HEINONLINE

Citation: 68 S. Cal. L. Rev. 1994-1995

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Mon Feb 23 16:08:43 2009

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0038-3910

ARTICLES

LURKING IN THE SHADOW

SCOTT ALTMAN*

TABLE OF CONTENTS

I. CUSTODY BARGAINS 495
A. PRIOR FINDINGS 496
B. NEGOTIATING PATTERNS IN CALIFORNIA 498
C. INTERPRETING THE CALIFORNIA FINDINGS 505
II. THE MORALITY OF CUSTODY BARGAINS 510
A. HARMFUL CONSEQUENCES 511
B. COERCION AND EXPLOITATION 513
C. INAPPROPRIATE ATTITUDES 517
D. SPECIAL CIRCUMSTANCES 518
III. LEGAL SOLUTIONS 520
A. FAMILY LAW 520
1. *Supervision* 520
2. *Custody Solutions* 521
3. *Child Support* 522
B. CONTRACT LAW 523
C. PROFESSIONAL RESPONSIBILITY 525
D. SUGGESTED SOLUTION 527
IV. CONCLUSION 529
V. APPENDICES 531

* Professor of Law, University of Southern California. For helpful comments on prior drafts, I thank Howard Chang, Erwin Chemerinsky, Dick Craswell, Howard Erlanger, Laura Fry, Ruth Gavison, Alon Harel, Deborah Hensler, Lewis Kornhauser, Ed McCaffery, Fran Olsen, Judith Resnik, Elyn Saks, Jerry Wiley, and the members of the L.A. Family Law Working Group. For tireless assistance in research, I thank Deborah Colaner, Angela Woo, and the U.S.C. law librarians. Financial support was provided by the Conrad N. Hilton Endowed Fund for the Improvement of the Administration of Justice.

HeinOnline -- 68 S. Cal. L. Rev. 493 1994-1995

"Who knows what evil lurks in the hearts of men?"
The Shadow, radio drama

"Individuals bargain in the shadow of the law."
Mnookin & Kornhauser

To bargain in law's shadow means to settle disputes in light of the costs and likely outcome of litigation if settlement efforts fail.[1] Law's most famous shadow is cast by unpredictable child custody standards, which enable some divorcing men to tell their wives "give me a good financial settlement, or else I will litigate custody." Some divorcing women capitulate, hoping to avoid the risk, pain, cost, and delay of litigation.[2]

Anecdotal evidence of these trades, though widespread,[3] reveals little about litigation threats or the individuals who make them. Such stories oversimplify a varied practice to a caricature. Part I of this Article documents the frequency and variety of custody-property trades.

Threatening litigation as a negotiating strategy is not the only way divorcing spouses use legal rules to torment each other.[4] However,

1. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). For other references to the law as shadow metaphor, see Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEG. PLURALISM 1, 8 (1981). For citations to the debate over whether law has a shadow, see H. KRITZER, LET'S MAKE A DEAL 164 n.6 (1991).

2. *See, e.g.*, Howard S. Erlanger, Elizabeth Chamblis, & Marygold S. Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC. REV. 585, 597, 600 (1987) ("Against custody threats and other tactics, a lawyer's reassurances and support may be insufficient to keep clients from folding.").

3. *See* Lawrence v. Lawrence, 642 P.2d 1043, 1049 (Mont. 1982) ("[C]ustody is frequently a bargaining chip in the settlement negotiations whether we like it or not."); JON ELSTER, SOLOMONIC JUDGMENTS 129 (1989); Thomas A. Bishop & Ann L. Milne, *When Custody is Not The Issue*, 12 FAM. ADVOC. 14 (1989); Erlanger, Chamblis, & Melli, *supra* note 2, at 600; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1595 (1991); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984); Nancy Polikoff, *Gender and Child Custody Determinations: Exploding the Myths*, in FAMILIES, POLITICS, AND PUBLIC POLICY 183, 195 (Irene Diamond ed., 1983); Henry H. Foster Jr. & Doris Jonas Freed, *Polities of Divorce Process—Bargaining Leverage, Unfair Edge*, N.Y. L.J., July 11, 1984, at 1.

4. Custodial parents deny visitation to extract child support payments or increases. *See, e.g.*, Edward L. Raymond, Jr., Annotation, *Withholding Visitation Rights for Failure to Make Alimony or Support Payments*, 65 A.L.R. 4th 1155 (1988). Noncustodial parents withhold child support to enforce visitation, and allege visitation violations to avoid paying child support. *See, e.g.*, REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM, GENDER AND JUSTICE at 96 (1991). Divorcing spouses threaten falsely to denounce the other as a child

HeinOnline -- 68 S. Cal. L. Rev. 494 1994-1995

this tactic differs from many others because it is lawful and is believed by some to be morally acceptable. Part II of this Article considers the morality of negotiating for custody trades. Part III reviews the legality of these negotiating tactics and proposes a legal change.

The moral and factual disputes that surround divorce negotiations complicate the choice of descriptive terms. Explicit proposals stating that one will litigate unless given a concession could be called "litigation threats" or "settlement offers." In Part II, I will address the claim that such proposals should be called "threats" because they commit the moral wrong of coercion. I will use the term "threat" loosely in Part I without intending any moral judgment.

I. CUSTODY BARGAINS

Divorce negotiation tactics differ in sometimes subtle ways. Parties seek a variety of terms, including favorable property division and visitation, low child and spousal support, promises not to relocate, promises not to seek restraining orders, and promises not to request child support increases or enforcement.[5] They attempt to extract these terms by threatening, or beginning,[6] litigation to get sole custody, joint custody, particular visitation schedules, custody modification, or orders that prevent relocation.

Even without explicit statements demanding concessions to avoid litigation, negotiators induce trades. Other techniques include demanding a particular outcome, hinting at litigation, and offering a settlement with custody terms unacceptable to the other side in order

abuser. *See id.* at 23; WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, s 4 (1989); GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT: COMMONWEALTH OF MASSACHUSETTS 69 (1989). *But see* Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L. Q. 279, 294 (indicating that this problem is far less prevalent than many people believe). Divorcing spouses may also threaten to reveal embarrassing and damaging facts, *see, e.g.*, Brash v. Brash, 551 N.E.2d 523 (Mass. 1990); Kaplan v. Kaplan, 182 N.E.2d 706 (Ill. 1962), or to declare bankruptcy, *see, e.g.*, *In re* Marriage of Baltins, 260 Cal. Rptr. 403, 408 (Ct. App. 1989).

5. This list is incomplete. It is based on fact patterns from reported cases and from interviews with divorce lawyers in Los Angeles that I conducted while preparing to write this Article.

6. Individuals start or complete custody litigation as a tactic for financial gain. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 479 n.118 (1985); Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, *in* DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990) [hereinafter *Private Ordering*]; Beverly Webster Ferreiro, Parental Conflict and Bargaining in Custody and Divorce Negotiations: Toward a Theory of Custody Negotiations 44 (1988) (unpublished Ph.D. dissertation, University of North Carolina (Greensboro)).

HeinOnline -- 68 S. Cal. L. Rev. 495 1994-1995

to elicit a counter-offer that contains financial concessions. Individuals who initially suggest a trade sometimes offer to pay for time with the child, and sometimes seek payment to forego time. Primary custodians gain financially when a noncustodial parent is willing to pay for more time with a child than the custodial parent wants to provide. Primary custodians lose financially when they pay (or give up support) so that the noncustodial parent will reduce or completely abandon visitation.

A. Prior Findings

Several types of evidence demonstrate that divorcing parents trade custodial for financial terms. Public testimony before Gender Bias Study Commissions,[7] surveys of family lawyers and judges,[8] and interviews with divorced individuals[9] all reveal evidence of threats and trades.

Conclusions about the frequency of threats and trades vary considerably. The vast majority of family lawyers in Connecticut think trades happen often or sometimes. In Washington, however, many lawyers and judges believe women never trade support or property for uncontested custody. In Florida and New Mexico, lawyers and judges

7. California Judicial Council, Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the Courts 8-9 (draft version 1990); Florida Supreme Court Gender Bias Study Commission, Report 63 (1990); Georgia Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts 187 (1991); Illinois Task Force on Gender Bias in the Courts, 1990 Report 79, 84 (1990); Louisiana Task Force on Women in the Courts, Final Report 44 (1992); Michigan Supreme Court Task Force on Gender Issues in the Courts Final Report 58 (1989); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report*, 15 Wm. Mitchell L. Rev. 826, 864 (1989); New York Task Force on Women in the Courts, Final Report 174 n.281 (1986).

8. *See infra* app. C. Increasingly sophisticated economic models of divorce bargaining lend theoretical support to empirical evidence of trades. *See, e.g.*, Carol C. Fethke & Nancy R. Hauserman, Changing Laws, Changing Bargains: The Impact of Child Custody and Child Support Laws on Bargaining Behavior (unpublished manuscript).

9. Howard S. Erlanger, Elizabeth Chambliss & Marygold S. Melli, *Cooperation or Coercion: Informal Settlement in the Divorce Context* 22 (1986) (Working Paper Series, University of Wisconsin) [hereinafter *Cooperation*]. In a study of 15 couples, Ferreiro found coercive tactics in 10. These included three litigation threats (one by a wife), two threats to reveal marital infidelity, and one threat not to pay child support. *See* Ferreiro, *supra* note 6, at 108; Barbara J. Lonsdorf, *Coercion: A Factor Affecting Women's Inferior Financial Outcomes in Divorce*, 3 Am. J. Fam. L. 281 (1989); Barbara J. Lonsdorf, *The Role of Coercion in Affecting Women's Inferior Outcomes in Divorce: Implications for Researchers and Therapists*, 16 J. Divorce & Remarriage 69 (1991) [hereinafter *Role of Coercion*].

HeinOnline -- 68 S. Cal. L. Rev. 496 1994-1995

overwhelmingly agree that fathers seek custody to gain financial leverage either sometimes or often. Results from these surveys are compiled in Appendix C.

Interviews also yield conflicting evidence. One woman in three interviewed by Lenore Weitzman said that her husband had threatened to seek custody as a "ploy in negotiations."[10] Jessica Pearson and Nancy Thoennes report that about one in five individuals in mediation felt pressure to trade financial concessions for concessions in custodial terms,[11] though pressure did not always stem from specific threats. Both men and women reported pressure, usually for men to forego custody or visitation time in exchange for financial terms.[12]

Maccoby and Mnookin suggest that pressure to make trades is uncommon and ineffective in securing better financial settlements. In their sample, ten percent of fathers and seven percent of mothers requested more custodial time in divorce petitions than they claimed actually to want.[13] The authors infer that because so few individuals request more custody than they desire, requests are rarely made for strategic reasons. Further, these authors analyzed child support and spousal support awards in cases awarding primary physical custody to the mother. They found that levels of conflict over divorce (as self-

10. Weitzman, *supra* note 6, at 310. Weitzman interviewed 228 men and women in 1978. Unfortunately, Weitzman does not report information about the questions she asked. Given the serious problems raised about her work, *see, e.g.*, Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) [hereinafter *Consequences*], it seems uncertain how much weight to place on this figure.

11. Pearson and Thoennes interviewed 302 individuals who used public and private mediation services in ten states between 1986 and 1988. Individuals tended to attribute the pressure to lawyers and ex-spouses more than to mediators. THE CENTER FOR POLICY RESEARCH, THE EQUITY OF MEDIATED DIVORCE AGREEMENTS 71 (1990) [hereinafter EQUITY OF MEDIATED DIVORCE AGREEMENTS].

In analyzing a large data set, Pearson and Thoennes again found pressure to trade was experienced by about 20% of the individuals surveyed. In this study they did find some variation based on gender and on the custodial arrangement eventually established. Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCH. 233, 240 (1990).

12. EQUITY OF MEDIATED DIVORCE AGREEMENTS, *supra* note 11, at 72. This was not universal. Some mothers reported pressure to permit greater visitation in order to secure child support or other financial terms. Some fathers reported pressure to pay more child support in order to secure better visitation.

