ideals of community are implicit in arguments about whether disputes involving same-sex couples should be private. This section considers the more straightforward argument that same-sex couples should use community mediation because they should resolve their disagreements according to lesbian and gay community norms.¹⁸² This is the community-enhancing vision of dispute resolution: dispute resolution should enhance the salience of a particular community in either, or both, of two ways: (1) individuals should resolve disputes according to the community (including some combination of its norms, history, and practices); and (2) individuals should leave the process more firmly incorporating that community in their sense of who they are. This argument is sometimes made explicitly in the context of lesbians and gays, as in the commitment by two women to practice "lesbian feminist mediation" that would reflect the values of the lesbian feminist community.¹⁸³ To

179. See *id.* at 35.

180. See *id.*

181. See Part V.B.

182. Some scholarship implies that the definition of "community mediation" includes the way in which a community mediation applies community norms or at least facilitates a discussion informed by norms of the relevant community. See PAVLICH, *supra* note 99, at 9; THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 13, at 3.

183. See Engelhardt & Triantafillou, *supra* note 46.

situate this argument, however, I first turn to a comparison with several other communities that have practiced *community-enhancing mediation*.

1. Examples from Other Communities: Jews, Native Americans, and Muslims

One set of examples of community-enhancing mediation involves trying to reconcile individuals to the way some group of individuals—often described as “the community”—now acts. (Of course, the questions of when a set of practices constitutes a community and how to resolve claims between rival communities is often not considered.¹⁸⁴) One example of community-enhancing mediation is the practice of Jewish law by Jewish courts. Historically, particularly in countries in which Jews lived separately from others, various Jewish courts resolved disputes involving Jews. Some of these courts applied particular written aspects of Jewish law. In other cases, not explicitly covered by religious law, Jewish lay tribunals acted as kinds of arbitrators to decide cases. Although the practice of both kinds of Jewish courts declined widely when Jews became integrated into particular societies, a small number of Jews continue to submit some disputes by agreement, even business disputes, to some form of Jewish court.¹⁸⁵

In a variety of ways, such Jewish courts apply principles and practices designed to resolve disputes according to Jewish law. In addition, some of the pronouncements of such courts historically involved not merely binding resolution of particular disputes, but also advice on proper conduct, albeit conduct the court chose not to enforce. For example, pronouncements might assert both that a parent could disinherit a child, and that a parent usually should not: “When a person disinherits his sons . . . his act is legally effective, but the Sages are displeased with him.”¹⁸⁶ Thus, part of the

184. But see MODERN APPLICATIONS OF JEWISH LAW: RESOLUTION OF CONTEMPORARY PROBLEMS ACCORDING TO JEWISH SOURCES IN ISRAELI COURTS 101 (Nahum Rakover ed., 1992) [hereinafter MODERN JEWISH LAW] (discussing the conflict between practices of different kinds of Jews and which practice should be given effect).

185. See 1 ELON, *supra* note 90, at 6–39 (providing a general background on Jewish tribunals). For a history of such Jewish tribunals in various countries, see also GOLDSTEIN, *supra* note 162, at 9–83. Individuals in the United States continue to submit cases to such tribunals and occasionally ask courts to give effect to such decisions. See, e.g., *In re Mikel and Scharf*, 432 N.Y.S.2d 602 (1980), *aff’d*, 444 N.Y.S. 2d 690 (1981) (commercial leasing dispute submitted to Jewish court for arbitration, which secular court declined to enforce); *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

186. 1 ELON, *supra* note 90, at 150.

message of Jewish law is not merely that courts would enforce particular laws or agreements, but that individuals should themselves conform to certain Jewish norms.¹⁸⁷

Such Jewish law also typifies community-enhancing mediation by enforcing norms based on "custom" and practice, if not on Jewish law. Principles of Jewish law enforce customs that are widely practiced in a particular region, even if Jewish law does not otherwise take a position on such customs.¹⁸⁸ For example, a rabbinical court in Israel concluded that severance pay was not sufficiently widespread to be customary law, but ten years later concluded that severance pay was sufficiently widespread to be enforced as customary law.¹⁸⁹

In a similar way, some argue that Native American¹⁹⁰ courts once did, and now should (and perhaps do) encourage disputants to resolve their differences according to the current practices of the community. According to one scholar, Zion, at least before Europeans arrived on North America, Native Americans "had many sophisticated methods for halting bitter disputes and reconciling wrongdoers to the community."¹⁹¹ As a doctrinal matter, federal regulations and tribal statutes require Native American courts to look first to potentially applicable federal law of the United States before seeking to apply tribal law.¹⁹² Zion suggests that, when applicable law permits Native American courts to look to tribal law,

187. See ROTH, *supra* note 15.

188. See 1 ELON, *supra* note 90, at 926-32.

189. See *id.* at 929.

In addition to more purely religious forums, the Jewish Conciliation Board of New York, founded in 1930, helped facilitate and arbitrate a number of disputes between Jews. See GOLDSTEIN, *supra* note 162, at 72. The board was not a religious court and could not, for example, grant religious divorces. See *id.* at 89. The board heard cases in panels that consisted of a rabbi, a lawyer, a layperson, and often a consulting psychiatrist. Although it was not a religious court, it did draw on community norms and commitment to a Jewish community. See *id.* at 90 ("The judges were, for the most part, not trained lawyers or judges, but men and women who nevertheless exercised moral authority at the hearings; seasoned experience, social concern, communal leadership and . . . common sense . . . were their chief credentials."). At least according to its supporters, the board also "sought to represent every segment of Jewish society." See *id.* (internal quotation marks and citations omitted).

190. For simplicity, I refer to "Native American" tribunals even though (1) practices may vary by tribe, and (2) the conflation of all tribes into an amalgamated Native American identity is a western notion, albeit one that even Native Americans have often come to use. See Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1140 (1994).

191. James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 265 (1984). Although differences may vary among different Native American groups, I sketch out some common aspects, which may vary to some degree among different groups.

