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Freeing the Parties From the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation

Joel Kurtzberg and Jamie Henikoff

*The law is a tool, not an end in itself.*¹

--former Chief Justice Warren E. Burger

I. INTRODUCTION

While mediation has grown in popularity in recent years, critiques of mediation abound, claiming that mediation hurts the poor and the disempowered by paying too little attention to the legal rights designed to protect them.²

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1. W. Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982).

2. See e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 679 (1986) ("The wholesale diversion of cases involving the legal rights of the poor [by mediation] may result in the definition of these rights by the powerful in our society rather than by the application of fundamental societal values reflected in the rule of law."); Richard Delgado, et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391-92 (mediation "reinforc[es] powerful . . . forces in society . . . [and] inhibits social change by persuading disputants with legitimate grievances to sacrifice their grievances in the interests of peace and cooperation."); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 13 (1993) (arguing that mediation uses a technique "which discourages people from asserting their rights when they have been injured"); Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 267, 280-95 (Richard L. Abel ed., 1982) [hereinafter INFORMAL JUSTICE] (mediation serves to "neutralize conflict" by addressing the demands of the poor and disadvantaged without reference to formalized legal protections such as rights); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1567 (1991) (mandatory mediation discourages assertion of rights thus harming women, the poor, and minorities). For a similar critique applied to women in the context of divorce mediation, see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 443-44 (1992) ("Negotiating lawyers rely upon . . . legal entitlements and craft divorce agreements reflecting them, thereby loosening the control men traditionally wield over economic resources and the socialization of children. While

According to the critics, mediators treat "the law" as an obstacle to creative agreements³ and obscure the problem by focusing solely on the seductive rhetoric of "interests" and "autonomy," while parties unwittingly forfeit their legal protections and acquiesce to the demands of the powerful. Although the disempowered may typically leave a mediation feeling satisfied,⁴ it is only because they are usually unaware of what they have conceded.⁵ This view holds that mediation is especially dangerous in situations in which (1) the poor or disempowered are afforded significant formal legal protections, and (2) they are generally unaware of these protections. Such is clearly the case in the context of the Massachusetts housing law, where tenants are generally poor⁶ and unaware of their legal rights.

In this article, we point out two fundamental flaws of the critique. First, the critique compares mediation to an idealized view of adjudication instead of comparing mediation to its real-life alternatives. Second, it takes a narrow view of the role of law in mediation, erroneously assuming that mediators must either ignore the law or impose it on the parties. Part I of this article spells out the critics' claim that mediation generally harms the poor and disempowered by failing to adequately incorporate formal legal protections into the process. Part II examines the critique as it is applied to the landlord-tenant context; specifically, this section focuses on the

mediation proponents employ the . . . rhetoric of relatedness, mediation unobtrusively reduces this threat to patriarchy by returning men to their former dominant position.").

3. See Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 3-4 (1987) (noting that alternative dispute resolution proponents perceive substantive law as "frustrating creative results"); see also Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 27 (1984) (arguing that law is an irrelevant constraint on the mediator's ability to bring parties to agreement).

4. See e.g., Kenneth Kressel & Dean G. Pruitt, *MEDIATION RESEARCH 10-25* (1989) (showing that even parties who go through mandatory mediation are satisfied with the process).

5. The alleged victims of mediation are often unaware that they have been harmed on an individual level. Moreover, mediation makes the poor less likely to realize that others in similar situations are experiencing the same harms and, thus, makes them less likely to mobilize politically in support of their class interests.

6. This article will proceed with the assumption that tenants who are threatened with eviction are generally poor and have less power and money than most landlords. While it is certainly true that not all tenants are poor and disempowered—or that all landlords are rich and powerful—it is safe to say that an overwhelming majority of the tenants who are evicted are less rich and less powerful than the landlords who evict them. Anyone who has ever visited an urban housing court will admit that this assumption is generally a fair one in spite of the fact that there are some notable exceptions. See e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 557 (1992) ("Rent court, more than most other courts, is a theater of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are poor and poorly situated with respect to the attributes that garner respectful hearing in court rooms.") Both common sense and anecdotal evidence from tenants' advocates and those who regularly mediate eviction cases corroborate the reasonableness of this assumption. Telephone interview with Gordon Shaw, Mediation Coordinator at Hampshire Community Action Commission (Apr. 15, 1996) [hereinafter "Shaw Interview"]; Interview with Chuck Doran, Mediator at Mediation Works, Inc., in Kingston, Mass., (Feb. 12, 1996) [hereinafter "Doran Interview"]; Interview with Roger Bertling, housing attorney at Hale & Dorr Legal Services Center, in Jamaica Plain, Mass. (Mar. 27, 1996) [hereinafter "Bertling Interview"].

power imbalances which impact landlord-tenant negotiations and the many, frequently unknown, formal legal protections that the Massachusetts housing law provides to tenants. Part III offers a response to the critique by arguing that mediation need not ignore legal rights and protections and that mediation fares fairly well in comparison to the actual, real-life alternatives. Part IV provides a theoretical framework for both describing and evaluating the various approaches to incorporating the law into housing mediations and suggests that mediation remains truest to its underlying principles when it focuses on *both* the legal rights and personal interests of the parties, even though many mediators intuitively believe that such a dual focus is not possible. Part V examines four different approaches to incorporating the law into housing mediation and evaluates two of the approaches by comparing them to their real-life alternatives. Finally, Part VI offers prescriptive advice about how to best achieve the goal of a dual focus on rights and interests in the landlord-tenant context. We suggest that to accomplish this task, mediators and parties must not ignore the law, as some programs do, but rather address it directly.

II. THE CRITIQUE IN GENERAL

Critics of mediation point out that mediation hurts the poor and disempowered on both an individual and a class level. According to the critics, poor disputants who mediate do a disservice to themselves by typically accepting unjust agreements and to other poor disputants by contributing to a system that prevents the poor from politically mobilizing on a class level. At the core of one version of the critique⁷ lies the charge that mediation, in contrast to adjudication, fails to adequately deal

7. There is another, more radical, version of the critique which charges that *both* formal methods of dispute resolution, such as adjudication, and informal methods of dispute resolution, such as mediation, perpetuate power imbalances and serve to reinforce the status quo. See e.g., Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in 1 *INFORMAL JUSTICE*, *supra* note 2 at 158-60. These radical critics have little faith in the legal system and argue that as long as different groups have unequal bargaining strength, social justice cannot be furthered by any institutions of dispute resolution. See also, Richard L. Abel, *Redirecting Social Studies of Law*, 14 *LAW & SOC. REV.* 805, 827 (1980); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC. REV.* 95 (1974). Having no faith in the ability of legal reform to bring about social justice, these critics argue that political organization aimed at achieving a more equal distribution of power is the key strategy to be pursued in seeking justice. These radical critics seem to argue that "formal justice" can *sometimes* be used to correct power imbalances, but that "informal justice" (i.e., mediation) *always* oppresses the underprivileged. See Lazerson, *supra* note 7, at 159 ("[An informal] legal system that encourages conciliation between landlords and tenants—two parties with vastly unequal resources—by curtailing the procedural rights of the weaker can only succeed in amplifying that inequality . . . [However,] whether formal justice serves the status quo depends very much on the nature of the status quo.") While we agree with these critics that both mediation and adjudication can be used to perpetuate power imbalance, we disagree with their implicit conclusion that informal means of justice, such as mediation, cannot *ever* adequately deal with power imbalances. This article will focus on the mainstream critique which looks to adjudication as an adequate response to power imbalance. However, the response also applies to the more radical critique in that it suggests ways in which mediation can adequately deal with power imbalances.

with power imbalances.⁸ In this view, mediation is based on a well-intentioned, but somewhat naive, romanticism, which erroneously assumes that disputing parties have roughly equal bargaining power.⁹ In the words of one critic:

[A]dvocates of ADR . . . act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help By viewing the lawsuit as a quarrel between two neighbors, the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties. It treats settlement as the anticipation of the outcome of trial and assumes that the terms of settlement are simply a product of the parties' prediction of that outcome. In truth, however, settlement is also a function of the resources available to each party . . . and those resources are frequently distributed unequally.¹⁰

According to these critics, mediation pays too little attention to power differentials among parties and inevitably leads to agreements that merely reflect these power differentials. Even though both parties might consent to a final agreement, critics argue that "[p]arties [often] settle while leaving justice undone."¹¹ The critics see the goal of mediation as being to "maximize the ends of private parties" and to "secure the peace," and they argue that these goals pale in comparison to the ultimate goal of adjudication, which is insuring justice.¹² A powerful example illustrates this point: "Imagine . . . [what] would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated."¹³ Sometimes justice requires more than simply "keeping the peace". Thus, judges are not simply strangers who settle disputes among neighbors as the "mediation parable" would have it; rather, they are public officials authorized "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and bring reality into accord with

8. There is a rich literature surrounding "power" and negotiation. While power has proven difficult to define with much precision, most theorists equate power with the ability of one party to influence another to behave in accordance with the first party's wishes. See MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 84 (1973); P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 186-90* (1979); DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 87 (1981); R.H. TAWNEY, *EQUALITY* 159 (1964); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 152 (1947).

9. See Lazerson, *supra* note 7, at 159 (" . . . much of the propaganda for informal justice, neighborhood justice centers, and mediation . . . expresses an idealist perspective that is not historically or empirically rooted.")

10. Owen M. Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1075-76 (1984).

11. See *id.* at 1085.

12. *Id.*

13. Edwards, *supra* note 2, at 679; see also, Fiss, *supra* note 10, at 1089 (citing *Brown v. Bd of Ed. of Topeka*, 347 U.S. 483 (1954); 349 U.S. 294 (1955) (illustrating a prime example of how adjudication helps bring about justice in ways that settlement cannot).

them."¹⁴ In so doing, judges level the playing field by bringing society closer to its chosen ideals which often include significant protections for the poor and disadvantaged.

The critics argue that adjudication helps insure justice by providing individuals with formal substantive and procedural legal rights. Mediators, critics charge, ignore these formal protections by typically viewing "the law" as "getting in the way" of the central focus of the mediation: the interests of the parties.¹⁵ Mediators often emphasize that the goal in mediation is a "fair" agreement-- generally defined as one that is subjectively fair to each of the parties.¹⁶ Objective standards of fairness, such as the law, are therefore perceived as either an obstacle to creative option-generating on the part of the parties or as entirely irrelevant to the process. Critics charge that "[t]he irrelevance of formal...law and the lack of objective fairness standards creates great confusion for mediators," who let the parties decide for themselves what they think is fair, "trusting a somewhat foggy commitment to 'self-determination.'"¹⁷ In the minds of most mediators, the law is not relevant to the parties' internally developed standards of fairness. Critics believe that this mediation approach frequently leads to injustice by undercutting the "public values" underlying our formal legal principles.

In fact, critics contend that mediators typically go out of their way to avoid discussions of the law, using "informal sanctions" to encourage the parties to replace the rhetoric of principles, blame, and rights with the rhetoric of compromise and relationship.¹⁸ For instance, mediators frequently urge the parties to "eschew[] the language of individual rights in favor of the language of interdependent relationships."¹⁹ Similarly, parties are typically discouraged from complaining about past behavior of the other party and from focusing on fault or blame. Instead, they are encouraged to be "forward-looking" and focus solely on how the problems of the

14. Fiss, *supra* note 10, at 1085.

15. See Rifkin, *supra* note 3, at 27; Brunet, *supra* note 3, at 3-4.

16. A small number of mediators define fairness in relation to what the court would have decided had the case gone to trial. Critics rightfully point out that if this legalistic definition of fairness is accepted, then it can no longer be said that the parties are in control of the normative issues at stake in the mediation. Moreover, it reduces the possible benefits of mediation to lower cost and greater efficiency rather than adjudication. See Grillo, *supra* note 2, at 1593.

17. Bryan, *supra* note 2, at 506 n. 271. Professor Bryan cites the following passage as an illustration of the confusion:

Fairness in property division and allocation of material resources involves a number of external or objective criteria, but even in this area, internal factors play a role. How do you assess whether the "bottom line" is fair? A 50/50 agreement somehow inherently appears to be fair However, in mediation the couple has an opportunity to develop their own standards of equity, which may not be the same as those prevailing in the community. To what extent does the mediator allow these standards to deviate from the prevailing ones? And what percentages are within the parameters of fairness?

Joan Dworkin & William London, *What Is a Fair Agreement?* 7 MEDIATION Q. 3, 8-9 (1989). Dworkin and London leave these questions for the parties to respond to, relying on the principle of self-determination. *Id.* at 11.

18. Grillo, *supra* note 2, at 1560.

19. *Id.* (quoting Merry & Silbey, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 29 (1986)).

past can be avoided in the future.²⁰ The end result of mediation's "informal sanctions" against discussions of fault and blame is that rights are frequently ignored. More importantly, mediation often does not live up to its promise to "contextualize conflict" by tailoring a solution to the individual needs of the parties. Frequently, the critics point out, past history and perceptions of who is "at fault" are important issues and need to be addressed to adequately chart the best course for the future. To ignore these issues is to ignore the relevant context of the dispute, which is something on which mediation is supposed to focus. As one critic put it, "[t]he risk of mediation is that if principles are abandoned, and context is not effectively introduced, we end up with the worst of both worlds."²¹

At the core of the problem, according to the critics, lies an inherent tension between two of the central principles of mediation--neutrality and self-determination--and mediation's ability to protect the weaker party from unfair outcomes.²² Neutrality in its purest form requires mediators to refrain from attempting to influence the substantive outcome of the mediation.²³ Likewise, the principle of self-determination requires that mediators allow parties to make decisions for themselves. Both principles lead mediators to the conclusion that the only acceptable way to deal with power imbalance is by focusing on process and not on the substance of agreements. According to the critics, however, attention to process alone is not enough to protect the disempowered. True empowerment of the parties often requires intervention in the substance of agreements.²⁴ Allegedly

20. Grillo, *supra* note 2, at 1563.

21. *Id.* at 1558.

22. See Bryan, *supra* note 2, at 504. The insights of Professor Carol Steiker are worth noting here. Professor Steiker has observed that whenever legal theorists or philosophers say that there is an "inherent tension" between two principles, what they usually mean is that the two principles completely contradict each other and are, in the end, entirely irreconcilable. Carol Steiker, Criminal Law Lecture at Harvard Law School (Fall 1993).

23. Strict neutrality is a human impossibility, since mediators inevitably bring with them their own personal biases based, among other things, on their social class, ethnicity, and upbringing. See Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1125 (1988); Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in *INFORMAL JUSTICE*, *supra* note 2, at 242. Moreover, mediators can sometimes subtly influence an agreement's substance indirectly by indicating their preferences to the parties by focusing on various options and deemphasizing others. See Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISP. RESOL. 141. Most sources suggest that neutrality requires mediators to refrain from *intentionally* attempting to influence the substance of an agreement, thus recognizing the possibility--or perhaps the inevitability--of inadvertent influences on substance.

24. See Bryan, *supra* note 2, at 502-05. At issue are really two separate notions of empowerment which rest on a foundation of two separate notions of autonomy. The first notion of empowerment--that criticized by opponents of mediation-- contends that parties are empowered when they make decisions for themselves. The second notion of empowerment takes issue with this notion, arguing that parties are only empowered when they make fully informed decisions for themselves. According to this second notion of empowerment, in our imperfect world where parties often don't have the information needed to make informed choices *truly* autonomous decisions sometimes require outside intervention - (i.e., outside parties leading people to the choices that they *would have made* had they been fully informed and uncoerced).

The second notion of autonomy is generally applied to instances when there is "market failure"

neutral process tactics, such as allowing both parties ample opportunity to speak, do not do much to level the playing field or to assure fair outcomes given the nature of the power disparities that typically exist between the rich and poor. A weaker party may actually speak more than a more powerful one, but the few words spoken by the powerful party may reflect his or her greater levels of knowledge, self-agency,²⁵ negotiating skill, or interpersonal skill, thus leading to an unjust result.²⁶ In short, critics charge that mediators focus on process at the expense of substance and that focusing on process alone is not enough to adequately address power imbalances.

Furthermore, critics charge that mediation "individualizes grievances" which inhibits the perception of common grievances and reduces the likelihood of collective action on the part of the poor and disempowered. The private and confidential nature of the process, while necessary for mediation to work, effectively isolates complainants from each other and from the community, thus preventing them from realizing that others in similar situations often have common complaints. The disempowered may 'win' cases as individuals but lose as members of a wider social class.²⁷ In short, mediation focuses on the individual at the expense of the collective group, encouraging conciliation and peacefulness in individual cases where the appropriate response often would be to collectively fight back by asserting formal legal rights.

In sum, the critics suggest that though mediation may trim court dockets, it does so at a large cost. The parties may claim to be satisfied with agreements they have reached, but these agreements may not bring justice. Instead, they simply provide the rich and powerful with an easy way to circumvent the protections that the formal law provides for the underprivileged. Where the formal law is particularly protective of the poor and disadvantaged, the community has voiced a significant concern that such protections are necessary. In such contexts, we should be particularly skeptical

of some kind. For example, our laws prevent tenants from contracting out of the implied warranty of habitability because society is concerned that, due to imperfections in the market, tenants will be unable to make an informed and uncoerced choice in the matter. The rationale underlying the law is that no fully informed consumer would freely agree to live in an uninhabitable apartment. Thus, the law seeks to provide tenants with what they would have bargained for if they were fully informed and able to make a truly free choice. Essentially, the critics of mediation charge that mediation is based on the first notion of autonomy, and that the second notion is more appropriate in cases where there is a significant power imbalance (i.e., a market failure).

25. Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOTIATION L. REV. 85, 86 (1996). Ms. Fox notes that tenants frequently have difficulty adequately asserting their own interests. She refers to the ability to adequately represent oneself as "self-agency." It is in this sense that we use that term here.

26. See Bryan, *supra* note 2, at 504-05.

27. Hofrichter, *supra* note 23, at 240. For example, Legal Services lawyers describe the importance of developing a political strategy that will help improve the legal position of all tenants. See e.g., Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1973). In the 1970s, many legal aide centers—in Boston and New York, for example—intentionally took on and vigorously defended all eviction cases in an attempt to control a large percentage of the court docket, thereby having an influence on the direction of the courts' development of the law. According to the critics, mediation precludes, and even thwarts, such efforts to improve the lot of all tenants. See Lazerson, *supra* note 7, at 158-60.

when the poor and disadvantaged "voluntarily," and perhaps even happily, agree to something less than what society has deemed them entitled. We should be even more skeptical when they do so through a process, such as mediation, that tends to play down the significance of these protections and instead leaves it to the parties, who often have significant differences in bargaining power, to hash out on their own what they consider to be fair.

Housing disputes take place in the exact context that critics fear most. Considerable power differentials between landlords and tenants often exist in eviction proceedings. Moreover, tenants' ignorance of the significant protections afforded to them by the law make them vulnerable to the unfair suggestions of the powerful. To fully appreciate the potential dangers of mediation in landlord/tenant cases, it is necessary to grasp both the significance and the extent of the power differentials between landlords and tenants, as well as the formal laws designed to protect tenants from injustice.

III. THE CRITIQUE AS APPLIED

A. Power Differentials between Landlords and Tenants

The majority of tenants subject to eviction actions are members of groups that are relatively without power.²⁸ Tenants who are sued for nonpayment of rent are almost always poor and living near subsistence. In contrast, landlords generally have more money, education, and experience with navigating the court system.²⁹ Moreover, most landlords benefit from the services of experienced agents and lawyers who have considerable negotiating experience, knowledge of the law, and

28. See *supra* note 6. Tenants subject to eviction actions are fairly likely to be poor, minority, and/or female. See e.g., Bezdek, *supra* note 6, at 540 (describing the Baltimore area); Fox, *supra* note 25, at 92-93 (describing the Boston area). As one scholar has noted, the word "tenant" itself "is an assignment to a culturally recognized economic class of persons excluded from property ownership and its literal and symbolic means for autonomous participation in the social order, in its economic, civil, political, and social dimensions." Bezdek, *supra* note 6, at 540 n.24.

29. Shaw Interview, *supra* note 6 (describing landlords and tenants in the Northampton area); Doran Interview, *supra* note 6 (describing landlords and tenants in the "South Shore" area); Bertling Interview, *supra* note 6 (describing landlords and tenants in the Boston area). These observations are also based on the authors' visits to District Courts in Northampton, Plymouth, Hingham, Quincy, and West Roxbury, and to the Boston Housing Court, as well as one of the author's observations while working as a student advocate for tenants in the Boston area at the Hale & Dorr Legal Services Center in Jamaica Plain, Massachusetts during the Fall of 1995.

