

# ***Moral Reasoning in Interactional Context: Strategic Uses of Care and Justice Arguments in Mediation Hearings\****

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**Angela Garcia, *University of Cincinnati***

Previous studies of moral reasoning have treated moral reasoning as a product of the individual. This article extends the study of moral reasoning by analyzing its use in strategic interaction. I analyze how participants in a naturally occurring situation of conflict use moral arguments strategically and negotiate over the types of arguments that are acceptable. Gilligan's Care and Justice modes of moral reasoning are identified in participants' justifications for positions taken in nine videotaped mediation hearings. I found that participants may use both modes of reasoning during the course of a hearing, and that the type of moral argument used is often a response to the actions of other participants. Strategic uses of moral arguments included shifting mode to challenge or support another's position, bridging a difference in mode between two disputants, and shifting mode to refocus the topic. Because of their institutional and interactional roles in the hearings, mediators play a major role in negotiations over mode of moral reasoning.

Previous research on moral reasoning has been primarily from psychological perspectives—specifically cognitive and psychoanalytic (Emde, Johnson, and Easterbrooks 1987). Such approaches treat moral reasoning as reflecting an individual's worldview or moral values. However, moral reasoning theorists also recognize the social and contextual aspects of moral reasoning. For example, Mead (1934) suggests that an ethical theory must be a social theory, because of the inherently social nature of the self. The creation of the self through a process of socialization in which the attitudes of the generalized other are internalized produces individuals who share society's values and make moral decisions by considering how others' interests are affected (Mead 1934). Kohlberg (e.g., 1981, 1976) also sees moral reasoning as the result of a social process, because experiences affect cognitive development. Thus moral education can raise one's level of moral maturity (e.g., Larabee 1993, p. 3; Kohlberg 1981). Gilligan (1988, 1982) taps the social aspects of moral reasoning even more directly by studying individuals' responses to real-life situations: "[V]ery few people face or solve moral conflicts in a vacuum. Rather, the person appears to function in an everyday, ongoing context of relationships" (Brown et al. 1989, p. 164).

However, in spite of the social nature of moral reasoning, research is generally based on individual-level data. Common research approaches include subjects' responses to hypothetical dilemmas (e.g., Smetana, Killen, and Turiel 1991; Kohlberg 1981, 1958; Gilligan and Attanucci 1988; Gilligan 1982), interviews (Lyons 1989; Gilligan 1982), and written responses to questionnaires (e.g., Hansen 1991; Richmond et al. 1990; Ford and Lowery 1986). Gilligan's methodology treats specific instances of moral reasoning as products of the individual (Gilligan 1993, p. 210).

In everyday life, moral arguments are produced not just as a reflection of an individual's belief system or moral values, but as a response to others' arguments in informal or institutional encounters (e.g., conversations, arguments, trials, hearings, therapy sessions, or meetings). People in interaction with others use arguments strategically to achieve goals (Goffman 1967). Interactions in which moral arguments are used can thus be seen as struggles over which moral framework will prevail (Cobb and Rifkin 1991). This provides a motivation for observing moral reasoning in one of its natural settings—actual situations of conflict—rather than as individuals construct or reconstruct it for researchers. The purpose of the current article is to expand the sense in which moral reasoning is considered a social phenomenon by investigating how participants use moral arguments in strategic interaction.

### **The Problem of Choice of Mode**

Gilligan (1982) argues that there are two moral personalities, one associated with Kohlberg's "justice" voice, the other with the "care" voice that she discovered (Larabee 1993, p. 7). These two voices reflect inner characteristics or differences between people that arise from experiences related to social structures of gender: for example, experiences with employment, family structure, child rearing, and societal expectations (Gilligan 1993, p. 209–210; Larabee 1993, p. 12; Gilligan 1982).

Given that both the Care and the Justice modes are used, how can an individual's decision to use one mode or the other be explained? Although moral reasoning preferences are produced by a process of socialization, they are lodged in the individual. Thus mode choice depends on individual personality characteristics (e.g., identity, self-definition) rather than situation or context (Gilligan and Attanucci 1988, p. 235).

Gilligan's initial study of the two modes of moral reasoning suggested a link to gender (1982). However, additional research (e.g., Gilligan and Attanucci 1988, p. 232; Ford and Lowery 1986; Lyons 1983) showed that most people use both modes, although each gender tends to emphasize one mode (Justice for men, Care for women).<sup>1</sup> Kohlberg, however, questions the claim that choice of mode is linked to gender. He argues that the type of moral dilemma and the setting it oc-

curs within determine the preferred mode of reasoning (Smetana et al. 1991; Kohlberg 1984).