13. Mnookin gives two different figures. In one report, he makes the claim in text in ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 102 (1992) [hereinafter DIVIDING THE CHILD]. In *Private Ordering*, *supra* note 6, at 50, he says that 9% of fathers and 5% of mothers made excess demands.

HeinOnline -- 68 S. Cal. L. Rev. 497 1994-1995

reported) did not affect levels of support. They infer that because custody threats likely occur with high conflict, women are not giving up much support in response to threats or excess demands.[14]

Prior researchers have not usually explored how gender correlates with negotiation practices. The possibility that mothers demand financial terms in exchange for custodial terms has largely been ignored. Probably writers have assumed that because mothers usually have primary physical custody of children, fathers cannot be pressured into a trade. This assumption is bolstered by reported cases: the two dozen judicial opinions that discuss threats to litigate custody all involve husbands threatening wives. However, custodial time is a spectrum. Anyone who wants time with a child might fear a threat to deny that time. Admittedly, because there is a strong presumption in favor of visitation, threats to litigate against visitation altogether are not often credible.[15] Still, fathers who want more than minimal visitation might feel pressure to pay for it. In fact, in several reported cases wives threatened to curtail visitation if not given certain terms in a settlement.[16] The few researchers who have inquired about gender found some men reporting pressure to pay for custodial time.[17]

Uncertainty and conflict in prior research raise several questions. First, how often do spouses explicitly threaten litigation to secure financial terms? Second, how often are more subtle pressures intended or experienced? Third, how effective is pressure in extracting financial gain? Might effectiveness vary depending on state laws? Do the exchanges that occur usually involve property division, child support, or spousal support? Fourth, what portion of custody threats and trades involves women making financial concessions?

B. Negotiating Patterns in California

I surveyed members of the Family Law Section of the California Bar Association in an effort to answer some of these questions. The

---

14. Dividing the Child, *supra* note 13, at 154-58.

15. Of course, threats to deny visitation unlawfully can be credible and are known to occur.

16. *See, e.g.*, Libel v. Libel, 616 P.2d 306 (Kan. Ct. App. 1980). In several cases wives allegedly threatened to reveal embarrassing information if not given certain terms. *See, e.g.*, *In re* Marriage of Chapman, 515 N.E.2d 424 (Ill. App. Ct. 1987).

17. Pearson and Thoennes reported finding some who felt such pressure. Pearson & Thoennes, *supra* note 11. A New Mexico task force asked family lawyers whether mothers use custody for economic leverage. Although male and female attorneys disagreed as to frequency, 65% of male attorneys and 41% of female attorneys agree that mothers do this at least sometimes. Less than 10% of attorneys thought mothers never do this. New Mexico State Bar Task Force on Women and the Legal Profession, Final Report 67 (1990).

HeinOnline -- 68 S. Cal. L. Rev. 498 1994-1995

questionnaire [reproduced with responses as Appendix B] asked whether attorneys and their clients traded or experienced pressure to trade custodial time for financial terms in the past year. It encouraged respondents to make additional written comments. Specific findings and an explanation of survey methods are contained in appendices. The questions used neutral terms, such as "proposal" and "trade," rather than terms with negative associations, such as "threat." Although answers to particular questions varied widely, little variation could be explained by factors such as attorney gender, client income, or location. Questions often inquired about client behavior and behavior of opposing counsel in order to minimize nondisclosure of embarrassing information. To the extent that anonymity and focus on other people's actions did not overcome the natural tendency to deny negative behavior, the data likely understate the prevalence of threats and trades. Overall, the results confirm that negotiating tactics aimed at trading custodial time for financial terms are widespread though hardly universal. They are also less explicit and less gender-linked than some accounts suggest.

Divorcing individuals in California do threaten custody litigation. Sixty-one percent of lawyers reported receiving (or representing a client who received) such a threat at least once in the past year.[18] However, lawyers did not report receiving threats very frequently. Across the entire sample, on average respondents received threats in thirteen percent of their cases.[19] A majority thought this practice was more common now than ten years ago.

Lawyers were unsurprisingly more reticent when discussing their own behavior.[20] Several written comments indicated that lawyers rarely threatened litigation or suggested this tactic to their clients. Rather, lawyers reported that most explicit threats were made by clients on their own initiative. Fifty-four percent responded that a client

18. The question producing this figure, as with all other data, did not use the word "threat." Rather, it asked "[i]n the last year have opposing counsel or their clients ever stated or clearly implied that they might litigate over custodial time if your client did not agree to a favorable financial settlement? Include proposals reported to you by your clients." The entire questionnaire is reproduced in Appendix B.

19. Those who received at least one threat on average reported threats in 21.5% of their cases.

20. That lawyers admitted making threats less often than receiving them is unsurprising for several reasons. First, threatening custody litigation is widely regarded as unethical. Therefore lawyers had reason not to admit to this behavior. Second, because much of this behavior likely takes place with no lawyers present, lawyers' information mostly derives from their clients. Clients who make threats are less likely to reveal them to their lawyers than are clients who receive threats.

HeinOnline -- 68 S. Cal. L. Rev. 499 1994-1995

had suggested threatening litigation to gain a favorable financial settlement in the last year. Nearly all of these lawyers (95%) tried to dissuade the client. Only 21.5% admitted that they or their client actually had threatened litigation in the past year. Across the whole sample lawyers said this happened in two percent of cases.[21]

Three out of four lawyers asserted that threatening custody litigation is never ethical. Among those who thought it sometimes ethical, some indicated in written comments that they believed the practice is permitted by the codes of professional responsibility, though not necessarily by morality. A few indicated that litigation threats or other pressures to trade were inevitable, a natural part of bargaining, demanded by zealous advocacy, or acceptable in limited circumstances, such as in response to inappropriate actions from the other side.

The gender of threat recipients was mixed. When asked who they were representing when they received a litigation threat, a majority of lawyers responded either "women only" or "women more than men." Among lawyers who admitted making (or representing clients who made) threats, a majority said they represented "men only" or "men more than women." So the practice is clearly linked to gender. However many lawyers responded "men and women equally" to both questions, and relatively few selected the extreme categories of "men only" or "women only." As the following charts indicate, a large majority of respondents say that women threaten litigation in at least some cases.

Representations When Receiving a Threat:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
6% (34)	10% (60)	29% (172)	41% (240)	14% (81)

21. Those who admitted threatening (or representing someone who threatened) litigation reported such threats in 13% of their cases.

HeinOnline -- 68 S. Cal. L. Rev. 500 1994-1995

Representations When Making a Threat:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
30% (63)	33% (70)	27% (57)	7% (14)	3% (6)

Some efforts to trade custodial for financial terms rely on subtle pressure. Many lawyers (50%) reported that their clients accept worse financial settlements than the lawyer thought they could get in order to secure more custodial time even in the absence of clear litigation threats.[22] Across the whole sample, they reported such concessions on average in 8.4% of cases. Most of these lawyers (84%) reported trying to convince clients not to accept such terms. However, they found such attempts successful somewhere between "not often" and "as often as not." Because clients apparently resist pressure in some cases, pressure must be felt in more than the 8.4% of cases in which the pressure succeeded.

Pressure to trade can arise when the other person requests more custodial time than actually desired. Many lawyers (33.4%) reported making offers and counter-offers requesting more custodial time than their clients want. Across the whole sample lawyers on average reported doing so in eight percent of cases. Among those who request more time than desired, a minority (23%) admitted doing so at least in part to secure better financial terms.

Pressure can also arise in the face of requests for sincerely desired custodial time if the proposal is undesirable to the recipient and the requestor is receptive to a trade. Most lawyers (76%) reported settling for less custodial time than they initially request. Of these, 24% sometimes try to trade such concessions for financial concessions. On average lawyers admitted doing this in 2.4% of cases.

The gender of clients who exert subtle pressure was again mixed. Usually men encourage women to trade money to secure time. But

22. Some lawyers indicated in written comments that this question was particularly difficult to answer for two reasons. First, clients' motivations for accepting terms were not always clear. Even when they were clear, they were often mixed. A client might make a concession to generate good will, which might help in negotiations over custody and might maintain good relations that would benefit everyone in the long term. Second, concessions were subtle and hard to detect. They sometimes took the form of failing to pursue claims over close questions regarding valuation of assets and characterization of property as separate or community.

some men feel pressure to pay for time. The following three charts all attest to this pattern:

Representations When Clients Concede Money to Secure Custody Without Threats:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
7% (33)	12% (56)	30% (145)	40% (192)	11% (53)

Representations When Demanding Unwanted Time to Secure Financial Terms:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
28% (38)	33% (44)	32% (43)	4% (6)	2% (3)

Representations When Trying to Trade Desired Time for Financial Terms:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
15% (27)	29% (51)	42% (75)	11% (20)	2% (4)

I did not inquire whether those who traded for custodial time gave up property or support more often. However, many lawyers discussed this question in written responses. They all stated that child support was the main financial term exchanged for custodial time.[23] Those who mentioned spousal support and property division said that trades involving these terms were rare or nonexistent in their

23. These written comments mirror the findings of a survey of Washington judges and lawyers. Substantially more lawyers and judges in Washington thought women gave up child support to secure custody than thought women gave up community property to secure custody. *See infra* app. C. One study found that couples often do not trade child custody for marital property. *See* Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules, and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279 (1993).

HeinOnline -- 68 S. Cal. L. Rev. 502 1994-1995

experience. I found these assertions surprising. Because support is modifiable, I expected that individuals who give up custodial terms would demand concessions made in property division rather than support, at least when there is some property to divide.

The apparent dominance of child support exchanges likely stems from several sources.[24] First, often couples have little property at divorce. Second, bargains over child support could prove more stable. Because child custody and visitation are modifiable, giving up marital property to secure custodial terms could be foolish. After making the concession, one might lose the custodial terms in a later modification, or subject oneself to further financial demands, much like a blackmail victim. Because child support is modifiable and periodic, a later threat to modify custody can be met with a counter-threat to increase child support. In this way each side is somewhat protected from the other. Third, many lawyers identified a connection between trades and certain unusual aspects of California's child support laws discussed further below.

In summary, two conclusions seem safe:

(1) *Individuals exert and feel pressure to trade custodial time for financial terms in a substantial minority of divorces, likely more than twenty percent.*

Twenty percent is a conservative estimate. Lawyers reported receiving threats on average in thirteen percent of cases, and representing clients who concede financial terms to secure custodial terms in the absence of threats in 8.4% of cases. In an additional number of cases subtle pressure was resisted. This provides evidence of pressure in more than twenty percent of cases. Although lawyers admitted making threats and offering trades in fewer cases, the natural tendency to understate one's own morally problematic behavior gives reason to discount these numbers when they differ from lawyers' reports of threats received and terms their clients gave up.

Further, threats and trades are likely more common than indicated even by lawyers reporting pressure from the opposing side. These lawyers had no reason to overstate frequency. Several reasons

24. Tax considerations likely played no role in this result. The main incentive created by the federal income tax is to disguise transfers as alimony, which is deductible by the payor and included in the recipient's income. If they are in different tax brackets, this permits savings to the couple that they can split.

suggest that their experiences understated actual practice. First, because lawyers often counsel their clients not to make threats and not to give up financial terms in exchange for custody, unrepresented individuals [whose negotiations were not captured by my questions] likely trade finances for custodial terms more often than represented individuals. Second, because so many disputed custody issues are resolved without lawyers, especially in California's mandatory mediation, many lawyers do not hear about the details of their clients' custody negotiations. Third, lawyers had some incentive not to admit receiving threats, as this behavior reflects badly on their profession. Finally, I inquired only about threats at divorce. I therefore neglected two categories that—according to written comments—have higher incidence of threats and trades: dissolution of nonmarital relationships with minor children, and post-dissolution proceedings for child-support increases or collection.

Pressure to trade does not always lead to trades. My questionnaire did not ask how often pressure was successful. However, when clients wanted to accept financial losses to secure custodial terms, some lawyers (fifteen percent) did not attempt to convince clients not to do so. Those who did try to dissuade clients met with limited success.[25] Therefore survey responses support a conclusion that parents trade financial for custodial terms in a significant minority of cases.