It is noteworthy that all of the individuals with whom we spoke -- mediators, tenants' advocates, and even one professional landlord -- agreed that tenants are extraordinarily uninformed of their rights. For example, one tenants' advocate claimed that, "[b]y far the biggest problem facing tenants in summary process proceedings is that they don't understand their rights." Bertling Interview, *supra* note 6. One mediator estimated that tenants' awareness of their rights was "very, very low." Doran Interview, *supra* note 6.

familiarity with the relevant courts and judges.³⁰ As one scholar has noted, these differences give landlords a considerable negotiating advantage:

The primary operators in the rent court are a class of business agents whose repeated participation in the forum is a kind of legal education in the scope and form of legal claiming which is adequate to preclude even a minimal contest by most tenants and sufficient to defeat the few tenants who muster more. The representatives' . . . [repetition] provides a confidence in conducting business before the court, borne of a certain amount of familiarity with the setting and its rhythms, as well as the presiding officials.³¹

The typical mediation, therefore, is between an experienced lawyer or landlord who knows both the law and the system, and a tenant who is not familiar with either. Thus, the tenants are often at a decided disadvantage.

B. The Consequences of Power Imbalance: Tenants Failure to Assert Themselves and Mediation's Difficulty In Adequately Responding

A number of observers have noted that the combination of all of these power differentials often discourages tenants from asserting their own interests and legal rights when negotiating with landlords and/or their agents.³² Consider the following "typical" exchange between a tenant and a landlord's lawyer which was recorded by an observer at the Boston Housing Court. Arnold Moses, the tenant, spent an hour and a half talking to fellow tenants in the hallway of the court about the decrepit state of his apartment, the number of times he told the landlord to fix the problems, and the fact that the landlord never did anything about them. He seemed to be aware that he was legally entitled to have the landlord make the repairs. When it was

30. In the four courts we examined, landlords were represented by counsel in 75.2% of the cases at Northampton District Court, 70.4% of the cases at Plymouth District Court, 60.5% of the cases at Hingham District Court, and 58.0% of the cases at Quincy District Court. A large percentage of the cases in which landlords were not represented involved repeat players, such as the Quincy Housing Authority, who had, for all intents and purposes, a representative who was as knowledgeable and as experienced with housing cases as most housing attorneys. In contrast, tenants were represented by counsel in only 10.2% of the cases at Plymouth District Court, 11.0% of the cases at Hingham District Court, and 6.2% of the cases at Quincy District Court. In all courts combined, 60.4% of landlords had counsel while only 7.8% of tenants did.

31. Bezdek, *supra* note 6, at 556-57. See also Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limit of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974); Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant As Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1662 (1969); Fox, *supra* note 25, at 92-93. Our own research confirms that in the courts we examined, 81.8% of landlords were either repeat players or were represented by counsel, while the same was only true for 8.1% of tenants.

32. One writer has described tenants' silence and inability to assert their own interests as a lack of "self-agency." See Fox, *supra* note 25, at 86. See also Bezdek, *supra* note 6, at 566-75 (describing the various ways power differentials lead tenants to remain silent when negotiating with landlords or appearing at hearings at "rent court").

Arnold's turn to negotiate with the landlord's lawyer, however, the following exchange occurred:

Lawyer: Are you Arnold Moses? (Arnold nodded.)
Lawyer: You owe three hundred and fifty dollars. Is that correct? (Arnold nodded.)
Lawyer: How long do you need? (Arnold shrugged.)
Lawyer: Your landlord wants three hundred and fifty dollars over seven months. That's fifty dollars a month, March through September, the fifteenth of each month. Can you do that?
Arnold: Okay.
Lawyer: Okay, Mr. Moses. You wait here and I'll go write up an agreement.³³

After the lawyer left, Arnold was asked why he did not tell the lawyer what he had told the other tenants. Arnold responded, "People here are afraid to talk. You know, you get that inner fear, and you're too afraid to say anything."³⁴

Tenants' advocates often find that tenants have difficulties asserting themselves, even when talking to their own lawyer. For this reason, student advocates interviewing prospective housing clients are instructed to always ask very specific questions regarding the condition of the prospective client's apartment. Interactions such as the following which took place between one of the authors and a prospective client are not uncommon:

Joel Kurtzberg [JK]: What about the condition of the apartment? Do you have any things that need to be fixed or repaired?
Prospective Client: No. Not really.
JK: Well, do you have adequate heat?
Prospective Client: Yes.
JK: Do you have any problems with leaks?
Prospective Client: No.
JK: How about any problems with cockroaches?
Prospective Client: Yes. We've got lots of those. And rats too! .
..
JK: Do you have any smoke alarms?
Prospective Client: No³⁵

33. Fox, *supra* note 25, at 98-99.

34. *Id.* at 98.

35. The conversation has been reconstructed over a year after it occurred. While it may not reflect the exact words said, it does capture the essence of a conversation that occurred multiple times over the course of a single semester. The roach and rodent infestation, along with the lack of smoke alarms, would have entitled this tenant to withhold some rent if the landlord had been informed of the problems

How many mediators--or judges for that matter--would have continued this line of questioning with a tenant after an initial response that there were no problems with conditions in the apartment? Yet, often such persistence is required to get to the bottom of things. While not all tenants are like the one in this example, one Legal Services Attorney in Boston estimated that at least one-third of his clients say that they have no conditions when first asked, despite the existence of considerable code violations.³⁶ Hence, there is good reason to believe that a substantial number of tenants have a difficult time asserting themselves. Critics contend that mediators in their struggle to maintain neutrality and treat the parties equally typically fail to do enough to encourage tenants to assert themselves.

C. Society's Reaction to Power Imbalance: Tenants' Many Legal Protections and Mediation's Difficulty in Preserving Them

A generally recognized revolution occurred in American landlord-tenant law in the 1960's and 1970's which greatly expanded tenants' procedural and substantive rights.³⁷ Prior to the late 1960s, the law in most jurisdictions was simple: *caveat emptor* or *caveat lessee*, meaning let the buyer/lessee beware. In the classic scheme, the landlord had only two major legal obligations to the tenant: (1) to give the tenant a clear right to possession at the inception of the lease by producing good title,³⁸ and (2) to respect the tenant's "implied covenant of quiet enjoyment" by not materially disturbing his use or enjoyment of the property once the lease commenced.³⁹ Landlords had no duty to deliver the premises in good condition and no implied obligation to repair any defects on the premises during the term of the lease.⁴⁰ The tenant was expected to examine the premises prior to signing the lease and to decide for himself/herself whether it was suitable for his/her purposes.⁴¹ Thus, any risk of

or had been aware of them beforehand.

36. Bertling Interview, *supra* note 6.

37. See e.g., Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 517-27 (1984); Mary A. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Deborah H. Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 483-504 (1985).

38. 1 HERBERT T. TIFFANY, *THE LAW OF LANDLORD AND TENANT* § 182 at 1147-54, 1156-67 (1910).

39. *Id.* § 79 at 522-23.

40. See CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* 285-86 (2d ed. 1985); Rabin, *supra* note 37, at 521-22. The only exception to this rule was that landlords had a duty to repair "latent defects," which were known to them and not reasonably discoverable by the tenant. See J. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 741 (1993).

41. The following statement captures the essence of the classical approach in Massachusetts quite well:

It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store no covenant is implied that it should be fit for occupation. (Citations omitted.) . . . [E]ven where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purposes for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant, but his only remedy is by action for damages.

damage to the premises was borne by the tenant who was obligated to make all ordinary repairs during the life of the tenancy.⁴² Furthermore, courts considered the contractual obligations of landlords and tenants to be independent of each other; thus, each party's obligation to perform their part of the bargain was not contingent upon the other party's performance. Hence, the tenant's legal obligation to pay full rent continued even if the landlord violated an express covenant to make certain repairs.⁴³ Finally, under the "self-help" termination doctrine, a landlord could remove tenants' belongings from the premises, cut off water or electricity, and change the locks to forcibly evict a tenant who refused to relinquish possession after a lease had allegedly been terminated.⁴⁴

The revolution of the 1960's and 1970's brought about sweeping changes in landlord-tenant law across the country, replacing the old paradigm with a new one which had significant increases in both procedural and substantive protections for tenants. There is no question that a large part of the change was motivated by a societal recognition that tenants needed significant formal legal protections to reduce the disparity in their lack of bargaining power in relation to landlords. This is illustrated by the landmark case of *Javins v. First National Realty Corp.*,⁴⁵ which was perhaps the single most influential case in bringing down the old regime. In *Javins*, the court discarded several common law rules including: (1) the landlord's lack of duty to keep the premises in a habitable condition, (2) the independence of the tenant's legal obligation to pay rent from the landlord's legal obligation to make agreed upon repairs, and (3) the constructive eviction requirement that a tenant must leave the premises before asserting defenses to nonpayment of rent based on the condition of the premises.

Judge J. Skelly Wright, writing for the District of Columbia Court of Appeals, held that "the common law itself must recognize the landlord's obligations to keep his premises in a habitable condition" by implying a warranty from the landlord to the tenant that the premises are habitable.⁴⁶ The warranty guaranteed that the premises were given to the tenant in complete compliance with the Housing Code and that compliance would continue throughout the term of the lease: "[B]y signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law."⁴⁷ Three main

Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 837 (Mass. 1973) (quoting Royce v. Guggenheim, 106 Mass. 201, 202-03 (1870)).

42. The tenant's obligations with respect to repairs were defined by the law of waste. Hence, the tenant was obligated to make ordinary repairs, but not to make substantial, lasting, or general repairs that would materially affect the value of the property. 1 Tiffany, *supra* note 38, § 109 at 706.

43. SINGER, *supra* note 40, at 741. The tenant's only remedy against a landlord's violation of a covenant to do repairs was to sue the landlord for money damages. Unless the damage to the premises were so bad as to completely deprive the tenant of any beneficial enjoyment--a "constructive eviction"--the tenant could not get out of a lease early and had to continue to pay the full rent to the landlord, in spite of the fact that the landlord was breaching the agreement. *Id.*

44. *Id.* at 665-66.

45. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

46. *Id.* at 1077.

47. *Id.* at 1081.

rationales underlay Judge Wright's ruling. First, Judge Wright contended that the assumptions that provided the basis of the common law rules were no longer valid in modern society.⁴⁸ Second, he argued that the rationale underlying recent decisions in consumer protection law applied to the landlord-tenant context and required that the old rule be abandoned.⁴⁹ Lastly, and most importantly for purposes of the critique of mediation, Judge Wright stated that the inequality of bargaining power between landlord and tenant in the urban housing market made such protections necessary.⁵⁰ With regards to the last rationale, Judge Wright explained that:

[T]he relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.⁵¹

Hence, one of the main rationales for tenants' formal legal protections is that significant power imbalances between landlords and tenants produce market imperfections that make freedom of contract untenable. In the few years following *Javins*, almost every state adopted the implied warranty of habitability, either by statute and/or common law.⁵² In Massachusetts, the revolution began in 1967, three years prior to *Javins*, when the state legislature passed chapter 239, Section 8A of the Massachusetts General Law which permitted tenants to withhold rent if the premises were "in violation of the standards of fitness for human habitation

48. The common law rule that treated the contractual obligations of landlords and tenants independently of each other was based on the assumption that the rent was given in exchange for the land itself, not as consideration for a habitable dwelling. Judge Wright pointed out that this rule made sense in an agrarian economy, but not in an urban society where tenants are interested in a suitable place to live rather than in the land. *Id.* at 1077-78.

49. *Id.* at 1079. Judge Wright cited the landmark case of *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69, 78 (N.J. 1960), which found that there is an unwaivable implied warranty of merchantability when purchasing goods such as a car. The decision was based largely on the notion that consumers were not in as good a position as manufacturers to discover potential defects. Judge Wright found that the same rationale applied to tenants shopping for an apartment:

In dealing with major problems such as heating plumbing, electrical or structural defects, the tenant's position corresponds precisely with 'the ordinary consumer who cannot be expected to have the knowledge or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose.'

Javins, 428 F.2d at 1079 (citing *Henningson*, 161 A.2d at 78).

50. *Id.*

51. *Id.*

52. See SINGER, *supra* note 40, at 748.

established under the state sanitary code.⁵³ In order to withhold rent, Section 8A required: (1) that violations of the state sanitary code "endanger[ed] or materially impair[ed] the health or safety or well-being of persons occupying the premises,"⁵⁴ (2) that the tenant gave the landlord written notice of his intentions to withhold rent at a time when the tenant was completely current in rent payments, and (3) that a report was issued by the board of health corroborating the tenant's claims.⁵⁵ In 1973, the Supreme Judicial Court of Massachusetts greatly expanded the protections embodied in Section 8A in the landmark case of *Boston Housing Authority v. Hemingway*.⁵⁶ The *Hemingway* court held that the common law provided an implied warranty of habitability in every lease which entitled tenants to withhold rent if they lived in an uninhabitable dwelling, regardless of whether or not they complied with the statutory requirements of Section 8A. As was the case in *Javins*, the court was clearly concerned with correcting the power imbalance that existed between landlords and tenants. The belief that tenants could not adequately assert their own interests underlay both the court's finding that the implied warranty "cannot be waived by any provision in the lease or rental agreement"⁵⁷ and the court's determination that the common law had to reflect the radically different characterization of the relationship between landlord and tenant that was embodied in the recent statutory changes made in this area of law.⁵⁸

Hemingway cleared the way for the creation of a number of formal substantive legal protections for tenants in Massachusetts in the years that followed. Since *Hemingway*, tenants have been given a number of options for dealing with code violations that affect the tenant's health, safety, and well-being. For example, they may legally withhold rent,⁵⁹ sue the landlord for damages,⁶⁰ or make repairs

53. MASS. GEN. L. ch. 239, § 8A (1995).

54. § 8A.

55. See § 8A.

56. 293 N.E.2d 831 (Mass 1973).

57. *Id.* at 843.

58. See *id.* at 841 (stating that "the Legislature's actions reflect a characterization of the landlord-tenant relationship that radically differs from the status accorded to it by the common law").

59. In order to legally withhold rent, the following conditions must be met:

1. The landlord or the landlord's agent must be aware of the sanitary code violations before the rent withholding begins. If the conditions existed at the inception of the tenancy, then the landlord is deemed to have knowledge. Written notice from the Board of Health or any agency with the authority to inspect is considered proof of knowledge.
2. The tenant must not have caused the sanitary code violations.
3. The Code violations must be capable of being repaired without the tenant vacating the premises.
4. The premises must not be in a hotel or motel.

See MASS. GEN. L. ch. 239, § 8A (1995).

60. Under the law, a tenant is entitled to recover as damages the difference between the agreed upon rent and the fair value of the premises in its sub-standard condition. The tenant is entitled to an abatement from the time the landlord is made aware of the conditions until they are remedied. A tenant cannot unilaterally abate his or her own rent. Either the tenant and landlord must agree on an amount or the court will determine the amount by applying the above formula. See MASS. GEN. L. ch. 239, § 8A (1995).

themselves and deduct the amount from their rent.⁶¹ Furthermore, a combination of statutory, regulatory, and judicial reforms led to a prohibition against retaliatory eviction,⁶² restrictions on the landlord's right to access to the apartment,⁶³ the creation of an absolute right for tenants to obtain an inspection for alleged violations of the state sanitary code,⁶⁴ the application of consumer protection laws to "professional landlords",⁶⁵ the advent of rent control,⁶⁶ the application of strict liability to the warranty of habitability,⁶⁷ and the creation of strict laws regulating how security deposits and first and last month's rent payments are to be collected and held.⁶⁸ These potential defenses and counterclaims provide tenants with a

61. Tenants may make repairs themselves and deduct the amount from their rent if the following conditions are met:

1. The landlord was notified in writing from the Board of Health or a comparable agency that sanitary code violations exist which "materially endanger the health and safety" of the tenants.
2. The landlord has failed to begin making repairs within five days of receiving the inspection report.
3. The landlord has failed to substantially complete the repairs within a 14 day period (unless the Board of Health specifies a shorter period).

See MASS. GEN. L. ch. 111, § 127L (1995).

62. Under Massachusetts law, it is illegal for a landlord or his or her agent to threaten or to take retaliatory action against a tenant who has notified the landlord or his agent of state sanitary code violations that exist on the premises, organized or joined a tenants' union or organization, or taken any other lawful action designed to bring the landlord into compliance with any federal, state, or local law regulating the landlord-tenant relationship. Rent increases and eviction actions that occur within six months of any of the aforementioned actions are presumed under the law to be retaliatory unless the landlord can present "clear and convincing evidence" that the action was independently justified and would have taken place in the exact same time and manner had the tenant not engaged in the protective action. See MASS. GEN. L. ch. 186, § 18 (1995).

63. See MASS. GEN. L. ch. 186, § 15B(1)(a) (1995).

64. See generally, MASS. REGS. CODE tit. 105, § 400.001 (1996). There is no requirement that the landlord be present for the inspection or be informed in advance that the inspection is to take place.

65. See MASS. GEN. L. ch. 93A, §§ 1, 2, 9 (1978). Consumer protection laws are very protective because they provide for treble damages when professional landlords knowingly violate the State Sanitary Code.

66. In Massachusetts, rent control was enacted in Boston, Cambridge, and Brookline. In November of 1994, the citizens of Massachusetts voted to eliminate rent control in a state wide referendum ("Proposition 9"). See MASS. GEN. L. ch. 400 §§ 1-6 (1996). Shortly thereafter, Governor William Weld signed an emergency declaration establishing a statewide policy for ending rent control. See MA LEGIS 282 (1994). A resulting law suit challenging the validity of the referendum resolved by initiating a gradual phase-out of rent control. Recently, the Cambridge City Council voted to re-enact rent control. None of the courts we examined in Section Five of this paper (Plymouth, Quincy, Northampton, and Bingham) were subject to rent control.

67. See *Berman & Sons, Inc. v. Jefferson*, 396 N.E.2d 981 (Mass. 1979) (holding that tenant's obligation to pay rent abates when the landlord has notice that the premises fail to comply with the requirements of the warranty of habitability and that the landlord's lack of fault and reasonable efforts to repair do not entitle the landlord to full rent any sooner).

68. See MASS. GEN. L. ch. 186, § 15B (1995) (requiring landlords to provide tenants with a written receipt and a written statement of conditions of the premises upon acceptance of a security deposit, to deposit the security deposit in a separate interest-bearing account which cannot be intermingled with the landlord's personal funds, to provide the tenant with an annual accounting and payment of interest, and to use the security deposit only at the end of the tenancy (unless the tenant gives express permission to use it during the tenancy for specifically designated purposes). Similar rules apply for advanced collection of the last month's rent. See § 15B. Willful violation of these statutes by a landlord "in the

variety of effective legal responses to an eviction action for nonpayment of rent. In the end, if the landlord owes the tenant more for his violations of the appropriate safety and health violations than the tenant owes in back rent, then the tenant cannot be legally evicted.⁶⁹

The revolution granted tenants significant procedural protections as well. Most notably, "self-help" evictions became illegal and were replaced with formalized "summary procedures" intended to provide "relatively fast judicial determination of a landlord's claim of a right to regain possession of her property."⁷⁰ These new procedures provided tenants with a reasonable level of due process protections to avoid unjust evictions and the potentially violent encounters inherent in a self-help approach. In order to legally evict a tenant under the Massachusetts Uniform Summary Process ("summary process") rules, a landlord must: (1) properly notify the tenant that he or she is terminating the tenancy by giving a written notice called a notice to quit; (2) get a judgment from a court that he or she may legally take possession of the premises; and (3) get a court order called an execution which enables the landlord to act on the judgment and physically move the tenant out with the help of a constable, if necessary.

Summary process procedures allow tenants to prolong the process by filing for discovery,⁷¹ transferring the case to Housing Court,⁷² applying for a stay of

trade or business" of renting apartment units can give rise to a claim under consumer protection laws for damages worth three times the value of the security deposit or last month's rent. See MASS. GEN. L. ch. 93A, §§ 1, 2, and 9 (1995).

69. See MASS. GEN. L. ch. 239, § 8A (1995).

70. See SINGER, *supra* note 40, at 695. In Massachusetts, the Massachusetts Uniform Summary Process Rules were enacted in 1980 and were designed to accommodate two competing principles: the landlord's interest in a speedy and inexpensive procedure for resolving eviction actions and the tenant's fundamental need for dwellings that are habitable and secure. Mass. Unif. Summ. Process R. 1, (1995).

71. Massachusetts Uniform Summary Process Rule 7 entitles both parties to obtain discovery from the other party through written interrogatories, requested for admissions, and/or requests for the production of documents. Filing a demand for discovery automatically postpones the trial date two weeks from the original trial date. See MASS. UNIF. SUMM. PROCESS R. 7 (b). In practice, the delay often lasts longer, depending on how long it takes the landlord to respond to the discovery requests. Of course, parties are not supposed to engage in discovery solely for purposes of delay. However, it is safe to say that the extra time that discovery provides tenants is often part of what motivates tenants' advocates to file for discovery even in seemingly straight-forward cases.