An alternative possibility is that at least some instances of mode choice are interactionally negotiated. This possibility can be addressed by examining how moral reasoning is done in naturally occurring conflictual encounters.<sup>2</sup> If the participants use both modes of reasoning, and use both modes to talk about the same issues, this would suggest that the choice of mode can be made independently of type of dilemma, setting, or gender. Individuals may bring a level of maturity, values, or mode preferences to the interaction, but for communication to occur they must reach an understanding with others. How is a moral voice collectively produced? When participants would use different modes in interaction with each other, how do they negotiate which mode will be used?

These questions will be addressed by analyzing participants' use of moral arguments in mediation hearings. I will show that participants in mediation hearings use the Care and Justice modes of moral reasoning strategically. They negotiate not only about the issues under dispute, but also about the types of arguments, reasons, and justifications that are to be used to resolve those differences. The mediators play a critical role in these negotiations. Although generally careful to maintain objectivity by not endorsing specific positions, they may influence the decisions reached by determining how these decisions will be made. Endorsing a disputant's mode of reasoning is not a neutral activity, because aligning with one by implication means not aligning with the other. Even if mediators use both modes during the course of a hearing, their support of one disputant's mode of reasoning on a specific issue in effect delegitimizes the other.

### **The Setting**

Mediation has been used to resolve conflicts in divorce and child custody cases (Saposnek 1983), civil disputes, juvenile cases, and criminal cases (Folstiner and Williams 1978). Rather than handing authority over to a third party, disputants in mediation retain that authority and negotiate an agreement with the help of the mediator (Merry and Silbey 1986). Mediation emphasizes cooperation and compromise (Worley and Schwebel 1985), and de-emphasizes the adversarial nature of disputing, which tends to be exacerbated in litigation (Girdner 1985). Mediation practitioners believe it reduces antagonism between disputants, gives them the opportunity to listen to each other's position, and promotes reconciliation (Roberts 1988; Dingwall 1986; Bottomley 1985; Folberg 1983). Cobb and Rifkin (1991) have shown that disputants in mediation hearings attempt to set a moral framework for the hearing, depicting themselves as good and their opponent as bad. Moral reasoning is critical to the process of dispute resolution in mediation, because it is through discussion and negotiation about positions that a solution is reached.

The setting I analyze is a mediation program sponsored by a California county. This program handles minor disputes such as landlord-tenant and neighborhood disputes, monetary disputes involving small sums of money, and noise and pet complaints.

I videotaped all hearings held during a six-month period in 1987, resulting in a collection of nine hearings.<sup>3</sup> The hearings varied from forty minutes to almost three hours in length. The collection consists of more than twenty hours of tape, and involves 43 participants (26 disputants and 17 mediators). Some mediators and one disputant appeared in more than one hearing. Audiotapes were transcribed by Gail Jefferson's transcription system (Atkinson and Heritage 1984).

The disputants (referred to as complainant and respondent) represent themselves. Hearings are chaired by one or two mediators. The mediators first solicit each disputant's story, then lead a discussion period about the issues. If no agreement is reached, the hearing is closed and mediators meet privately to arbitrate a solution. Mediation programs are not standardized, and much variety in organization of the sessions, role and number of mediators, philosophy of approach, and so on occur. Thus, results from this study should not be generalized to other mediation programs.

### Methods

All instances of the two modes of reasoning that Gilligan (1982) identified were located in the transcripts.<sup>4</sup> I conducted a narrative analysis of mediation participants' moral reasoning in the arguments, explanations, and accounts they use to justify positions taken. To the extent possible I analyzed the participants' utterances in the sequential context in which they are produced. However, in multiparty mediation hearings, talk not relevant to moral reasoning often intervenes between the statement of one party's position and another party's response. Because of this, a strict sequential analysis of transitions from one mode of reasoning to another is not always possible. Excerpts from a few hearings will be presented to illustrate this study's findings.

