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Mandatory Family Mediation and the Settlement Mission: A Feminist Critique

Noel Semple

North American family law conflicts are very often brought to mediation, in which a neutral third party attempts to bring about a voluntary resolution of the spouses’ dispute. Family mediation has many enthusiastic supporters and has in many jurisdictions been made a mandatory precursor to traditional litigation. However, it has also given rise to a potent feminist critique, which identifies power imbalance and domestic violence as sources of exploitation and unjust mediated outcomes. This article summarizes the feminist critique of family mediation and assesses the efforts of contemporary mediation practice to respond to it. Even in the absence of formal family mediation, litigating spouses are likely to be subjected to substantial informal pressure to settle from judges and other family justice system workers. The article argues that the feminist critique might be more relevant to this “settlement mission” than it is to formal family mediation as it is practised today.

In family mediation, a neutral third party seeks to bring about the voluntary resolution of a dispute between separating spouses. Family mediation is experiencing a renaissance in the province of Ontario. The government has pledged to make it available on a subsidized basis in every court that hears divorce and related
matters in the province.\(^1\) Going further, the chief justice of Ontario recently called for mediation to be made a \textit{mandatory} precursor to court for most family law litigants.\(^2\)

The idea that divorcing or separating people should be required to attempt mediation before going to court is not a new one—it was first implemented in the United States in 1980.\(^3\) However, family law mediation also gave rise to a trenchant feminist critique, which gathered steam in the mid-1980s and became a central part of the mediation literature by the mid-1990s. This article asks: should the feminist critique temper official enthusiasm for family mediation?

The first part of this article describes family mediation and the benefits that it claims. The second part reviews the feminist critique of family mediation, which has at its core the analysis of power imbalance, domestic violence, and their consequences for family dispute resolution. The critique has considerable force, even if mediation is not usually the catastrophe for women that some anticipated. The third part of this article shows that the force of the feminist critique has been recognized by mediators and policy makers, who have fine-tuned mediation programs in response to it. Court-adjunct family law mediation circa 2011 has profited greatly from this feminist scrutiny.

The fourth part of this article will draw on the author’s empirical research to propose another dimension for the debate. Avoiding mediation does not, in practice, mean allowing family litigants speedy access to authoritative and neutral adjudication. Instead, it means exposing them to the “settlement mission”—the informal and unregulated pressure to settle that family justice system workers apply to women and men experiencing family breakdown. The settlement mission might actually be more vulnerable to the feminist critique than formalized family mediation is today. Ironically, since formal mandatory mediation would probably reduce the need for the settlement mission, the feminist critique might weigh in favour of mandatory mediation today.


Mandatory Mediation in Family Law

Mediation is a dispute resolution method involving a neutral third party who does not have the authority to bind the parties.\(^4\) Its defining characteristic is the absence of an imposed outcome—mediation produces a resolution only if the parties agree on the terms. Unlike adjudication or arbitration, mediation gives the parties themselves the authority to reach a solution. However, unlike traditional bipartite negotiation or newer innovations such as collaborative law, mediation interposes a third party between the disputants.\(^5\)

Mediation’s advocates typically argue that it resolves disputes in an efficient and effective manner, while offering the benefits of self-determination to the disputants.\(^6\) Empirical studies have found that between 50 percent and 90 percent of family disputes that enter mediation reach settlement.\(^7\) Its self-determinative character may lead to outcomes that are objectively superior to those that emerge from adjudication, perhaps because mediation allows for more creative solutions.\(^8\) It is said that while a judge or arbitrator must usually “divide the pie” between civil litigants, mediation generates opportunities to “expand the pie.”\(^9\) Some empirical evidence suggests that, when parties choose to mediate and then settle their dispute, the resolution is more likely to be mutually satisfactory and durable than one that has been adjudicated.\(^10\) Mediation’s promised benefits have been summarized as “the

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5. Wanda Wiegers and Michaela Keet, “Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities” (2008) 46 Osgoode Hall Law Journal 738. In collaborative family law (CFL), the parties are represented by settlement-oriented lawyers with special training, often assisted by other financial or mental health professionals. In the event that settlement does not occur and the matter goes to court, the CFL lawyers must withdraw from the case.