192. See *id.* at 274.

such courts look at what Native Americans actually do, what he calls "usage":

A "usage" is something that is actually done in the community. It is possible that a tribal judge might know of an old ceremonial that would apply to a problem before the court, but unless the ceremonial is known, accepted, and used by the people of the present day, it will not be a custom or usage.¹⁹³

Zion makes a strong distinction between looking to what Native Americans now do versus looking at what Native Americans did in the past. On his reading of Native American law, there is no room for "tradition" in the sense of past practices.¹⁹⁴ Other research, however, suggests that some Native American tribunals rely rather heavily on a connection to historic beliefs and practices of Native Americans.¹⁹⁵

In contrast to the Jewish and Native American traditions, which both look to what people in the community presently do, a variation of community-enhancing mediation looks to past practices. In this stronger, backward-looking notion of community-enhancing, the goal is to reconcile individuals not to what other members of the community now do, but—at least in part—to what members of the community have done in the past or what religious text from the past suggests they should do. A recent article by two Islamic scholars explicitly suggests that community-based arbitration and mediation would let parties "apply Islamic values in addressing their needs and concerns, but which generally are unfamiliar in the [American] judicial system."¹⁹⁶ The article also suggests that such "values" will actually reflect quite detailed and specific substantive norms because it envisions "mediators" who "will have specialized knowledge about Islam, dispute resolution, and possibly, the area of Islamic law in which they are requested to assist."¹⁹⁷ One particularly interesting area of the article is its selection of quotations from the Qur'an, the Islamic holy book, to illustrate the claim that "[t]he imperative for Muslims to settle disputes through

193. *Id.* at 275.

194. In my brief overview of Native American law as one example of community-enhancing mediation, I do not claim to provide an exhaustive account of the various practices of various tribes, let alone the various interpretations. Rather, I present one account of Native American law as a kind of ideal for purposes of thinking about the idea of community-enhancing mediation.

195. I note that some research, for example, suggests that many Native American courts draw on commitment to traditional and historic practices, not just contemporary practices. Interview with Donna Coker, Associate Professor of Law, University of Miami (May 1997). I am grateful to Carol Goldberg-Ambrose for discussing her ongoing research in this area.

196. Abdal-Haqq & Abdal-Haqq, *supra* note 14, at 64.

197. *Id.* at 68.

arbitration and mediation is established in the Qur'an." One selection quotes a provision that requires "divorced women" to "wait concerning themselves for three monthly periods" because "their husbands have the *better right* to take them back in that period."¹⁹⁸

Although some of the language of the proposal suggests that Islamic mediation and arbitration would indeed encourage (in the case of mediation) or force (in the case of arbitration) parties to follow Islamic law, it is not clear how thoroughly this would happen—or how thoroughly this would be explained to parties. Elsewhere in the proposal, mediation is described in process- and communication-oriented terms as if the mediators for "divorcing women" would simply help husband and wife communicate, not channel acceptance of Islamic law:

The mediator's main concern is to prevent or reduce hostility between the parties and getting them to communicate clearly without being offensive. The mediator also should seek to eliminate confusion by narrowing the issues and keeping the meeting on track. If a party to the mediation appears to make an extreme demand, the mediator must help them to see the unreasonableness of that demand.¹⁹⁹

This is very general language. What would a woman who consented to Islamic mediation based on such a description expect? If she asked to have the same rights as a man—without the kind of burden of a husband's "right" to "take her back"—how would the mediator respond? If the husband did not object, would the mediator simply engage in passive neutrality, saying nothing, or would the mediator call the woman's request "offensive" or "off the track" of Islam, or an "extreme" or "unreasonable" demand?²⁰⁰

2. Traces of Lesbian and Gay Community-Enhancing

Compared to these varieties of community-enhancing mediators, the mediators for lesbian and gay couples that I studied fit the contemporary

198. *Id.* at 75–76 (emphasis added).

199. *Id.* at 70.

200. Similarly, the proposal is not entirely clear that all matters would be informed by backward-looking reference to Islamic law because it also notes that community mediation would "[p]rovide[] a forum for clarifying and establishing Islamic values." *Id.* at 73. The proposal also suggests community mediation would "[s]ecure[] the authority of the local, common people in the formulation and application of Islamic law as opposed to a remote, centralized authority dominated by professional jurists and scholars." *Id.*

practices model much more closely to the contemporary practices variety of community-enhancing mediation. This should not be particularly surprising because much of the recent history of same-sex relationships shows how the very concept of homosexuality as an identity is quite new. Likewise, this should not be surprising because the discussion of gay and lesbian rights in the United States did not become public in a significant way until the Stonewall Riots in the 1970s. Nevertheless, although there may be no lesbian and gay Islamic Qur'an or Jewish Talmud, there remains some tension between the idea of mediation as facilitating private ordering and mediation as promoting community values—albeit forward-looking notions of what community values now are or should be.

The most comprehensive explicit notion of community-enhancing mediation I have located is a description of a Boston mediation practice that two women described as "lesbian feminist mediation."²⁰¹ Triantafillou, the attorney, explained that she was attracted to mediation because, among other reasons, it could help the lesbian feminist community:

The third factor that led us to mediation was a commitment to the lesbian feminist community. I wanted to create a new form of conflict resolution that was less damaging to women and more in tune with my political beliefs. In my opinion there is no such thing as a feminist attorney. I think the words *feminist attorney* are mutually exclusive. Feminism is a belief system based in part on the efficacy of the "feeling process."²⁰²

Ironically, although Bonnie Engelhardt and Katherine Triantafillou are explicit about a commitment to a lesbian feminist community, their writing suggests a keen awareness of the problems of isolating identity as a lesbian feminist as the only source of bias or the only source of values. This, no doubt, partially reflects that the community value that Triantafillou emphasizes is the process value of the "feeling process." Both authors explicitly discuss the way that two women who love each other may nevertheless have different expectations based on such things as class.²⁰³ Ultimately, the two also recognize a balance between providing a space in which two women can explore the values of the lesbian community that the "wider

201. See Engelhardt & Triantafillou, *supra* note 46.

202. *Id.* at 332.