### Strategic Uses of Moral Arguments

Gilligan (1982) found that people reason using one of two "moral languages," each involving a different way of relating to the world, conceptualizing problems, and making decisions. The "Justice mode" is based on the application of rules, laws, and general principles. The concepts of justice, fairness, equality, and individual rights are central to this perspective. People who use the Justice mode are more likely to emphasize boundaries between people, and to define themselves as separate from others. This mode is characterized by a logical approach to reasoning (Gilligan 1982; Gilligan and Attanucci 1988). In the "Care

mode'' moral decisions are made by considering their effect on specific individuals in real-life contexts. The Care mode is based on taking responsibility for others, avoiding hurt, and maintaining relationships and connections with others (Gilligan 1982).<sup>5</sup>

The Care and the Justice modes are pervasive in these mediation hearings. The issue of mode choice is relevant when both modes of reasoning are used in an exchange. Why do some participants use both modes? How does the use of moral arguments by mediators and disputants differ? Disputants' goals include making moral claims, undermining an opposing disputant's position, and supporting one's own argument. Mediators' goals include persuading disputants to change their positions, ending an impasse, or refocusing the topic.

The remainder of this article shows how participants may use moral arguments to accomplish these goals. The first section (''Mediator Mode Shift to Refocus Talk'') shows how mediators may shift mode in order to end an impasse or refocus the topic. The section ''Mode Shift to Challenge or Coincide with a Position'' shows how mediators and disputants may shift modes in order to challenge a previous position or to present a position as consistent with another's. ''Mediators Bridge Mode Difference'' shows how mediators may work to bridge differences between disputants in mode of reasoning. When disputants use different modes of reasoning to discuss an issue, agreement on moral mode of reasoning must somehow be reached. Because of their roles in the hearing, mediators are often involved in such negotiations over mode of reasoning. The section ''Interactional Implications'' shows how mediators' strategic use of moral arguments can impact on the decisions reached.

### ***Mediator Mode Shift to Refocus Talk***

Mediators may shift from one mode of moral reasoning to another to influence what happens next in the hearing. One use of the mode-shifting technique is to end an impasse by refocusing the discussion onto other issues. A mode shift is effective for this purpose, because the two modes make different sets of issues relevant.

A hearing in which a divorced father (Stan) and his three children's stepfather (Mart) discuss recurring difficulties with visitation and transportation will illustrate this use of mode shifts. Two of the children live with Mart, and the eldest lives with Stan. Extensive discussion of the transportation issue focused on whether transportation responsibilities are divided equally between the two families. This Justice mode debate is transformed when a mediator introduces Care mode issues.

As the exchange begins Mediator A suggests that transportation duties are in fact fairly divided between the two families: ''The net effect is that Mart is delivering the children to you, you have their custody and do some things, and you

return the children to Mart . . . That sounds marvelous. Where is the drawback there?" Mart responds that because he returns the eldest daughter in a separate trip, his family actually does more of the transportation. Stan then replies, "You make two trips to Sandington, and I make four trips to Andrews ville. That's the nutshell of the situation." This Justice mode argument itemizes what he sees as the inequality in the amount of transportation each family provides. Mediator A's response ("No, but two of [the trips] are under your custody, which don't count.") challenges Stan's claim with a Justice mode argument. Stan acknowledges this point, but then reiterates his disagreement with Mart's position (expressed earlier in the hearing) that Stan should do all of the transportation if he wants to visit the children ("Now Mart . . . seems to think that if I want [the children], I should pick them up. But, you know, that doesn't seem equitable to me.").

Up to this point only Justice mode arguments have been used. The participants disagree about who does more of the transportation, but agree that fair and equal distribution of transportation is the goal. Mediator B then redirects the discussion away from Justice mode issues and introduces a Care mode argument. She acknowledges Stan's claim that Mart's proposal "doesn't seem equitable," and then suggests that it doesn't matter if the transportation duties are not divided equally: "But in the interest of fatherhood, motherhood, and everything else, can you live with this sort of arrangement?" This utterance references Care mode issues that both disputants raised earlier in the hearing as they talked about their concern for and paternal connection with the children. For example, Stan had said "As long as I get to see my kids, I'm happy."

Mart initially aligns with Mediator B's position, but immediately introduces a complaint about Stan. He claims he and his wife would be willing to be more flexible about transportation and to do more of the transportation themselves if "there's some communication, . . . if we don't have to worry, that when we talk to Stan on the phone he's going to start yelling and screaming." This complaint, however, is formulated in the Care mode. Mart's focus on communication, Stan's abusive behavior, and the possibility of flexible visitation arrangements references the following Care mode issues: maintaining relationships, affecting other people by our actions, avoiding hurt, and using the specifics of the situation and individual personalities to make decisions. Thus Mediator B's mode change was effective in moving the discussion to new issues and moving the mediation process forward.

In sum, one strategic use of mode shifts is to control the topic of talk and the progress of the hearing. Since facilitating the hearing is a responsibility of the mediators, this is accomplished by mediators, rather than by disputants.