(2) *More women than men feel pressure to trade financial terms in response to litigation threats, insincere custodial requests, and sincere custodial requests accompanied by willingness to trade. However, some men feel pressure to pay for custodial time, and some women threaten litigation and make excess demands to induce such payments.*

This finding should be approached cautiously. First, the fact that both women and men threaten litigation and make excess demands to gain financial terms does not show that they do this in similar circumstances. A variety of factual differences might lead one to regard some threats or pressure by women differently from threats and pressure by men. Women are often poorer than their husbands. If so, the money they seek might be more desperately needed. Further, because most children spend most of their time after divorce in their mother's custody, money acquired by women often increases the child's living standard, while money taken from women often

25. On average lawyers who tried to dissuade their clients thought they were successful somewhere between "not often" and "as often as not." *See infra* app. B question 9d.

HeinOnline -- 68 S. Cal. L. Rev. 504 1994-1995

decreases the child's living standard. Additionally, time traded away by a woman often leaves the woman many hours with the child. Men, on the other hand, might be trading away some of a small number of hours they would otherwise spend with the child. As well, perhaps men often threaten to litigate over primary physical custody, and women more often threaten to litigate over visitation schedules.

Second, as I will discuss further below, several unusual facts about California law could limit the universalizability of my findings. Custody trades might be more gendered in other states than they are currently in California. On the other hand, findings in New Mexico and Colorado suggest that exerting pressure to give money for time is nowhere an exclusively male practice.

C. Interpreting the California Findings

My conclusions offer a rough picture of negotiation practices. The picture is rough partly because important information cannot be obtained. For example, individual motives for accepting financial terms or for requesting custodial terms are unavailable to lawyers. Divorcing individuals do not always know their motivations, and cannot easily sort the mixed motives that certainly pervade this area.

As well, these practices have probably not always been like this in California, and are not currently like this elsewhere. Temporal and regional variation could explain why results vary among researchers who gathered information in different times and places. I found evidence of fewer explicit threats than Weitzman,[26] and more threats, pressure, and actual trading than Mnookin.[27]

No doubt some of this variation is due to differences in method. For example, that I find evidence of fewer litigation threats than

26. Weitzman found that 33% of *men* threaten litigation, while I found evidence of threats in only 13% of divorces. Because Weitzman did not include threats made by women, her finding is even further from mine than it first appears. This difference is even more puzzling because most lawyers believe litigation threats are more common now than 10 years ago when Weitzman collected her data.

27. My combined figure for threats (13%) and trades without threats (8.4%) does closely mirror Pearson and Thonnes' findings that couples report pressure to trade in about 20% of cases. *See* Pearson & Thonnes, *supra* note 11.

HeinOnline -- 68 S. Cal. L. Rev. 505 1994-1995

Weitzman might be because lawyers do not witness all threats.[28] Weitzman's interviews with clients should reveal a higher incidence.[29]

Mnookin's method, on the other hand, understates the level of strategic bargaining. Looking only to *filings* ignores threats to litigate and excess requests made during prefiling negotiations. If one spouse threatens litigation and extracts a financial agreement before filing, then the divorce petition will reflect an apparent consensus generated by strategic behavior. Further, one must be suspicious about self-reports of how much time people want to spend with their children. Because admitting that one does not want to spend time with one's child is embarrassing, people likely lie about their desires. As well, "sincerely wanting custody" can mean many things, including that one would like custodial time if time did not interfere with one's freedom; that one would like to be the sort of person who takes care of one's children; or that one is willing and ready to assume responsibility for child care. Given the range of meanings, and the likelihood that people are not certain which of these things they intend, such claims must be regarded with caution.[30]

Some variation likely reflects different practices over time and location. Many factors create complex incentives that could both

28. One aspect of Weitzman's claim seems to me insupportable. She claimed that one in three divorcing husbands threatens litigation as a "ploy." I do not see how either Weitzman or the women she interviewed could know which litigation threats were ploys. One person often perceives a proposal as a sincere offer, while another interprets it as a tactic or threat. For example, men often become more interested in spending time with their children as divorce approaches. Expressions of this apparently new interest can seem insincere, and perhaps calculated, to women. As well, it is natural to suspect control and bad motive during divorce. Most people leave negotiations with less than they initially requested. In retrospect, men who accept less custodial time than they requested can appear to have made both request and concession for financial leverage.

29. Method does not explain the substantial differences between Weitzman's and Pearson's results. Both interviewed divorcing individuals. Perhaps this discrepancy can be explained based on differences in time and location. Time might seem an unlikely explanation because my surveys indicate that litigation threats are more common now than when Weitzman collected her data. However, many written comments attributed the increase to recent developments in California's child support laws. Some comments suggested that without this effect, trades and threats are otherwise on the decline. It is possible that litigation threats would be less common in a state with different child support laws than they were in California 10 years ago.

30. As to the conclusion that women give up little in response to litigation threats, Mnookin's result depends on the assumption that pressure to trade will correlate with conflict. It does not seem reasonable to me to think that litigation threats will occur mostly with high conflict. Litigation threats might lead to terrible conflict. But they might end conflict by bringing negotiation to a quick and decisive end. Further, even if threats often bring conflict, the fact that conflict likely often arises from other sources makes it unlikely that Mnookin's method would identify losses attributable to litigation threats.

HeinOnline -- 68 S. Cal. L. Rev. 506 1994-1995

increase and decrease litigation threats and custody trades. These variations are impossible to measure with the limited data available. Nonetheless, factors that might affect negotiations include the following: mandatory mediation, child support guidelines, child custody rules, marital property rules, and shifting attitudes toward paternal custody and negotiating styles. I will discuss these briefly in turn.

California's mandatory child custody mediation might discourage litigation threats. In jurisdictions that permit mediators to communicate with judges,[31] parents might hesitate to threaten litigation or to link custody with financial terms out of fear that a mediator will discover the tactic and report it to a judge.[32] The judge could use this information to justify attorneys' fees or a custody decision.[33] However my data did not reveal significant variation that could be traced to mediation reporting practices. Perhaps couples were unaware of mediator reporting rules. Perhaps even in jurisdictions that do not permit reporting, mediators discourage these tactics. California's mandatory mediation is intended exclusively to resolve disputes over child custody. Several people have informed me that mediators will not permit discussion of financial issues in these sessions. On the other hand, mediation can be a forum for pressure to trade custodial time for financial concessions.[34] Mediators, who are trained to locate areas of compromise, might even encourage trades.

Child support guidelines alter divorce negotiation incentives in complex ways. In personal interviews and written comments many attorneys asserted that California's child support rules could affect custody-finance trading. California guidelines permit noncustodial parents to pay less child support if they increase their custodial time.[35]

Initially I assumed these set-offs would reduce the incentive to trade custodial time for financial terms. Parents interested in saving

31. In California, some counties permit mediators to recommend custodial decisions to judges if mediation fails. *See generally* Lizbeth M. Morris, Note, *Mandatory Custody Mediation: A Threat to Confidentiality*, 26 SANTA CLARA L. REV. 745 (1986) (discussing and criticizing the regulations that permit mediators to communicate with the court).

32. This might chill threats made outside the mediator's presence if threateners fear that the recipient will reveal the threat to the mediator.

33. Fathers threatening litigation have always risked the possibility that if the litigation actually took place, their threat would be revealed to the judge. However, the mediator's conclusion might be more convincing than the wife's allegation because the mediator is a neutral party.

34. *See* NANCY THOENNES, JESSICA PEARSON & JULIE BELL, EXECUTIVE SUMMARY OF THE EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION 85 (1991).

35. CAL. FAM. CODE § 4055(a), (b)(1)(d) (West 1994) (amending CAL. CIV. CODE § 4721).

HeinOnline -- 68 S. Cal. L. Rev. 507 1994-1995

money would insist on custodial time rather than trading it away. However, litigation threats appear to be increasing. And lawyers who mentioned the guidelines thought that set-offs increased the frequency of bargains. Perhaps attaching an explicit price to time with children induces parents to view this time as a source of funds, or leads noncustodial parents to consider the exact cost of reducing their visitation time, and therefore to be less willing to do so unless compensated. Perhaps because set-offs (and other factors) are leading fathers to seek more time with children, mothers are now resorting to litigation threats and other means of exacting payment for time they give up. In particular, because the child support reductions that accompany increased visitation often exceed reduced child-rearing expenses for the custodial parent, custodial parents can be impoverished by substantial visitation. Therefore even if a custodial parent wants a child to visit frequently with the noncustodial parent, set-offs create an incentive to oppose visitation unless paid. This incentive is heightened if the custodial parent believes that the visitation rights are being sought by the noncustodial parent only to reduce support obligations, and that the visitation rights secured will not be exercised.

Additionally, shortly before my survey, California's child support schedules had been amended to require larger child support payments, which some lawyers and noncustodial parents regarded as unfairly high.[36] Pairing high payments with set-offs might lead noncustodial parents to demand more time, or to demand payment to forego time, in order to avoid payments they regard as excessive. Several comments written on questionnaires indicated that the combination of high guidelines and set-offs generated an increase in litigation threats and pressure to trade.

The overall effect of California's child support guidelines is not obvious. Different aspects probably create contrary effects. However, states with different support levels and set-off provisions might have fewer bargains, less focus on child support, and fewer women seeking money for custodial time.

Variation in custody rules might affect negotiating practices. It has long been asserted that uncertain rules and risk aversion encourage settlement.[37] Even predictable rules can encourage bargains that exchange custodial time for money. A predictable outcome that is very objectionable to a risk-averse person will elicit greater risk

36. They have since been reduced somewhat for high-income payors.

37. Mnookin & Kornhauser, *supra* note 1.

HeinOnline -- 68 S. Cal. L. Rev. 508 1994-1995

aversion over whether a litigation threat will be carried out. For example, the possibility of joint custody could increase a would-be custodial parent's aversion to nonsettlement. Such threats might be more effective because they are more credible. In jurisdictions preferring joint custody, joint custody is easier than sole custody for a father to get,[38] and less burdensome for a father to manage. Anecdotal evidence about litigation threats has long included threats to seek joint custody.[39] On the other hand, joint custody rules might reduce litigation threats' effectiveness. Joint custody makes custodial time a spectrum. One is less likely in litigation to lose custody than to lose custodial time. Because losses in litigation are less absolute, threats might be less intimidating and therefore less effective.

Variation in marital property regimes could also account for regional variations. In both California and Washington property appears to be less often the subject of trading than is child support. Perhaps limited discretion in dividing marital property, or the sense that marital property is owned equally, makes such trades less likely in these community property states.

Finally, aggressive negotiating and custody trades could be linked to attitudes that vary over time and location. As more fathers are interested in custodial time, fathers might make fewer threats or demands for money, preferring to keep what time they get. On the other hand, as fathers insist on more custodial time, mothers might increasingly demand financial terms in exchange. Or as fathers increasingly want custodial time, they might increasingly resent settlements that deprive them of this time, and therefore be unwilling to settle unless paid.

Lawyers' attitudes are also relevant. The expansion of alternate dispute resolution and dissemination of information about less confrontational negotiating styles might change lawyers' attitudes toward litigation threats. Lawyers might less often suggest litigation threats and more often discourage clients inclined to be aggressive in this way.

Apart from the few rough conclusions that seem to me safe, and the speculations on factors that could explain variation over place and

---

38. *See, e.g.*, Mnookin et al., *Private Ordering*, *supra* note 6, at 54.

39. *See, e.g.*, Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 423 (1990); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 554 (1982).