7. Joan B Kelly, “Family Mediation Research: Is There Empirical Support for the Field?” (2004) 22 Conflict Resolution Quarterly 3. However, in some of the studies that produced these high rates of settlement, the cases that were mediated were not necessarily reflective of the entire population of family law cases. Mediated cases might have a lower level of conflict on average than other cases, which could contribute to the higher rate of settlement.


four Cs." Conflict and cost are apparently reduced when mediation is used, and
the parties’ co-operation and control over their dispute are increased. Although
mediation was originally conceived as a voluntary option, most studies have
found that its benefits persist even when participation is mandatory for litigants. 12

Some of the advantages claimed for mediation are considered particularly attrac-
tive in the family law context. Because the parties are individuals rather than insti-
tutions or corporations, they usually have less ability to pay and cost savings are
important. The fact that the sums at stake are relatively small can make the cost
to the parties of a full-blown civil trial difficult to justify. As it has become more
and more normal for both parents to remain actively involved in their children’s
lives after separation, the need for co-operation and conflict-reduction between
them has come to the fore. 13 Mediation promises all of these fruits and has therefore
been welcomed in family law over the past thirty years. 14 In Toronto, for example,
one experienced family lawyer has estimated that 60 percent of divorcing couples
use some form of mediation. 15

Many policy makers and practitioners became enthusiastic about family
mediation in the late 1970s and early 1980s, but litigants did not voluntarily partici-
pate in large numbers. 16 Some jurisdictions therefore chose to make family
mediation mandatory. Connecticut and Massachusetts did so first in 1980, and
California followed in 1981. 17 By 1989, some 4,500 different American jurisdic-
tions had mandated mediation for custody and access cases.

Mandatory mediation today comes in a wide variety of forms. In Newfoundland
and in some American jurisdictions, mediation is mandatory when and if the judge

and Divorce Mediation” in Lois A Weithorn, ed, Psychology and Child Custody Determinations: Knowl-
edge, Roles, and Expertise (Lincoln, NB: University of Nebraska Press, 1987) at 45.
14. Deborah Hensler notes that mediation flourished in family dispute resolution before it did so in
other types of civil litigation. While Hensler criticizes excessive reliance on mandatory
A1, quoting Toronto family lawyer Phillip Epstein.
16. Welsh, supra note 6 at 423.
17. Beck and Sales, supra note 3 at 7.
Quarterly 13 at 15. Procedural rules of this nature can differ from county to county, but twenty
different American states had at least one mandatory mediation jurisdiction by 1993. Elrod and
Dale, supra note 12 at 29.
orders the parties to participate. In others, such as Australia, the parties must mediate as a precondition to bringing an application. In Québec, the parties must attend a mediation information session in which the process is described. While most court-connected and mandatory mediation programs deal exclusively with parenting disputes, some also address financial issues between the separating partners. Some programs allow for the mediator to make recommendations to the court in the event that the parties do not voluntarily settle.

The Feminist Critique of Mediation

The feminist critique of family law mediation focuses on the nature of power imbalance and domestic violence within intimate relationships as well as the consequences of these phenomena for dispute resolution. Most of the scholarship enunciating the feminist critique appeared between 1984 and 1995, soon after family mediation started to become widespread. However, the central ideas have had significant intellectual repercussions since the mid-1990s. The term “feminist” is used to describe this critique, first, because it is especially (although not exclusively) attentive to family mediation’s consequences for women. Second, like other feminist family law scholarship, the critique critically scrutinizes claims of neutrality and privacy.

In summarizing this feminist critique of family mediation, this article will draw broadly on negotiation, mediation, and family law scholarship, which helps elucidate power imbalance and domestic violence in the context of relationship breakdown. There is a broad scholarly consensus about the reality of these phenomena. However, different schools of thought emerge when mediation is

21. Code of Civil Procedure (Quebec), Title IV, Chapter I, section 1, para 5: “Pre-hearing mediation” at s 814.3 and 814.6. As in most jurisdictions with mandatory mediation, exemptions from the requirement are available (s 814.10). See the discussion later in this article regarding “screening out” inappropriate candidates from family mediation.
23. Isolina Ricci, “Court-Based Mandatory Mediation,” in Folberg, Milne, and Salem, supra note 6, 397 at 407.
25. Much of this work was published after 1995. It is relevant to the themes of this article but is not part of the feminist critique of family mediation per se. This is because the post-1995 scholarship does not significantly add to the argument that the use of mediation for family law disputes should be curtailed or ended.
compared to adjudication and bipartite negotiation in terms of its ability to respond to them and to protect the interests of vulnerable parties. Some champion adjudication over mediation, some argue for representative negotiation over mediation, and a third group suggests that mediation may actually be better or no worse than its rivals as a way to respond to the experience of women in intimate relationships.