***Mode Shift to Challenge or Coincide with a Position***

Mediators and disputants may use mode shifts strategically to challenge others. In these data such challenges are directed not only at the position taken, but also at the type of argument being made and its foundational issues.

This use of mode change is illustrated with excerpts from a dispute between two brothers over a house they inherited from their mother. The complainant (Bob) wants to buy his brother Victor's half of the house, while Victor wants the house sold to an outside buyer. Bob wants his brother to accept a cash down payment, and let him owe the rest. Mediator A responds to this position with a Care mode argument: "He's not going to want to be tied up with any kind of a note from you. He's going to want his cash, because he's got his own things he has to do. He needs the money." This Care mode argument cites Victor's needs as a reason for rejecting the proposal, rather than its fairness.

A few minutes later Bob reiterates that his employment history will prevent him from getting a mortgage. Mediator A responds "I don't see any way that you're in a position, reasonably, to buy him out." Bob argues that they could take out a mortgage on the commonly owned house and use the proceeds to buy the brother his own house. Bob could then keep the house they inherited ("If we could cooperate as brothers, I could put him into a house of his own. We could take out a first on this place, and he could, you know, I could set it up, where we could buy . . ."). Bob has set up a Care argument: If he and his brother could cooperate, the needs of both would be met. The mediator challenges this argument ("What's this *we* business?") by pointing out that an unfair arrangement (they'd be using Victor's income to qualify for the loan) underlies the proposal. He thus uses the Justice mode to delegitimize Bob's Care mode argument.

Bob's response to this challenge illustrates another strategic use of mode shifts: to argue that one's position is consistent with the other's position. Bob abandons the Care mode issues he used earlier, and instead argues within the Justice mode: "He has a buddy . . . who wanted a hundred and eighty thousand out of the house. And Victor said sure, and I said sure. We were going to try and pull a hundred and eighty thousand out of that place. . . . I find it a little ironic that he'd be willing to encumber the homestead for a hundred and eighty thousand, to his buddy, and wouldn't be willing to carry *me* for forty!" Two Justice mode arguments are embedded in this utterance. First, Bob argues that, as a brother, he has more rights to consideration than the "buddy" does as only a friend. This weighing of the relative rights and claims of people depending on type of relationship is consistent with the logic of the Justice mode. Second, he argues that it is not fair for Victor to agree to take a mortgage for one and not the other. Unequal treatment violates the concern for fairness and equality. Bob has thus

matched the mediator's Justice mode in his attempt to persuade the mediator that his proposal is acceptable.

These excerpts show participants behaving opportunistically about the types of arguments they use to justify their positions. When he challenged Bob's position, the mediator emphasized the differences between their positions by framing the challenge in the mode of reasoning *not* used in Bob's position statement. Bob, on the other hand, wanted to show that his position met the mediator's conditions. Hence, he switched from the Care mode to the Justice mode. By matching the mediator's mode of reasoning, he emphasized similarities in their perspectives.

### ***Mediators Bridge Mode Difference***

Thus far I have shown how moral reasoning is done in exchanges between disputants and mediators, and how each may change the types of moral arguments they use in response to the other's actions. In this section I analyze exchanges in which opposing disputants use different modes. When this occurs, mediators may have to get both participants using the same mode before progress can be made toward resolution.

Excerpts from a dispute between a divorced couple over visitation arrangements for their three children will illustrate this process. The ex-spouses initially take opposing positions on this issue, and use different types of moral arguments to justify their positions. The respondent (the ex-wife) uses Care mode arguments to justify her position that the children spend too much time at the complainant's (the ex-husband's) house: "It's just seeming real disruptive to my schedule, to their schedule. I'm just feeling that more than half the time over there is disruptive as far as continuity and our scheduling . . . I just see a real disharmony in them being there half time. And, I'm fully willing to give him any time after school, till five-thirty. I'd like them home at dinner." The frequent and (to her) lengthy visits at her ex-husband's house are disrupting family harmony and routine, making the children's lives inconsistent, and causing scheduling difficulties.

A few minutes later the respondent elaborates her position, arguing that the constant shuttling back and forth between the two households deprives her children of the "security" that a nuclear family can provide. They are visiting their father "too much," and shuttling back and forth is "disruptive." She "wonders about the consistency." "Not coming home on the bus" makes them different from other children and deprives them of social contacts with their peers. They may not be getting "their homework done at a certain time," and they don't get a chance to "play with their friends." Consistency is "real important."