72. Massachusetts Uniform Summary Process Rule 4 entitles any party to transfer a summary process action from the District Court to the Housing Court (if there is a Housing Court in that jurisdiction) upon filing a motion for transfer. A motion for transfer can be filed the day before the trial is scheduled. Most tenants' advocates transfer all of their cases to Housing Court for three reasons: (1) the judges in Housing Court tend to know the law better because all they do is housing cases, (2) the judges at Housing Court are usually more pro-tenant than the judges at the District Court, and (3) transfer usually postpones the date of the trial. See LEGAL SERVICES CENTER, EVICTION HANDBOOK FOR TENANTS 11 (1992) (on file with authors); Bertling Interview, *supra* note 6.

execution,⁷³ and filing for appeal, if they have good faith, non-frivolous arguments.⁷⁴ The rules require an eviction to take a minimum of forty-seven days from the time the notice to quit is filed to the time the sheriff can forcibly move a tenant out.⁷⁵ As one tenants' handbook indicated, "[e]victions are not easy and can be expensive if a landlord fails to follow the law and a tenant knows and enforces her rights."⁷⁶

Unfortunately, there is good reason to believe that tenants are not aware of their rights--both substantively and procedurally. In spite of strong anecdotal evidence of the prevalence of sanitary code violations,⁷⁷ the data indicates that tenants rarely assert their rights. For example, in 1995 summary process cases in Plymouth, Hingham, Northampton, and Quincy District Courts tenants waived all of their possible legal defenses and counterclaims by failing to file an answer 72% of the

73. Sections 9 and 10 of the Massachusetts General Laws allow the court to stay the execution if (1) no rent is owed, the tenant is not at fault for the eviction, and the tenant has been unable to find a new place to live after making a bona fide effort, (2) the tenant is sixty years of age or older or handicapped, or (3) in cases of special hardship. The court can grant the tenant extra time -- sometimes several months -- to find a new place. MASS. GEN. L. ch. 239, §§ 9 & 10 (1995).

74. Massachusetts Uniform Summary Process Rule 12 allows parties to appeal within 10 days from the entry of judgment. This can further delay the eviction process for approximately six months. While parties are required to post a bond for the amount of the judgment against them, indigent parties can get the bond waived. See MASS. GEN. L. ch. 239 § 5 (1995).

75. The rules require fourteen days to pass before a tenancy can be terminated for nonpayment of rent (i.e., the notice to quit lasts fourteen days); a summons and complaint can be served on the tenant on the fifteenth day, see Massachusetts Uniform Summary Process Rule 2; the complaint can be filed with the court by the twenty-second day, see *id.*; the tenant has until the twenty-ninth day to file an answer, see Massachusetts Uniform Summary Process Rule 3; the trial can be held no earlier than the thirty-second day, see Massachusetts Uniform Summary Process Rule 2 (c); judgment cannot enter until the thirty-third day, see Massachusetts Uniform Summary Process Rule 10 (d); the execution cannot be granted until the forty-fourth day, see Massachusetts Hood Summary Process Rule 13; the sheriff must serve a 48-hour notice of eviction one day after the execution; and after the 48 hours have expired--on the forty-seventh day--the sheriff can move the tenant out. The rules make it illegal to forcibly evict a tenant in less time than forty-seven days. See A. DUKE, LEGAL TACTICS: SELF-DEFENSE FOR TENANTS IN MASSACHUSETTS, app. at 218-19 (A. Duke, Ed. 5th Edition, 1993) [hereinafter LEGAL TACTICS].

76. PETER SCHACK, *Evictions*, in LEGAL TACTICS, *supra* note 75, at 207. The usual costs of an eviction include: 1) the fee to file the case in court, which is approximately \$140 as of the date of this publication; 2) fees for hiring a constable or deputy sheriff to serve court papers on the tenant, (MASS. GEN. L. ch. 262, § 8A; 3) attorney's fees, which often run over \$500 (more if the case is appealed); and 4) fees for the constable to actually evict the tenant and for movers to move and store the tenant's belongings, which often costs as much as \$2,000. See *id.* at 231 n.1 (providing updated figures for 1996). Because tenants are often unaware that landlords have to pay these costs, they are often unaware of the bargaining power they may actually have. For instance, if tenants were aware that landlords had to pay close to \$2,000 to have a constable evict them, they might realize that they have more leverage when negotiating than they originally thought.

77. See Bertling Interview, *supra* note 6.

time.⁷⁸ Moreover, tenants filed "informed answers" in only 15.6% of the summary process cases heard in these three courts.⁷⁹

The dangers highlighted by the critics of mediation are of serious concern in cases where uninformed, unrepresented tenants are mediating with sophisticated, represented landlords. The formal protections embodied in the law are due in large part to the recognition that tenants and landlords have unequal bargaining power in the market for housing. If mediation allows tenants to unwittingly waive those protections, it is likely that justice is not being done.

IV. A RESPONSE TO THE CRITICS

While there is much to be learned from the critique, it is fundamentally flawed in two important respects. First, it compares a real-world model of mediation to an idealized model of adjudication. A comparison of mediation to its real-life alternatives, even in the suspect area of landlord-tenant cases, reveals that alternatives to mediation deal less adequately with power imbalances than mediation does. Second, the critique takes a narrow view of the role of "the law" in mediation, erroneously assuming that mediators always view the law as an obstacle to creative agreements and, therefore, choose to ignore it. While some mediators may take this view,⁸⁰ many choose to incorporate the law into mediation. However, they do so not only as a means to provide parties with the formal "protections" that society has bestowed upon them, but also to enable parties to make a fully informed choice about what is best for them. Thus, mediation often incorporates the law in an attempt to allow the parties to "go beyond" the law—to both fully understand the law and to decide for themselves whether the parties can accept the principles underlying it or wish to replace those principles with others they find more compelling. In failing to recognize this, the critics fail to recognize mediation's true potential.

A. Comparing Mediation to Its Real-Life Alternatives

Critics of mediation tend to compare it to a romanticized notion of formal adjudication. Images of adjudication's largest success stories, such as *Brown v. Board of Education*,⁸¹ are typically conjured up and juxtaposed to mediation's

78. The breakdown for each court was as follows:

<u>Court</u>	<u>Answers Filed/Total Cases</u>	<u>Informed Answers/Total Cases</u>
Hingham	49/172 (28.5%)	23/172 (13.4%)
Plymouth	77/257 (30.0%)	39/257 (15.2%)
Quincy	291/1073 (27.1%)	157/1073 (14.6%)
Northampton	120/416 (28.9%)	81/416 (19.5%)
TOTAL:	537/1918 (28.0%)	300/1918 (15.6%)

79. For an explanation of the criteria used to distinguish between "informed answers" and "uninformed answers", see *infra* note 86 and accompanying text.

80. See *supra* notes 3 and 19 and accompanying text.

81. 347 U.S. 483 (1954); reargued 349 U.S. 294 (1955).

greatest nightmares.⁸² This comparison obscures the often harsh realities of our system of adjudication for the poor and underprivileged. In considering whether mediation harms the poor and disempowered, we must not compare it to an idealized vision of "formal justice," but rather to its real-life alternatives of negotiated settlements and litigated cases.

The notion of the poor tenant who is protected by a strong advocate who eloquently asserts a multitude of formal legal defenses and counterclaims to eviction on the tenant's behalf, thereby ensuring a fair and just outcome is mocked by the realities of the formal legal system. An examination of all of the 1995 summary process cases⁸³ in four separate Massachusetts district courts (Quincy, Plymouth, Hingham, and Northampton) reveals that adjudication's so-called formal protections for the poor and disempowered rarely amount to considerable protection in practice.

The reality is that many of the power imbalances described in the critique of mediation also have an adverse impact on litigated cases. For example, while 81.8% of landlords in our sample were either represented by counsel or were experienced repeat players, only 8.1% of tenants had attorneys and none were repeat players.⁸⁴ Without the benefit of legal counsel, tenants frequently forfeited their formal legal protections by failing to assert them. In 71.7% of the cases examined, tenants waived all of their defenses and counterclaims prior to trial by failing to file an answer.⁸⁵ To make matters worse, 38.2% of the few answers that were actually filed were "uninformed" in that they raised no real defenses or counterclaims at all.⁸⁶

82. See Fiss, *supra* note 10, at 1089 (citing *Brown* as a prime example of how adjudication helps bring about justice in ways that settlement cannot); see also Edwards, *supra* note 2, at 679.

83. There were a total of 1,918 cases in the four courts combined, with the breakdown being as follows:

<u>Court</u>	<u># of Cases</u>
Quincy	1,073
Northampton	416
Plymouth	257
Hingham	172

84. Landlords were represented by counsel in 63.6% of the cases observed (1220 out of 1918). Of the remaining 36.4%, approximately half (349 out of the remaining 698 cases) involved landlords who were repeat players—either real estate corporations, partnerships, housing authorities, or professional landlords whose names repeatedly appeared on the docket lists.

85. Tenants filed answers in 537 out of 1918 total cases. This includes *all* cases in our sample, not simply those that went to trial.

86. We examined each of the 537 answers filed by tenants and evaluated each of them on the basis of the defenses and counterclaims asserted, labeling them either "informed" or "uninformed." While there is some degree of subjectivity involved in such an evaluation system, most of the answers were either very informed or very uninformed and fit very clearly into one of the two categories. Generally, any answer that raised significant legal defenses or counterclaims was considered an informed answer. Most informed answers were either written by attorneys or were form answers taken from a "pro se packet" distributed by various Legal Services Centers in Massachusetts and copied from LEGAL TACTICS. Some were simply narratives written by the tenant which described various code violations. To be considered an uninformed answer, an answer had to be extremely uninformed. Many uninformed answers were completely blank, while others literally raised no legal defenses or counterclaims. Typically, uninformed answers simply said something to the effect of, "I can't afford to pay right now, but I would like to." If there was any question about whether a given answer was informed or uninformed, the default position was that an answer would be considered informed.

Essentially, only 15.6% of tenants filed an answer that effectively served to assert their legal rights.⁸⁷ Furthermore, in spite of the fact that filing for discovery automatically postpones the trial date two weeks,⁸⁸ only 12.0% of the tenants in our sample availed themselves of this opportunity.⁸⁹ Finally, tenants were so intimidated by and/or fearful of going to court that they defaulted 31.3% of the time.⁹⁰

As might be expected, the results from adjudicated cases mirror the above imbalances in power. For example, in all summary process cases which were decided by a formal hearing or trial, the landlord was granted possession of the premises 96.9% of the time.⁹¹

While tenants raised counterclaims in 38.9% of the cases that went to trial, abatement of rent to reflect housing code violations was ordered in only 4.9% of the cases.⁹² Although courts have the power to order the landlord to do repairs when sanitary code violations exist, not a single landlord was ordered to do repairs in all of 1995 in any of the four courts observed.

While the above data might suggest that few conditions or problems exist or that the negligible abatement rate follows from landlords repairing the defects that

87. Tenants filed informed answers in 300 out of 1918 cases examined. The breakdown by court was as follows:

<u>Court</u>	<u># of Informed Answers</u>	<u>% of Cases with Informed Answers</u>
Quincy	157/1073	14.6%
Northampton	81/416	19.5%
Plymouth	39/257	15.2%
Hingham	23/172	13.4%

88. See MASS. UNIF. SUMM. PROCESS R. 7 (b); *supra* note 71 and accompanying text.

89. Tenants filed for discovery in 179 out of 1489 cases examined. This sample includes data from Quincy and Northampton District Courts. The breakdown by court was as follows:

<u>Court</u>	<u># of Cases Discovery Filed</u>	<u>% of Cases Discovery Filed</u>
Quincy	113/1073	10.5%
Northampton	66/416	15.9%

Data from the Plymouth and Hingham District Courts regarding discovery was not collected.

90. Tenants defaulted in 601 out of 1918 cases examined. The breakdown by court was as follows:

<u>Court</u>	<u># of Cases Defaulted</u>	<u>% of Cases Defaulted</u>
Quincy	341/1073	31.8%
Northampton	114/416	27.4%
Plymouth	80/257	31.1%
Hingham	66/172	38.4%

91. Landlords were granted possession in 157 out of 162 trials. Tenants were granted possession in the remaining 5 cases. The breakdown by court was as follows:

<u>Court</u>	<u>Possession for Landlord:</u>		<u>Possession for Tenant:</u>	
	<u># of Cases</u>	<u>% of Cases</u>	<u># of Cases</u>	<u>% of Cases</u>
Quincy	102/106	96.2%	4/106	3.8%
Northampton	42/43	97.7%	1/43	2.3%
Plymouth	9/9	100.0%	0/9	0.0%
Hingham	4/4	100.0%	0/4	0.0%

92. The breakdown by court was as follows:

<u>Court</u>	<u># of Cases Counterclaims Filed</u>	<u># of Cases Counterclaims Prevailed</u>
Quincy	37/106 trials	4/37 (10.8%)
Northampton	20/43 trials	4/20 (20.0%)
Plymouth	3/9 trials	0/3 (0.0%)
Hingham	3/4 trials	0/3 (0.0%)

prompted tenants' complaints, anecdotal evidence and common sense suggest otherwise. One clerk-magistrate explained that the trend over the last two or three years in judging summary process cases has been towards not recognizing tenants' defenses. He attributes this to a philosophical shift "towards the right" which leads judges to refuse to recognize defenses and counterclaims concerning conditions when the conditions are first complained about after the notice to quit is filed. Often, judges "believe that [the conditions] are not the real reason why tenants are withholding rent; they think that [the conditions] are just a rationalization for not paying the rent given after-the-fact."⁹³ This particular clerk-magistrate went as far as to say that he often tells tenants, "You know, you have some excellent defenses under the law, but the history of this court is not to recognize them."⁹⁴ Moreover, tenants' lawyers confirm that housing conditions are typically a problem for their clients. As one tenants' lawyer stated, "well over 90% of the potential tenants that come through my door have substantial problems with conditions. About one-third of them don't complain about it when you ask them . . . but further probing [through specific questions] reveals considerable problems."⁹⁵ While not all eviction cases involve apartments with deplorable conditions, anecdotal evidence indicates that many do.⁹⁶

In many ways, it is unrealistic to look at litigated cases as the main alternative to mediation. As is the case in most areas of law, most housing cases are not resolved at trial. In fact, only 8.4% of the cases from our sample were decided by a judge after a trial or hearing. In reality, the primary alternative to mediation is negotiated settlement. Negotiated settlements present even greater risks of exploitation of the poor and disempowered than does mediation. While mediation's focus on "process checks" to remedy power imbalances may be inadequate, as the critics suggest,⁹⁷ negotiated settlement leaves those same power imbalances completely unchecked. It is not surprising, therefore, that 99.9% of non-mediated negotiated settlements granted possession to the landlord.⁹⁸

In short, the real-life alternatives to mediation present a harsh and unsympathetic option for tenants, which is a far cry from the ideal picture of formal justice offered by the critics. In the end, in all cases that went to trial or that were

93. Interview with Clerk-Magistrate X (March 8, 1996). If the clerk-magistrate is correct, then the judges are intentionally disregarding the law. There is nothing in Massachusetts landlord-tenant law that authorizes judges not to enforce valid defenses or counterclaims simply because they are first raised after the notice to quit is filed. For obvious reasons, we wish to keep the identity of this clerk-magistrate anonymous. Therefore, all quotes to him will be attributed to "Clerk-Magistrate X."

94. *Id.*

95. Bertling Interview, *supra* note 6.

96. *Id.*

97. See *supra* note 28 and accompanying text.

98. Out of 700 non-mediated settlements from the four courts observed, only one granted possession to the tenant—and it did so contingently upon the tenant meeting the terms of a payment plan. This single exception came out of Northampton District Court. This excludes approximately sixteen agreements in which the cases were dismissed. In these cases, it is not clear who effectively was granted possession.

settled without mediation, the landlord was granted possession 99.6% of the time.⁹⁹

*B. The Role of the Law in Mediation:
Embracing the Law So As to Move Beyond It*

The second fundamental flaw of the critique lies in its narrow view of the role of "the law" in mediation. The critics charge that mediators' primary emphasis on "self-determination" and on agreements "tailored" to the needs and interests of the parties leads them to ignore objective standards of fairness such as the formal law. While it is true that many mediators ignore the law, the critics generally fail to recognize that many other mediators do incorporate the law into the mediation process to ensure that the parties make *informed*, fair decisions. Mediators employing the law into mediation often consider the law to be neither controlling nor irrelevant, but rather a germane reference point that enables the parties to reach a truly fair agreement:

Where law controls, it can usurp the parties' sense of fairness. Where it is ignored, the parties miss any value that it might have in aiding them to reach a fair agreement. A third option exists. Given the appropriate attitude on the part of the parties and the mediator, law can play a role in the process where it is neither used as a club nor disregarded. Rather, law is considered a relevant factor . . . [T]he mediator can help the parties consider law not primarily as a set of necessary applied rules, but as providing a relevant reference point, both in terms of a practical

99. In non-mediated cases pursued to judgment, 1481 out of 1487 resulted in a judgment for the landlord for possession. Tenants were granted possession in only 6 out of 1487 cases. The breakdown by court was as follows:

Court	<u>Possession for Landlord:</u>		<u>Possession for Tenant:</u>	
	<u># of Cases</u>	<u>% of Cases</u>	<u># of Cases</u>	<u>% of Cases</u>
Quincy	861/865	99.5%	4/865	0.5%
Northampton	306/307	99.7%	1/307	0.3%
Plymouth	115/116	99%	1/116	0.5%
Hingham	118/118	100%	0/118	0.0%

This accounts for all cases, whether they were litigated or settled out of court without mediators, in which a judgment for possession was made. Therefore, it excludes all cases which were dismissed or transferred, which account for 18.0% of all cases. The court files revealed that the overwhelming majority of the dismissed cases—69.6% of them—involved voluntary dismissals by the landlords, in most instances because the tenant moved out or paid the back rent. 10.0% of the dismissed cases were by stipulation. While some of the stipulated dismissals were clearly tenant "victories"—e.g., the landlord agreed to dismiss in response to the defendant's counterclaims—most of them were due to agreements in which the tenants agreed to vacate or pay the back rent. Only 2.2% of the dismissed cases were involuntary dismissals, such as a granted motion to dismiss by the tenant. The remaining 18.2% were "no-shows" which were typically due to the tenant having agreed to vacate or pay the back rent.

alternative and as an expression of societal norms and, perhaps, some underlying principles.¹⁰⁰

The critics act as if mediators are faced with a choice between *either* ignoring the law completely or imposing it on the parties.¹⁰¹ They fail to see that a third option exists, perhaps because so many mediators fail to see this as well. This third mediation approach attempts to “free the parties from the law” by embracing it and enabling the parties to both fully understand it and to decide for themselves whether they accept or reject its underlying principles.¹⁰²

Mediation’s promise to contextualize conflict offers parties at least two things that adjudication cannot: empowerment and the potential for mutual understanding.¹⁰³ Adjudication, even when idealized, achieves “fair outcomes” at the expense of empowerment; it decontextualizes conflict by treating parties as proxies for classes of individuals¹⁰⁴ and applying objectively “fair” pre-determined outcomes. Mediation, on the other hand, empowers parties by responding to their individualized needs, encouraging them to speak for themselves, and demanding that they come up with their own creative solutions to their problems. By applying objective rules to every conflict and encouraging legal representatives to handle all communications, adjudication generally discourages parties from attempting to understand each other. Mediation, on the other hand, encourages each party to recognize and acknowledge the other party’s situation, even though their needs and interests may, in the end,

100. THE CENTER FOR MEDIATION IN LAW, *THE PLACE OF LAW IN MEDIATION*, Memo No. 6 (1983) (training materials).

101. For example, Professor Bryan explains at the outset of her article the kind of mediation her critique is directed at: “[In] the mediation model I contemplate . . . [s]ubstantive law does not control the . . . settlement’s terms. Rather the mediator encourages the couple to design an agreement that reflects their particular needs and interests.” Bryan, *supra* note 2, at 447-48 (emphasis added). As she proceeds with her argument, however, it becomes clear that she equates this model of mediation with one that completely ignores the law. For instance, she later writes that, “. . . mediators concerned with fairness cannot use substantive legal norms to balance power and assure outcomes that, at least, somewhat reflect society’s perception of justice.” *Id.* at 505 (emphasis added). Professor Bryan fails to recognize the possibility that mediation can use substantive legal norms, without having them control the terms of the settlement.

102. The notion of “freeing the parties from the law,” which also appears in our title, came out of our conversations with Gary J. Friedman. Telephone Interview with Gary J. Friedman (April 3, 1996) (“Friedman Interview”).

103. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) (arguing that mediation’s unique powers lie in its ability to empower parties and enable them to reach some degree of mutual understanding).

104. It is a common view of adjudication that it treats parties as representatives of classes of actors and that judges consider the broad societal implications of their decisions and not just the individual circumstances of the parties involved. See *id.* at 268 n.42; RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 18-19 (2d ed. 1977).

remain opposed.¹⁰⁵ There is value in achieving such empathy and mutual understanding, even if no final agreement is reached in the end.

These potential benefits of mediation do not come without risk, however. If mediation fails to correct large existing power imbalances, the process risks becoming a forum for the oppression of the poor and disempowered. Almost all mediators recognize that mediation is both dangerous and inappropriate in cases involving large power imbalances.¹⁰⁶ Hence, general consensus exists in the mediation community that divorce cases involving histories of abuse should not be mediated, and most programs attempt to "screen out" cases involving the kinds of power disparities typical of abusive relationships.¹⁰⁷ Likewise, most mediators consider themselves ethically bound to terminate a mediation in which they feel that one party is unable to effectively assert himself or herself.