203. See *id.* at 329 ("Problems arise when partners discover intense reactions to differences in class background and race that were not evident in the beginnings . . . of the relationship.").

community" may not share, and the ability of different women (implicitly, different lesbian feminists) to give different weight to such values:

It's a question of how to value those things we feel very emotional about. Some things of value to lesbian feminists may not be valued by the broader community. Consequently, we need to learn to put a financial value on something for which we want to negotiate. We come to the point of saying, "What is your bottom line?" "What will make you feel OK?" Women say, "Oh, I can't do that, that's so arbitrary." But that's what we are here for, an arbitrary feeling about what would be *all right for you*.²⁰⁴

Some may question whether the structure and vocabulary of this exercise—putting a dollar value on something—does not distort the way that individuals balance values. Overall, however, the technique as described does provide a space to consider lesbian feminist values without treating such values as the exclusive consideration or giving them nearly the same weight that the Native American, Jewish, and Muslim processes suggest.²⁰⁵

A second, less thoroughgoing form of community-enhancing mediation appears relatively upfront in interviews with some mediators. In particular, one sees elements of community-enforcing mediation in the way that several mediators insist that mediating couples agree to value biological and nonbiological parents. My interviews with mediators do not reveal mediators who asked parties to agree explicitly to follow norms of some lesbian or gay community; they do, however, reveal attempts to have parties agree that mediation would follow certain norms or principles—including principles and norms often associated with parts of lesbian and gay communities. Amy Oppenheimer, one of the founders of San Francisco-based

204. *Id.* at 337. When I asked Triantafillou recently what kinds of values she associated with the lesbian feminist community when she first wrote about lesbian feminist mediation, she identified process values:

One tenet of feminism is the personal as political—take control of your life, empower yourself. And you empower yourself when you are able to make decisions on your own in a safe environment. Mediation seemed ideal then because gay people were not treated well by the courts or were seen through a prism of negativity. Twelve years ago, a gay man couldn't go to probate court in Massachusetts and be viewed as having the same issues.

Telephone Interview with Katherine Triantafillou (Feb. 13, 1997).

205. Although the theoretical possibility of some kind of lesbian and gay community-enhancing mediation remains, Triantafillou today does not share all of her earlier hopes: "I'm not sure people today understand lesbian feminism—it's the age of lipstick lesbians. A lot of gay people grow up without any political consciousness." Telephone Interview with Katherine Triantafillou, *supra* note 204.

Gay and Lesbian Alternative Dispute Resolution Services, recalls a dispute between two women who had been raising a child together. "I suggested mediation on an agreed-upon principle of equality," Oppenheimer said "but the other woman wanted to say that she, as biological mother, had all the rights."²⁰⁶ Oppenheimer characterizes the incident as typical of an "ethical" question:

Just because a person can take a position legally doesn't mean they can take it ethically. I've spoken with many lesbian mothers. Some people sound as if they feel the legal position is more important, that there's no way to ignore it or give it up. We're adults. We can choose to ignore them or go on.²⁰⁷

Another mediator described how she would not mediate a lesbian custody dispute unless both women agreed each would be "honored as parents."²⁰⁸

In contrast to this relatively open way that mediators describe community-enhancing mediation, there is a third, more troubling and covert way that "culturally sensitive mediation" may function as a form of covert community-enhancing mediation. Although raised by scholars in the context of ethnic identity, a recent article on cultural competence might easily be applied to the "culture" of those in same-sex relationships. Three Canadian mediators describe their experience with what they characterize as "different cultures."²⁰⁹ The fundamental value judgment that the authors describe is that "cultural competence" means that "[m]ediators need to value diversity and respect the inherent dignity of all cultural groups."²¹⁰ Consider how the three authors recommend dealing with Vietnamese couples who value women less than men:

Sons may receive preferred treatment over daughters and are more likely to be encouraged (morally and financially) to further their education. For instance, girls may be expected to help with domestic chores. The difficulty for mediators is how to help parents explore these issues without imposing the mediators' values upon the family. One way that mediators can avoid losing neutrality is to bring in a

206. Oppenheimer Interview, *supra* note 10.

207. *Id.*

208. Reeves Interview, *supra* note 96 ("I can be neutral about a \$100,000 house, but it's hard not to want to bash heads when the biological mother is acting like the other mother has no rights.").

209. Barsky et al., *supra* note 65.

210. *Id.* at 169 (citing K.H. KAVANAUGH & P.H. KENNEDY, PROMOTING CULTURAL DIVERSITY (1992)).

Vietnamese social worker who can tell the family his or her views on how to balance traditional parenting practices with those of their new community.²¹¹

The authors' concern is with the way that Vietnamese culture may shed light on how couples act in mediation.²¹² However, the problematic and unspoken assumption about "neutrality" and "cultural competence" is that the only relevant culture is Vietnamese culture.

C. The Problematic Nature of Community-Enhancing

The problem with identifying "cultural competence" as a form of neutrality is that it downplays the very real choice that mediators make in identifying "culture." In particular, the identification of Vietnamese as the relevant "culture" neglects the possibility that "women" and "women's values" are another relevant culture.²¹³ When the mediator brings in a Vietnamese social worker, the mediator is not neutral between competing cultures: the mediator is inscribing Vietnamese culture at the potential expense of women's culture. More generally, there is no "neutral" way to have "cultural competence" because any three-dimensional person has many cultures and communities that inform her existence.²¹⁴ And the clash of cultures and communities is all the more pervasive and more

211. *Id.* at 173.

212. A mediator observed by Pavlich displayed a similar assumption that there was an obvious culture with obvious values; the mediator asked a woman, "Is it the same in your culture?" PAVLICH, *supra* note 99, at 175 n.31. When I asked one mediator for lesbian and gay couples whether she thought such mediators should themselves be lesbian or gay, she emphasized the importance of cultural knowledge and volunteered her concern that she, as a non-Asian, feared she had difficulty mediating Asian couples:

I feel blind sometimes. I know things are going on, but I can't figure out what. It doesn't feel like the kind of healing that can happen in mediation—particularly for men. There's stuff going on that I don't know how to deal with. I feel there may be cultural taboos, but I don't know what they are.

Reeves Interview, *supra* note 96.