The respondent's justifications express Care mode concerns such as the effect of the visits on her children, how they can best be cared for, and how their needs can be met. She expresses concern about maintaining relationships—both the family unit and the children's relationships with their friends. The structure of



the children's lives and the emotional environment of the family are also important. Her arguments are based on her understanding of her children as individuals.

The ex-husband takes the opposite position, that the children should spend more time with him:

"I do not agree with three days a week. Thursday, Friday, Saturday? By my calculations, Thursday to Friday is 24 hours, Friday to Saturday is 48. I've had them 50 hours in a week. There are 168 hours in a week—twenty-four times seven. That's less than thirty percent of the time. And the bottom line here is what constitutes reasonable, as outlined in this petition. And I believe, for me to see my twins, less than thirty percent of the time, is very reasonable. I'm not asking for you know, Saturday and Sunday, I'm asking them for like the afternoon on Saturday and, and Thursday and Friday evenings and that's it."

The ex-husband assumes that the children's time should be evenly divided between the parents. He counts days and hours, and calculates the percentage of time he has with the children, concluding that the situation is unfair because "that's less than 30 percent of the time." He then refers to a legal document specifying the divorce arrangement ("this petition") as justification for his position on what is "reasonable" visitation. His position that "less than thirty percent of the time is very reasonable," refers to the legal document and hence to formal justice and legitimate authority. Fairness and equality are referenced by his argument that his position is reasonable because he's only asking for Saturday (half the weekend) not both Saturday and Sunday. The complainant's arguments are based on justice and fairness, on following the "rules of the game," and on laws, rules, and legitimate authority—Gilligan's "Justice" mode.<sup>6</sup>

In a subsequent exchange the disputants reach an impasse over the visitation issue. The mediator bridges their difference in mode of reasoning by validating the Justice mode arguments used by the complainant. The respondent then follows the mediator's lead and begins using Justice mode arguments as well. As this exchange begins the respondent elaborates her earlier Care mode argument:

I don't think it's correct that they're [at their father's house] so much. I don't feel it's right . . . that I've got the base, the home, [the] family, and I feel that Thursday, Friday, and Saturday without them being consistently at home is too much. I feel that it's too much. Even though you don't get to see them, they're not at home, and they're at school, and they're on the road.

The complainant interrupts the respondent to challenge this position: "They're home seventy-five percent of the time." He reframes the issue in the Justice mode by ignoring the Care mode arguments the respondent introduced and replacing them with a new issue: a fair distribution of the children's time between the households.

The mediator intervenes in the incipient dispute by interrupting the complainant. She first acknowledges the respondent's opinion that her home is a bet-

ter environment for the children. ("That's your feeling, and you have every right to those.") But then she argues that the complainant also feels his home provides a good environment. ("That is not his feeling, and that's not how he sees his home base. . . . He sees it [as] very loving, very whole, very consistent, very disciplined.").

The mediator then refocuses the discussion from the respondent's Care issues to the complainant's Justice issues by stating: "He's a fifty percent parent and you're a fifty percent parent." The mediator thus aligns with the complainant's definition of fairness as equality (a Justice mode approach) rather than in terms of what's best for the children (a Care mode solution to the problem "what's fair").<sup>7</sup> The "fifty percent parent" concept refers to the fact (brought up earlier in the hearing) that the parents have joint *legal* custody. According to the divorce decree, they are "joint" parents, and hence have "equal" rights. With this utterance the mediator validates the complainant's Justice mode arguments, giving them preference over the respondent's Care mode arguments.<sup>8</sup>

The mediator's "fifty percent parents" formulation turns out to be a pivotal point for debate on this issue. After this utterance, Care mode arguments about visitation arrangements are put in the background, and the decision is ultimately made on the basis of Justice concerns. Prior to the mediator's intervention the respondent had used only Care mode arguments, but after it she produces only Justice mode arguments.

For example, several minutes later in the hearing the complainant proposes a solution to the problem: that the children visit him two Thursdays a month instead of four. As the mediator and respondent discuss this proposal, the mediator states that the complainant "is willing to give up two of those Thursdays." This formulation sets the stage for a discussion of the issue in terms of Justice concerns rather than Care concerns. The phrase "he is willing" implies that the complainant is making a concession, a bargaining move that may then make the respondent indebted, or expected (in the logic of the Justice mode) to reciprocate with a similar concession. When the mediator says the complainant is willing "to give up" two of those Thursdays, she implies that "those Thursdays" are "his," he has a right to them, which he is now "giving up." These Justice mode arguments are framed in terms of individual rights and property rights—in this case "ownership" of visitation days.