The critics, however, want to throw the baby out with the bathwater. When done properly, mediation can adequately address power imbalances in most cases by making sure that parties are *aware* of their rights and are therefore able to make informed choices about if, when, and how to assert them. Moreover, mediators can use a variety of techniques to ensure that the process is fair and not contaminated by serious power imbalances.¹⁰⁸ Finally, when possible, mediators should screen out cases involving very large power disparities and terminate mediation where such power imbalances emerge. These actions minimize the risks associated with mediation, enabling its potential benefits to outweigh its potential costs in the majority of cases.

V. THEORETICAL ANALYSIS

A. Introduction

In this section we explore the substantive goals of mediation programs which incorporate the law into their procedures and compare these program's aspirations to those of other conflict resolution processes such as court and traditional community mediation programs. While traditional court processes tend to focus

105. See Bush, *supra* note 103, at 269; Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) ("The central quality of mediation [is] its capacity to reorient the parties to each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.").

106. See generally, Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995).

107. See e.g., Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43 (1995) (arguing that mediation programs have a responsibility to screen cases for abuse to determine whether mediation is appropriate).

108. See Albie Davis and Richard A. Salem, *Dealing with Power Balances in the Mediation of Interpersonal Disputes*, 6 MEDIATION Q. 17, 20-21 (1994) (suggesting ten techniques that mediators can use to address power imbalances which range from "interrupting intimidating negotiating patterns" to "watch[ing] to see that one party does not settle out of fear of violence" and "encourag[ing] the parties to share knowledge").

exclusively on rights and community mediation programs tend to focus on interests, many of the mediation approaches we have studied try to focus on both factors. Although in practice this dual focus is often difficult to maintain, our research has led us to conclude that a balance of interests and rights is both possible and desirable. After discussing the substantive goals of the various dispute resolution processes, we next briefly outline three of the procedural "principles" recognized as important within the mediation field: neutrality, self-determination, and informed consent. Lastly, we explore the tension which exists between preserving neutrality and self-determination while ensuring that the parties are adequately informed.

B. Substantive Analysis: Rights v. Interests Based Processes

Dispute resolution approaches are typically described as *either* "interest-based" or "rights based" with the implicit assumption being that a process may not incorporate both factors effectively. As a result, many mediators erroneously assume that an inverse relationship exists between "rights-based" and "interest based" approaches: the more that a certain procedure focuses on one factor (i.e., interests or rights), the less it focuses on the other.¹⁰⁹ A symbolic representation of this concept would be a single axis with "interest based" processes on one side and "rights based" processes on the other. [See Figure One.]

Despite the traditional focus of many dispute resolution processes on either interests or rights, we believe that it is possible to design an approach which focuses on both of these important factors.¹¹⁰

It is possible to create a graph which illustrates the substantive focus of the various dispute resolution processes available to individuals. The horizontal axis represents the level at which the process focuses on the interests of the parties, while the vertical axis represents the importance of parties' legal rights and entitlements in the resolution process. [See Figure Two.] Quadrant Two of the graph represents those processes which focus mainly on the rights of the parties and pay little attention to the individual's particular interests and concerns. It is descriptive of many traditional dispute resolution processes such as litigation.¹¹¹ Quadrant Four of the graph represents those processes which focus mainly on the interests of the parties and avoid discussion of the law relevant to the dispute. It is descriptive of many "interest-based" community mediation programs. Quadrant One of the graph represents processes used to resolve disputes which focus neither on rights nor

109. See Harvard Mediation Program Basic Mediation Training Materials, Fall 1995.

110. Negotiation scholars have observed a similar tendency for individuals to focus exclusively on either interests or rights during negotiations generally. See ROBERT MNOOKIN et. al., *BARGAINING IN THE SHADOW OF THE LAW: THE LAWYER AS NEGOTIATOR* (Forthcoming) (arguing that negotiation is most effective when conducted at *both* the interests and rights "tables").

111. Although many advocates would argue that they are concerned about their clients' interests, we consider litigation to be a traditionally rights-focused process as legal determinations are generally based on the parties' legal rights and entitlements, not their particular needs or concerns.

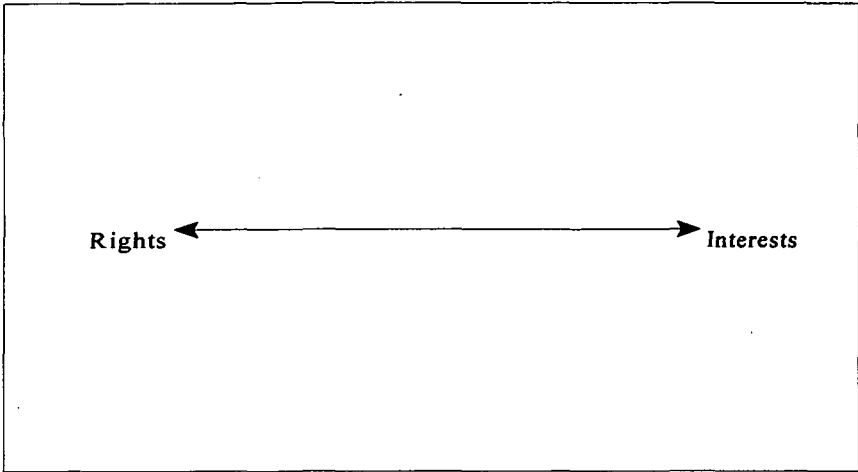


Figure 1

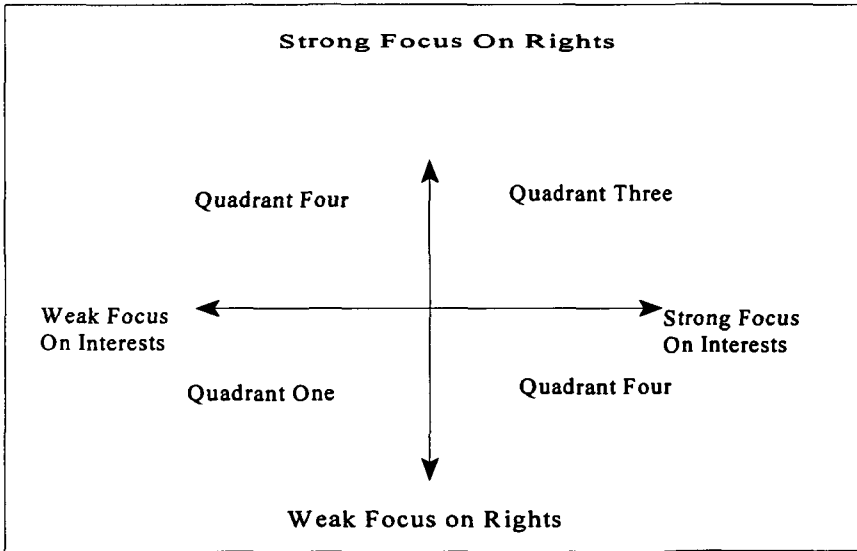


Figure 2

interests and probably best symbolizes processes whereby a dispute is resolved through force or power.¹¹²

Traditional dispute resolution processes such as litigation mainly focus on the individuals' legal rights or entitlements. Although some forms of alternative dispute resolution, such as arbitration, are similarly "rights-based,"¹¹³ many of the other processes currently used by third party neutrals try to focus discussion more on the parties' interests -- those concerns and needs which are personally important to them -- than on their legal entitlements.

An "interest-based" mediation approach may be appropriate in those circumstances where either (1) parties are already aware of their legal rights and responsibilities, or (2) the interests of the parties are much more important to the parties themselves than their legal entitlements. Often community mediators working in small claims courts will question parties to see whether they are primarily concerned with settling their dispute or with having a legal determination rendered.¹¹⁴ Many cases exist, however, in which the parties are not independently knowledgeable about their rights and entitlements, *and* in which they do consider the law to be extremely relevant to the resolution of their dispute.

In such circumstances, "interest-based" mediators find themselves in a difficult situation. In essence, their only options are to either: (1) refer the parties to lawyers (which often is not a realistic option due to financial or time constraints), or (2) provide the parties with enough information regarding the "interest-based" mediation process so that the parties may make an informed decision as to whether they wish to continue to mediate their case or return to court where the bulk of the discussion will be focused on rights and entitlements. In such circumstances, parties are not given the opportunity to pursue a resolution process which looks at *both* the interests and rights of the individuals involved.

Many mediation programs have begun to strive to provide parties with a dispute resolution process which is both rights and interest-based. In essence, by explicitly incorporating the law into an "interest based" template of mediation, these programs hope to provide an arena in which those parties who either do not know their legal rights and entitlements, or feel that the law is central to their dispute, may still attempt to craft a negotiated agreement which better suits their individual interests than the judgement which would be rendered by the court.

112. For example, although distasteful, war and other uses of physical force are processes of resolving disputes which do not focus either on the parties' interests or legal entitlements.

113. There are also "rights-based" mediation programs which attempt to mirror the outcomes a court would produce. Such programs are not the subject of the critique enumerated in Section One and are therefore not the main focus of this article.

114. For example, in its Basic Mediation Training, which prepares community mediators to work in small claims courts, the Harvard Mediation Program advises trainees to openly question parties who seem focused on legal arguments and "the law." Typical questions and statements include "Do you think the law is extremely relevant to your case?," "Are you concerned with getting some kind of legal determination?," and "If you think these legal arguments are the most important issues surrounding your dispute, you might want to consider going back to court."

There are two levels on which the success of such ambitious mediation programs may be evaluated. First, although substantively, each of these programs would like to be identified as being located in Quadrant Three of the graph -- representing processes which focus both on rights and interests -- the issue still remains of *which* point in Quadrant Three best describes the program. Although different programs may each attempt to incorporate law into the mediation process, their method of doing so dramatically affects how well the process enables the parties to consider both their interests and rights when crafting a final agreement.

For example, a mediation process which either explicitly or implicitly frames the law as the most important piece of criteria which the parties should consider may effectively focus the parties on their rights, however, this might be accomplished at the expense of some of the parties's interests.¹¹⁵ This approach of incorporating law into the mediation process may place the program nominally in Quadrant Three, however, it is most likely that the exact point representing the program would be in the northwest section closest to Quadrant Two. Alternatively, a different program which encourages the mediators to provide legal information if the parties *specifically* ask for it may also be nominally in Quadrant Three, however, the exact location of such a program would probably be closest to the southeast section bordering Quadrant Four. The closer a program can get to the Northeast section of Quadrant Three, the more successful it is at effectively providing the parties with the opportunity to effectively focus on both their interests and their rights during the mediation process. Although probably practically unattainable, the *most* northeast point in the Quadrant represents the ideal dispute resolution process. In evaluating various program's attempts to create this ideal process, it is useful to analyze how their various approaches affect the substance of the focus of the mediation process.

The second level on which different programs' success at incorporating the law into mediation can be evaluated focuses on procedural issues. Although there has been considerable debate in recent years over the development of a set of ethical rules and canons for this emerging profession,¹¹⁶ a few guiding "principles" are universally recognized among scholars and practitioners in the field.¹¹⁷ These "principles" represent procedural goals which mediators strive to obtain in each session with the parties regardless of the substance of the discussions. Some of the most commonly recognized principles include: (1) neutrality, (2) self-determination,

115. Note that if parties to a mediation are led to believe that the law is the most important issue in resolving their dispute, they might be convinced that it is best to settle on an agreement similar to the judgment which would be rendered in court, *even if* such agreement were not the best way to satisfy each of their respective interests.

116. See Edward Sherman, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 96.

117. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994) developed jointly by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution; STANDARDS OF MEDIATION PRACTICE developed by the Massachusetts Association of Mediation Programs ("MAMP"); ETHICAL STANDARDS FOR THE PROVISION OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES (Proposed Draft 1995) developed by the Standing Committee on Dispute Resolution of the Massachusetts Trial Court.

and (3) informed consent. The next section briefly outlines each of these principles and explores how the incorporation of the law into the mediation process potentially threatens each of these important concepts.

C. Procedural Analysis: The Principles of Mediation

1. Introduction

Although a broad range of topics are often touched upon in discussions of mediator ethics, the three principles mentioned above are common to most proposed sets of ethical norms.¹¹⁸ It is important to note, however, that while the terms "neutrality," "self-determination," and "informed consent" are ubiquitous within the field, they are often used to represent very different concepts. For this reason, we will first briefly provide an explanation of the definition we would like to attach to each of these concepts before turning to a more detailed analysis of how the introduction of law into the mediation process potentially threatens each principle.

2. Neutrality

In this paper, the principle of neutrality is defined to consist of two equally important components. The first -- objective neutrality -- describes the mediator's obligation not to permit her own biases and feelings towards either of the disputants to affect her ability to act in a fair, impartial manner during the mediation. Despite the fact that mediators often empathize more strongly with one party than the other, and sometimes even strongly dislike one of the individuals with whom they are dealing, they have an ethical obligation to not let such emotions interfere with their responsibilities as a mediator.

The second component -- subjective neutrality -- refers to how the parties perceive the mediator's actions. Even if a mediator is operating in a completely neutral fashion, it is possible that one of the parties may view her as biased, whether for racial, gender, or other reasons. In order to establish and maintain the legitimacy of the mediation process, it is extremely important that mediators constantly check to make sure that their actions are not being perceived as biased by the parties.¹¹⁹ Although most codes of mediator ethics do not explicitly talk of "objective" and

118. See e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), *supra* note 118. Standard One reads that "A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties." In the comment regarding this standard, the code touches upon the principle of informed consent by stating that although "[a] mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement . . . it is good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate to help them make informed decisions." Standard Two states that "A Mediator Shall Conduct the Mediation in an Impartial Manner," and Standard Five states that "A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality."

119. See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991).

"subjective" neutrality, the standards which they offer generally encompass both principles. For example, the recently proposed Ethical Standards for the Provision of Court-Connected Dispute Resolution Services developed by the Massachusetts Trial Court's Standing Committee on Dispute Resolution states that "A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct *as well as appearance*."¹²⁰

The introduction of legal information into a mediation potentially threatens a mediator's neutrality in a number of distinct ways.¹²¹ First, each time that mediators decide to provide parties with legal information, they are effectively dictating which substantive legal issues should be put on the negotiating table.¹²² Although in many cases it is fairly obvious which laws are relevant to the dispute at hand, in other mediations a number of different statutes and regulations might exist which each have a tenuous connection to the issues on the table. For example, it is common in landlord/tenant mediation for the parties to discuss security deposit issues while talking generally about rent payments. If the term "security deposit" comes up, should the mediators immediately refer the parties to the very pro-tenant Massachusetts laws which outline numerous scenarios in which a tenant is entitled to receive three times their security deposit from their landlord?¹²³ Should the mediator next focus the parties' attention on Massachusetts summary process procedural law which states that tenant's rights to receive such compensation from their landlords is forfeited if they have failed to file an answer to the original complaint directly addressing the security deposit issue?¹²⁴ The decision by the mediators of both which laws to introduce and the timing of such introductions can have an extremely large impact upon the mediation process. Mediators making such difficult decisions must be confident that their own biases and subjective feelings towards the parties do not unduly influence their choices regarding which substantive legal information to provide to the parties.¹²⁵

120. ETHICAL STANDARDS FOR THE PROVISION OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES, *supra* note 118, Standard IIIA (Proposed Draft 1995) (emphasis added).

121. See e.g., Tom Arnold, *Mediator Ethics Issues in Mediation*, C976 ALI-ABA 701, 724-25 (1994); Lela Love, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 106.

122. "Allowing a mediator to give either legal information or advice is controversial. Some commentators believe that if a mediator is allowed to comment at all, personal bias may enter the process in deciding which laws to reveal." Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 714 (1994).

123. See MASS. GEN. LAWS ch. 186, § 15B (1995).

124. "Counterclaims shall be set forth in the defendant's answer and shall be expressly designated as counterclaims. The right to counterclaim shall be deemed to be waived as to the pending action if such a claim is not filed with the answer pursuant to Rule 3, unless the court shall otherwise order on motion for cause shown." MASS. SUMM. PROCESS R. 5; see MASS. GEN. LAWS ch. 239, § 8A (1995).

125. The ability to provide substantive legal information to parties during a mediation significantly increases a mediator's ability to influence the negotiation process. For example, a mediator who chooses to inform parties of Massachusetts' security deposit law, but not of summary process procedural law which dictates that tenants forfeit their rights if they fail to file an answer to the complaint, may drastically alter the parties' perceptions of their court alternatives to mediation – thus greatly impacting the negotiation process. Mediators' neutrality may be threatened if they allow personal biases and

Many mediators who introduce substantive law to parties during a mediation try to distinguish their actions from those typically conducted by lawyers by relying on the nebulous distinction between providing "legal information" and providing "legal advice." In discussing this distinction, one scholar noted that:

The pertinent distinction the mediator must make here is between giving legal information and giving legal advice. The mediator may give legal information, provided that he or she is qualified by training or experience to provide it. This allows the mediator to advise all parties of laws that are common knowledge and may be applicable to the dispute. For example, it would seem that an experienced family mediator would know of, and could provide, court-established child support guidelines. On the other hand, mediators should avoid giving legal advice, such as how an agreement might affect the participants' legal rights or obligations.¹²⁶

A mediator providing "legal information" might alert the parties to documents which outline statutes and regulations which are related to their dispute, while a mediator providing "legal advice" would interpret those laws for the parties and analyze how they might be applied to the particular circumstances of the parties' dispute. Although on a theoretical level these two concepts may be distinguishable, in practice the line between them is very gray.¹²⁷ Anytime a mediator chooses to introduce "legal information" into a mediation, interpretive implications surround her decision. First, and most obviously, the mediator must have interpreted the law at some level in order to determine that it was relevant to the dispute on the table. Additionally, even if the mediator is simply sharing a statute or other piece of "neutral information" with the parties, the manner in which the material is introduced (e.g., how the mediator instructs the parties to think about the law in their decision making process, the tone of voice used, etc.) often reveals some of the mediator's own feelings regarding the relevance of the law to the discussion, potentially threatening the perceived neutrality of the mediator in the eyes of the parties.

Even if a mediator could present legal information in a perfectly "neutral" manner, it is likely that the content of the information provided may still lead one of the parties to believe that the mediator is biased. An individual faced with unfavorable law may feel that the mediator has purposely introduced information which only helps the other side's arguments.¹²⁸ Some programs attempt to pre-empt this challenge to mediators' neutrality, by having the mediators refer to a "neutral source" of information or manual during the process, so that legal information provided to parties during a mediation is perceived as coming from "the law," and

feelings to impact decisions regarding which laws to introduce.

126. Moberly, *supra* note 123, at 714.

127. See Love, *supra* note 122, at 106.

128. See Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 241 (1993).

not the mediator.¹²⁹ While such a system may ensure the parties that the legal information which they are receiving is not fabricated, it does not solve all the potential neutrality problems as parties may question the mediators' motives behind their decisions regarding which sections of the manual to discuss.

As illustrated by this section, the introduction of substantive law into the mediation process raises a number of complex issues regarding potential threats to mediator neutrality. Mediators choosing to provide such information must be extremely careful that their own feelings and emotions towards the parties do not color their decisions regarding the timing and content of any substantive law to which they refer. Additionally, mediators must also be conscious of how their actions and the information which they are conveying to both sides is altering disputants' *perceptions* of their role as a neutral third party in the resolution process.

3. Self-determination

The principle of self-determination is considered by many to be the defining characteristic of the mediation process in comparison to other dispute resolution mechanisms.¹³⁰ In contrast to litigation and arbitration procedures, no third party imposes a final decision on the parties during a mediation. Each disputant is free to decide for herself whether she wishes to accept any proposed offers which are on the table.¹³¹ At the heart of the principle of self-determination lies the assumption that the parties understand and truly feel that their participation in the mediation process is voluntary. First, it is important for individuals to realize that they need not commit to anything as a result of the mediation and that alternative dispute resolution mechanisms (e.g., court) are available to them. Additionally, in order to fully uphold the self-determination mandate, mediators must be careful to prevent any existing power imbalances in the parties' relationship from enabling one party

129. Mediators working with the non-profit organization Mediation Works, Inc. in Boston use an "authoritative resource" when conducting summary process eviction mediation. This manual, which contains (1) a summary of Massachusetts Residential Landlord/Tenant Law, (2) the State Sanitary Code, (3) Chapter 93A Regulations, (4) Uniform Summary Process Rules, and (5) a compilation of Massachusetts statutes is referred to by both mediators and parties when direct questions regarding the law are asked. Doran Interview, *supra* note 6. See MEDIATION WORKS, INC. SUMMARY PROCESS RESOURCE MANUAL; see also Donald Wechstein, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RES. 95, 108.

130. "First, the primary purpose of mediation is to allow party self-determination and empowerment. Virtually all the mediator ethical codes set forth self-determination as a major (often the major) principle and goal of mediation." Robert Moberly, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RES. 95, 117. Additionally, the "Model Standards of Conduct for Mediation" recently developed by the American Arbitration Association ("AAA"), the American Bar Association ("ABA"), and the Society of Professionals in Dispute Resolution ("SPIDR") defines self-determination as "the fundamental principle of mediation." MODEL STANDARDS OF CONDUCT FOR MEDIATION Standard I (1994).