HeinOnline -- 68 S. Cal. L. Rev. 509 1994-1995

time, I can offer only questions for future inquiry. First, are litigation threats or other pressures to trade correlated to parenting time during marriage? Second, are they correlated with relative economic welfare of husband and wife? Third, are they correlated with family economic status? Fourth, what factors might explain variation in attorney responses collected in a single state?[40]

II. THE MORALITY OF CUSTODY BARGAINS

Why object if someone threatens litigation or proposes to trade property or support for a specific custodial arrangement? Many people think threatening civil litigation to settle disputes is acceptable if the threatener has a valid legal claim.[41] Because custody standards are so broad, and outcomes so varied, most custody claims are potentially valid. Perhaps individuals who make these proposals do not want the custodial terms they demand or threaten to seek. But many negotiators use false demands. Few people consider false demands generally unethical.[42]

Threatening custody litigation and proposing to trade property for custodial terms raise moral difficulties that do not necessarily arise for negotiating practices outside family law. In this part, I consider three arguments that these practices are prima facie wrongful. First, they harm children and custodial parents without good reasons. Second, they often coerce and exploit. Third, they exhibit inappropriate attitudes toward children. I also consider whether the wrongfulness of these proposals is diminished if the proposer sincerely wants custody,

40. Regressions of answers based on characteristics such as county population, attorney gender, average client wealth, client gender, years of experience, and amount of practice devoted to family law did not explain much variation in attorney responses.

41. Lawyers believe that threats of civil litigation are generally proper. *See* ROGER S. HAYDOCK, NEGOTIATION PRACTICE 147 (1984). Many even say that they would threaten deportation to gain leverage in settling a civil suit if negotiating with a deportable individual. *See* Steven Pepe *cited in* David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 406 (1985).

42. *See* Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 191-92 (1989); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, AM. B. FOUND. RES. J. 926, 934 (1980). Those who find it inappropriate argue that there is no difference between lying and other forms of deception in negotiation, *see* Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 6 (1987), or that false demands are inappropriate in limited circumstances. *See* Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 90-93 (1985); Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations*, 1990 J. DISP. RESOL. 103, 111-12.

HeinOnline -- 68 S. Cal. L. Rev. 510 1994-1995

if no explicit litigation threat precedes the trade, or if the trade arises in certain special circumstances.

I conclude that in many cases trading custodial terms for support or property is wrong, and that practical steps should probably be taken to deter these trades. However, the question is more complex than initially appears. Some trades are plausibly regarded as morally acceptable or even desirable. Others, though wrongful for being coercive, might be justified or excused because they are beneficial for children. Although there are reasons to suspect that most are objectionable, I am uncertain about proportions, and am skeptical that any practical steps could deter only the objectionable trades.

A. Harmful Consequences

Demanding payment for custodial time could contribute to harms associated with divorce. It might increase a child's exposure to bad placement, litigation, protracted hostility, poverty, and lost contact with a noncustodial parent.[43]

These harms are not equally likely. Bad placement and litigation are probably rare results. If the proposal is accepted, the child faces no litigation and ends up with the same custodian she would have had without the proposal. Threats and pressure could prolong divorce negotiations if they delay compromise.[44] But effective pressure can shorten negotiations. Demands to trade sometimes increase hostility that lasts long beyond the divorce.[45] Many family law attorneys discourage aggressive negotiating because it is remembered and retaliated against to the detriment of parents and children alike.[46]

Trades harm children most directly by making children poorer and by depriving them of significant contact with one parent. Admittedly, sometimes losing contact with a noncustodial parent is better

43. Parents need not settle on custodial arrangements exclusively on the basis of the child's welfare. If a child would be slightly better off with one of two good parents, but the other parent would suffer dramatically more from not having custody, the latter parent would not breach a duty by retaining custody, and the former would not breach a duty by permitting this. *See* Elster, *supra* note 3, at 143.

44. Thurman, *supra* note 42, at 111-12.

45. For an explanation of how custody threats might lead to a cycle of revenge and retaliation see Lonsdorf, *Role of Coercion*, *supra* note 9.

46. *But see* Ferreiro, *supra* note 6, at 128 (documenting cases in which moderately coercive bargaining strategies together with communication during the divorce are associated with less conflict in the long term than cases in which no coercion or communication occurs during the divorce).

HeinOnline -- 68 S. Cal. L. Rev. 511 1994-1995

for a child. Very often, however, some contact is better than none, and modest amounts of visitation are better than minimal amounts. When noncustodial parents demand (or accept) lower child support payments in exchange for reduced visitation, the bargain provides children with less money and less contact with the noncustodial parent. When the noncustodial parent agrees not to contest custody, the harm is merely financial.

Not all trades harm children. Couples with sufficient funds will provide for children despite trades. For couples with little money, trades are likely symbolic assertions of power more than decisions with financial consequences.[47] Trades involving visitation sometimes provide children sufficient contact with each parent. Trades can even benefit children. When primary custodians extract favorable financial terms in exchange for increased visitation, children get more money and more contact with the noncustodial parent. Some trades have mixed effects on children's welfare. For example, child support setoffs can encourage time spent with the noncustodial parent and at the same time impoverish the child financially.

Demands to exchange financial terms for custodial terms might contribute to the impoverishment of women. Women's poverty after divorce is a serious problem.[48] It is not clear, however, what role custody trades play in women's financial circumstances. In most divorces there is little property to divide.[49] Much of the disparate effect of divorce on women stems from differences in education, job skills, seniority, and the cost of rearing children.[50] That alimony, child support, and property division often leave women poor even in litigated cases

47. Some trades are not financial at all. In written comments and personal interviews lawyers mentioned cases in which litigation threats were used in an effort to prevent relocation or to induce a custodial parent to withdraw a petition for a restraining order.

48. The problem is real on anyone's reading of the statistics. *See* WEITZMAN, *supra* note 6, at 337-43, 351-52; Ned H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251, 278-80 (1989); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985) [hereinafter *Reconsideration*]; Duncan & Hoffman, *Consequences*, *supra* note 10; Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95 (1989).

49. As of 1988, fewer than 32% of divorces involved division of assets. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, Series P-23, No. 167, CHILD SUPPORT & ALIMONY: 1987 at 8 (1987). *See generally* WEITZMAN, *supra* note 6, at 55-56 (discussing the lack of substantial assets among divorcing couples); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 619, 662-66 (1991) (discussing the value of marital property).

50. *See* Duncan & Hoffman, *Reconsideration*, *supra* note 48, at 495.

HeinOnline -- 68 S. Cal. L. Rev. 512 1994-1995

suggests that eliminating pressure in settlement negotiations might do little to help women financially. Furthermore, because many factors besides custodial terms affect settlement outcomes,[51] eliminating this single tactic might do little to remedy women's poverty at divorce. Finally, although more men than women use these tactics, some women benefit financially from these trades.

Sincere desire for custody, or the absence of an explicit threat to litigate, does not reduce the harms of custody trades. Polite offers to trade can cause hostility and poverty just as much as angry threats to litigate. Demanding payment to forego custodial time that one wants impoverishes children no less than demanding payment for time one does not want.

I cannot demonstrate that the harms associated with trades and threats are worse than the benefits. However, I suspect that harms are more pressing. Women seem to be giving up financial terms more often than gaining them. Given that children spend the majority of their time after divorce in their mother's custody, the net effect of trades and threats is likely to be a reduction in women and children's wealth and a reduction in time spent with noncustodial parents.

These simple consequentialist objections to trades do not exhaust moral concerns. In the remainder of this part, I consider more complex arguments, such as the claim that litigation threats exploit and coerce. There is no need to choose among these objections; actions can be wrong for multiple reasons. Nonetheless, it seems worth noting that different moral objections can diverge in their targets. The most coercive or exploitative proposals will not necessarily be those that harm children most, and wholly noncoercive proposals sometimes impoverish children.

B. Coercion and Exploitation

To coerce is to interfere wrongfully with a person's freedom. How to identify proposals that coerce has been the subject of much dispute. On some accounts a person wrongfully coerces by proposing to do something illegal or immoral if not paid. Litigation threats meet this requirement only if the litigation itself would be immoral, for example because it would traumatize a child without good reason. I

51. These include attitudes toward the divorce, guilt about failure of the marriage, *see* Ferreiro, *supra* note 6 at 124, and desire to terminate the marriage quickly. *See* Erlanger, *supra* note 9, at 25.

HeinOnline -- 68 S. Cal. L. Rev. 513 1994-1995

have elsewhere argued for an account of coercion that does not limit the category to cases in which people threaten acts that are themselves wrong. On my account, threats can wrongfully limit freedom by depriving the recipient of an important option available in the situation without the proposal.[52] Specifically, a proposal is a threat if a proposer places a condition on an option known to be important to the recipient, and the proposer would have provided the option for free had the proposer been unable to impose the condition. According to my data, had threateners been unable to place a condition on custody, a majority would have given it up for free. In these cases, conditioning uncontested custody on a transfer of property gives nothing to the custodial parent, and should therefore be regarded as coercive.[53]

Of course, some lawyers said that the most recent client who threatened litigation to extract a financial settlement would have litigated custody if unable to negotiate. These proposals are not coercive on my account.[54] However that some litigation proposals are not coercive does not show that they are acceptable. The noncoercive proposals might be objected to on other grounds, such as exploiting hardship or harming children. Furthermore, survey responses probably overstate the likelihood of litigation. First, because three times as many lawyers reported receiving threats as making threats (and receiving them at a rate nearly seven times as often), the sample of those who admitted making threats might well have been biased in favor of those who believed that the threat had been legitimate, and therefore in favor of those most likely to litigate. Second, many lawyers regard bluffing about litigation as morally problematic. This belief created an incentive even for those who admitted making threats not to admit making idle threats. Third, substantive reasons exist to doubt that people interested in financial returns would litigate over custody. The cost of spite would be very substantial.

Litigation threats can exploit. I have argued elsewhere that exploitation is benefitting at another person's expense from their

52. Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Scott Altman, *Divorcing Threats and Offers* (forthcoming 1995) [hereinafter *Divorcing Threats and Offers*].

53. Litigation threats at divorce that do not involve money might be coercive. Although no one has reported such a threat to me, one might imagine the proposal "if you do not give me the visitation schedule I want, I will seek sole custody." This might be coercive on my account.

54. Some of these proposals might be deemed coercive on the traditional ground that the threatened litigation would be immoral.

HeinOnline -- 68 S. Cal. L. Rev. 514 1994-1995

difficulties or admirable qualities. By "benefitting at their expense," I mean obtaining a better deal in negotiation than one would have obtained had that person lacked the difficulty or admirable quality.[55]

Many settlement proposals exploit the fear of losing time with the child. They exploit not because they increase price based on demand, but because they increase price based on the buyer's desperation to maintain a basic human good.[56] They exploit admirable characteristics by taking advantage of a parent's desire to maintain a close relationship with a child she loves and to shelter the child from traumatic litigation. They exploit hardship if they rely on the recipient's inability to afford the threatened litigation. Some survey responses highlighted the exploitative aspect of litigation threats, noting that threats are particularly common and effective against poorer spouses who are unable to afford litigation and against victims of marital violence. As one attorney said: "[V]ictims of domestic violence . . . accustomed to receiving threats that are carried out against them and often suffering from low self-esteem, are often bullied into accepting a lesser financial settlement in return for maintaining primary custody."[57]

Negotiators need not use explicit threats to be guilty of coercion and exploitation. Consider some hypothetical examples:

> 1. Allan explicitly threatens to litigate custody if not given most of the marital property. He does not want custodial time. He is motivated by spite and self-interest. He settles for twenty percent custodial time and seventy-five percent of the marital property.
>
> 2. Bob makes no explicit threat. He simply proposes a settlement in which he has sixty percent custodial time and fifty percent of the marital property. He makes the proposal with the hope and belief that it will induce his wife to make a counter-proposal in which she gets eighty percent custody and twenty-five percent of the marital property. When she does, he accepts it.

I see no reason to judge Bob less harshly than Allan. If he would have given his wife eighty percent custody without extracting marital property had he not seen the chance to use custody as leverage, he has coerced his wife by depriving her of an important option. The use of

---

55. Altman, *Divorcing Threats and Offers*, *supra* note 52.

56. One parent often cares much more about custodial time than the other. To some parents custodial time is as important as anything in their lives. *See, e.g.*, Ferreiro, *supra* note 6, at 74-76 (stating that "several parents made a graphic analogy between the loss of their children and losing a part of their body").