Finally, "two of those Thursdays" refers to two out of a typical four-Thursday month. The mediator emphasizes that the complainant is giving up two out of four, or half of the Thursdays. This references the equality and fairness theme of the Justice mode. Fairness, in this case, is defined in terms of a fifty-fifty split, because (as the mediator said earlier) they're both "fifty percent parents." In the logic of this mode the complainant's giving up fifty percent of the Thursdays would make things "fair."

The mediator then states that the complainant is willing to do this "to make it consistent for the children, and that would please you." This strategic use of Care mode arguments refers to a remark the complainant had made earlier when he proposed giving up two Thursdays. The complainant had offered to have the children only two Thursdays a month in order to "keep her happy." Although the mediator represents the complainant as trying to please the respondent, the proposal under consideration does not do what the respondent asked. She wanted the children to sleep over at her ex-husband's house only one night a week (Friday), because more than one day away at a time was disruptive and bad for the children. Under the complainant's proposal, the children would still be spending too much time (48 hours in a row) away from home; they would just be doing it less often. Although the mediator is trying to "sell" the proposal by strategic references to the respondent's own Care mode arguments, the proposal is based on the logic of the Justice mode's fairness issues.

After an unusually long pause, the respondent gives in to this pressure from the mediator and accepts the proposal: "I'll do it just to meet him halfway." Although agreeing to the proposal, she expresses her reluctance and dissatisfaction. The respondent is now reasoning using the logic of the Justice mode: The complainant's concession of two Thursdays (from his demands) leads her to accept his proposal to meet him halfway. If each makes a concession, the exchange is "fair."

The complainant and the mediator then both attack the respondent. The mediator says, "He's meeting you even more than halfway," while the complainant says, "I am, like, starting to grudge this." The mediator validates his remark with "Yes! Right. Halfway would be that he keep the consistency and you keep the same thing." The mediator appears to be arguing that since the complainant's proposal provides more consistency for the children (regular Thursday visits instead of switching days each week), he is meeting the respondent "halfway." By also giving up two nights of visitation a month, he is meeting the respondent "more than half way."

The respondent then repeats her offer, apparently not understanding the thrust of the critiques of her position made by the other two: "No, I said I will do this, relinquish two Thursdays to meet you halfway." She emphasizes that *she* owns the Thursdays; by relinquishing two of them, she is meeting him halfway. The mediator counters with "But he's already been having them through Thursday," thus challenging the respondent's claim that she "owns" the Thursdays. The mediator thus applies a general principle (possession is nine-tenths of the law): Since the complainant has been having Thursdays, he "owns" Thursdays. The respondent then contradicts the mediator's claim that the complainant "owns" Thursdays: "It's only been since March when he's had them every Thursday." She disagrees with the mediator, but her disagreement is framed

within the Justice mode, not the Care mode. Again, they're arguing over rights—who "owns" the Thursdays, and therefore who has a right to "give them up." The respondent then renews her acceptance of the two-Thursdays-a-month proposal, but carefully phrases it to avoid the ownership issue she was just criticized for: "I'm willing to have them two Thursdays and let him have them two Thursdays."

An agreement on the visitation issue is reached within the next few minutes of the hearing. The discussion revolves around fairness issues—who has more time with the children; which parent is "relinquishing" days. The issue is argued in terms of who has a *right* to those days, a Justice concern. These Justice issues are the ones the complainant raised early in the hearing. The Care issues introduced by the respondent are not taken into account in the final negotiation process.

The visitation issue was thus negotiated within the framework of the Justice mode. If the Care mode had been used instead, debate would have centered around what visitation arrangements were best for the children, and a different decision might have been reached. The mediator's early legitimization of the Justice mode, and her continued use and support of it during the negotiations, affected how this issue was resolved. By siding with the complainant's Justice mode, the mediator effectively sided with his position.

### ***Interactional Implications***

As shown above, participants in these hearings negotiate not only over the issues, but also over the types of moral arguments used to evaluate claims. Mediators' major role in this process provides them with indirect influence over the decisions reached in the hearing. In a dispute over repairs to a vehicle, the participants negotiate over what the complainant ("Jim") should pay for those repairs. Should this payment be determined by the extent to which the repair shop fulfilled their contract (Justice mode)? Or should it be determined by how the faulty repair work could have affected Jim and his family (Care mode)?