131. "SELF-DETERMINATION: is the principle which recognizes that parties to a dispute have the ability and the right to define the issues, needs, and solutions and to determine the outcome of the mediation process. It is the responsibility of the parties to mutually decide the terms of any agreement reached in mediation." STANDARDS OF MEDIATION PRACTICE (1994).

to effectively coerce or force the other into an agreement which they would not otherwise accept.¹³² Although the term "power imbalance" often conjures images in most people's minds of one party physically or emotionally bullying the other into an agreement, it is important to recognize that many types of "power imbalances" come in much subtler forms. For example, situations in which (1) one party is more articulate or intelligent than the other, (2) one party has a better sense of their legal rights and entitlements than the other, or (3) one party is struggling with some type of a language barrier and the other is not, can each create significant power imbalances between the parties which potentially threaten self-determination.¹³³ As discussed earlier, the threat of power imbalance looms heavily in the background of many mediations and must carefully be monitored in order to ensure that parties are making decisions which they sincerely feel are in their own best interests. Finally, underlying the principle of self-determination is the notion that mediation serves the parties by enabling them to make autonomous decisions about their own fate.

The introduction of substantive law into a mediation can threaten the principle of self-determination.¹³⁴ If the mediators discuss the law in a manner which leads the parties to believe that certain issues are "non-negotiable" (i.e., the law clearly dictates how certain issues should be resolved), then the parties' perceived power to make their own decisions is diminished. This negative impact upon self-determination occurs regardless of whether the parties are interpreting the law correctly or not. In situations where both parties are misunderstanding the relevant law, the effect on the mediation process can be tragic as the parties would be considering themselves "bound" by a false interpretation of the law.¹³⁵

The principle of self-determination, however, may be equally threatened in situations in which the parties are interpreting the relevant law correctly. One of the significant advantages of mediation over traditional court processes is that it encourages the parties to craft creative solutions to their problems which often may not be legally imposed by a judge.¹³⁶ Unfortunately, parties frequently are not used

132. See Hughes, *supra* note 106, at 553 (providing an in-depth description of the potential dangers which power imbalances present to mediation).

133. It is important to note that mediators do not see all power imbalances as a threat to self-determination or as even requiring "correction" of any kind. For example, the fact that a landlord owns the building and a tenant must rent gives the landlord power over the tenant. Such "imbalances" need not be corrected. Other imbalances, however, such as the fact that one party knows the law and the other does not are seen as "correctable" imbalances which threaten the fairness of the process. It is the latter type of power imbalances with which we are primarily concerned.

134. See Love, *supra* note 123, at 701.

135. Some mediators who defined their role as providing the parties with "legal information" and not "legal advice" stated that even if they thought that both parties were jointly misinterpreting the law which the mediators had provided, they would *not* correct the parties' conclusions. Many also noted that in practice, it is extremely rare that such a "dual misinterpretation" occurs. Doran Interview, *supra* note 6. Shaw Interview, *supra* note 6.

136. For example, if noise were an important issue in a mediation between a landlord and a tenant, there are a number of creative options which the individuals could develop to resolve their problem that a judge would not normally impose. The tenant might agree to reorganize her rooms so that the areas in which the most noisy activity occurs – such as the family room – are not directly above the landlord's bedroom. Alternatively, the two parties might agree to jointly purchase a carpet to install in the upper

to making their own decisions and look to the mediator for "the answer" to their problems. Once informed of "the law," many parties reflexively defer to it, thus effectively losing the ability to make decisions fully based on their own perceptions of a good outcome.

4. Informed Consent

The principle of "informed consent" is one of the standards of mediation which is generally recognized by practitioners and commentators as important to the mediation process. However, often these individuals have very different conceptions of what the principle represents. The proposed ETHICAL STANDARDS FOR THE PROVISION OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES, recently developed in Massachusetts, states that "informed consent" requires that "[t]he neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process."¹³⁷ This definition of the standard focuses mainly on the individual's understanding of the mediation process and its voluntary nature. In contrast, the STANDARDS OF MEDIATION PRACTICE developed by the Massachusetts Association of Mediation Programs defines "informed consent" as "the principle which affirms the parties' rights to information about the mediation process, and, *when necessary, their legal rights*, options, and relevant resources before consenting to participate in mediation or consenting to the terms of any agreement reached in mediation."¹³⁸ This definition appears to focus more on the parties' "informational right" to be provided with relevant data -- whether procedural, factual, or legal -- before being asked to make a decision. Although the proposed "Ethical Standards" also includes such an "informational right" in their informed consent standard, it is framed as both discretionary¹³⁹ and more procedural in nature. Specifically, the Ethical Standards dictate that "[w]hen a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the participants, the neutral shall so inform the participant(s)."¹⁴⁰ Although this standard demands that mediators ensure that parties are not making "uninformed" decisions, it does not authorize mediators to *provide*

apartment to absorb sound. In either case, it is highly unlikely that in cases such as this one, judges can render decisions specifically tailored to the parties' needs.

137. ETHICAL STANDARDS FOR THE PROVISION OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES Standard III(B) (Proposed Draft 1995).

138. Principle Number Two - INFORMED CONSENT, STANDARDS OF MEDIATION PRACTICE, *supra* note 118.

139. "A neutral *may* use his or her knowledge to inform the parties' deliberations, but shall not provide legal advise, counseling, or other professional services in connection with the dispute resolution process." ETHICAL STANDARDS FOR THE PROVISION OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES Standard III(B)(4) (Proposed Draft 1995).

140. *Id.* at Standard III(B)(3).

the missing information, but merely authorizes them to make sure that the parties are aware that they might not be in possession of all of the necessary information. Thus, the mediator's obligation is framed as procedural -- they are obligated to alert parties to the various alternative sources of information available before proceeding with the *process* of the mediation. In contrast, the MAMP standards appear to give the mediators more flexibility to provide parties with missing substantive information.

This difference between the two standards is illustrative of the current debate surrounding the concept of "informed consent." Many mediators practicing "facilitative" mediation are hesitant to provide the parties with any substantive information. Such mediators often consider their role to be that of a "guardian of the *process* of the mediation;" they do not wish to become entangled in the substance of the dispute. In cases where they feel that parties may be making decisions without the benefit of important information (legal or otherwise), mediators often find themselves in a bit of an ethical quandary. Attempts to raise one party's level of knowledge regarding relevant information potentially threaten the neutrality of the mediator in the eyes of the other disputant.

One interpretation of the principle of "informed consent" holds that such mediators must at least ensure that parties thinking of agreeing to a proposal are *procedurally* informed regarding their various alternatives -- they understand that it is possible to return to court, seek a lawyer's advice, etc. and have thought through the possible consequences of accepting the offer on the table. Facilitative mediators typically use questions to encourage parties to consider their alternatives and to raise their awareness of relevant information of which they might not be cognizant. Some useful lines of questioning generally touch upon such issues as: (1) the possible implications of the proposed agreement, (2) the party's knowledge of any relevant law, (3) the party's conjectures as to potential court outcomes, and (4) whether it would make a difference to the party's decision making process if they knew that a relevant law existed.¹⁴¹

Other mediators, however, argue that such "procedural" knowledge alone is not sufficient. In order to make "informed" decisions, parties must be provided with all of the relevant information. As mentioned earlier, this argument is particularly persuasive in the arena of landlord/tenant mediation as tenants typically are not aware of the substantial body of Massachusetts law which is highly protective of their rights. At the core of the summary process mediators' ethical and professional dilemma is the tension between increasing parties' knowledge regarding the relevant law while maintaining neutrality and self-determination.

V. PROGRAM DESCRIPTIONS AND EVALUATIONS

141. One mediator interviewed during this study described "informed consent" as composed of two elements: (1) full knowledge of the parties of their legal rights and alternatives, and (2) full understanding of the parties of their interests and needs. Of the two elements, he felt that the latter was much more important. Doran Interview, *supra* note 6.

In examining both the role of the law in mediation and mediation's effectiveness at addressing power imbalances in the landlord-tenant context, it is necessary to look at a variety of approaches to incorporating the law into landlord-tenant mediation. We have selected four separate programs as representative of the spectrum of approaches available. The first program seeks to completely avoid incorporation of the law into landlord-tenant mediation; the second incorporates the law through the use of a "neutral manual," which parties may request to see but mediators will not explain; the third program has mediators directly tell the parties what the law says, but only if asked; and the fourth has mediators not only explain the law, but encourages mediators to predict court outcomes if the case were to proceed (focus in this section will be on the second and third programs/approaches).

Our primary focus, since they are the primary programs/approaches, as they are the primary approaches we are aware of that are presently used in summary process mediation in the Massachusetts area. Our description and evaluation of these programs will be based on our direct observations of their training sessions, direct observations of mediation, direct observations of court sessions, interviews with mediators, and a comparison of mediated outcomes at each court with adjudicated/non-mediated outcomes.

Our description and evaluation of the first and fourth approaches, in contrast, will be much more theoretical. The first approach has been used by both authors while mediating non-summary process landlord-tenant cases in small claims court. A variety of programs that mediate non-summary process landlord-tenant cases use the first approach, but it is generally considered inappropriate for eviction cases. Nevertheless, we offer an analysis of this approach partly because it is the approach attacked by the critics and partly to explain *why* it is generally considered inappropriate by mediators and critics alike in the summary process setting. The fourth approach is used primarily in the context of divorce and commercial mediation. Neither author has any first-hand experience with it, and we know of no mediators who apply it in the summary process context. However, because it represents an approach that most aggressively seeks to eradicate power imbalances based on different levels of knowledge of the law, we examine and evaluate its potential for successful application to the summary process area.

A. Harvard Mediation Program

The Harvard Mediation Program ("HMP"), a student-run organization at Harvard Law School, has been in existence for the past fifteen years.¹⁴² Students and community members who have completed a 32 hour basic training provided by the program mediate small claims cases in six district courts in the greater Boston

142. Unless otherwise specified, all information in this section regarding the Harvard Mediation Program was collected either through informal conversations with Gabrielle Gropman, who is the Program Administrator, and various members of the Student Board, or through the authors' personal experiences as the Training Director and President of the organization in 1995 - 1996.

area.¹⁴³ Mediators who have also completed a 16 hour advanced training are eligible to participate in cases involving parent/child disputes, criminal cases and other more complex situations.¹⁴⁴ During the 1994 - 1995 school year, 88 mediators in the program mediated 397 small claims cases and 28 advanced cases.¹⁴⁵ In both the basic and the advanced program, HMP mediators employ an interest-based, facilitative model of mediation to help the parties to settle their disputes. This approach, which lies squarely within Quadrant Two of our graph, aims to increase the level of understanding between the parties and empower them to find their own solution to the conflict at hand.

HMP mediators encounter disputes involving landlord/tenant issues in small claims court and occasionally in the advanced cases. Although the program does not mediate summary process eviction cases, disputes mediated by HMP occasionally do conclude with the tenant agreeing to vacate the apartment. Typically, however, landlords initiating small claims proceedings are not looking to evict the tenant, but rather to collect on rent past due. In many situations, once the case has been scheduled for court, the tenant is no longer living in the landlord's apartment and eviction is not an issue.

The interest-based, facilitative model of mediation which HMP utilizes encourages mediators to be extremely purposeful or "hard" on the process of the mediation, but "soft" on the substance; mediators are trained to minimize the impact which their actions may have on the terms of the ultimate agreement. Therefore, although mediators are encouraged to "reality test" parties to ensure that they have thought through their various conclusions (e.g., ideas about their alternatives, decisions to agree to an option on the table, etc.), mediators are told not to mold the substance of the agreement by suggesting options, evaluating cases, or explaining relevant law to the parties. If the mediator believes that one or both of the parties is unaware of an important law or if the parties ask the mediators about the relevance of legal principles, she is expected to do one of four things: (1) ignore the legal issue--if the parties themselves do not raise the issue as one of their concerns or interests; (2) suggest to the parties that they may wish to speak with attorneys; (3) "reality test" the parties to determine their level of knowledge of the law and its significance to them;¹⁴⁶ or (4) suggest to the parties that if they are mainly concerned with their legal rights, their case might be better suited for adjudication. Under no

143. Specifically, HMP mediates small claims cases in Brookline, Cambridge, Chelsea, Malden, Roxbury, and Quincy District Courts. See HARVARD MEDIATION PROGRAM, ANNUAL REPORT 1 - 2 (1994-1995).

144. The parent/child cases are CHINS cases referred to the program by the Malden District Court and the criminal cases are referred by the Chelsea District Court. See *id.* at 7.

145. See *id.* at 4, 7.

146. "Reality testing" involves questioning the parties in order to get them to scrutinize their positions, demands, assumptions, and alternatives. In this context, a mediator might want to ask questions that would elicit from the party the fact that s/he was unaware of the applicable law. This would allow the party to reflect on how important the law was to him or her and would probably serve to remind him or her of the option to go back before the judge. Reality testing is often done in private sessions to encourage honest reflection, avoid posturing and avoid exploring each party's potential vulnerabilities in front of the other party.

circumstances do mediators provide the parties with legal information or advice of any kind. The HMP training manual does contain a section briefly outlining relevant small claims law, however, trainees are told that the section is merely included to familiarize them with relevant law and is absolutely not to be used as a reference during mediation.

On a substantive level, skilled mediators using the HMP approach generally succeed at focusing the parties on their interests and concerns, however often at the expense of important legal rights. Many of the critics' arguments outlined in Section One are directed specifically at this type of approach to mediation. Numerous rationales lay behind HMP's program policy which prohibits mediators from providing parties with "the law" during mediation. First, although individuals in the program are provided with a brief summary of small claims law, there is no guarantee that mediators will apply that law correctly to individual cases or even that the clerk-magistrate will end up ruling as they predict. Second, despite the often cited distinction between "legal information" and "legal advice," the program has legitimate concerns that law students instructed to provide parties with legal information may overstep their bounds. Lastly, and probably most importantly, it is feared that allowing mediators to provide parties with relevant law may greatly threaten mediator neutrality. Despite these rationalizations, there are significant costs to the HMP approach. While the facilitative model employed by HMP encourages parties to craft their own "fair" agreements, it fails to provide them with any access to developed legal standards of fairness, even when the parties consider such standards to be relevant.

The HMP mediation approach is highly focused on maintaining mediator neutrality in the eyes of the parties. During the thirty-two hour basic mediation training, trainees are instructed to be extremely sensitive to party perceptions and are constantly encouraged to consider how their actions may be misinterpreted by disputants. The decision to not have mediators introduce law into the dispute resolution process is based in part upon the concern that such an introduction would threaten mediator neutrality. First, mediators providing parties with legal information would need to be exceedingly careful to ensure that their own thoughts and opinions regarding both the case and the parties did not color their decisions regarding which laws to introduce and when to do so. Additionally, even if the mediators could be completely "objectively neutral" in their decisions regarding the law, the risk still exists that parties may perceive the mediators as favoring one side if the law relevant to the dispute happens to support one side's case more than the others.

HMP's policy decision to not allow the mediators to substantively discuss the law with the parties, therefore, appears to help the program to maintain a high level of perceived and actual mediator neutrality. Although the policy generally does help mediators to maintain their neutrality, in some circumstances the mediators' inability to provide disputants with relevant legal information can actually threaten their neutrality. Specifically, in those situations in which one party is considerably more knowledgeable and informed than the other, HMP mediators' responses to direct questions from parties regarding the law (e.g. "It's not really my role to tell you what

the law is," or "If you feel that the law is central to your dispute, you might want to consider contacting an attorney.") favor the informed party. Although HMP's policies appear neutral on their face, the program's refusal to provide parties with any legal information effectively favors knowledgeable parties.

Because parties are often encouraged to make decisions without the benefit of relevant legal information, the level of informed consent created by HMP's mediation approach is extremely low. The program attempts to compensate for this weakness by ensuring that parties have maintained some minimal level of "procedural informed consent." Specifically, before allowing parties to commit to an agreement, HMP mediators are charged with ensuring that the disputants *procedurally* understand the mediation process and understand the fact that there are other options available to them. While the mediators will not inform the parties as to what they believe would happen in court, they often ask the parties very direct questions to ensure that the parties have at least considered what they believe to be their true alternatives before settling on any one option. Lastly, HMP mediators are instructed to *procedurally* ensure that parties understand the implications of any proposed solution before agreeing to it. Thus, while HMP mediators may not *substantively* tell parties what their alternatives are or the implications of any proposed agreement, they are instructed to take *procedural* steps to at least ensure that the parties have thought through these issues for themselves. Although these procedural precautions may alleviate concerns regarding informed consent in some contexts, in many cases they prove to be highly inadequate.

Lastly, the approach utilized by HMP is extremely concerned with the issue of self-determination. The thirty-two hour basic mediation training required of all small claims mediators focuses very heavily on ensuring that mediators utilize a "facilitative" mediation approach in which they do not suggest options, evaluate cases, or provide legal information. In the court-annexed setting in which HMP mediators operate, it is feared that any information provided by the mediators will heavily influence parties' actions, thus, reducing their ability to craft their own agreement to their dispute. Although this approach generally ensures a relatively high level of self-determination on the part of the parties, we question how valuable the principle of self-determination really is when parties are being asked to make decisions without having access to all of the information relevant to the dispute. Although we have defined "self-determination" and "informed consent" as distinct concepts, in reality they are related in that the *value* of self-determination is dependent upon how informed the parties are when they render their decisions. Therefore, although HMP's approach supports the principle of self-determination, its inability to adequately educate the parties as to their legal rights and entitlements drains the principle of much of its value.

B. Mediation Works, Inc.

1. General Program Description¹⁴⁷

Mediation Works, Inc. ("MWI") is a non-profit corporation which provides alternative dispute resolution training and mediation services throughout New England. MWI's eviction mediation program provides housing mediation services to communities on the South Shore of Boston.¹⁴⁸ Started in September of 1994 with help from MWI's parent organization, the South Shore Housing Development Corporation ("South Shore Housing"), MWI has been mediating landlord-tenant cases -- both summary process (i.e., eviction) and non-summary process -- for almost two years. Although MWI's parent organization is mainly concerned with keeping people housed, MWI operates independently from South Shore Housing and has managed to maintain its reputation as a neutral program.

MWI mediators work mainly in Plymouth and Norfolk counties helping to resolve a variety of disputes ranging from small claims and business conflicts to parent/child, divorce, and landlord/tenant summary process eviction cases. The program has trained over 100 people to mediate and currently has a pool of about twenty-five to thirty people who conduct "advanced" mediation on a case-by-case basis (generally parent/child, divorce, corporate, small business and landlord/tenant cases) and eight to ten "active" mediators who perform small claims and summary process mediations weekly. Each year, MWI typically conducts approximately 100 - 125 summary process mediations, fifty to seventy-five small claims cases, and approximately twenty-five advanced cases.

MWI's housing cases are broken down into two main categories: summary process and non-summary process cases. Non-summary process cases generally come from the small claims and "advanced" mediation pool and include all housing disputes which have not yet progressed to the stage of an eviction proceeding. These typically involve disputes between tenants and landlords or multiple tenants over a variety of issues which occasionally include nonpayment of rent. Summary process cases, on the other hand, almost exclusively deal with nonpayment of rent. All of the summary process mediation which the organization conducts take place on the day of trial. Thus, cases which are mediated are already in the advanced stages of the eviction process: the landlord has already terminated the tenancy by filing a fourteen day notice-to-quit with the tenant; the landlord has filed a summons and

147. All of the information in this section describing Mediation Works, Inc. (MWI) was gathered through informal conversations with the program's director, Chuck Doran (formal interviews were conducted with him on February 12, 1996 and on March 4, 1996 in Cambridge, Massachusetts.) and from observations of the program's Summary Process Mediation Training conducted on the 23rd, 25th, and 27th of January, 1996 in Quincy, Massachusetts.

148. The South Shore community includes a number of small cities and towns south of Boston, including Rockland, Quincy (pop. 84,985), Plymouth (pop. 45,608), and Hingham (pop. 19,821). See 1990 U.S. Census. MWI mediates cases in the Plymouth District Court and the Hingham District Court, which are located in Plymouth County, and the Quincy District Court, which is located in Norfolk County. In Massachusetts, District Courts have jurisdiction over small claims, summary process, civil, criminal, and juvenile cases. MWI mediates predominantly small claims, summary process, parent/child, divorce, and misdemeanor criminal cases.

complaint with the tenant and the court; the tenant has been given an opportunity to file an answer to the complaint and to serve the landlord with discovery; the landlord has been given an opportunity to formally respond to the answer and/or discovery; and the case is ready to be heard by a judge.

MWI requires specialized training for those mediators who elect to do summary process cases. In addition to the thirty hour basic training in "facilitative" mediation skills taken by individuals participating in small claims mediation, mediators conducting summary process mediation must generally have experience mediating and have also participated in MWI's fifteen-hour summary process mediation training, which provides both a background in Massachusetts' substantive and procedural landlord-tenant law and further training in mediation skills and techniques. At the fifteen-hour summary process mediation training, mediators are given a resource manual which contains relevant Massachusetts statutes and regulations, as well as a clearly worded summary of the Massachusetts rules and regulations governing the eviction process.¹⁴⁹ Trainees are expected to both read the manual and keep it for use as a reference tool during actual mediations.