213. See, e.g., Rorty, *supra* note 66, at 31–32 (suggesting that one could imagine an emphasis on what women do and what women's practices are, such as MacKinnon has attempted); cf. MODERN JEWISH LAW, *supra* note 184, at 101 (it may be difficult to tell whether a given woman has chosen one option under Jewish law or another because the woman may not be aware that some interpretations of Jewish law would hold that accepting one kind of compensation as a widow means giving up some other set of rights). As always, one should remember that in describing what any set of people do, one must be mindful that there may be important differences within the group, such as racial differences among women. See, e.g., Harris, *Race and Essentialism*, *supra* note 69 and *supra* Parts II.E. and III.B.

214. See Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PENN. L. REV. 963, 986 (1991) ("In the real world, a self has . . . many different communities . . . which must coexist.").

intense if we value not just existing communities, but potential future communities.²¹⁵

Similarly, the unqualified assertion that mediators for same-sex couples need to know about lesbians and gays may neglect other aspects, such as race, class, and ethnicity. One very sensitive and personal account of mediation involving lesbians and gays seems to equate sensitivity to lesbian and gay life as the most important special feature of such mediation: "[B]efore a mediator can attempt to mediate a child custody case, he or she must be aware of the gay culture. With insight into the gay culture, a mediator can have a greater understanding of how gay people actually live and how they raise their children."²¹⁶ The real danger is not merely the neglect of these other sources of bias and values. It is also that parties themselves may feel less able to raise issues of bias because they may think to themselves, "After all, this is as fair as it gets. At least the mediator is not homophobic."²¹⁷ To put it more generally, parties may not object to the introduction of the values of only one community because they do not appreciate that there may be alternatives.²¹⁸ An author rather casually mentioned that panels of the Jewish Conciliation Board might have embraced sexist assumptions about the proper roles of men and women, but quickly excused this by noting that husbands and wives did not object.²¹⁹ Lack of objection, however, is not equivalent to an informed choice;

215. Thus, what some characterize as a clash between rights of a group, such as those of some national origin, can also be characterized as clashes between a group and another realized or potential group. See *infra* note 220. And so I differ from those who see oppression of women as only an individual versus group clash rather than a clash between two different groups. See, e.g., Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849, 850 (1995) (contrasting "collective rights" of Turkish immigrants with "basic individual rights" when "daughters are, due to the Islamic tradition . . . prevented from participating in certain fields"); see also *supra* notes 68-69.

216. McIntyre, *supra* note 96, at 143.

217. See generally Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEG. L. REV. 85 (1996) (noting that individuals may not assert their legal rights in landlord-tenant negotiations because they do not have a sense that it would be proper to assert such rights).

218. See Freshman, *supra* note 16, at 119 (a father might not object to dropping his child at day care rather than caring for the child himself because "[h]e may very well never imagine that he might care for the child himself," but if he were exposed to the idea that it is valuable work for parents to care for children themselves, then perhaps he would try to care for his child himself).

219. The observer reported that the Jewish Conciliation Board members often embraced the view that men should be strong and women warm. See YAFFE, *supra* note 162, at 134-35. Nevertheless, the author tacitly approved the practice by noting, "Women's Lib would probably not approve, but the men and women who appear before this court do not seriously question these basic assumptions." *Id.*

indeed, lack of objection may even be consistent with a choice we might label coerced.

The more fundamental problem with "cultural competence" is that it fails to explain why existing cultures have priority over other cultures of other persons or of cultures that could be imagined. In other words, cultural competence overvalues the fit between existing culture²²⁰ and a particular dispute. One problem with this is that there may be no easy way to determine what a particular culture "values." The idea that a single Vietnamese social worker will embody Vietnamese culture is bizarre, to say the least.²²¹ In addition, even if one could somehow identify the relevant culture, it is unclear why the goal should be to match an individual to the culture. As Margaret Jane Radin has observed, "We know we cannot argue that any given sexist decision is wrong simply because it does not fit well with all our history and institutions, for the problem is more likely that it fits only too well."²²² The premise that "cultures" need to be "respected" neglects the idea that a sincere attempt to apply some cultural values may subordinate individuals, such as women. Some have attempted in general to value groups and group values at the expense of individuals,²²³ but this is an argument about the relative importance of individuals and groups; it is not neutrality.

Thus, in at least three ways, mediation may reflect concerns about promoting the values of the community: explicitly in descriptions of lesbian feminist mediation, implicitly in conditions that mediators may set before mediating disputes, and rather covertly in attempts to be "culturally competent." All three of these varieties of community-enhancing mediation raise a question of justification: Why should mediation promote community

220. See Rorty, *supra* note 66, at 19. According to Rorty, "Philosophy's function is rather to clear the road for prophets and poets, to make intellectual life a bit simpler and safer for those who have visions of new communities," *id.*, and it is only a small leap to suggest that part of a mediator's function, too, is to help parties think of such visions of new communities as well. Another way to make a similar point is the notion of sensitivity to future selves: One should have some respect not just for an individual now, but for the individual that a given individual may become in the future, his potential future selves. See DEREK PARFIT, REASONS AND PERSONS 282-93 (1984); see also Richard A. Posner, *Are We One Self or Multiple Selves?*, 3 LEGAL THEORY 23, 26-27 (1997).

221. See Schnably, *supra* note 153.

222. Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY 127, 136 (Michael Briat & William Weaver eds., 1991); see also POST, *supra* note 159, at 4 (arguing that even if there is a community consensus, one may object that law should not be "governed by shared social norms").

223. Cf. Ronald R. Gare, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983) (describing the contrast between the usual concern with group rights as sum of rights of individuals in a group with a concern with the rights of the group as a group).

values? In the first two varieties, one may point to the possibility of meaningful consent: parties either agree to lesbian feminist mediation or parties agree to particular preconditions, even if they are not explicitly identified with a particular community. I say "possibility" because my research thus far is based on interviews with mediators who describe their practice, not with parties who have participated in such processes, let alone direct, systematic observations of attorneys or mediators "explaining" mediation. Further research should identify not only how parties report they experienced a choice, but also whether the process that led to the choice allows for informed consent. This includes questions about whether parties were aware of other alternatives to particular mediators, how much mediators negotiated over preconditions, and how aware parties were of any ability to negotiate over preconditions. Such research should be particularly sensitive to differences in knowledge among persons of different races, genders, and cultural backgrounds.