Jim uses Care mode arguments to justify his position that he should not have to pay for labor costs. He argues that "somebody forgot to do a lot of things" when his mobile home was repaired. The dealership should be responsible for this because "if I didn't even look under the hood, I wouldn't have noticed it. And if I didn't pick it up, my wife surely wouldn't have noticed it. . . . Who knows how long I could have driven with this hose like that!" If he had not checked the vehicle himself, the engine could have blown up because of an improperly installed hose, thus putting him and his wife at risk. This is a Care argument, because it is formulated not in legalistic terms (e.g., conditions of liability; the repair contract), but in terms of how specific individuals would have been affected. He criticizes the dealership for not acting to care for himself and

his family, for not avoiding hurting them, in short, for a failure of responsibility (Gilligan 1982).

Mediator B refocuses the conversation from the hose to the brakes: "Now I'm asking you about the brakes. You weren't charged for the radiator hose." Mediator B argues that because Jim wasn't charged for the hose, he has no right to complain about how it was installed. Claims based on risks to himself and his family are dismissed as irrelevant, and a general principle (if you didn't pay for it, you have no right to compensation) is applied instead. Mediator B thus discounts Jim's Care mode arguments, and reframes the debate in Justice mode terms.

Jim then challenges Mediator B's argument, in an attempt to return the debate to the Care mode: "But I'm saying, what could have happened if it wasn't replaced?" Mediator B rejects this move, interrupting Jim with "Let's deal with what *did* happen." Mediator B thus argues that since no accident actually occurred, risk of an accident is not accepted as valid reason for a claim against the repair shop. This is a Justice mode argument because Mediator B applies a general principle (hypothetical events not acceptable as justification) instead of allowing discussion about particular circumstances and how specific people might have been affected. The risk the repair shop exposed Jim's family to is no longer an issue that can be considered in the negotiation. Thus, without taking a position on the substantive issue under dispute—whether Jim should pay for the labor—Mediator B has effectively undercut his position on this issue by refusing to accept the types of arguments he's making, that is, Care arguments.

The mediators in this hearing framed the debate in terms of rules, procedures, and general principles rather than in terms of specific individuals and circumstances, relationships, responsibility, and avoiding hurt. They thus enforce an ethic of rights and delegitimize Jim's attempts to introduce an ethic of care. Although the requirement of mediator objectivity and neutrality generally prevents mediators from taking positions on issues, they are able to influence these decisions by determining what types of arguments, justifications, evidence, and so on, will be allowed. By such strategic uses of moral arguments they impact the types of decisions that can be reached in the hearing.

### Conclusion

This article has shown how moral arguments may be used strategically in mediation hearings. I found that participants use the Justice and Care mode orientations identified by Gilligan (1982) to support their positions on issues under dispute. A switch from one mode to the other is often motivated by another participant's intervening action. Although both mediators and disputants used moral arguments strategically, mediators used them for a wider variety of purposes, because of their institutional and interactional roles in the hearing.

Mediators used shifts in mode of moral reasoning to change the topic from

one set of issues to another and to bridge differences in mode of reasoning between disputants. Both mediators and disputants used mode shifts strategically during negotiations on specific issues, to challenge the other's position or to present their position as consistent with the other's. Mediators' strategic use of moral reasoning enabled them to indirectly influence decisions reached in the hearings, by validating or delegitimizing disputants' arguments.

Prior explanations of mode choice relied on gender, setting, and dilemma type. Gilligan (1982) and Gilligan and Attanucci (1988) argued that since men and women are socialized differently in our sexually stratified society, women are more likely to use the Care mode, while men are more likely to use the Justice mode. However, judging from data from the mediation hearings studied above, men and women used arguments in both modes to support positions. For example, the respondent in the dispute between a divorced couple (discussed above) initially used Care mode arguments to justify her position on the visitation issue. After mediator intervention that supported the Justice mode, she switched to that mode and continued using it until a decision was reached. A gender-based explanation of mode choice is therefore problematic.

Kohlberg (1984, p. 350) argues that Gilligan's research failed to distinguish between different settings and types of dilemma, and that these factors, not gender, explain choice of mode. There may be some settings and types of dilemma that are more amenable to discussion in one mode or the other. However, these findings indicate that individual participants might use both modes of reasoning in the same hearing, thus suggesting that setting is, at least, not determinative of mode choice. In addition, participants could switch from one mode to another while discussing a single issue within that hearing, suggesting that dilemma type is also not determinative of mode choice. In the mediation sessions drawn on in this study use of the Justice mode is not limited to legalistic or financial disputes, and the Care mode is not limited to family or personal disputes. For example, in a hearing about back rent owed to a landlord (not shown), the Care mode is the most frequently used mode in the hearing, and in the dispute about repairs to a vehicle (discussed above), the complainant uses the Care mode more often than the Justice mode. In the divorced couple's dispute both modes of reasoning were applied to the same issue.