In contrast, mediators helping parties to resolve landlord/tenant disputes in small claims court are *not* provided with a resource manual outlining relevant Massachusetts law. In fact, they are specifically instructed not to introduce legal issues into basic small claims mediation, even if asked to do so by the parties. As this policy regarding the incorporation of law into small claims landlord/tenant mediation is very similar to that followed by HMP, we will not analyze it any further. Instead, we will focus the remainder of this section on the aspect of MWI that distinguishes it from HMP: its incorporation of the law into its summary process cases through the use of an "authoritative resource."

2. Program Goals: Summary Process Mediation

MWI employs a "facilitative" mediation approach¹⁵⁰ which predominately focuses on the interests and concerns of the parties. The goal of the process is to have the mediators improve communication between the parties in order to increase their understanding of each side's perspective of the dispute and empower the parties to develop a solution which best meets their individual needs.¹⁵¹ Despite the heavy focus on interests, however, MWI's summary process procedures do enable parties

149. See *MEDIATION WORKS, INC., SUMMARY PROCESS RESOURCE MANUAL* (1996).

150. In "facilitative" mediation, the mediator seeks to avoid directly influencing the substance of agreements as much as possible, instead focusing on the fairness of the mediation process. Thus, extremely facilitative mediators will avoid suggesting options to parties as much as possible. In contrast, "directive" mediation involves the mediator more directly in shaping the substance of the mediation. In the context of incorporating the law into mediation, facilitative mediators will hesitate to raise legal issues that the parties fail to raise themselves, even if the legal issues appear to be extremely relevant, while more directive mediators will raise legal issues themselves whenever they seem important enough to do so. MWI employs a facilitative approach to incorporating the law into mediation.

151. See Bush, *supra* note 103, at 267-73 (identifying mediation's unique powers as its ability to promote both empowerment and mutual recognition).

to learn more about their respective legal rights if they feel that such knowledge is important to the resolution of their conflict.

Mediators are trained to incorporate the law into the mediation through the use of an "authoritative resource." During their opening statement, mediators inform the parties that they possess an "authoritative legal resource" which can be used if anyone has any questions regarding landlord/tenant law. Although the mediators specifically state that they cannot interpret any of the laws for the parties--as that would be providing legal advice--they encourage the parties to ask to use the manual if they have any questions. Mediators will not, however, introduce the law into the mediation unless the parties ask them to do so--regardless of how relevant it may seem to be. Nevertheless, access to the "neutral manual" is provided in the hope that parties will be better equipped to negotiate with one another knowing both their interests and rights.

Several rationales underlie MWI's summary process mediation approach. The program policy of prohibiting mediators from interpreting the manual's statutes and laws is based on three main concerns: (1) Mediators risk losing their neutrality by interpreting a law in a manner which favors one party over the other, (2) Mediators may incorrectly interpret the law as there is always some uncertainty as to how a judge would rule, and (3) Legal interpretation exposes the program to potential liability for unauthorized practice of law.¹⁵² The decision to use neutral, authoritative resources was based upon a desire to provide parties with legal information while still maintaining mediator neutrality and self-determination. This is evidenced by the instructions given to trainees at MWI's January 23, 1996 summary process mediation training to, "go to the manual, even if you do know [the law]. You don't want to set up a situation where it's your interpretation of the law against the party's interpretation."¹⁵³ The goal of MWI's summary process mediation approach, therefore, is to provide a process located in Quadrant Three of our theoretical graph: one that enables parties to focus on both their interests and rights during the mediation.

3. Program Evaluation: Comparison to Mediation Ideals

MWI's approach provides parties with the opportunity to explore the law, however, only at their own initiative. While the process enables parties to effectively explore and prioritize their interests, the "neutral manual" present in the mediation room is rarely used.¹⁵⁴ Given the existing power imbalances between landlords and tenants, it is not surprising that uninformed tenants rarely avail themselves of this opportunity to inform themselves. Several characteristics of the MWI mediation

152. Doran Interview, *supra* note 6.

153. Chuck Doran, Instructions at the MWI Summary Process Mediation Training (January 23, 1996).

154. At MWI's January 23, 1996 summary process mediation training, trainees were repeatedly assured that, "the need to use [the authoritative] resource does not arise very often."

approach render the manual ineffective in informing parties of their legal entitlements.

First, the program's facilitative approach to introducing the law¹⁵⁵ places the burden of raising legal issues on the parties who are frequently so ignorant of their rights that they are not even able to identify the legal issues that are important to them. Thus, if the parties are discussing an issue which is directly addressed by a relevant Massachusetts law, the mediators will only refer to the manual if the parties express confusion over a legal issue or if it is evident that legal clarification is necessary. While in some cases this program policy may serve to inform ignorant parties, in other situations in which the parties do not even realize that a legal rule exists, the mediators may not be adequately "prompted" to refer to the manual and may decide to remain silent.¹⁵⁶ Given that tenants are much more likely than landlords to not raise the appropriate legal questions and vocalize "confusion" over relevant laws,¹⁵⁷ MWI's "neutral manual approach" often fails to provide an adequate mechanism for getting legal information to the party that needs it most. Second, MWI's approach often places the burden of understanding complex statutes and regulations completely on the parties who are frequently incapable of deciphering such legalese without the benefit of counsel. When parties do ask for information regarding the law, MWI mediators first refer parties to the "summary" section of the authoritative resource which describes Massachusetts law in layman's terms. If questions still exist, the mediators may choose to refer the parties to the actual statutes and regulations themselves which are also included in the manual if there are questions regarding either the summaries or the statutes, however, the mediators are specifically trained not to offer any explanation or interpretation of the material contained in the manual. Thus, a tenant who has been (erroneously) told by a friend that his "right to quiet enjoyment" has been violated by the landlord because his electricity was cut off for several hours might be asked to make sense of the first sentence of the relevant statute, which reads as follows:

155. See *supra* note 151.

156. For example, in a summary process case observed in Quincy court, the parties spent time discussing the issue of the security deposit and how much of it would be applied to future rent. Despite the fact that numerous Massachusetts laws exist regulating the return of security deposits (and outlining situations in which the landlord may be liable for paying the tenant three times the initial deposit), the mediator never referred the parties to the resource manual. Observation of summary process eviction mediation in Quincy District Court, March 28, 1996.

157. MWI Director, Chuck Doran, hypothesizes that tenants' awareness of their rights is "very, very low" and estimates that the ratio of informed tenants to informed landlords parallels the ratio of tenants who have attorneys to landlords who have attorneys. See Doran Interview, *supra* note 6. In the three courts that MWI mediates at—Quincy, Plymouth, and Hingham—only 7.8% of tenants had attorneys in 1995 (117 out of 1502), while 60.4% of landlords did (907 out of 1502). We would suggest that a more accurate proxy for "informed parties" includes both parties who are represented by counsel and parties who are repeat players. When that figure is considered, the balance of power tips even more drastically in favor of landlords: 7.8% of tenants are informed of their rights (117 out of 1502) and 80.2% of landlords are informed (1205 out of 1502). Either way, by putting the burden of asking to see the manual on the parties, MWI's "neutral manual approach" gives informed landlords a decided advantage over uninformed tenants.

Any lessor or landlord of any building or part thereof occupied for dwelling purposes, other than a room or rooms in a hotel, but including a mobile home or land therefore, who is required by law or by the express or implied terms of any contract or lease or tenancy at will to furnish water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service to any occupant of such building or part thereof, who willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service at any time when the same is necessary to the proper or customary use of such building or are thereof, or any lessor or landlord who directly or indirectly interferes with the furnishing by another of such utilities or services, or who transfers the responsibility for payment for any utility services to the occupant without his knowledge or consent, or any lessor or landlord who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant, or who attempts to regain possession of such premises by force without benefit of judicial process, shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment for not more than six months.¹⁵⁸

The odds of the average layperson understanding the above statute are slim, at best. Given the incredible density of the written statutes, it is not surprising that one tenants' advocate considered the "authoritative resource" approach to incorporating law into housing mediation to be "totally worthless" to tenants because "The Massachusetts Legislature is incredibly bad . . . at drafting legislation that is . . . generally understandable . . . I've had *lawyers* come to me and say, 'What does this statute mean?' [The authoritative resource approach] would be of no value whatsoever to tenants, who are generally less well read than the people at-large, are frequently illiterate, and sometimes do not speak very good English."¹⁵⁹ Although the summaries provided in MWI's resource manual do help to explain the law to parties in simpler terms, they do not always provide a clear cut answer, making it necessary to refer to the more complex statutes and regulations themselves.

Lastly, although Massachusetts law is very protective of tenant's rights, the timing of MWI's mediation works to the detriment of tenants. Although mediators often encourage parties to mediate prior to the date of their hearing, almost all landlords refuse to do so.¹⁶⁰ Therefore, although the manual provides the tenants with a resource to help them understand the law, at the time of the mediation, when they are given the opportunity to use the manual, most tenants have already forfeited their rights by failing to file an answer to the complaint which lists out all of their

158. MASS GEN. L. ch. 186 § 14 (1995). The sentence represents only the first sentence of the statute. This example was actually taken from a role play used at the MWI summary process mediation training on January 23, 1996.

159. Bertling Interview, *supra* note 6.

160. Doran Interview, *supra* note 6.

defenses.¹⁶¹ Therefore, it is difficult for the approach used by MWI to focus on both parties' interests and rights, since the majority of the tenants involved in such mediations have already lost their right to rely on the bulk of available protections substantive rights by the time of the mediation. Although the MWI program aspires to be located within the domain of Quadrant Three, the difficulties described above typically limit its ability to effectively inform the parties of their rights and reduce existing power imbalances caused by different levels of knowledge and familiarity with the law and the legal system.

MWI's mediation approach in summary process cases can be further evaluated using several of the procedural criteria outlined in the previous section. In sum, the program puts a high emphasis on neutrality and self-determination, and a lower emphasis on the principle of informed consent. In our view, the context of landlord-tenant mediation requires special attention to the principle of informed consent, and MWI's failure to provide such attention is its biggest shortcoming.

MWI's approach maintains the neutrality of its mediators; however, use of the manual may still occasionally threaten this core mediation principle. For example, if one party believes that the mediator is only referring to the resource manual to point out law which favors her opponent, use of the book threatens to undermine the mediator's neutrality. More basically, all of the strategic decisions regarding when and how to refer to the manual may be perceived by one side as favoring the other's arguments or interests.¹⁶² Mediators using the manual, therefore, must be extremely sensitive to how their actions impact the parties' perceptions of their neutrality.

Finally, the facilitative mediation approach employed by MWI is very "party-centered" in that the disputants are asked to focus much of their time exploring each side's interests and concerns, improving communication and brainstorming possible solutions. The parties play an extremely active role in the mediation and are expected to decide for themselves how to resolve their conflict. Although this process places a rather large emphasis on the principle of self-determination, again we question how empowering it is to make one's own decisions when one is extremely uninformed.¹⁶³

4. Program Evaluation: Comparison to Real-Life Alternatives

A comparison of MWI's mediated summary process cases to summary process cases that were either litigated or settled without mediation in the same courts reveals that while MWI's results do show outcomes that tend to reflect the "pro-landlord" power differentials discussed above, they also show that mediation, as practiced by

161. In the three courts that MWI mediates in—Quincy, Plymouth, and Hingham District Courts—tenants filed answers only 27.8% of the time (417 out of 1502 cases). Moreover, tenants filed informed answers—i.e., those which raised potentially legitimate defenses and counterclaims—only 14.6% of the time (219 out of 1502 cases).

162. Cf. Honeyman, *supra* note 23, at 141 (noting that mediators can sometimes indirectly demonstrate bias by emphasizing certain subjects and deemphasizing others).

163. See *supra* page 40.

MWI, is a better option for tenants than the alternatives of adjudication and negotiated settlement.¹⁶⁴

For example, in adjudicated cases, landlords were granted possession of the premises 100% of the time¹⁶⁵ and tenants defaulted 92.4% of the time; while tenants raised counterclaims approximately 14.5% of the time, judgment was entered for the landlord on the counterclaims every time.¹⁶⁶ In no cases was there any rent abatement due to the conditions of the apartment or an order for the landlord to do repairs.

A similar pattern emerges in cases that settled through non-mediated/negotiated settlements. All of the non-mediated agreements granted possession to the landlord;¹⁶⁷ none granted rent abatements due to housing code violations; and only a handful set up payment plans designed to give tenants an opportunity to keep possession.¹⁶⁸ Most agreements required the tenant to vacate and pay the full back rent immediately or within a few weeks. A large majority of the non-mediated agreements were form agreements drafted by the landlord's attorney. Few contained any clauses that might even conceivably be considered favorable to the tenant.¹⁶⁹

In contrast, mediated agreements at least offered tenants the possibility of retaining possession. While all of the ninety-three mediated cases that led to a settlement¹⁷⁰ resulted in agreements that granted possession to the landlord, 10.8%

164. Our observations are based on a comparison between 103 summary process cases mediated by MWI in 1995 at Plymouth and Hingham District Courts (of which 93 settled) and 159 adjudicated cases (including trials and defaults) and 74 negotiated (i.e., non-mediated) cases at those same courts. An additional 103 summary process cases from Plymouth and Hingham Courts were not considered: 31 of those cases were transferred to Housing Court while the remaining 72 were voluntarily dismissed by the landlord before judgment could be entered. In these cases, it was impossible to determine who effectively received possession. It was clear, however, that *none* of the dismissals were clear tenant victories, such as a granted motion to dismiss. Cases from Quincy District Court were not considered. While MWI presently mediates cases in Quincy, they began mediating there in 1996, after the period we examined.

165. Landlords were granted possession in 13 out of 13 cases that went to trial. In the remaining 146 cases, landlords were granted possession by default judgment.

166. Tenants raised counterclaims in approximately 14.5% of the total cases at these three courts. While breakdowns for adjudicated cases were not calculated, there is no reason to believe that the percentage of total cases in which counterclaims were filed would be different than the percentage of adjudicated cases in which counterclaims were filed. In any event, it is clear that no tenants were awarded any damages for any of their counterclaims.

167. All 74 of the non-mediated agreements granted possession to the landlord.

168. While exact figures are unavailable, a significant number of agreements contained payment plans, but only a handful of agreements (less than five) contained payment plans that were designed to allow the tenant to keep possession if the terms of the agreement were fulfilled.

169. Exact figures are unavailable to support these propositions. However, the agreements were overwhelmingly pro-landlord. Most were drafted by landlord's attorneys, and almost all of them simply had the tenant agreeing to vacate, pay all back rent, waive any rights to appeal, and waive any future counterclaims. None contained any provisions for landlords to make repairs or for rent abatements due to conditions problems. Because the agreements were so one-sided, we feel comfortable making the generalizations made in the text.

170. MWI's settlement rate in summary process mediation is 91.2% (93 out of 102 mediation led to a written agreement.) We examined the agreements produced in the 93 settled cases. The remaining 9 cases were considered to be either adjudicated or negotiated, depending on how they were ultimately

of the agreements specified that possession would transfer to the tenant if certain conditions were fulfilled.¹⁷¹ Furthermore, 10.8% of the agreements provided that the landlord would reduce or waive some of the back rent owed due to problems with conditions, and 10.8% of the agreements provided that the landlord would forgive or reduce back rent in exchange for the tenant vacating by a certain date. Finally, some of the agreements contained creative benefits for tenants. For example, one landlord agreed to let the tenant store her furniture and boxes in a locked attic room. Another landlord agreed to speak to the other tenants in the building and request that they keep noise levels to a minimum when the defendant/tenant was in the building. One agreement even contained a provision stating that the tenant could avoid eviction by entering an alcohol rehabilitation program. Lastly, three landlords agreed to provide the tenant with a positive reference for any future rentals.¹⁷² None of the above benefits for tenants were, in practice, found in any of the adjudicated or negotiated outcomes.

Mediation also appeared to reduce the likelihood of having an execution issue against the tenant. While landlords obtained executions in 75% of adjudicated cases and 79.8% of non-mediated/negotiated cases, respectively, executions were obtained (and not even necessarily served) in mediated cases only 52.7% of the time.¹⁷³ Since mediated cases, unlike adjudicated and non-mediated/negotiated cases, allow for the possibility of possession reverting to the tenant, it is likely that a good number of the mediated cases in which execution did not issue represent cases in which evictions were avoided. This suggests that mediated cases are less likely to lead to evictions than the alternatives.

Nevertheless, there is some evidence to suggest that MWI's approach does not adequately inform tenants of their rights. A comparison of mediated cases to those in which tenants used a "pro se packet" is telling. Tenants who had the pro se packet took almost twice as long to evict as tenants who went through mediation.¹⁷⁴ The

resolved.

171. Ten of the 93 agreements had such provisions. In 7 out of the 10 cases, possession was to transfer to the tenant when the terms of a payment plan were fulfilled. The other 3 agreements were more creative and one agreement even made possession contingent upon the tenant entering an alcohol treatment program.

172. See MWI 1995 SUMMARY PROCESS AGREEMENTS (on file with Chuck Doran).

173. Landlords obtained executions in 129 out of 172 adjudicated cases: seven out of thirteen cases (53.8%) that were decided after a trial and 122 out of 159 cases (76.7%) that were decided by default. In non-mediated/negotiated cases, executions were issued in fifty-nine out of seventy-four cases. In mediated cases, executions were issued in only forty-nine out of ninety-three settled cases (52.7%). It is difficult to determine the significance of the execution not issuing. Landlords need an execution to forcefully remove a tenant from an apartment, however, many tenants might vacate the premises as soon as a judgment for possession is entered for the landlord, making it unnecessary for the landlord to get the court to issue an execution. In such cases, an eviction takes place and the execution does not issue simply because the threat of it issuing is enough to eject the tenant from the apartment. In other cases, however, the execution might not issue because the tenant has paid the back rent owed, thus avoiding eviction altogether.

174. In mediated cases where an execution was issued, it took an average of 47.0 days from the time the complaint was filed until the time the execution was served (based on a sample of forty-nine cases). In cases where tenants used a *pro se* packet, it took an average of 77.6 days (based on a sample of seven

same was true of cases in which tenants had attorneys.¹⁷⁵ Moreover, tenants who had attorneys prevented execution from issuing in 62.7% of the cases.¹⁷⁶ Tenants who had attorneys were *much* more likely to raise issues regarding conditions than tenants in mediation. *All* tenants who had attorneys complained of problems with conditions, while a majority of tenants in mediation did not. As a result, landlords agreed to make repairs in only 2.2% of the mediated cases.

Finally, most of the mediated agreements were significantly "pro-landlord." While a few of the agreements had creative clauses, as mentioned above, the overwhelming majority of them contained boilerplate language which tended to focus on when and how the tenant would vacate the apartment. For example, the three most popular clauses in MWI mediated agreements were: (1) "The defendant/tenant agrees to vacate by X date" (present in 64.5% of agreements); (2) "The plaintiff/landlord agrees to hold and not serve the execution until after X date" (present in 60.2% of agreements); (3) "Failure of the defendant/tenant to vacate by X date will allow the plaintiff/landlord to serve the execution immediately" (present in 47.3% of agreements). The first and third of these clauses are clearly very "pro-landlord"; the second appears to be a possible benefit to the tenant, but in reality, the landlord typically does not agree to hold the execution for very long¹⁷⁸ and is automatically able to issue an execution if the tenant breaches the agreement. Unfortunately, tenants breach quite frequently, resulting in immediate issuance of the execution. MWI agreements resulted in breach (and immediate issuance of an execution against the tenant) 41.5% of the time.¹⁷⁹

5. Conclusion

At one point during MWI's most recent summary process mediation training, one of the trainees expressed concerns about the program's ability to adequately

cases). It is fair to assume that tenants who use the *pro se* packet are relatively informed and that any difference between the two samples is attributable to the differences in knowledge of the law.

175. On average, in mediated cases, it took 47.0 days from the day the complaint was filed until the day the execution was served (based on a sample of forty-nine cases). In cases in which tenants had attorneys it took 70.4 days (based on a sample of nineteen cases). The average for all cases was 45.2 days (based on a sample of 221 cases).

176. This data strongly corroborates our hypothesis that the reason tenants fare so poorly in court is not because there are no problems with housing conditions but rather that they simply do not know how to effectively assert their rights. However, it is possible that the data merely reflects the fact that tenants' attorneys only take on the most egregious of cases. If tenants knew how to effectively assert their rights, then they would get evicted much less often. Out of fifty-one cases in which tenants had attorneys, execution did not issue in thirty-two of them. Of these cases, six were transferred to Housing Court, seven were dismissed (one by motion, six by agreement), and nineteen simply did not issue execution.

178. See *supra* note 195 (suggesting that execution is issued on an average of forty-seven days after the complaint is filed in mediated cases). The average for both adjudicated and negotiated non-mediated cases was 44.7 days. There is no statistically significant difference between the two figures.