Apart from research on actual practices, we also should think about theories regarding the relationship between community and dispute resolution. It is certainly laudable to be concerned about respect for individuals to be free from bias, as the private-ordering impulse suggests, and to be free to adopt a range of community values. From both a private-ordering and a communitarian perspective, however, we need to think more about how to deal with a society filled with communities—intersecting communities that individuals now may experience in phenomena like multiracial identity and different potential communities that individuals may not feel able to imagine. The next part suggests one way to reconcile the way in which we may value the attraction of community while also respecting the value of autonomy, the ability of individuals to retreat from particular communities, form new communities, and even—to a very large extent—withdraw from community.

V. PRIVATE ORDERING AND COMMUNITY: AN OUTLINE OF COMMUNITY-ENABLING MEDIATION

One Mediator's Perspective on Same-Sex Couples:

I'm there as eyes and ears. I'll say, "You haven't thought of this. I've had 100 people cross my desk. You've thought of 20 things,

here's another five." The mediator also said she anticipates problems as she has more cases involving lesbians and gays.²²⁴

Many mediators would agree that a mediator should spot issues and point out concerns. As this Article has suggested, however, how mediators spot and describe issues of norms, particularly norms of communities, real and potential, often remains problematic. This part sketches out a notion of *community-enabling mediation* that seeks to address the shortcomings of both the private-ordering vision and the community-enhancing vision of mediation. In the passive-neutrality model of mediation—which often accompanies the rationale of private ordering—parties may never consider potential community values that they might find valuable.²²⁵ In various kinds of community-enhancing mediation, community may play a role, consciously, as when mediators announce a commitment to "lesbian feminist" principles, or structurally, when mediators perceive the need to be sensitive to what they identify as the relevant community. But the individual has much less freedom and encouragement to consider the mix of community values that fits her experience, values, needs, and goals best. Particularly when community-enhancing mediation involves experts on "the community," parties may miss an opportunity to consider different communities, different interpretations.²²⁶ In contrast to community-enhancing mediation, community may still play a role in community-enabling mediation, but it is a role that respects the autonomy and informed judgments of the parties.

224. Oppenheimer Interview, *supra* note 10. For example, in gay and lesbian couples, she often suggests a provision over who can stay in a house after she has seen some people have their new lovers move in. Similarly, a mediator who handled complaints of discrimination based on sexual orientation said that when parties have "no idea" about settlements of discrimination claims, he gives information of the kinds of settlements that other parties have reached. Brinkin Interview, *supra* note 158.

225. See text accompanying *supra* notes 129–154.

226. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987):

[I]t would not be a bad thing for judges to base constitutional decisions on their own sense of what values best reflect our cultural tradition, so long as the conflicting perspectives competing to define those values are made explicit. The search to define those values could then serve a clarifying, rather than a mystifying, role.

Id. at 386.

A. An Outline of Community-Enabling Mediation

One key feature of the community-enabling concept is a notion of *active neutrality* of the mediator, rather than passive neutrality. Active neutrality means that the mediation process introduces a wide range of values and encourages parties to consider how such values, or some combination of them, might fit their needs; they may accept some, reject others, modify many, but they will do so with a sense of alternatives. A community-enabling mediation would encourage parties to consider the range of possible values²²⁷ and practices that could affect how they resolve a dispute or structure an agreement. This would include active consideration of the ways that others, including communities that the parties find valuable,²²⁸ have resolved similar disputes or reached similar agreements. It would also try to consider various other ways that individuals *could* resolve disputes. In this sense, it would not be exclusively backward-looking—what would be the decision in the past of a court, industry, community, or so on—but also how one might suggest that such standards should be in the future. Under active neutrality, the mediator does not raise issues in the exceptional case; the mediation process introduces var-

227. At least in the context of same-sex relationships, the many norms considered would not include homophobic norms, such as the notion that same-sex relationships are always improper. See Marc Fajer, *Some Thoughts on Harassment: A Gay Male Perspective*, MD. J. CONTEMP. L. ISSUES 199, 200 (1993) ("I think one thing we might do is make explicit in any 'reasonable victim' standards we put into these [sexual harassment] policies that 'reasonable' does not include racism, and 'reasonable' does not include homophobia."); Christine Littleton, Presentation at Law and Society Meeting, Glasgow, Scotland (July, 1996) (definition of sexual harassment should take perspective of reasonable nonhomophobic person). Although the exclusion of such thoroughgoing homophobia may be unproblematic, other questions may be less clear, such as the treatment of those who are not birth parents. See *supra* text accompanying notes 178–180. Another interesting question will be whether one should discuss the idea that no community norms should inform a relationship—indeed, one might ask whether couples should be told that they should question whether the pervasive notion that coupling is better than alternatives is justified. See McFarland, *supra* note 120.

228. Many fear that an emphasis on how individuals can choose from an array of values and identities tends to emphasize selfish values, and I mean to avoid this criticism by including values of various communities as a source of values in mediation. See Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, in PRAGMATISM IN LAW AND SOCIETY, *supra* note 222, at 155, 173 ("One of the most distasteful and unconvincing aspects of models of self-creation that extol autonomy and mastery is their assumption that true self-fulfillment lies solely in sustained pursuit of self-interest."). This is an important concern, but it conflates two dynamics: (1) Whom does an individual care about? (2) Who decides whom an individual cares about? Individual choice is consistent with the idea that an individual cares about others—but the identity of those others (lover? friends? parents?) is decided by the individual. See FINEMAN, *supra* note 19; Freshman, *supra* note 16 (exploring the idea that individuals care for those who cannot care for themselves).

ious norms as a matter of course in every mediation. By making this active consideration the norm, active neutrality avoids some of the problems with passive neutrality. Under a passive- neutrality understanding of mediation, a mediator does not suggest values or solutions, but facilitates the way in which the parties structure the discussion.²²⁹ This often leads to the question of whether the mediator should "bolster" the party that seems less "capable" of participating or less "powerful."²³⁰ This is an issue because the expectation is a silent mediator: silent about values, particularly values that are not closely yoked to some relatively determinate legal rule. Under active neutrality, the mediator does not treat ideas equally by being equally silent but by being equally forthcoming: the mediator presents a variety of values and ideas and makes the argument for them.