57. Survey from attorney with 15 years experience doing exclusively family law for poor clients.

this leverage was exploitative if he benefits financially because she cares for the children and perhaps because she cannot afford to fight for them.

The moral objections to custody threats are not necessarily reduced if proposers sincerely want custody. Many fathers who express a desire to have custody do little or nothing to get custody.[58] In part this reflects the ease of saying one wants custody compared to the strain of having custody. In part, it reflects other reasons for not demanding what one wants. In either case, some fathers who say they want custody give up nothing they would otherwise have had when they sell uncontested custody. On the other hand, when sincerely desired time is traded away, bargains might be less often coercive and exploitative.

Whether trades are less problematic if initiated by the person seeking more custodial time rather than by the person seeking more money is not obvious. Consider for example a mother who suggests receiving lower child support payments if the father does not seek primary custody. Perhaps her initiation indicates that she has reason to believe the father would actually have litigated had she not agreed to less child support. If so, the transaction was not coercive because it provides a benefit to both parents. However, payor initiation might indicate only that the mother fears litigation, which need not reflect actual likelihood of litigation.[59]

Of course, not all trades of custodial terms for financial benefits coerce or exploit. Consider:

> 3. Charlie proposes a settlement identical to Bob's. He wants sixty percent custodial time because he thinks the children are best off spending time with him. After difficult negotiations he accepts twenty percent custody, and seventy-five percent of the marital property. His wife refused to compromise about time. So he accepted her terms to avoid litigation for the children's sake. He demanded the property because he felt taken advantage of if he did not get something in exchange for giving up time.[60]

Because Charlie did not enter the negotiations demanding payment for something he would otherwise give for free, he has not coerced his wife. Nothing in the example suggests that he used his wife's desperation or attachment to the children to gain marital property.

58. Mnookin et al., *Private Ordering*, *supra* note 6, at 49.

59. *See* Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993).

60. For a real example of this behavior, see Ferreiro, *supra* note 6, at 79.

HeinOnline -- 68 S. Cal. L. Rev. 516 1994-1995

C. Inappropriate Attitudes

Trading custodial time for financial terms can evidence an inappropriate attitude toward one's child. It might evidence one of several attitudes that can be criticized. These include (a) wanting to spend little or no time with one's child; (b) not caring that the trade might impoverish the child; (c) preferring money to having a relationship with one's child; and (d) regarding one's child primarily as a source of money or leverage in negotiations. Any of these attitudes shows contempt for what should be an important relationship.

Other criticisms directed at attitudes are more complex and controversial. For example, perhaps taking money to forego time with a child treats the child as a commodity.[61] Such claims can take various forms, ranging from the allegation that any pricing of intimacy treats a person as a thing, to complaints about the incursion of market forms into personal realms. A separate objection focuses on how accepting money for time with a child fails to make the child incommensurable with money. A variety of writers have argued that parental love is in part constituted by refusing to consider money as a reason to sacrifice time with a child.[62] People willing to make such trades do not just value time with their children too little. They value it in the wrong way.

One must be careful about these judgments. Motives and attitudes are notoriously opaque. One cannot tell from observing people if they were thinking of their children in terms of dollar values. Charlie in the example above seems to have cared deeply about his children and to have been well-motivated in reducing his custodial time. Although his motives for demanding money can be criticized, he did not regard money as a reason to give up time with his children. He gave up time with his children for their welfare. More generally, not every pricing of a child treats the child primarily as a commodity. It depends as much on attitude and purpose as it does on action. For example, surrogacy need not violate a prohibition on treating persons

61. There are many understandings of commodification arguments. Some rely on concerns that treating persons as objects will cause psychological harm. I do not mean to subscribe to such a claim. *See* Scott Altman, *(Com)modifying Experience*, 65 S. Cal. L. Rev. 293 (1991). Other understandings are claims about the immorality of treating persons primarily as things with market values. *See* Margaret Jane Radin, *Reflections on Objectification*, 65 S. Cal. L. Rev. 341 (1991).

62. *See* Joseph Raz, The Morality of Freedom 348-49 (1986); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich. L. Rev. 779, 786 (1994); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 Chi.-Kent L. Rev. 147, 149-50 (1992).

HeinOnline -- 68 S. Cal. L. Rev. 517 1994-1995

as commodities. Although a price is paid, the surrogate might well act primarily out of a desire to help others in need. The adoptive couple likely acts primarily out of a desire to acquire a child to love.

Furthermore, consensus that one should not sell a relationship provides little guidance for complications such as indirect trade-offs, compromises over marginal time with children, and trades motivated by aims less crass than having cash for its own sake. Many parents give up time with their children to earn money and to pursue other goals. As anyone who has hired a baby-sitter knows, time away from a child can be an important part of a healthy life. Perhaps we accept these decisions because the trade-offs are indirect; perhaps we do so because they benefit the child through additional money and happier parents; perhaps we so do because giving up time does not always diminish the quality of a personal relationship.[63]

That we work more hours than minimally needed for sustenance and sometimes value time away from children without showing contempt for important relationships counsels caution in evaluating divorce negotiations. The propriety of trading time for money likely varies with how much time one retains and for what purpose the money is needed. Negotiating away an hour a week places a dollar value on one's relationship to a child if it is the only hour one will have. Trading down from four days a week to three might evidence no disrespect for the relationship. Paying for additional time with a child surely shows no disrespect. Giving up custodial time to have money for the child or for basic needs does not mean that one thinks of the child as just a source of funds. But willingness to spend little time with a child in order to have more money can signal that one thinks of the child as just one among many sources of pleasure and entertainment available for a price.

D. Special Circumstances

Even if one thinks pressure to trade financial terms for custodial terms is generally immoral, one might think such tactics justified by special circumstances. I have already mentioned several cases worthy of consideration for special treatment: trades that work to the child's financial benefit, and trades that leave the child financially well off

63. As Raz points out "people are sensitive to the motives behind various offers, and to their symbolic significance." Raz, *supra* note 62, at 349.

HeinOnline -- 68 S. Cal. L. Rev. 518 1994-1995

and with plenty of time with both parents. Written comments on several surveys suggested two other justifications.

First, litigation threats or pressure to trade might be justified responses to unreasonably high child support guidelines or unreasonable legal rules, such as, in the opinion of some people, child support set-offs. Second, they might be justified in response to unreasonable behavior or unreasonable settlement offers from the other side.

If child support laws are too high or unfair in calculating set-offs, the appropriate response is to change these laws, not to resort to aggressive negotiating tactics. But what if such laws are not changed? Can one justly use these tactics to protest unjust laws or in response to unreasonable demands? No doubt some level of firmness is both prudent and justified in response to unreasonable proposals from opposing counsel. However, this does not mean that litigation threats or linking custodial time with property are appropriate. One can meet a demand for too much money with an offer of too little. One can meet an offer of too little time with a child with a demand for too much. There is no need to link time with money in response to hard bargaining.

On the other hand, perhaps these tactics are ineffective, and stronger measures are needed to protect against abuses. For example, it is often said that under California's child support set-offs, noncustodial parents seek substantial visitation in order to reduce their child support obligations, and then do not even exercise their visitation rights. Faced with a demand for visitation that one thinks the other parent will not exercise, and the prospect of insufficient child support, perhaps a primary custodian should threaten to oppose substantial visitation unless more child support is paid.

Finally, even if explicit threats cannot be justified, some lawyers suggested that trades are justified simply because they cannot be avoided. Rearing children is costly. Time spent with one's children could otherwise be spent earning money. Direct expenditures on children consume a large portion of most parents' incomes. Therefore whatever custodial arrangement couples accept at divorce will have financial consequences. Furthermore, in California, where child support guidelines build in an explicit trade in which time with children creates financial benefits, implicit trading cannot be avoided.

HeinOnline -- 68 S. Cal. L. Rev. 519 1994-1995

Although serious, this argument seems to me mistaken. First, making pricing explicit can itself be harmful.[64] Second, that decisions must have financial consequences does not require that decision-makers be motivated by those consequences. One can return a lost item knowing about a reward without doing so to get a reward. Third, even if one cannot avoid trades, one can avoid threats and exploitation. Finally, some objections to trading money for time do not reject the influence of money so much as the undervaluing of reasons that ought to weigh against financial gain, such as the welfare of one's child, a desire to spend time with one's child, and a desire to avoid coercing and exploiting another person with whom one was once intimate.

III. LEGAL SOLUTIONS

Could laws deter people from threatening litigation or exerting other pressure to trade custodial time for property and support? In this part, I review legal approaches that have been tried or suggested. I then propose one that I believe would be more effective.

A. Family Law

1. *Supervision*

Many states permit or require courts to consider whether a proposed settlement agreement is fair before incorporating it into a court order.[65] Although this provides an opportunity for courts to look for coercion and imbalance, courts approve agreements with minimal investigation.[66]

A state could try to increase third-party investigation. However this might not be practical.[67] Rapid settlement by private agreement limits the public and private costs of divorce.[68] Evidence of coercion is usually unavailable. If one party believes the other might litigate, she will not reveal the threat unless she can prove it, and her disclosure will permanently prevent him from seeking custody. Finally, fair

64. Guido Calabresi & Philip Bobbit, Tragic Choices (1978).

65. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 46b-66 (West 1986). Some look to whether the agreement is not unconscionable. Unif. Marriage and Divorce Act § 306(c) (1987).

66. *See, e.g.*, Sally Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. Pa. L. Rev. 1399, 1409-10 (1984). For empirical support, see Marygold S. Melli, Howard S. Erlanger & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 Rutgers L. Rev. 1133, 1145 (1988).

67. *See generally* Judith Resnik, *Judging Consent*, 1987 U. Chi. L. Forum 43 (1987).

68. For a contrary position, see Sharp, *supra* note 66, at 1451-53.

HeinOnline -- 68 S. Cal. L. Rev. 520 1994-1995

allocation at divorce is not subject to widespread consensus, especially outside community property states. Therefore, monitoring substantive outcomes would not detect litigation threats or proposals used to get advantageous but not outrageous settlements.

2. *Custody Solutions*

Because litigation threats depend on fear of losing litigation, inability to afford litigation, and a desire to protect the children or to resolve issues quickly, some people favor making the custody standard more predictable. A standard predictably favorable to women would help women resist litigation threats by reducing the risk that they would lose custody. It might also make litigation shorter, less expensive, and less traumatic. The West Virginia Supreme Court displaced the best-interest-of-the-child standard with the primary caretaker rule in part for these reasons.[69]

This solution has disadvantages. First, unless one believes that the primary caretaker standard is the appropriate way to reach custodial decisions, it is an extreme measure. It might deprive fathers who were not engaged in any form of extortion of a chance at custody. Of course, there are grounds to favor the primary caretaker standard as the correct way to decide custody.[70] If one does like the primary caretaker standard for reasons apart from its effects on negotiation, the standard might go far toward deterring litigation threats and some trades. This standard might be particularly appealing if one objects to trades that impoverish children more than to trades that work to children's financial benefit. Because it strengthens the bargaining position of primary caretakers but does not interfere with demands to be paid for substantial visitation, it might deter more trades that are objectionable than trades that are acceptable. On the other hand, it does not deter some harmful bargains, such as paying noncustodial parents not to visit. And not everyone would agree that trades are acceptable just because they benefit children financially.

69. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). A similar rule was adopted by the Minnesota Supreme Court, though it has since been overturned by the state legislature.

70. *See, e.g.*, Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment With the Primary Caretaker Preference*, 75 MINN L. REV. 427, 440-52; Marcia O'Kelly, *Blessing the Tie that Binds: Preferring the Caretaker as Custodian*, 63 N.D. L. REV. 482 (1987). *But see* Crippen, *supra*, at 452-95 (reviewing flaws in the primary caretaker standard).