179. In response to the research conducted by the authors, MWI has altered some of its prior practices, such as the inclusion of prolandlord boilerplate language in agreement forms. Interview with Chuck Doran (May 19, 1997).

address the "information power imbalance" between landlords and tenants by using the "neutral resource manual": "I'm not entirely comfortable becoming a tacit vehicle for the powerful I would hate to become part of a system that contributed to the problem, instead of being part of the solution." Other trainees immediately nodded in assent.

The trainers' response was that mediation was not part of the problem, especially when one considers that tenants probably do worse in court. "Essentially, the tenants who come to us are already in a terrible situation. We make it slightly better for them by offering them a *chance* to keep possession and work out some kind of payment plan that is to their benefit."

MWI's approach does produce outcomes for tenants that are better than those produced by the real-life alternatives of adjudication and non-mediated settlement. However, there is good reason to believe that tenants are not adequately informed of their rights in any of the real-world alternatives, including mediation as practiced by MWI.

C. Hampshire Community Action Commission Housing Program

1. General Program Description¹⁸⁰

The Hampshire Community Action Commission's (HCAC's) Housing Program is a grassroots anti-poverty program, designed to fight homelessness in the Northampton community. The Housing Program consists of two separate components: (1) a Housing Services Program, which provides free counseling to tenants facing eviction proceedings, free information to both landlords and tenants regarding the laws surrounding the eviction process, and free mediation services to all interested parties involved in summary process/eviction cases and (2) a Housing Search Program, which helps tenants who are "at-risk" of homelessness find housing. Started in 1987 with funds from the Massachusetts Bar Foundation, Inc., HCAC's mediation program focuses exclusively on housing cases and primarily on summary process (i.e., eviction) cases.¹⁸¹ The program's approximately twenty mediators¹⁸²

180. The information in this section describing the Hampshire Community Action Commission (HCAC) Housing Program was gathered through informal conversations with the program's Mediation Coordinator, Gordon P. Shaw, and telephonic interviews conducted with him on March 11, 1996 and April 15, 1996.

181. From September 1, 1994 through August 31, 1995, HCAC's Housing Services Program mediated ninety-three cases, of which eighty-two were summary process cases. The remaining eleven cases included four mediations where the disputants were all tenants and landlords at various stages of terminating the tenancies of one or more of these tenants and were looking to mediation as an alternative to summary process. See Memo, *Hampshire Community Action Commission Housing Services Program Project Outcomes: September 1, 1994 - August 31, 1995* (1995) (excerpted from Annual Report to Massachusetts Bar Foundation, Inc.) (on file with authors).

182. The program has had approximately twenty mediators over the course of the past year, six of which have been active. The program typically sends four mediators each week to Northampton District Court.

perform almost all of its mediations at the Northampton District Court, which serves the communities of Northampton, Amherst, and Easthampton.¹⁸³

While HCAC's counseling program for tenants and its mediation program are technically distinct entities, "the vast majority of cases reach mediation after first having been screened through the [tenant] counseling program."¹⁸⁴ This is because the mediation program has an arrangement with the clerk's office at the Northampton District Court which allows them to advertise *both* the mediation and counseling services to tenants as soon as they are served with a summons and complaint.¹⁸⁵ Under the program's regular procedure, however, landlords receive a separate letter, informing them only of the mediation services and its potential benefits to them. The letters are reprinted below to illustrate the significant differences between them:

The Tenant's Letter:

FACING EVICTION?

CALL _____ FOR ASSISTANCE BEFORE YOUR COURT DATE

Dear Tenant:

This letter is to inform you of services for tenants available through the Housing Services Program at Hampshire Community Action Commission. We are writing to you because your name has appeared on the list of eviction cases at the Northampton District Court for _____.

It is our experience that many tenants go to their hearing without knowing their legal rights or the procedure involved in an eviction. We invite you to contact our program if you have any questions relating to your eviction. Our tenant counselor, _____, can advise you about possible defenses and/or counterclaims to your eviction, and assist you in preparing an "Answer." An "Answer" must be filed

183. Northampton (pop. 29,289), Amherst (pop. 35,228), and Easthampton (pop. 15,537) are all located in Hampshire County. While Hampshire County is well known for some of its rustic, affluent neighborhoods, its reputation is deceiving. The county has significant pockets of rural poor and has the highest rate of people living at the poverty level in all of Massachusetts (The poverty rate is 10.8%; while the Massachusetts average is 8.9%). In Northampton, for example, 57.3% of the population lives in a household earning under \$25,000/yr. In Easthampton, the comparable figure is 55.0%; in Amherst, 47.3%. See 1990 U.S. Census, *supra* note 83. Almost all of the tenants who get evicted are poor. See Shaw Interview, *supra* note 6.

184. *Id.* Shaw, estimates that at least 50 - 55% of the tenants who mediate with the program are informed about their rights through the program's tenant counseling service. Shaw Interview, *supra* note 6.

185. Under the arrangement, the court clerk sends the program the names of all parties to summary process actions immediately after the "entry date." The "entry date" is the date the landlord files the summons and complaint in court. This must be done on a Monday at least seven, but no more than thirty days after the landlord serves the summons and complaint to the tenant. Hence, tenants get the relevant information ten to twelve days prior to the hearing date and prior to the time their answer is due.

with the court and served on your landlord no later than the Monday before your hearing. If you do not file an Answer, the judge will not consider any of your defenses or counterclaims--no matter how serious the violation.

Low-income tenants facing eviction For non-payment of rent may be eligible for emergency rental assistance through the Welfare Department. Several area churches and other organizations sometimes have charitable funds to help tenants pay back rent and high utility bills. The tenant counselor can help you explore these possible sources for getting assistance, as well as help negotiate a rental arrears payment plan--if feasible under your income--with your landlord. Our counselor can also help tenants who decide they need to move by providing information about area housing options.

Housing Services also sponsors a free mediation clinic at the courthouse on the day of eviction hearings. Mediation is a process where the tenant and landlord sit down together in a private conference room and, with the aid of neutral person [sic], attempt to work out mutually agreeable solution to their dispute. During the mediation session, both parties are given a complete opportunity to speak and present their concerns. The mediator does not judge the parties or give legal advice; his or her role is to help the parties negotiate a fair settlement. Mediation can be used as a means to resolve an eviction without having to go before a judge. If an agreement is not reached through mediation, however, neither party forfeited their right to have their case heard before a judge, and a hearing can be obtained the same day. Mediation is a voluntary process and both the landlord and the tenant must be willing to participate. If you are interested in trying to have your case mediated, you should contact our mediation coordinator, Gordon Shaw. With prior notice of your interest, he can contact the landlord and determine his or her willingness to participate prior to your hearing date.

To speak with either the tenant counselor or the mediation coordinator, please call the Housing Services Program between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday at _____.

Sincerely,
The Housing Services Program

The Landlord's Letter

Dear Landlord:

This letter is to inform you of free mediation services available for landlords and tenants concerning eviction disputes. We are writing to you because your name has appeared on the list of summary process cases at the Northampton District Court for _____.

In a mediation session, a landlord and a tenant sit down together and, with the aid of a neutral third party, attempt to work out a mutually agreeable solution to their dispute. One of the advantages of mediation is that it allows the parties involved to

decide for themselves how the dispute should be resolved. If the case has been brought because a tenant has fallen behind on the rent, the mediator can assist the parties in working out a payment plan that could enable the landlord to recover all past rent owed, and allow the tenant to continue to live in the rental unit if they can keep current with their rent. If the tenant has brought counterclaims for code violations, the mediator can help the parties put together a schedule for making repairs, and then come to terms on a fair rental abatement figure. Sometimes a tenant has no defense to an eviction, but needs more time to find another place to live. Through mediation, the parties can come to terms on a move-out date, allaying the landlord's fear of having the eviction delayed unilaterally by the tenant through an appeal or a motion to stay the eviction.

Hampshire Community Action Commission has been sponsoring a landlord-tenant mediation program at the Northampton District Court since 1987. If you are interested in trying mediation, you can contact the Commission Monday through Friday, 8:30 a.m. to 4:30 p.m., at _____. Mediations can be set up to take place in court at the time of the scheduled hearing date or out-of-court in advance of the hearing date.

Mediation is a risk free, costless and private way to resolve a legal dispute; it is a process the court strongly encourages landlords and tenants to undertake before bringing their claims before a judge. If the settlement is not reached or an agreement not honored by a party, you still have every right to take the matter before a judge.

Sincerely,
Gordon P. Shaw, Esq.
Mediation Coordinator

While all tenants receive letters, many landlords who have been through the process several times do not. Neither landlords nor tenants are generally made aware of the fact that different letters are sent to each party. In spite of these differences, the program appears to have maintained its neutrality in the eyes of the parties. This is because the mediation program is clearly separated from the counseling program and the mediators stress that their neutrality is central to their role. According to Mr. Shaw, the program's mediation coordinator, the parties are aware that the mediators' goal is to find a "win-win" situation when possible and "to try to achieve solutions that are beneficial to both parties."¹⁸⁶

The program aims to mediate cases as early as possible. While some landlords will agree to mediate in advance of the hearing date--usually those who have considerable counterclaims filed against them-- most landlords refuse to mediate until the date of the hearing.

Program mediators must have significant prior mediation experience and training before they can mediate summary process cases. Mediators must also undergo a three hour summary process training in which they are taught an overview

186. Shaw Interview, *supra* note 6.

of Massachusetts housing law and observe a mock summary process mediation.¹⁸⁷ While trainees are given materials summarizing Massachusetts housing law to study on their own time, they are instructed not to bring the materials with them to the mediation as an "authoritative resource." Rather, inexperienced mediators are paired up with experienced mediators who know the law well enough to explain it to the parties.¹⁸⁸

If issues come up surrounding the state of the law, experienced mediators will not hesitate to explain to the parties the procedural rules surrounding eviction proceedings. For example, mediators will routinely explain to parties things such as the court's time line surrounding evictions, the process for obtaining an execution, how damages work, and any other "procedural information" they might not know. Mediators often introduce procedural legal information when they think it would be relevant to the parties even if the disputants do not ask for it explicitly.¹⁸⁹

In contrast, mediators will not offer substantive legal information unless the parties specifically ask for it. Thus, mediators will never raise substantive issues that are not raised by the parties. For example, a mediator would not ask a tenant in a private session about the condition of the premises if the tenant had not already independently raised the issue without any prodding. Such a maneuver would be considered too much of a threat to the mediator's neutrality.¹⁹⁰ However, if a tenant were to ask what the law was with regard to security deposits, a mediator would provide the tenant with the relevant legal information. In no cases will the mediators interpret the substantive law or give legal advice.

187. The program currently has plans to offer a fifteen hour training modeled in large part after the one done by MWI. *Id.*

188. It is noteworthy that only two of the experienced mediators are lawyers, which opens the program up to accusations of unauthorized practice of law. According to the program's Mediation Coordinator, the experienced non-lawyer mediators know the law as well as any of the lawyers do. *See Shaw Interview, supra* note 6. Other attorney-mediators attest to similar experiences working with non-lawyer mediators. *See Friedman Interview, supra* note 102. Such evidence suggests that the ethical rules should perhaps be modified/clarified to allow such experienced mediators to give legal information without concerns that they will be brought up on charges.

189. Mediators tend to avoid introducing such information unless they are asked to do so by the parties. *See Shaw Interview, supra* note 6. They will only introduce such information independently of a request to do so by the parties if it is very apparent that the parties do not understand something that is very important.

190. The rationale for the "facilitative" approach with regard to the introduction of substantive law is grounded in neutrality. Raising substantive issues that the parties have failed to raise themselves is considered too much of an advocate's role. *See Shaw Interview, supra* note 6. However, it is not entirely clear why the program considers a more "directive" approach with regard to the introduction of procedural law to be any less of a threat to neutrality than a "directive" approach with regard to substantive law. According to Shaw, "that's just where [we] draw the line." *Id.*

2. Program Goals

HCAC clearly seeks to provide a process which would be in Quadrant Three of our theoretical graph: one which enables parties to consider both their interests and their rights during the mediation. As is the case with most programs aiming for Quadrant Three, the goals of empowerment/self-determination and mutual understanding are paramount. The main focus of the mediation is the parties' subjective conceptions of fairness. "The law" is neither determinative nor irrelevant; rather, it is relevant insofar as it is a reference point used by the parties to determine their own conception of what is fair. In the words of the program's coordinator, "Our focus is not just on [the law and] legal posturing, but rather on the needs of the parties and what their abilities are too *Law is just one benchmark we use to decide what is fair.*" (Emphasis Added)¹⁹¹

3. Program Evaluation: Comparison to Mediation Ideals

Like MWI, HCAC employs a predominantly facilitative approach to introducing substantive law which places the burden of raising legal issues on the uninformed parties. However, HCAC does two things which MWI does not that partially rectify this problem. First, the HCAC approach allows mediators to be more directive with regard to procedural law by explaining relevant summary process time tables and jargon when it seems relevant for the parties to accomplish their goals. Second, and more importantly, HCAC lets *all* tenants know about opportunities to inform themselves of their legal rights prior to the mediation through the use of their free counseling service. The combination of these policies enables HCAC to more solidly locate its program in Quadrant Three of our graph.

Of course, HCAC mediators insure increased levels of informed consent at the expense of their neutrality. By sending tenants letters describing both the counseling and mediation services available to them, HCAC comes dangerously close to blurring the line between the counseling and mediation programs. This threatens the mediation program's neutrality. If landlords knew that the mediation program "was connected to the tenant's counseling program," that the program writes reports to justify its funding by citing statistics about how many evictions were avoided, or even that the mediation program sends out different letters to landlords and tenants offering entirely different services to each; the landlords might not trust the program to be completely neutral.¹⁹² It is important to keep the advocacy/counseling part of the program completely separate from the neutral/mediation part of the program.

Unlike MWI's "authoritative resource approach," HCAC's approach puts the burden of understanding complex statutes and regulations on experienced mediators, as opposed to putting the burden on lay parties. Thus, experienced mediators are able to paraphrase dense legal jargon, making it simpler for the parties to understand

191. *Id.*

192. It is important to note that some landlords *are* aware of these things and still see the program as neutral.

if they ask. While this practice effectively raises the level of informed consent of the parties, it potentially threatens mediator neutrality more than the use of an authoritative resource does.

A larger number of tenants who mediate through HCAC appear to be informed of their rights than at other programs due to the efforts of the counseling program. However, the 45-50% of tenants who do not make use of the counseling services appear to be just as vulnerable to unfair outcomes as uninformed tenants at other programs. In short, HCAC's approach to incorporating the law *during* the mediation, like MWI's, does little to help inform tenants of their rights. Rather, it only benefits tenants who are already informed. The evidence suggests that uninformed tenants simply do not raise legal concerns in mediations. As one HCAC mediator observed, "Parties rarely fight over the law. The parties know the law if they're raising it as an issue and it's not an issue if they don't raise it."¹⁹³

4. Program Evaluation: Comparison to Real-Life Alternatives

A comparison of HCAC's 1995 mediated summary process cases to summary process cases that were either litigated or settled without mediation in Northampton District Court reveals that tenants do considerably better in mediation than they do with either of the other two alternatives. Even if some dangers do exist for uninformed tenants when mediating with HCAC, it appears that tenants as a whole are better off mediating than they are either negotiating without a third-party neutral or going before a judge.¹⁹⁴

As was the case in the Plymouth and Hingham District Courts, tenants litigating summary process cases at Northampton District Court faced a harsh reality. In all adjudicated cases in which the court entered a judgment for possession, landlords were granted possession 99.4% of the time;¹⁹⁵ at trial, landlords were granted

193. Shaw Interview, *supra* note 6.

194. Our observations are based on a comparison between 64 summary process cases (all of which settled) mediated by HCAC in 1995 at Northampton District Court and 219 adjudicated cases (including trials, defaults, non-stipulated dismissals, and non-suits) and 109 negotiated (i.e., non-mediated) cases at those same courts. Some cases were not easy to classify. For example, 47 cases were dismissed voluntarily by the plaintiff/landlord. While we chose to classify these cases as "adjudicated" cases, they just as easily could have been classified as "negotiated" cases, in that negotiations might have led to an "off the record" agreement to dismiss. Generally, we considered cases adjudicated if the court either entered a judgment or disposed of a case without any record in the file of an agreement directing the court's judgement or disposition. Cases were considered negotiated only if there was explicit evidence of an agreement between the parties in the court records. It is worth noting that our results would have been essentially the same had we chosen to classify these cases differently.

195. Out of the 219 adjudicated cases, the court entered a judgment for possession in 157 of them. 156 of the 157 cases granted judgment to the landlord for possession. This statistic, however, is somewhat misleading in that tenants' "victories" often result in no judgment being entered at all. For example, in the remaining 62 adjudicated cases in which no judgment entered:

- Tenants got the case dismissed in 2 cases.
- Landlords voluntarily dismissed the case in 47 cases.
- Landlords did not show up at court in 12 cases.
- The case was continued (and is still pending) in 1 case.

possession 97.7% of the time;¹⁹⁶ tenants defaulted 52.1% of the time;¹⁹⁷ and while tenants raised counterclaims approximately 21.2% of the time,¹⁹⁸ tenants won on these claims only 11.4% of the time.¹⁹⁹ There were no cases in which the court issued an order for the landlord to do repairs. While this situation represented a significant improvement over that which exists at Plymouth and Hingham District Courts, perhaps because of the efforts of HCAC's tenant counseling services, the outlook of going to court for tenants was still a bleak one.

The outlook was even more bleak for those tenants who resolved their summary process disputes through a non-mediated/negotiated settlement. All of the non-mediated agreements examined granted possession to the landlord, and only one arranged for possession to revert to the tenant if certain conditions were fulfilled.²⁰⁰ As was the case in Plymouth and Hingham, agreements at Northampton District Court were incredibly "pro-landlord" and tended to be drafted by the attorney for the landlord. In most agreements, the tenant simply agreed to move out, pay the back rent, and waive all of his or her rights to appeal. By far, the most popular clause in the non-mediated agreements was one promising that "the tenant will vacate by X date."²⁰¹ None of the agreements contained any provisions for landlords to make repairs or for rent abatements due to conditions problems.

Tenants who went to mediation fared considerably better.²⁰² While all of the sixty-four cases examined resulted in agreements that granted possession to the landlord, a full 41.2% of the mediated agreements provided a process for tenants to

If these additional 62 adjudicated cases are included, then landlords received possession 71.2% of the time, tenants received possession 1.3% of the time (once via court verdict and twice via motion to dismiss), and it was unclear 27.5% of the time. The latter 27.5% of cases were dismissed, and it is not clear from the court records who effectively ended up with possession.

196. After a hearing on the merits, landlords were granted possession by the judge in 42 out of 43 cases.

197. Tenants defaulted in 114 out of 219 adjudicated cases.

198. This figure is based on a partial survey of the data. Tenants filed counterclaims in 35 out of 165 adjudicated cases examined (representing 75.3% of the entire sample of adjudicated cases).

199. Of the 35 adjudicated cases in which counterclaims were found, tenants were granted partial judgments on their counterclaims in four of them.

200. Of 100 agreements examined, 99 granted possession to the landlord and only one left open the possibility of the tenant regaining possession if he/she was able to stick to the terms of a payment plan. In nine other cases, the parties agreed to dismiss the case. However, it is not clear whether these dismissals were the product of the tenant agreeing to move out or the landlord agreeing to let the tenant stay. In the end, 90.8% of the non-mediated agreements granted possession to the landlord, 0.9% gave the tenant an opportunity to regain possession, and 9.1% were unclear about who effectively maintained possession.

201. These conclusions are based on the authors' examination of all of the 109 non-mediated agreements. While no official count was kept of the frequency of various clauses in the agreements, it was obvious that the tenant's promise to vacate was by far the most popular clause. Similarly, in spite of the fact that there was no official count, it is safe to say that the agreements were overwhelmingly one-sided in favor of landlords.

202. Our conclusions are based on a close examination of 51 out of HCAC's 64 mediated cases for 1995. The sample does not include mediations which did not lead to a settlement. HCAC's settlement rate is approximately 87.8%. See Memo, "HCAC Housing Services Program Project Outcomes: September 1, 1994 - August 31, 1995," *supra* note 202.

reinstate their tenancy and maintain their housing.²⁰³ Furthermore, 23.5% of the agreements provided for reductions in back rent owed due to either the tenant's counterclaims or in consideration for the tenant vacating by a certain date.²⁰⁴ Landlords agreed to perform necessary repairs in 9.8% of the mediated cases.²⁰⁵ Generally successful payment plans were set up in 58.8% of the cases. In fact, mediated agreements were breached only 15.8% of the time.²⁰⁶ Finally, tenants agreed to vacate the premises in only 33.3% of the mediated cases.²⁰⁷

Executions for possession were significantly less likely to be issued against tenants who mediated than they were against tenants who had their cases heard before the court or who settled them without the help of a mediator. While landlords obtained executions for possession in 69.8% of the cases that went to trial and 63.8% of cases that settled without mediation, executions were obtained in mediated cases only 46.9% of the time.²⁰⁸ Given that a significant number of mediated cases allow for the possibility of possession reverting to the tenant, it is likely that a large number of the cases in which execution did not issue represent cases in which evictions were avoided. The same cannot be said for the alternatives to mediation.