Of course, such a rich and detailed concept of mediation may require more than one session—and more than one kind of session. Community-enabling mediation is not a goal for a single meeting, but for an entire mediation process. It is not necessary that every aspect involve consideration by each person with the mediator present. Individuals might learn about some possibilities in a variety of ways: individuals or couples

229. To some extent, the problem with passive neutrality in mediation is similar to the problem with mere colorblindness in remedies for discrimination. As with passive neutrality, colorblindness requires that a decision should not involve the consideration of race (or similar characteristic). This is not enough for those who want individuals not merely to be free from formal constraints because of race but actually want to be able to achieve certain kinds of ends. Consider Culp's criticism of why the Court did not go far enough in striking down Virginia's law that made it a crime for a white person to marry a black person: "The real moral duty in *Loving* is not simply to permit those who wish to marry interracially to escape criminal prosecution, but rather to be able to choose whomever they wish to marry, free from social and political violence." Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading As Moral Claims*, 69 N.Y.U. L. REV. 162, 173 (1994); see also Rachel Moran, *Interracial Intimacy* (1997) (unpublished manuscript, on file with author). Similarly, passive neutrality may remove superficial bias, but may not enable individuals to make informed choices.

230. Many mediators I interviewed emphasized the problem of power inequalities with lesbian and gay couples and spoke more freely of intervening to balance such differentials, but they continued to treat such interventions as exceptional:

What the mediator has to be careful of is that one person has more power and the other person can get browbeaten into something just as they were in the relationship. Heterosexuals can fight in court—homosexuals can, but there's no recognition of the relationship. The judge won't recognize the finer issues. . . . I become more attuned I try to keep a lid on the person with more power. I may say, "Be quiet. He or she did not interrupt when you spoke." Often the one with more power is not used to listening. . . . I will try not to be an advocate unless one is being a horse's ass. It takes a little more time, but you can bring them back. If you can't, then maybe some advocacy will work. I'll say, "If you found yourself in a court of law, this is what could happen to you."

Benett Interview, *supra* note 10.

might learn about different possibilities by: (1) passively watching videos; (2) passively listening to tapes; (3) meeting with groups of other couples and actively discussing different ways of ordering their relationships; (4) exploring options on interactive media that let individuals read some material and then identify areas of additional reading or materials—for listening or viewing—that the individuals may want to consider. These multiple media and activities partially address two potential doubts about community-enabling mediation. First, these processes may address the objection of cost because they may cost less than face-to-face meetings. Second, because they are part of a process over time, they address the potential objection that individuals really do not consider competing ways of looking at things when they engage in face-to-face negotiations with short deadlines.²³¹

B. The Rationale for Community-Enabling Mediation

There are two related but distinct reasons why the mediation of same-sex couples should aspire to community-enabling mediation. The first reason is purely consequential and utilitarian: the parties may be happier with an outcome they have not yet been able to contemplate. A modest argument for this may be that parties in the midst of a dispute may display behavior that does not even serve what they would characterize as their own preferences.²³² The bolder premise I describe is that the mediator should try to uncover what the parties' values really are because what parties say they want at a particular point may not serve their needs as well as the choices they make after considering many alternatives.

This claim that the preferences are not true preferences depends on a variety of theoretical perspectives that what individuals say they want at a

231. One study concluding that students, and by extension, lawyers, do not really listen to legal arguments or different ideas about norms was based on face-to-face negotiations involving law students in simulated negotiations. See Condlin, *supra* note 136. In fairness to Condlin, he does note in the article that further research is needed into whether the generalizations based on law student simulations apply to how practicing attorneys negotiate. *Id.* at 90 n.54 & 135–36. Nine years later, however, Condlin's article is still cited in connection with more general skepticism that negotiations depend on arguments about competing applications of norms, legal or otherwise. See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1374 (1994).

232. See Ross, *supra* note 80; cf. BUSH & FOLGER, *supra* note 16, at 191 (a party in conflict may not look beyond her own needs).

particular point may be infected—even, in extreme cases, *determined*—by social influences apart from the individual.²³³ This argument is most frequently associated with critics of utilitarianism and neoclassical economics.²³⁴ It is also increasingly an understanding that even those once identified as orthodox economists, such as Gary Becker, have begun to contemplate.²³⁵

Although such preference skepticism is not brand new, it does deserve a new reading in the context of mediation. This is because the resistance to the idea of preference-skepticism partly depends on skepticism about whether *judges* have the competence and legitimacy to question preferences. The question of competence arises because a judge may not have the tools to know what parties really want.²³⁶ And even if the judge could, a legitimate objection is that a judge must give effect to controlling legal principles even if the parties would adopt different principles.²³⁷

These kinds of judicially focused arguments make it hard to think about how a judge skeptical of preferences would actually decide cases, but they do not apply with the same weight to mediation. As to legitimacy, mediators need not always give effect to legal principles at odds with party

233. A stronger version of skepticism about preferences—or at least stronger sounding vocabulary—is the notion that a person's understanding of her own interest may diverge from her own needs so much that one might say the person suffers from false consciousness. See, e.g., Radin, *supra* note 222, at 136.

234. See, e.g., ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 318 (1993) (describing the view that "[t]he relatively powerless prefer outcomes that are often detrimental to their true interest because they have been unduly influenced by a worldview (and a correlative conception of their place within it) that is the product of illegitimate, capitalist, racist, professionalist, or patriarchal power"). West is skeptical that a judge will have a better sense of a party's preferences than parties themselves. I share this skepticism, but I think it is worth exploring whether we can construct a mediation theory and practice that does allow individuals to develop a more fulfilling or otherwise valuable sense of their own identity and preferences.