HeinOnline -- 68 S. Cal. L. Rev. 521 1994-1995

Second, the standard is not always predictable. In some homes there is no primary caretaker;[71] even where there is, the standard has been applied unevenly.[72] Some people therefore support a maternal preference, although it would attract vigorous opposition.[73] Third, the primary caretaker rule is not politically feasible. Fathers' rights groups view the rule as a veiled maternal preference and oppose it vigorously and successfully.[74] Finally, to the extent that one objects to litigation threats used by likely custodial parents against parents who want substantial visitation, the custody standard provides no solution.

3. *Child Support*

Because it appears that California's current child support guidelines contribute both to litigation threats and to support/custody trades, repealing visitation set-offs and/or reducing child support levels might reduce the level of threats and trades. On the other hand, repealing the set-off provisions might do more harm than good, especially if unaccompanied by reduced support levels. If unable to save money by demanding more visitation, some people would just seek custody. This concern is highlighted by the following comment made by a legal services attorney in a written response to my survey: "Since the child support guidelines use a zero percent time share for public assistance cases, . . . we have been seeing more non-custodial parents filing for *custody* in these situations, since they cannot 'trade' support or other financial terms for custodial time."[75]

The desirability of changing either set-offs or support levels is far too complex a topic to address here. I will note only that the goals of fairness and protecting children are important enough that it seems undesirable to set child support policy in a way that would otherwise

71. Crippen, *supra* note 70; Dan O'Hanlon & Margaret Workman, *Beyond the Best Interests of the Child: The Primary Caretaker Standard in West Virginia*, 92 W. VA. L. REV. 355, 374 (1990).

72. Apparently the predictability of this standard depends in part on the amount of appellate review. For documentation, see Crippen, *supra* note 70.

73. Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992); Marry Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 26-7 (1990).

74. The rule enacted in Minnesota has already been repealed. It was defeated in many places. *See* O'Hanlon & Workman, *supra* note 71, at 374. There has been more success in convincing states to add "being a primary caretaker" to the list of relevant considerations in making custody decisions. *See, e.g.*, Jordan v. Jordan, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982). But of course adding the criterion does little to make litigation more predictable, which was one central benefit of the primary caretaker standard.

75. Anonymous response to survey. *See infra* app. B.

HeinOnline -- 68 S. Cal. L. Rev. 522 1994-1995

be rejected in order to deter certain negotiating practices. At least we should prefer a solution that addresses negotiating without compromising child support goals if possible.

B. Contract Law[76]

Settlement agreements can be set aside by demonstrating sufficient defects in contractual process. Potential grounds for setting aside include public policy,[77] confidential relationship doctrine,[78] unconscionability,[79] overreaching,[80] and duress. Duress has proven the most promising. But it provides few realistic chances for release.

The requirements of duress vary. Despite contrary developments in modern contract law, courts considering threats to litigate custody typically require the victim to show that she was (1) robbed of her free will (2) by a wrongful act of the defendant (3) resulting in an unfair agreement.[81]

---

76. Unless otherwise noted, all cases cited in this section involve threats to litigate custody unless given favorable financial terms in a settlement.

77. Public policy arguments have not been successful in custody threat cases. In *In re* Marriage of Lawrence, 642 P.2d 1043, 1049 (Mont. 1982), the court held that striking down custody trades as against public policy would be impractical because it "would expose many separation agreements to attack and worse, would not be based on any kind of realistic understanding of preagreement negotiations.... [C]ustody is frequently a bargaining chip in the settlement negotiations whether we like it or not." *Cf.* McFarland v. McFarland, 519 N.E.2d 303, 304 (N.Y. 1987) (expressing willingness to expose a separation agreement to public policy attack, but finding no gross inequity to support such an attack).

78. Confidential relationship doctrine has been somewhat successful in custody threat cases. *See*, Sharp, *supra* note 66, at 1416 (citing Francois v. Francois, 599 F.2d 1286 (3d Cir. 1979), *cert. denied*, 444 U.S. 1021 (1980); *In re* Marriage of Cohn, 569 P.2d 79 (Wash. Ct. App. 1977); and Marshall v. Marshall 273 S.E.2d 360 (W. Va. 1981)); *see also* Robert O. v. Ecmel A., 460 A.2d 1321, 1324 (Del. 1983). Courts often find that the confidential relationship ended before the agreement. Sharp, *supra* note 66, at 1418.

79. Unconscionability doctrine has been useful in some custody threat cases. *See, e.g., In re* Marriage of Carlson 428 N.E.2d 1005, 1011 (Ill. App. Ct. 1981). However it is often unsuccessful. *See, e.g., Lawrence*, 642 P.2d at 1047-48.

80. *See, e.g.*, Golder v. Golder, 714 P.2d 26, 30 (Idaho 1986) (Supreme Court of Idaho upheld district court's finding that husband was guilty of fraud and overreaching when he concealed the value of their property and then threatened his wife with custody litigation if she secured legal representation or disputed the property settlement agreement.).

81. The Restatement (Second) of Contracts requires that the threat "leave[] the victim no reasonable alternative." Restatement (Second) of Contracts § 175. Some cases also state this rule. *See, e.g., In re* Marriage of Baltins, 260 Cal. Rptr. 403, 414 (1989) (noncustody threat); Eckstein v. Eckstein, 379 A.2d 757, 762 (Md. 1978). No case involving a threat to litigate custody has discussed this matter in depth.

HeinOnline -- 68 S. Cal. L. Rev. 523 1994-1995

The free will requirement—abandoned in much of contract law[82]—has been used to uphold settlement agreements unless the complaining party was emotionally upset at the time she signed.[83]

The wrongful-act requirement has been given several interpretations. Most courts hold that the threat to institute a civil suit is wrongful only if not made in good faith.[84] Usually this means that agreements will be upheld unless "there is no reasonable belief of success."[85] This is rarely the case under an unpredictable custody standard. A few courts loosen this requirement, finding litigation threats wrongful if they "coerce a settlement in a transaction unrelated to the subject matter of the suit,"[86] or if they are made for an inappropriate purpose such as extortion.[87] It is not usually clear what is meant by "purposes of extortion." A few courts have abandoned the wrongfulness requirement, at least in dicta.[88] But even those courts have been hesitant.[89]

82. The Restatement (Second) of Contracts explicitly rejects this requirement, "because of its vagueness and impracticality." RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b.

83. *See* Johnson v. Johnson, 313 S.E.2d 162, 164 (N.C. 1984) (affirming a trial court finding that "any alleged statements made by the Defendant to the Plaintiff that he intended to . . . litigate . . . custody . . . did not constitute any threat to the Plaintiff . . . [because] Plaintiff was not afraid and was not intimidated by and was not therefore . . . placed under duress or fear at or before the time of the signing of the Separation Agreement."); *In re* Marriage of Gonzalez, 129 Cal. Rptr. 566, 579 (Ct. App. 1976) (stating " 'duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim,' " quoting Lewis v. Fahn, 113 Cal. App. 2d 95, 99 (1952), and nullifying an agreement in part because there was evidence that the wife was distraught). *See also In re* Marriage of Harrison, 734 S.W.2d 934, 942 (Mo. 1987) (noncustody threat); Bell v. Bell, 379 A.2d 419, 424 (Md. 1977) (rejecting relief despite finding a wrongful threat because Mrs. Bell was not deprived of her free will by her husband's (noncustody) threats. She actively negotiated with him and there was evidence that she did not seem upset.).

84. *See, e.g.*, cases cited in *Bell*, 379 A.2d at 423.

85. *Bell*, 379 A.2d at 473. *See* Zeeb v. Zeeb, 395 N.E.2d 660, 662 (Ill. 1979) ("Simply insisting upon using the courts to substantiate what one believes to be his legal rights is not coercive."); Harges v. Harges, 261 N.Y.S.2d 713, 719 (1965).

86. Link v. Link, 179 S.E.2d 697, 705 (N.C. 1971) (invalidating a transfer of stock from a wife to her husband after he threatened to take their house and children from her); *Bell*, 379 A.2d at 423.

87. *See e.g.*, Mathews v. Mathews, 725 S.W.2d 275, 279 (Tex. Ct. App. 1986) ("It is never duress to threaten to do that which one has a legal right to do . . . . However, a vice arises when one employs extortive measures or, lacking good faith, makes improper demands."); *In re* Marriage of Bartlett, 664 S.W.2d 655 (Mo. Ct. App. 1984); Eckstein v. Eckstein, 379 A.2d 757, 763 (Md. Ct. Spec. App. 1978); Link v. Link, 179 S.E.2d at 705.

88. *In re* Marriage of Gonzalez, 129 Cal. Rptr. 566, 572-73 (Ct. App. 1976). Because the court did find that the husband's acts were wrongful, its suggestion was made only in dictum. A statement in *In re* Marriage of Harrison, 734 S.W.2d 934, 942 (Mo. Ct. App. 1987), could be interpreted in this way. The court said: "duress is not to be tested by the nature of the threats, but by the state of mind induced thereby in the victim."

89. One went on to say, "we do not encourage a challenge of negotiated property settle-

HeinOnline -- 68 S. Cal. L. Rev. 524 1994-1995

The Restatement of Contracts permits release from agreements induced by improper threats even if the agreement is not unfair.[90] However, in family law many courts do not find duress unless a settlement agreement induced by a wrongful proposal is "grossly unfair."[91]

Duress doctrine might be altered to address these difficulties. However many agreements would still be enforced. Most states require that evidence of threats must be clear and convincing,[92] despite the secret nature of these threats.[93] Threatening spouses might also win by arguing that the agreement was ratified.[94] Spouses wait to challenge agreements because they are intimidated by the threats that induced their agreement in the first place. Finally, it seems unlikely that any state would include subtle pressure to trade custodial time for property as grounds for voiding an agreement.

C. Professional Responsibility

A state could forbid lawyers to participate in or encourage custody threats. The American Bar Association has not codified ethical standards for attorneys specifically focusing on negotiation.[95]

ment agreements where custody and property rights have been settled on an arm's-length basis. We are only referring to the exceptional case." *Gonzalez*, 129 Cal. Rptr. at 573.

90. Restatement (Second) of Contracts § 176 (1977).

91. *See, e.g., Link*, 179 S.E.2d 697, 705 ("the threat . . . becomes wrongful . . . if made with the corrupt intent to coerce a transaction grossly unfair to the victim . . . ."). Though the following were not custody threats, they give similar holdings: Stewart v. Stewart, 300 S.E.2d 263, 265 (N.C. Ct. App. 1983); Tureman v. Tureman, 620 P.2d 1200, 1202 (Mont. 1980).

92. *See, e.g.*, Kunkel v. Kunkel, 547 So.2d 555, 559 (Ala. Civ. App. 1989).

93. Because the disputes often involve one spouse's word against the other's, the evidentiary standard proves determinative. In Johnson v. Johnson, 313 S.E.2d 162 (N.C. 1984), the court held that testimony that the notary was the wife's friend supported a finding that there was no coercion since the notary would have been aware of it, despite the fact that the wife was never even alone with her friend during the notarization, but was always in the presence of her husband, who was threatening her. *See also In re* Marriage of Baker, 584 S.W.2d 449 (Mo. 1979) (finding no evidence of fraud or unconscionability despite testimony that petitioner executed settlement agreement because she was scared). One California case has stated that an unfair settlement alone can be evidence of duress. *See In re* Marriage of Baltins, 260 Cal. Rptr. 403, 414 (Ct. App. 1989).

94. *See, e.g.*, Saggese v. Saggese, 290 A.2d 794, 797 (Md. Ct. Spec. App. 1972) ("No express ratification is necessary. Any act of recognition of the contract (retaining the fruits of it through many years) has the effect of an election to affirm.") (noncustody threat).

95. The Discussion Draft of the Model Rules included a rule which would have required lawyers "in conducting negotiations . . . [to] be fair in dealing with other participants." Model Rules of Professional Conduct Rule 4.2(a) (Discussion Draft 1980). However, this proposal was ultimately rejected due to an overwhelmingly negative reaction from members of the bar. For discussion of reasons given in opposition, see Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. Litig. 173, 174 (1989) (citing M. Freedman, Lawyers' Ethics in an Adversary System 5 (1975)); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be*

Although there are clear prohibitions on threatening criminal prosecutions, there is no prohibition on threatening civil suits.[96] Civil litigation threats are prohibited if they are used only to harass[97] or if made by someone sure to lose at trial.[98] Some ethical provisions arguably could limit other custody threats, such as the rule against conduct involving dishonesty, fraud, deceit, or misrepresentation.[99] But it is unlikely that a lawyer would be disciplined under these provisions for making false demands.