This study suggests a different way of thinking about the problem of mode choice. Shifts from one mode to another may be interactionally negotiated rather than a reflection of individuals' belief systems, personal preferences, or level of moral maturity. Decisions by the participants studied here about whether to use Care or Justice mode arguments were made in an interactional context, as the contenders reacted to the changing contingencies produced by others' actions and uses of moral arguments.

West and Zimmerman's (1987) analysis of how gender is conceptualized in

sociological research suggests that investigation should shift "from matters internal to the individual and [focus] on interactional, and, ultimately, institutional arenas" (p. 126), to allow us to see "gender as an emergent feature of social situations . . . [rather than] as a property of individuals" (p. 126). Similarly, studying moral reasoning as a product of interaction rather than as a property of individuals can also be profitable. Analyzing how people do moral reasoning in a naturally occurring interactional context, rather than in individuals' accounts, reveals a third social aspect of moral reasoning that has not been revealed by prior research approaches. Mead, Kohlberg, Gilligan, and others defined moral reasoning as social because the individual doing moral reasoning internalizes the values and perspective of society in order to make moral decisions. Gilligan added a second aspect of the social by studying real-life dilemmas, thus revealing a type of moral reasoning that specifically depended on such contexts. But the third social aspect of moral reasoning, the interactional level, has to date been understudied. The use of interactional data such as mediation hearings gives us some unique insights into moral reasoning that are not available from individual-level data.

I do not intend to claim from these data that there is no relationship between gender, setting, or dilemma type and type of moral argument used. What I have attempted to show is that the problem of mode choice is usefully conceived as an interactional problem, not just an individual decision. In order for a moral argument to be upheld in a hearing, it must be supported by the cooperation of others. If one's co-interactants do not accept the type of arguments one is using, attempts to establish this mode as the "mode of use" will be unsuccessful.

Further research should explore moral reasoning in different settings rather than in different categories of individuals (e.g., male and female). If the production of moral reasoning is embedded in an interactional process, any individual differences that might exist will be best observed in that context.

#### ENDNOTES

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<sup>1</sup>Arendell's (1992) study of divorced men's use of a "rhetoric of rights" is consistent with Gilligan's position. However, Walker (1984, 1989) did not find a relationship between mode of reasoning and gender.

<sup>2</sup>Previous research on moral reasoning in face-to-face interaction (e.g., Nichols and Day 1982; Kurtines 1986; Berkowitz, Oser, and Althof 1987; Edwards 1987; Eisenberg 1987; Packer 1987; Dukerich et al. 1990) leaves the two moral orientations Gilligan identified unexamined.

<sup>3</sup>Steps were taken to minimize the intrusiveness of the videotaping. Participants' anonymity is protected by limiting access to the videotapes collected and by using pseudonyms in the transcripts. For further details on data collection, see Garcia (1991, 1989).

<sup>4</sup>My use of Gilligan's modes should not be seen as a positivist application of predetermined categories to a new data set, but as a parallel rediscovery of their use in this context. I show how participants use the modes in the course of performing actions in the hearings: supporting or challenging positions, facilitating the hearing, and negotiating ground rules for debate or evidential frameworks. Thus my analysis is ethnomethodological or interpretive rather than positivist (see, for example, Silverman 1993; Rosenau 1992).

<sup>5</sup>Some question whether these two modes are distinct tracks of moral development (Carse 1991; Kohlberg 1984, p. 343, 349). Gilligan herself acknowledges areas of intersection between the two modes (Bernstein and Gilligan 1990).

<sup>6</sup>Gilligan argues that both modes can be applied to any moral conflict (Gilligan 1988; Gilligan and Wiggins 1987). Thus, the respondent could have argued that because she has physical custody, the children should spend most of their time with her (Justice mode). The complainant, on the other hand, could have argued that his paternal influence was good for the children, and thus that the children should spend more time with him (Care mode).

<sup>7</sup>See Gilligan (1988) for a discussion of how fairness is differently conceived in the Justice and Care orientations.

<sup>8</sup>Note that the mediator maintains objectivity in terms of how it's traditionally defined in mediation (and within the Justice mode—see Carse 1991): She does not take sides on the specific issue of whether the children spend less time with the father. What she does is side with one mode of reasoning, by validating equality as the basis on which the decision should be made.

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