235. See GARY S. BECKER, *ACCOUNTING FOR TASTE* 3–4 (1996) (noting that the "economist's normal approach" to preferences is to assume they are "independent . . . of the behavior of everyone else," but Becker's newer work expands "the definition of individual preferences to include personal habits and addictions, peer pressure, parental influences on the tastes of children, advertising, love and sympathy, and other neglected behavior").

236. See WEST, *supra* note 234, at 307 ("Although a judge cannot know anything about our subjective states, she can know our objective behavior."),

237. These objections track the familiar twin questions of legal process: Does a particular institution have competence for some activity? Does a particular institution have legitimacy for some activity? See generally HART & SACKS, *supra* note 17.

preferences, particularly when there are no dependents involved.²³⁸ The competence question is a more complicated question, which I consider in greater detail below.

C. Potential Objections to Community-Enabling Mediation

The model I have just sketched of community-enabling mediation is quite skeletal, but I anticipate two sets of objections. One objection is that community-enabling mediation would cost too much or would be inefficient. A second objection is that mediators, particularly lawyer mediators, might not have the competence to provide community-enabling mediation. Both objections deserve attention.

The first objection of cost depends in part on what one uses as a comparison. The simplest comparison would be between community-enabling mediation and existing forms of mediation. In comparison to often quite brief mediations, including mediation involving same-sex couples, community-enabling mediation may take more time and otherwise cost more.²³⁹ On the other hand, community-enabling mediation looks less expensive if we compare it to litigation.²⁴⁰

The related objection of efficiency is more complicated because there may be different notions of efficiency. Any species of efficiency balances costs and benefits, which means that much depends on how one defines benefits and goals. To the extent that mediation aims simply to maximize "satisfaction"²⁴¹ by promoting an agreement the parties deem "acceptable," anything more than the most minimal interventions may take more time with no efficient increase in "acceptability." One reason to want parties to consider whether there are better solutions than the ones they

238. To the extent that the parties agree to a solution on their own, or with the help of some other party, such as a mediator, courts are extremely likely to accept the agreement and even enter it as a judgment. See MACCOBY & MNOOKIN, *supra* note 9, at 41-42. It is a different matter if the parties do not agree with an arbitrator. As a matter of formal doctrine, some courts will not enforce arbitration agreements or awards when they involve custody or other "public policy" aspects of family question. See *supra* note 42.

239. See Engelhardt & Triantafillou, *supra* note 46, at 335 (describing standard mediation for lesbian couples as four-and-a-half-hours).

240. By litigation I do not mean the rare trial but a more usual set of pleadings, discovery, and settlement that resembles what litigants more typically do. See Erlanger et al., *supra* note 146.

241. See, e.g., Jeffrey Z. Rubin, *Foreword*, in BUSH & FOLGER, *supra* note 16, at xi ("Above all else, mediation makes it possible for agreements to be reached, and for those agreements to be ones that the disputants find satisfactory."). Rubin also goes on to emphasize an important secondary goal of promoting a "transformed" or "enhanced" relationship between the parties. *Id.* at xi-xii.

find acceptable relates to the way that what parties say they want at any particular moment may not best reflect what they would say they wanted if given more information about possible choices. A second independent reason is that the kind of choices that individual parties make may perpetuate institutions and practices that are no longer efficient. Some economists emphasize that individuals and society may cling to old frameworks even when they are not efficient. Nobel Prize-winning economist, Albert North, has explained this concept as "path dependence," which "comes from the increasing returns mechanisms that reinforce the direction once on a given path."²⁴² At a very general level, North theorizes that incremental change that makes society more efficient comes from "acquiring skills, knowledge, and information that will enhance their objectives."²⁴³ When it comes to the way in which individuals structure their intimate relationships, whether through marriage or otherwise, North's teaching suggests that we might worry that such existing patterns may reflect past practices more than contemporary needs.

Finally, we must consider questions of efficiency alongside a potentially rival claim that mediation should promote informed choice as an end in itself. We may believe that choices about relationships are more valuable—or even *only* valuable—if they are based on some kind of informed decision about other potential choices and arrangements. One might believe, for example, that even if a couple chooses a highly individualistic concept of relationships rather than a conception of a joint enterprise, the choice will be more valuable if the couple had the opportunity to consider the concept of a joint enterprise. Such a notion of informed consent is a fundamental value in much American political theory and legal practice.²⁴⁴ Such a conception of choice is consistent

242. LANCE E. DAVIS & DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 112 (Cambridge: Cambridge University Press, 1990).

243. *Id.*

244. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PENN. L. REV. 41, 109 (1979). Informed consent, in turn, draws on the value of autonomy. See DENNIS PATTERSON, *LAW AND TRUTH* 152 n.8 (1997) ("If any single theme runs through the whole of modernity it is the idea of autonomy."); Bruce Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707–15 (1992). For an outstanding argument that autonomy—including the choice of community practices—is consistent with support for a wide variety of communities, see Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 415–16 (1996). Despite the value of informed consent, it may be understandable in today's political climate that "informed consent" sets off some skepticism. A few readers of this Article worried that community-enabling mediation might burden individuals with information they did not want to know. More specifically, one reader worried that it reminded her of proposals that women may not have abortions until they are informed about other alternatives and the risks of abortions. In light of the assault on reproductive rights, the

with many western religious views that emphasize informed choice. Nevertheless, it is worth acknowledging that a notion of community-enabling mediation may be inconsistent with those who believe that communities or groups have rights as groups, including the right to promote individual identification with groups.²⁴⁵

The second major objection to community-enabling mediation is that it is unrealistic at any price because mediators lack the requisite skills. This competency objection fits many assumptions about what lawyers now do, but it says less about what a mediation *process* could do. In many existing mediations, lawyers function in conjunction with therapists.²⁴⁶ Moreover, community-enabling mediation as a process might well involve many kinds of professionals and forums other than face-to-face meetings with a lawyer or therapist. To some extent, then, the focus on lawyer mediators and what lawyers may do rests on the dubious notion that mediators must be lawyers.