Recently, the American Academy of Matrimonial Lawyers promulgated suggested standards of conduct. They specifically forbid lawyers from representing a client who uses a custody or visitation claim as a bargaining chip, though they do not define "bargaining chip."[100]

Trustworthy when Dealing with Opposing Parties, 33 S.C. L. REV. 181 (1981); Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 435 (1988).

96. In California there is specific acceptance of the practice. *See* California State Bar, Formal Op. No. 1991-124.

97. The Model Code Disciplinary Rule 7-102(A) states "In his representation of a client, a lawyer shall not . . . assert a position . . . that . . . would serve merely to harass or maliciously injure another." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980). Model Rule 4.4 states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1983). And California's Rule 3-200(A) says "a member shall not . . . assert a position . . . for the purpose of harassing or maliciously injuring any person." CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-200(A) (1982).

98. Model Rule 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." However, because of the word "therein," a proposal outside the confines of a proceeding might not be prohibited. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

99. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980). Moreover, Disciplinary Rule 7-102 states "(A) In his representation of a client, a lawyer shall not: (5) Knowingly make a false statement of law or fact." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1980).

The Model Rules are somewhat more ambiguous about this situation. Rule 8.4(c) states that "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983). Rule 4.1(a) states that "in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." But the comment to Rule 4.1 reads, "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. . . . [A] party's intentions as to an acceptable settlement of a claim are in this category . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983).

Some states have statutes making lawyer deceit criminal. *See, e.g.*, N.Y. JUD. LAW § 487 (McKinney 1983).

100. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY, STANDARDS OF CONDUCT cmts. to rules 2.14 and 2.25.

HeinOnline -- 68 S. Cal. L. Rev. 526 1994-1995

Mediators in some states play a significant role in divorce settlement. The main ethical standards applicable to divorce mediators do not specifically prohibit mediators from encouraging trades of custody for property.[101]

Although stronger ethical strictures on divorce negotiation for lawyers and mediators seem desirable, they are insufficient.[102] Many divorces are conducted without lawyers and mediators. Some negotiation takes place between couples outside lawyers' sight. Many lawyers distrust and perhaps will not follow ethical rules limiting what they see as zealous advocacy. And it would be difficult for lawyers to prevent trades of custodial time for property unaccompanied by explicit threats, or for anyone to monitor such negotiating details.

D. Suggested Solution

One solution that has not before been proposed would be more practical and effective. It involves a rule for the timing of settlement agreements.[103] Settlement agreements should be submitted in stages. The child custody and visitation would need to be approved some time before any financial agreement could be submitted. Were the details of such a rule appropriately structured, it might greatly reduce litigation threats and other ways of trading custodial time for property.

For example, courts could require that no property division, child support, or spousal support settlement could be submitted until two

---

101. *See* American Bar Association, Divorce and Family Mediation: Standards for Practice 1986; Academy of Family Mediators, Standards of Practice for Family and Divorce Mediation (1986). However the founder of a process called "structured mediation" does express clear disapproval: "[I]f there is a controversy regarding custody, all financial matters must first be resolved in the form of a legally binding contractual settlement before the issue of child custody will be considered." O.J. Coogler, Structured Mediation in Divorce Settlement 19 (1978). Unfortunately, even well-meaning suggestions of this sort likely encourage trades. If custody is settled *after* financial terms, then the prospect of a custody dispute can influence financial terms. As I explain below, Coogler's suggestion is exactly backwards.

102. For a recent discussion of the complexities of the role of lawyer as negotiator, see Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 Md. L. Rev. 1 (1992).

103. One author mentions a related suggestion. *See* Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687 (1985). Schepard suggested that in divorce litigation judges should more carefully separate child custody from monetary issues, *id.* at 761, and that this would somehow deter custody threats. *Id.* at 775. I do not understand this claim, however. That in litigation the issues would be separated does nothing to preclude the success of custody threats in negotiations over a settlement agreement.

HeinOnline -- 68 S. Cal. L. Rev. 527 1994-1995

weeks after a final settlement of custody and visitation was approved by the court. The court could remind the parties when they submitted a custody agreement that the agreement could not be changed. Even if one party obtained the custody agreement by agreeing to bad financial terms, she could now change her mind, and seek reasonable financial terms without fear of losing custody or visitation.

This rule would probably affect divorcing couples in several different ways. Those whose attorneys negotiate for them would be unlikely to make unenforceable bargains trading financial for custodial terms. Rather, attorneys would advise their clients not to make such agreements. Perhaps explicit rules of professional responsibility in conjunction with these timing suggestions would strengthen this effect. Unrepresented individuals, on the other hand, might not know enough about the law to be deterred from trading custodial for financial terms. These individuals would be affected primarily by the ability to avoid being bound by such agreements.

The virtues of this method are significant. First, unlike the primary caretaker rule, it has no consequences for individuals who are not trading custodial time for money. Some people regard the primary caretaker rule as unfair, and therefore view enacting it to deter certain bargaining as unjust punishment. Second, unlike contract and professional responsibility solutions, it will deter bargaining tactics that are more subtle than explicit threats to litigate. Third, it does not require substantial monitoring or investigation of the parties' behavior, and therefore cannot be undermined by the rubber stamp difficulty.[104] Fourth, it has few administrative costs. Finally, because it is gender-neutral and takes no controversial stands on appropriate distributions of assets or appropriate custodians, it would be likely to gain political support.

There are problems with this proposal. First, individuals might not know that they were safe, or might believe that they were bound by a prior promise to provide a particular financial arrangement. Second, unless it were accompanied by a significant barrier to custody and visitation modification, the timing rule would do little good, as the custodial parent would still fear modification if she did not consent to financial terms. Third, even if custodial parents were protected

104. Of course it could be undermined if courts were less than firm in disallowing parties from withdrawing initial custody decisions or in demanding delay in submissions of financial agreements.

HeinOnline -- 68 S. Cal. L. Rev. 528 1994-1995

against modification, they might fear other sorts of retaliation, perhaps including violence. Fourth, perhaps this rule would lead some spouses to litigate custody either to gain custodial terms or to trade the terms away after the litigation. The other spouse would be worse off than had she been able to trade financial terms for a custodial arrangement before litigating.

These disadvantages are likely surmountable. Because all settlement agreements are submitted to judges, custodial parents could be clearly informed of their rights to ignore previously-made agreements about finances when they submit agreements about custody and visitation.[105] Although there is reason to fear retaliation, noncustodial parents unable to extract good settlements will not often litigate custody. The strength of spite and anger as motives should not be ignored. But this rule imposes substantial constraints only on individuals who are willing to give up custody or visitation terms in exchange for a better financial arrangement. Unless the cost of litigation is less than the improved settlement value attributable to custody trades, one would not expect much increased litigation.[106] In the vast majority of divorces, the cost of litigating child custody exceeds potential savings in property division and child support.[107]

CONCLUSION

Lurking in the shadow one rarely finds the caricature of evil that one fears. Complexities—both moral and factual—far outnumber monsters. This Paper aimed at illuminating a few lurking complexities. Among them are: A minority of couples trade various terms, most often custody or visitation time, for child support. Trades are induced by threats and by offers. They are sometimes initiated by women, though more often by men. Although the frequency of trading appears consistent among many groups, it could be affected by a

105. Of course, being told that one has a legal right is not the same as being willing to rely on that right. In the end, people who make agreements from which they are legally entitled to be released might abide by them nonetheless. *See generally* Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC. REV. 565 (1992) (examining the roles of law and social norms in divorce negotiations).

106. This rule could be evaded if one party could secure a favorable custodial agreement during negotiations, for example by threatening to litigate for sole custody. After the agreement was incorporated, it might be traded for financial terms. However, it is unclear that threats to litigate over custody can be effective in securing favorable custodial arrangements.

107. Unlike some negotiating contexts in which repeat players rationally carry out threats against their interests, there is no particular reason for divorcing individuals to create a reputation.

HeinOnline -- 68 S. Cal. L. Rev. 529 1994-1995

variety of factors, including child-support laws and custody standards. Trades often deprive children of money and of contact with one parent, though they can provide children more of both. Traders *can* coerce, exploit, traumatize children, impoverish women, and demonstrate inappropriate attitudes toward important relationships; but they *do not always* commit any of these wrongs. Although many different legal rules might deter certain threats and trades, none will deter only those that are clearly wrongful. Perhaps the best legal solution would be the timing rule proposed above.

HeinOnline -- 68 S. Cal. L. Rev. 530 1994-1995

APPENDIX A: METHODOLOGY

The questionnaire—reprinted below—was mailed in the first week of October 1992 to 2000 randomly selected members of the Family Law Section of the California Bar Association. At that time, the organization had 3392 members. Two weeks later, a reminder was sent to all 2000.

For a variety of reasons, 55 questionnaires were excluded from the sample. Some were returned as undeliverable. Others were sent back by individuals who do not practice family law, or do not practice in California. This left 1945 people in the sample. In response, I received 976 completed questionnaires, or a response rate of just over 50%.

The responses seem not to have been biased in any detectable way. Just over 40% of respondents were female. Although no figures were available about the composition of the Family Law Section, a count of identifiably male and identifiably female names indicates that the Section has between 38% and 42% female members. Respondents were Certified Family Law Specialists in 26.5% of cases. Approximately 22% of the Section's members appear to be Certified Specialists.

The average member of the Family Law Section devotes nearly 75% of her or his practice to family law. On average, members represent clients with a mean yearly combined income of almost $92,000. In this respect, survey results overemphasize the negotiations of individuals who are able to afford a divorce lawyer with expertise in family law.

Mean responses varied somewhat based on respondent characteristics such as attorney gender, client gender, county of practice, amount of practice focused on family law, years in practice, and client income. However, even the strongest correlations did not produce very large differences in mean answers. For example, questions 8 and 8a concerned whether attorneys had represented clients who had been threatened with custody litigation in the past year, and if so in what percentage of their cases. More female than male attorneys said this happened (66% compared to 57%) and said it happened in a higher percentage of cases (14.5% compared to 12%). Most variation correlated with attorney or client characteristics was less pronounced than this.

HeinOnline -- 68 S. Cal. L. Rev. 531 1994-1995

Although my data did not explain much variation, I believe that several factors account for differences in attorney answers. First, some questions required interpretation. For example, one question asked if opposing counsel stated or clearly implied that they might litigate over custody. People likely disagree over what counts as a clear implication. Second, many negotiations take place in private. Some attorneys learn more about their clients' private negotiations than others and therefore report more of this behavior than others. Third, some attorneys might regard discussing these practices as harmful to the reputation of their profession, giving them an incentive to understate unpleasant behavior.

HeinOnline -- 68 S. Cal. L. Rev. 532 1994-1995

APPENDIX B: CALIFORNIA RESPONSES

Questions 1-7 yielded the following demographic information.

Male Attorneys	59% (577)
Female Attorneys	41% (399)
Certified Specialists	26.5% (259)
Average Year in Practice	16.25 Years
Average Client Income	$91,829
Average Amount of Practice in Family law	72.36%

Represent Men Only	Represent Men More than Women	Represent Men/Women Equally	Represent Women More than Men	Represent Women Only
.1% (7)	4% (40)	81% (788)	13% (128)	.1% (11)

Alameda	4% (39)
Contra Costa	3% (34)
Los Angeles	30% (286)
Orange	5.8% (57)
Riverside	2% (22)
Santa Clara	6% (63)
San Diego	9% (88)
San Mateo	3% (25)
Sacramento	5% (45)
San Francisco	5% (49)
Sonoma	3% (28)
Ventura	2% (24)
32 Other Counties	22% (216)

HeinOnline -- 68 S. Cal. L. Rev. 533 1994-1995

8. In the last year have opposing counsel or their clients ever stated or clearly implied that they might litigate over custodial time if your client did not agree to a favorable financial settlement? Include proposals reported to you by your clients.