Furthermore, when executions *did* issue for possession, tenants who mediated had, on average, more time before they had to vacate than tenants who opted to litigate or settle without mediators. In cases in which an execution was served after a trial, it took an average of 58.1 days (based on 30 cases) from the time the complaint was filed until execution was issued. In non-mediated/negotiated cases, it took an average of 52.7 days (based on 67 cases). In contrast, in mediated cases where an execution was issued it took an average of 77.7 days (based on 28 cases) from the time the complaint was filed until the execution was served. What is truly astonishing is that the average time for execution to issue in mediated cases (77.7 days) exceeds the average time for cases in which tenants were represented by attorneys (72.8 days--based on 20 cases).²⁰⁹

203. 19 out of the 51 cases examined provided that the tenant would keep possession and the action would be dismissed if the tenant satisfied the terms of a payment plan. Two other agreements provided that the tenant would keep possession if a relative who was dealing drugs in the apartment was removed from the apartment and never allowed to visit.

204. Most of these reductions were due to the tenant's counterclaims, as opposed to agreements to vacate.

205. Landlords agreed to make repairs in five out of the 51 cases examined.

206. Payment plans were administered in 30 out of the 51 cases observed. Follow-ups were done by the authors on 38 mediated agreements and only six resulted in a breach of the agreement.

207. Tenants agreed to vacate in only 17 out of the 51 cases observed.

208. Landlords obtained executions in 30 out of 43 cases that went to trial; 67 out of 105 non-mediated/negotiated cases; and only 30 out of 64 mediated cases. It is difficult to determine the significance of the execution not issuing. See *supra* note 196 and accompanying text. However, the data suggests that mediated cases are less likely than the alternatives to lead to eviction.

209. Although there appears to be no statistical difference between the two averages, it is well worth noting that, in some instances, mediation leads to outcomes for tenants that are comparable to those achieved by attorneys. Given the small sample size, we would not suggest drawing the conclusion that mediation is equally effective as legal representation in protecting tenants' rights. Even in our sample, tenants with attorneys were much more likely to get their case dismissed altogether than were tenants

Finally, HCAC agreements cannot be labeled as either generally pro-landlord or pro-tenant. The overwhelming majority of agreements are filed on a standard form, which includes blanks to be filled in not only for "rent owed ____" and "possession for _____," but also for "rent reduced by _____ on account of the tenant's claims" and "defendant's tenancy shall be reinstated on _____, provided that s/he has paid the total amount of this judgment and has become current on his/her rent." Thus, the four most popular clauses in HCAC mediated agreements are fairly balanced: (1) The tenant will pay the landlord \$X, over time, according to the following payment plan (present in 58.8% of agreements); (2) The defendant's tenancy shall be reinstated on _____ if certain conditions are met (present in 41.2% of agreements); (3) The tenant will vacate by X date (present in 33.3% of agreements); and (4) The rent owed is reduced by \$X on account of the tenant's claims (present in 23.5% of agreements).

5. Conclusion

HCAC mediations provide results for tenants that appear to be significantly better for them than the results provided by either of the two real-life alternatives. The most probable explanation for this is that the program works in conjunction with a counseling program that informs all tenants who have been served with summary process complaints of the availability of free legal advice. It does this, however, at an increased risk that the program will lose its (perceived) neutrality. Nevertheless, tenants who mediate with HCAC are more likely to be informed of their legal rights before going into a mediation. However, HCAC's approach to incorporating the law into mediations-- which is "facilitative" with respect to substantive legal rights and "directive" with respect to procedural legal rights-- does little to ensure that tenants who are not informed of their rights prior to the mediation will become informed *during* the mediation.

who went through mediation (47.4% of cases with attorneys were dismissed without a judgment of possession being entered, while no mediated cases were.).

D. *The Center for Mediation in Law (CML)*

1. General Description

The fourth program we examine does not do summary process mediation at all and is not even located in the Massachusetts area. Rather, the Center for Mediation in Law, located in Mill Valley, California, provides mediation training predominantly for those interested in mediating divorce and/or commercial cases. For this reason, we examine not the program itself, but rather its unique approach to incorporating the law into mediation, and we examine its potential application to the summary process arena.

The Center for Mediation in Law clearly aspires to provide a process which would be located in Quadrant Three of our theoretical graph-- one which allows the parties to focus on both their interests and their legal rights. Thus, CML seeks to incorporate the law into mediation in order to give the parties an opportunity to "go beyond it." Under CML's approach, parties are informed that one of the goals of the mediation is to come up with an agreement that they both think is fair, and the "the law" will be "one of several reference points" to help them decide.²¹⁰

In the view of CML, incorporating the law into a mediation is no easy task. The problem lies in the fact that most parties tend to see the role of the law in terms of a false dichotomy in which they view the law as either outcome determinative or entirely irrelevant.²¹¹ The mediator's goal, therefore, is to introduce the law in order to help the parties see that it is relevant both as a practical alternative and as an expression of societal norms, while at the same time to make sure that neither party comes to think of the law as dispositive.²¹² The dangers of the law taking too central a role are everpresent. In the words of CML Director, Gary J. Friedman, "The law [can be] like an elephant in the room. The mediator's job is to discharge the power . . . the law has over people"²¹³ in order to enable them to use the law as a tool that can help them make a truly informed decision about what they think is fair.²¹⁴ The mediators "free the parties from the law" by dealing with it directly. The program strongly believes that mediators have a professional responsibility to the parties to learn the law and explain its proper role to the parties. Hence, mediators will tell the parties directly what "the law" says about their case, both procedurally and substantively, while explaining to them the limitations of such predictions and their proper role in the process. In response to the traditional concerns about such an approach--namely, that the mediator could be wrong, the parties might see the

210. Friedman Interview, *supra* note 102.

211. It is this same false dichotomy that leads many mediators to the conclusion that mediating in Quadrant Three of our theoretical graph is not really possible. As pointed out previously, the critics fall prey to this same false dichotomy. *Supra* note 101 and accompanying text.

212. See Center for Mediation in Law, *supra* note 105, Memo No. 6.

213. Friedman Interview, *supra* note 102.

214. This view supports our argument that the values of informed consent and self-determination are inextricably related. True empowerment/self-determination requires that people make autonomous decisions which have little value if they are uninformed.

mediator as favoring the party who she or he says is favored by the law, and the parties might place too much significance on the mediator's prediction--CML mediators are instructed to be both aware of those potential pitfalls and to alert the parties to them by sharing their concerns about them with the parties.

Hence, the role of the mediator, the parties, and "the law" are carefully explained at the outset of the mediation and legal information is almost always coupled with a careful reminder about the proper role of the law, the mediator, and the parties. For example, before making legal predictions, mediators will explain to the parties that "there is some uncertainty in the law, so I could be wrong" and that "you shouldn't defer to my opinion if it differs from what seems right to you."²¹⁵ Likewise, mediators might remind parties that "what is personally fair to you [is] the highest priority here" and that "[y]ou are not bound here by the law, although you are free to use it as a reference point."²¹⁶ Finally, if a party accuses a mediator of aligning with the other party after hearing a prediction about the law that is unfavorable to him or her, a mediator might respond by saying, "I'm sorry you feel that way. But what I am trying to do is what I think you both asked for--to give you as clear an indication as I can about how the law would apply to your situation. I don't want either of you agreeing to something without understanding the legal context of the decision."²¹⁷

In the view of the program, the purpose of offering legal predictions is to make sure the parties truly understand the law. If the parties are simply told what the black letter law says, they still will not know what matters to them most--namely how courts generally *apply* the law. Rules about "legal advice" and "legal information" notwithstanding, it is the view of the program that mediators, like lawyers, should be able to offer parties the benefit of their legal expertise--i.e., that legal predictions should not be considered legal advice. Ideally, the parties would see the mediator "as a neutral friend who happens to understand how a court would view [the parties'] situation."²¹⁸

In "hard cases," predictions are given less emphasis. Where there is considerable uncertainty about what a court might do, it is more important that parties understand the principles that would guide a court in making its decision. Hence, in difficult cases, mediators might explain to the parties the arguments he or she might make before the judge if he or she were acting as the lawyer for each party. Once the parties understand the principles underlying the legal debate, they will be equipped to make an informed decision about what principles they think are most fair--which is the program's ultimate goal in incorporating the law.²¹⁹

215. GARY J. FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION* 87 (New York: Workman Publishing Co., Inc., 1993).

216. Center for Mediation in Law, "Explanation of the Mediation Process," Memo No. 5 (1983) (training materials).

217. Friedman, *supra* note 216, at 91.

218. *Id.* at 85.

219. Gary Friedman describes a technique he uses whereby he stands behind one party and declares, "This is what I would say if I were your lawyer . . ." and then stands behind the other party and says, "Now, this is what I would say if I were *your* lawyer . . ." He then turns to both parties and says, "Now,

2. "Evaluation": Potential for Application to Summary Process Cases

Applying CML's approach to incorporating the law into mediation in summary process cases could potentially enable the parties to obtain a high level of understanding of both their legal rights and their interests during the mediation. This is because the CML approach allows the mediators to explain to parties what are their legal rights -- both procedurally and substantively--and to predict what a court might do in a given case.

There are various reasons, however, why it may prove difficult in practice to translate this mediation approach into the summary process arena. First, while the approach works well with sophisticated parties, there is a significant risk that poorly educated tenants will view the mediators' legal interpretations and predictions as binding. Second, the approach creates a larger risk to mediator neutrality than those used by MWI and HCAC. Lastly, mediators employing the CML approach in summary process cases would face difficult decisions regarding which laws to introduce. A number of different statutes and regulations may be relevant to such cases, and mediators may not realistically be able to fully explain all of these laws to the parties in the short time period allotted to summary process mediations. In spite of these potential obstacles, however, it is possible that the CML approach can be effectively adapted to summary process mediations.

VII. PRESCRIPTIVE ADVICE

The summary process mediator in Massachusetts faces unique challenges in upholding the principles of mediation. Anecdotal evidence from various parts of the state reveals that tenants almost universally do not understand the multitude of legal rights or procedural rules designed to protect them; data from a variety of courts corroborates this fact. In contrast, landlords tend to be well-informed repeat players, who are represented by experienced counsel. These power imbalances pose a major obstacle to the summary process mediator who wishes to preserve the fairness of the process.

It is not enough to say, as some mediators have, that mediation cannot and should not be concerned with the protection of rights.²²⁰ Even when protection of rights is not the primary goal of mediation, the central goals of empowerment and self-determination cannot truly be fulfilled when parties are ignorant of the legal context surrounding their decisions. True empowerment, we would argue, entails making an *informed*, autonomous choice about one's own future. Is it truly empowering for a tenant to agree to vacate an apartment when he or she does so only because he or she erroneously believes that he or she has no legitimate arguments for

you both know as much as I do. What do you think would be fair for the judge to decide?" Friedman Interview, *supra* note 102.

220. See e.g., Bush, *supra* note 115, at 265 (arguing that mediators cannot effectively concern themselves with protecting the parties' rights "without undermining their usefulness altogether.")

staying? Mediations that take place when parties are grossly uninformed do little to further the central principle of "interest-based mediation": self-determination.

Yet mediators are not and cannot be advocates for the uninformed or disempowered. A mediator's neutrality is indispensable to his or her role, and, as critics of mediation point out, there appears to be an inherent tension between ensuring fair agreements and maintaining neutrality.²²¹ As one mediator/scholar has argued, "mediators who try to protect substantive rights and guarantee that agreements are fair must adopt substantive positions that inevitably compromise their impartiality, either in actuality or in the parties' eyes."²²² Moreover, the context of summary process aggravates these dangers: if mediators introduce a process that informs tenants of their rights, it will not be perceived as neutral when judged in comparison to the present system. The problem is further magnified by the fact that the process is voluntary: landlords will probably not agree to participate in a process that they perceive to be adverse to their interests.

But remaining true to the principles of informed consent and self-determination does not require that mediators lead the parties toward certain substantive outcomes. Rather, it requires that mediators enable parties to make informed autonomous decisions by making sure that they understand the legal context in which they make their decisions. While this will inevitably raise neutrality concerns--especially in a context such as housing law, where the law seems to so clearly favor one side over the other--there is no reason that mediators cannot ensure that the parties are informed while addressing the potential neutrality issues openly at the outset and throughout the mediation. Furthermore, while housing law is pro-tenant, its application often favors the landlord, making the truth about the law somewhat more balanced--and more palatable to all parties involved--than a cursory glance at the law might suggest.

Therefore, we believe that summary process mediators can and should implement dispute resolution processes which focus on both the parties' interests and their rights. Mediation processes which solely focus on an individual's interests at the expense of their rights too often result in unacceptably low levels of informed consent. The ideal mediation, we would suggest, produces fully-informed, autonomous decisions made by the parties after considering both parties' interests and rights.

The ideal, however, is difficult to achieve in practice. A rights and interest-based approach to mediation is much more demanding of the mediator than alternative approaches which focus solely on rights or interests. To be successful, the mediator must be both adept at conflict resolution techniques and knowledgeable of the relative substantive law.

The most aggressive approaches to incorporating law into mediations--such as that employed by CML--come closest to achieving the ideal when done properly, but

221. See *supra* note 26 and accompanying text.

222. See Bush, *supra* note 115, at 265. See also JOSEPH STULBERG, TAKING CHARGE/MANAGING CONFLICT 141-49 (1987); Joseph Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 88-91 (1981).

they also have the potential to cause considerable harm when done improperly. Moreover, a significant obstacle exists for most mediation programs to implementing such an approach--namely, it puts lawyers in a unique position to effectively achieve the ideal.

There are good reasons why only attorneys should attempt to implement the most aggressive approaches to incorporating the law into mediations. First, unless the mediators explaining the law to the parties are experienced attorneys, there is a significant risk that the parties will receive either inaccurate or incomplete information. Second, while non-attorney mediators are often able skillfully to master some complicated but discrete bodies of law, such as summary process law, such well-trained, non-lawyer mediators may still fail to spot related, relevant legal issues that may not fall into their area of limited legal expertise. Finally, and perhaps most importantly, non-lawyer mediators who attempt to inform the parties as to how the law applies to their particular fact-situation will likely find themselves facing accusations of illegal practice of law.

Given that many of the most skilled mediators are non-attorneys, an aggressive approach to incorporating the law into mediation would significantly limit the pool of talented mediators upon which parties and court systems could draw. For this reason, despite the fact that we find that such an aggressive approach comes closest to the ideal when practiced by an adept and experienced attorney-mediator, we would recommend that most mediation programs conducting summary process mediations do not attempt to introduce such a process. Moreover, our empirical research suggests that less aggressive approaches to incorporating the law into mediation may be worth pursuing. With this in mind, we offer the following suggestions for mediators--both lawyers and non-lawyers--who wish to help raise the level of informed consent present in landlord/tenant mediations.

A. Legal Reform

Ideally, mediators would not have to serve the function of informing the parties of their legal rights. Given the tension between conveying legal advice and maintaining neutrality, it would better serve the principles of mediation if the parties came to the mediation already fully informed. In the best of all possible worlds, all parties would have the benefit of legal counsel.²²³ Unfortunately, this is neither financially feasible nor politically realistic in our present society. Nevertheless, there are still significant measures, which are both relatively inexpensive and eminently practical, that state governments can take to ensure that poor, disadvantaged parties, who cannot afford counsel, are informed of their legal rights. For example, state courts could be required by law to make a "pro se summary process packet" available to all landlords when they pick up and/or file the summons and complaint and to

223. Unlike many mediators, we are of the firm belief that access to counsel for all parties would be a benefit to both mediation and the court system generally.

have the same packet sent to tenants by the court at the time they are served.²²⁴ To be effective, such a packet would have to be written in plain language and clearly spell out all of the relevant defenses and counterclaims for tenants, as well as how eviction proceedings work. Such a proposal would take the burden of acquiring legal information off of those who realistically cannot afford it and place it on those who are in a much better position to make sure that the relevant information gets to those who need it most.

While such a proposal would be financially feasible, the political reality is that there is little to no chance that such drastic legal reform will occur. Hence, we offer some more practical suggestions as well.

B. Tenant Counseling

HCAC's combination of mediation services and "tenant counseling" appears to be an effective way to give tenants an opportunity to inform themselves prior to the mediation. To maintain the neutrality of the mediation program, however, it is important to separate the two services as much as possible.

Mediation programs could take it upon themselves to set up such a service. To avoid the appearance of favoring one side over the other, programs that undertake such a project should be sure to offer services to both landlords and tenants who need them. There is little cost to making the same information available to parties on both sides; such a move may help preserve the perceived neutrality of the mediation program. In any event, the role of the mediator is to make sure that both parties are informed.

Providing free information for those parties involved in housing disputes would increase the visibility of mediation in the legal community while ensuring that the goals of mediation are met at the same time. Given the current percentage of parties that are completely uninformed of their rights before mediating and the difficulties of educating such parties while mediating, mediation programs should consider it part of their professional responsibility to inform the parties.

224. Alternatively, the rules could require that landlords include the packet when serving the tenant with the summons and complaint. While such a suggestion appears to go against the principles of our adversary system, it is clear that there is enough "market failure" here to justify such a measure. The adversary system, like mediation, cannot effectively achieve its goals if an entire class of parties are as grossly uninformed as the data suggests.

C. Change the Timing of the Mediation

Because most summary process mediations take place on the date of trial, tenants who have failed to file an answer have already waived all of their possible defenses and counterclaims. While there would be value to introducing the law to parties who have already forfeited their rights (i.e., it would allow parties to consider the law as one reference point in helping them decide what they think is fair), mediations would be much more empowering if parties were informed of their legal entitlements in time for them to assert them. Mediation programs should, therefore, strongly encourage parties to mediate prior to the date of the hearing.

Since it is the experience of most mediation programs that parties are reluctant to mediate prior to the hearing date, even when encouraged to do so,²²⁵ mediation programs should encourage the courts they work in to join them in urging the parties to consider mediating at an earlier date. Ideally, a court-sponsored, voluntary "settlement conference" would be suggested to the parties as an option and mediation services would be made available.

D. Bring Law Into the Mediation "Preemptively"

Mediators can fulfill their responsibility of informing the parties by providing parties with neutrally worded "information packets" which describe the relevant summary process law and explain some of the principles underlying the law. These information packets could be given to parties prior to mediating, alerting them to frequently raised issues and the laws surrounding them. Unlike other approaches which put the burden of thinking of the relevant legal issues on those who are least capable of doing so (i.e., the frequently uninformed parties),²²⁶ this more "directive" approach takes the burden of thinking of the relevant legal issues off of the frequently uninformed parties while staying somewhat "facilitative" by keeping the burden on the parties to raise the legal issues that matter to them most. To avoid charges of non-neutrality, the packets should be made available to both parties and their purpose should be clearly explained.

E. Have Mediators Explain the Law to the Parties

At the very least, parties should have the *opportunity* to get legal information that relates to their case. This should be done in a manner that makes the information as accessible as possible to the parties. Hence, it is preferable to have the mediator explain to the parties in simple, understandable language what the law

225. See Doran Interview, *supra* note 6; Interview with Gordon Shaw, Mediation Coordinator at Hampshire Community Action Commission (March 11, 1996).

226. For example, MWI's authoritative resource approach and HCAC's "facilitative" approach with regard to substantive law both put the burden on the parties to think of the relevant legal issues. If the party comes to the mediation uninformed, then there is little likelihood that she or he will know enough to even ask the right questions.

says rather than simply presenting the parties with the relevant statutes or regulations in all of their complexity. Parties are unlikely to understand the formal language of legal statutes and regulations and should not be expected to make sense of complications statutes and regulations on their own. Of course, this requires that mediators know the law well; however, so does the alternative method of relying on an authoritative resource, which requires mediators to know when, where, and how to look for the relevant law on point. To avoid situations where there is a direct conflict between one of the parties and the mediator over the meaning of the law, mediators can bring an "authoritative resource" with them to help settle or open up an honest dialogue about any potential disputes. Another alternative is to not only use an "authoritative resource," but also to explain to the parties what the relevant statutes and regulations mean. The pitfall to be avoided is placing the burden of deciphering the meaning of complex legal texts on those who are least likely to be able to do so.

VIII. CONCLUSION

In recent years, critics have attacked mediation for its failure to adequately address power imbalances between disputants. Critics charge that ignorant parties routinely agree to settlements which fail to acknowledge their substantive legal rights. At first glance, this argument appears particularly persuasive within the realm of landlord/tenant mediations as the law is both obscure and highly protective of tenants. While these observations carry some truth, the critics fail to recognize that in comparison to the real world alternatives, mediation's outcomes are often more advantageous to tenants. Contrary to critic's charges that mediators ignore the law in the name of neutrality and self-determination, many mediation approaches do incorporate the law, thus providing parties with the opportunity to make informed, autonomous decisions regarding their future. By effectively focusing parties on both their interests and rights, mediation can adequately protect the poor and disempowered parties, while still providing disputants with an opportunity to shape their own fate.