Even to the extent that one looks at the potential of lawyers to play a role in identity-enhancing mediation, the evidence is not clear cut. Marc Galanter and Mia Cahill, for example, doubt that there is evidence that lawyers can identify parties' true needs as Carrie Menkel-Meadow hopes,²⁴⁷ or that parties settle according to the kind of private ordering that Melvin Eisenberg²⁴⁸ envisions. Oddly, they do not express any skepticism about Bush's claim that mediation should have what they characterize as an "inward effect" on participants, but note that such "inward effect" may be a standard for evaluating settlements.²⁴⁹ Maybe lawyers

reader's skepticism is quite understandable. Nevertheless, the sentiment that any reference to informed consent is troublesome is undercut because there are ready examples of the use of informed consent that supporters of reproductive freedom would find laudable. For example, advocates of reproductive choice might well invoke notions of informed consent to explain why a doctor should list abortion as one option to a woman who expresses reservations about giving birth. (And many of those with reservations about abortion would also want a doctor to inform a woman about abortion in at least some circumstances, such as when birth would risk the mother's life.)

245. See Garet, *supra* note 223.

246. Bennett Interview, *supra* note 10 (describing plan to organize a Los Angeles project to provide a team of a lawyer and a mediator to mediate disputes between same-sex couples); Engelhardt & Triantafillou, *supra* note 46, at 327 (describing how lawyer and therapist began mediating same-sex disputes together); see also *supra* note 123.

247. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984); Menkel-Meadow, *Whose Dispute Anyway?*, *supra* note 9.

248. See Galanter & Cahill, *supra* note 231, at 1359-40 (referring to Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976)).

249. See Galanter & Cahill, *supra* note 231, at 1378.

cannot practice community-enabling mediation now.²⁵⁰ If lawyers cannot do this presently—which is a kind of generic objection to mediation—then we should perhaps consider whether we need to reconfigure the kinds of things that we expect lawyers to do.

Finally, in considering these various objections, we also need to ask whether community-enabling mediation works as an ideal, even if we doubt how well it could work fully in practice. Ultimately, even if we conclude that community-enabling mediation is too expensive or inefficient in its most ideal form, it may still have value as an ideal. As Geoffrey Hazard and Paul Scott have noted, society may aspire to process values that we cannot or will not fund.²⁵¹ Similarly, as Martha Fineman has argued, it may be helpful to revise how we should arrange our lives and institutions, even if they seem "utopian."²⁵² In addition, as I have argued elsewhere, such re-visioning is particularly valuable when we appreciate how individuals (and communities of individuals) may enact ideals that larger groups do not.²⁵³ Different mediators may experiment with different ways to incorporate community-enabling into their practices.

CONCLUSION

This Article has made a series of related but severable arguments. Many may agree with one argument, but disagree with other arguments. First, the Article cautions that attempts to facilitate private ordering by resort to mediation by some subgroup, such as mediation by lesbian and gay community mediators, may not be entirely successful. This is partly because there may be forms of bias other than ones associated with the community, so that, for example, one may banish homophobia but still have vestiges of racism, class bias, and so on. Many may agree with this critique, but think such private community justice is still better than any

250. See Daniel J. Guttman, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 OHIO ST. J. ON DISP. RESOL. 175, 179 (1996) (attorneys may lack the training and skills to deal with emotional issues surrounding divorce).

251. See Geoffrey C. Hazard & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 44 (1988) ("With respect to the administration of justice . . . Americans evidently aspire to a higher standard of service than they are willing to pay for on a sustained basis"); cf. HUNTINGTON, *supra* note 76, at 16 ("In other societies, ideologies give priority to one value or the other, but in American society all these values coexist together in theory, even as they may conflict with each other when applied in practice. They coexist, indeed, not only within American society, but also within individual citizens.").

252. See FINEMAN, *supra* note 19, at 226–36.

253. See *id.*; Freshman, *supra* note 16.

alternative, such as resorting to courts; others may see the criticism as an occasion to engage in sensitivity to other forms of bias. The Article, however, also suggests that a partial solution to the problem would be to introduce various competing notions of community values and practice into the mediation process.

Second, the Article notes that some—including mediators and organizers of community mediation projects—may see mediation as an occasion to advance some notion of community interests. Sometimes this may be overt, as in those who offer things such as lesbian feminist mediation or Islamic mediation, but sometimes it may be less clear, as in “cultural sensitivity.” At a minimum, I suggest that parties should be aware of how mediators see the role of community and community values. Of course, mediators themselves may not always be clear on how much they just want to help individuals engage in private ordering and how much they want to serve (what they see as) community interests. To help clarify the possible roles of community, I offer examples of community-enhancing notions in other practices and traces of it that may occur in mediation involving same-sex couples. Moreover, I argue that community-enhancing is often problematic because it enhances one kind of community at the expense of other communities that individuals might value.

Third, the Article suggests one way to resolve the tension between community-enhancing mediation, which gives community a very strong role, and the passive neutrality of much mediation, which gives little room to notions of community and community values. The Article suggests an outline of community-enabling mediation that would encourage individuals to consider a range of values from different communities, but would not be designed to encourage individuals to adopt any particular set of such values or even to adopt any of those values rather than some combination of their own making. This proposal is related to my critique of the private-ordering and community-enhancing visions of mediation: private-ordering values community too little; community enhancing values particular notions of community too much. A community-enabling vision of mediation attempts to give community an appropriate place in letting individuals think about how to lead their lives. Again, the argument is severable from either or both of the other arguments about the limits of either the private-ordering or community-enhancing visions of mediation.

Finally, however one ultimately resolves the competing visions of mediation, those providing mediation or advising others about mediation—particularly attorneys—should remember the very real differences in vision and in practice between the way various individuals practice mediation. One should also appreciate the very different ways in

which individuals, particularly individuals with various disadvantages, may experience processes in different ways. For attorneys, the question becomes how to counsel individuals who want to choose a process to resolve their disputes and facilitate agreements. The relevant ethical consideration is helping a client make important and informed decisions about his representation. For those who design mediation programs, this means understanding the very different goals one might envision for mediation, including goals that affect communities beyond the parties in a particular mediation.