    60.95% responded "yes."

8a. If yes, in what percentage of divorce representations involving minor children in the past year did this happen?

    The mean response was 13.04%.

    Distribution:

Common Answers	%/# Responses
0	39.5% (378)
5	12.1% (116)
10	14% (134)
15	3.7% (35)
20	7.8% (75)
25	3.8% (36)
50	4.6% (44)

8b In these cases, were you representing (on a scale where 1 represents "Men Only" and 5 represents "Women Only"):

    The mean response was 3.5.

    Distribution:

1. Men Only	2. Men More than Women	3. Men/ Women Equally	4. Women More than Men	5. Women Only
6% (34)	10% (60)	29% (172)	41% (240)	14% (81)

HeinOnline -- 68 S. Cal. L. Rev. 534 1994-1995

8c Compared to 10 years ago (or when you entered family law practice if that is more recent) were such proposals in the last year:

Distribution:

1. Significantly more common	2. Somewhat more common	3. About as common	4. Somewhat less common	Significantly less common
29% (166)	28% (160)	26% (147)	9% (53)	8% (43)

9. When opposing counsel or their clients do *not* state or clearly imply that they might litigate over custodial time, do your divorce clients ever accept worse financial settlements than you think they could get in order to secure more custodial time?

50.15% responded "yes".

9a If yes, in what percentage of divorce representations in the last year involving minor children did this happen?

The mean response was 8.427%.

Distribution:

Answer	%/# Responses
0	51% (480)
2	3% (29)
5	8.7% (82)
10	14.5% (136)
20	6.2% (58)
25	3.3% (31)
50	2.4% (23)

HeinOnline -- 68 S. Cal. L. Rev. 535 1994-1995

9b In these cases did you represent:

The mean response was 3.4.

Distribution:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
7% (33)	12% (56)	30% (145)	40% (192)	11% (53)

9c When your clients want to accept financial terms that you think are worse than they could get in order to secure custodial terms do you ever attempt to convince them not to do so?

84.32% said "yes."

9d If yes, are such attempts successful?

The mean response was 2.8.

Distribution:

1. Never or almost never	2. Not often	3. As often as not	4. Usually	5. Always or almost always
4.5% (18)	34.5% (139)	38.8% (156)	20.6% (83)	1.7% (7)

10. In the last year, has a client or potential client suggested that you threaten to litigate custody as a way to secure a favorable financial settlement?

53.93% said "yes."

10a If yes, do you usually try to dissuade the client?

94.61% said "yes."

11. In negotiating during the last year, did you or a client ever state or clearly imply that you might litigate over custodial time if not given a favorable financial settlement?

21.48% said "yes."

HeinOnline -- 68 S. Cal. L. Rev. 536 1994-1995

11a If yes, in what percentage of divorce negotiations involving minor children in the last year did you or a client state or clearly imply this position?

The mean response was 2.21%.

11b In these cases did you represent:

The mean response was 2.19%.

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
30% (63)	33% (70)	27% (57)	7% (14)	3% (6)

11c In the last case in which you or your client stated or clearly implied this position, do you think your client would actually have litigated custody if negotiating about finances had been impossible?

56.4% responded "no."

12. While negotiating for a client do you ever make offers or counter-offers that request more custodial time than your client actually wants?

33.4% responded "yes."

12a If yes, in what percentage of divorce negotiations involving minor children in the last year did you do this?

The mean response was 7.751%.

12b Did you make such requests in order to:

1. Trade finances for custody	2. Secure custodial terms	3. Both 1 and 2	Other
2% (8)	70% (225)	21% (69)	7% (21)

12c Among the cases in which you made such a request at least in part so that you could later accept less custodial time in exchange for better financial terms, did you do so on behalf of:

The mean response was 2.2.

Distribution:

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
28% (38)	33% (44)	32% (43)	4% (6)	2% (3)

13. Among cases in which you do *not* request more custodial time than your client actually wants, do you ever settle for less custodial time than you request at the start of negotiations?

75.6% responded "yes."

13a If yes, when you decide to make such a concession in negotiations, do you ever try to trade it for a financial concession from the other side?

24% responded "yes."

13b If yes, in what percentage of negotiations in the last year in which you did not request more custodial time than your client wanted did you try to trade a custodial time concession for a financial concession?

The mean response was 2.421%.

13c Among these cases did you represent:

The mean response was 2.6%.

1. Men Only	2. Men More than Women	3. Men and Women Equally	4. Women More than Men	5. Women Only
15% (27)	29% (51)	42% (75)	11% (20)	2% (4)

HeinOnline -- 68 S. Cal. L. Rev. 538 1994-1995

14. Please indicate your feelings about the following statement:

It is sometimes ethically permissible for lawyers or their clients to state or clearly imply in negotiations that they might litigate over custodial time if not given certain financial terms.

The mean response was 3.3%.

1. Agree strongly	2. Agree somewhat	3. Disagree somewhat	4. Disagree strongly
7% (72)	15% (147)	16% (153)	61% (592)

HeinOnline -- 68 S. Cal. L. Rev. 539 1994-1995

APPENDIX C: OTHER STATE SURVEYS

Valuable information on many subjects can be found in state and federal gender and race bias task force reports. Unfortunately, these reports have not been very uniform. A modest number include anecdotal evidence about divorce negotiations. Only four include data from surveys on this question. Even these four are sufficiently varied that direct comparisons are not possible. For example, as the charts below make clear, Connecticut and Washington inquired whether women ever sacrificed financial outcomes to secure uncontested custody, while Florida and New Mexico inquired whether fathers ever sought custody to gain leverage. Because questions were phrased differently, no precise comparison is possible. Nonetheless, rough conclusions seem safe. In Connecticut, there is overwhelming agreement that women accept lower financial settlements to avoid custody at least sometimes. In Florida and New Mexico there is similar agreement that men seek custody for leverage at least sometimes, though New Mexico responses vary considerably depending on attorney gender. Although terms such as "sometimes" and "often" are difficult to quantify, these conclusions seem roughly compatible with my findings, and with those of Pearson discussed in this paper.

The findings from Washington differ from the others. Although even in Washington, more than half of respondents thought women gave up child support to secure uncontested custody "occasionally," very few thought this happened "usually" and many respondents thought it happened "never." The Washington results might differ from the others for several reasons. First, the choice of "usually" rather than "often" as an option might have led people to more conservative choices. Second, the Washington questions asked separately about child support and property. Perhaps this division led to a reduction in estimates because although women in Washington "usually" trade either property or support, they do not "usually" trade either independently. Third, the Washington questionnaire inquired whether women conceded "more than 50% of the property" or "less child support than the father's income would call for" to secure uncontested custody. These precise questions could mask other trades. For example, if a woman accepted lower child support than she and her lawyer believed she might get in court, but still more than minimum local guidelines, the lawyer might believe the question required a "no" answer even though the woman made a concession to secure uncontested custody. Finally, as I discuss below, a very large

HeinOnline -- 68 S. Cal. L. Rev. 540 1994-1995

proportion of those answering these questions were not members of the family law section of the state bar. Very likely most of these had little family law experience compared to individuals who specialize to a great degree.

Sampling methods varied from one state to another. Connecticut sent questionnaires to more than 2000 attorneys, intentionally identifying equal numbers of men and women, and intentionally targeting certain sections of the bar, as well as judges and other court employees. Apparently no effort was made to weigh responses in order to reflect the bar as a whole. They received just over 1000 responses. However, only 470 lawyers responded to the question about divorce negotiations, presumably because others did not know. Unfortunately, one cannot tell from this method whether those who answered had substantial experience in family law.

Florida used a sophisticated disproportionate sampling technique to ensure adequate responses from various groups. Weighting of answers was then used to assure that final data reflected the family law bar as a whole. Questionnaires were sent to 875 members of the family law section of the bar. They received 408 responses.

New Mexico distributed surveys to all members of the state bar. Rather than focus on the family law section, it relied on attorneys to decide whether they had sufficient experience to answer particular questions. They received more than one thousand responses from the 3683 members of the bar. They received 452 answers to the family law questions.

Washington sent questionnaires to 4791 lawyers, including members of the family law section and to all state judges. They received responses from 1509 lawyers and 222 judges. Although Washington instructed lawyers and judges only to answer questions if they had experience in an area during the last three years, lawyers seem to have answered questions with which they did not have extensive experience. More than 1000 lawyers offered views about exchanging financial for custodial terms. Yet fewer than 200 respondents were members of the family law section of the state bar.

HeinOnline -- 68 S. Cal. L. Rev. 541 1994-1995

Connecticut[1]

Do women accept lower financial settlements in order to avoid custody challenges?

	Almost Always	Often	Sometimes	Rarely	Never
Lawyers	5.1% (24)	35.3% (166)	47.4% (223)	10.4% (49)	1.7% (8)
Judges	0% (0)	16.4% (11)	62.7% (42)	19.4% (13)	1.5% (1)
Employees	2.8% (5)	23.2% (41)	52% (92)	14.1% (25)	7.9% (14)

Florida[2]

Do fathers seek custody or primary residence of their children for leverage in negotiating alimony and/or child support?

Almost Always	Often	Sometimes	Rarely	Never
2.5%	37.2%	45.1%	13.5%	2.75%

New Mexico[3]

Do fathers seek custody primarily as leverage to obtain a favorable economic position in divorce litigation or post decree matters?

	Always	Often	Sometimes	Rarely	Never
Men	1%	24%	51%	20%	4%
Women	3%	62%	30%	5%	0%

1. Connecticut Task Force on Gender, Justice, and the Courts, Final Report (1981). Response rates and methods for this survey are discussed in the Report at 50. Responses are given in (1) Attorneys' Questionnaire Section IV Question 4; (2) Judges' Questionnaire Section IV Question 10; and (3) Employees' Questionnaire Section VIII Question 10. In all these categories, male respondents thought this occurred less often than did female respondents.

2. These results are reported in Barry Sapolsky, Report on the Supreme Court Gender Bias Study Commission Survey of Attorneys 114 (1988). When surveys were divided by attorney gender, female attorneys reported this phenomenon more often than male attorneys. *Id.* Survey methods are documented at 215-20.

3. New Mexico State Bar Task Force on Women and the Legal Profession, Final Report 67 (1990). The questionnaire is reproduced as appendix 7 to the report.

HeinOnline -- 68 S. Cal. L. Rev. 542 1994-1995

Do mothers seek custody primarily as leverage to obtain a favorable economic position in divorce litigation or post decree matters?

	Always	Often	Sometimes	Rarely	Never
Men	4%	22%	39%	31%	5%
Women	0%	5%	36%	52%	7%

Washington[4]

Have you ever represented (for lawyers) or are you aware of (for judges) mothers who conceded more than 50% of the property in exchange for the father's agreement not to seek custody?[5]

	Always	Usually	Occasionally	Never
Lawyers	2% (9)	7% (31)	38.4% (170)	52.6% (233)
Judges	0% (0)	3% (3)	44.6% (45)	52.5% (53)

Have you ever represented (for lawyers) or are you aware of (for judges) mothers who agreed to less child support than the father's income would call for in exchange for the father's agreement not to contest custody?[6]

	Always	Usually	Occasionally	Never
Lawyers	1.1% (5)	7.9% (36)	52.4% (240)	38.7% (177)
Judges	0% (0)	2.0% (2)	68.6% (70)	29.4% (30)

4. Survey methods for the Washington study are discussed in WASHINGTON STATE TASK FORCE ON JUSTICE AND GENDER IN THE COURTS, FINAL REPORT A-177-81 (1989).

5. *Id.* at A-201. When responses are broken down by respondent gender, female judges and attorneys report this happening more often than do male respondents.

6. *Id.* at A-201, B-240. When responses are broken down by respondent gender, female judges and attorneys report this happening more often than do male respondents.

HeinOnline -- 68 S. Cal. L. Rev. 543 1994-1995