**Power Imbalance**

The critique begins by observing that many conjugal heterosexual relationships are characterized by a power imbalance in favour of the male party. Power is a complex phenomenon that pervades all human relationships, including intimate relationships between men and women.\(^\text{26}\) Within a negotiation or mediation, power can be defined simply as the ability to bring about desired outcomes.\(^\text{27}\) In a typical family law dispute, some of the desired outcomes are financial—paying less or receiving more money. However, most family law disputes also include parenting issues, with each party seeking more parenting time or parental decision-making authority.\(^\text{28}\) Carol Smart has observed that children and parenting are inevitably “a nexus of power within family relations,” even if this fact sits uncomfortably with our desire to think of parenting exclusively in terms of affection and nurturing.\(^\text{29}\)

The simple definition of power as the “ability to obtain something” requires elaboration if it is to be a helpful guide to what actually happens when ex-spouses participate in mediation. Within mediation and negotiation studies, power is said to be relational and contextual—it describes an interaction between people and depends on the circumstances in which that interaction takes place.\(^\text{30}\) The relative power of the parties may fluctuate during a mediation, depending on which issue is being discussed and the course of the interaction.\(^\text{31}\) Empowerment, which is the ability to obtain something, has been distinguished from the sense of entitlement, which is the belief that one has a moral right to it.\(^\text{32}\) The power to obtain something

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29. Smart, *supra* note 26 at 1.


32. *Ibid* at 50.
in a negotiation is of little use if one does not feel that one is entitled to it and therefore does not ask for it.

If power is the ability to bring about desired outcomes, what factors give a person power in a family mediation? The original feminist critique traced power to resources. The leading authors of the 1980s distinguished between “tangible resources” (property and, in some formulations, education) and “intangible resources,” which was an umbrella term for anything other than property. Subsequent scholarship suggests that intangible resources may actually be just as important as tangible resources, or even more so, in determining a party’s ability to achieve his or her goals in a mediation.

Desmond Ellis and Laurie Wight, for example, conducted a three-year longitudinal study comparing mediation with lawyer negotiation as family dispute resolution techniques. They measured the parties’ tangible resources and the history of violence as well as the substantive outcomes. The intriguing finding was that neither relative poverty in tangible resources nor having suffered domestic violence made a party less likely to achieve her goals in mediation. The authors responded by developing a theory of interpersonal power in which resource possession was only one factor, complemented by four others: “potential power, use of resources, actual power, and convergence on outcomes.”

Other scholars have proposed alternative enumerations and categorizations of the sources of power in negotiation or mediation. Robert Mnookin and Lewis Kornhauser proposed a five-factor bargaining model to explain why one spouse might have a greater ability than the other to obtain favourable outcomes. Three of their contributors to power—risk tolerance, ability to withstand transaction costs, and willingness to bluff—have especially clear potential to lead to imbalance and injustice. Mnookin argues that disparities in bargaining power might justify limits on the general right of divorcing parties to resolve their own affairs without authoritative third-party intervention.
Another theory of power in negotiations was suggested by Ilan Gewurz. Gewurz reviewed the literature’s “numerous laundry lists” of negotiating power factors and formulated his own with a view to helping mediators respond appropriately. At the top level of Gewurz’s classification scheme is a distinction between (1) “dispute-specific power dynamics” and (2) “the relationship context.” While these terms are not explicitly defined, numerous examples and sub-types of each are provided. The “relationship context” group includes sources of power that would both operate during the life of an intimate relationship and persist into the negotiation of its dissolution. For example, patterns of deference or gender roles that create power imbalance in a divorce mediation would be familiar to the parties from the experience of their marriage. A wife who has never had any role in financial decision making during her marriage is likely to be disempowered by this aspect of the relationship context when negotiating the financial aspects of a divorce with her husband. To exemplify this type of power imbalance, Gewurz describes a scenario in which a husband has been the breadwinner and decision maker in the marriage and is also more educated and confident.

By contrast, Gewurz’s “dispute-specific” group of power factors includes phenomena that might only become concrete after divorce negotiations begin. Subdivided into “procedural” and “substantive” groups, it includes items such as eloquence, negotiating skills, single-mindedness, and “coercive and reward power.” Gewurz’s effort to propose specific mediator interventions to respond to specific forms of power imbalance will be reviewed later in this article.

The feminist critique suggests that the male party will usually have more power than the female party after the dissolution of the average heterosexual intimate relationship. The first source of male power is tangible resource imbalances. On average, men earn higher incomes and possess more property than women, making them wealthier at the time of the relationship dissolution. Wealth creates power because the poorer party in a mediation may be more willing to settle for less due to a greater fear of proceeding to trial or a greater immediate need for the financial settlement. Empirical research with divorcing parties has found that people who are more impatient to settle often sacrifice financial

44. Gewurz, supra note 27.
45. Ibid at 146.
46. Ibid at 156-7.
47. Ibid at 146.
entitlements in order to do so.\textsuperscript{50} Many women entitled to child or spousal support from male ex-partners are in exactly this position.\textsuperscript{51} Victims of abuse may also have an intense need to put the relationship behind them as quickly as possible.

Beyond dollars and cents, intangible resource imbalances may also assist men in divorce mediation and negotiation, according to the feminist critique.\textsuperscript{52} Status, dominance, self-esteem, and reward expectation are among the ‘resources’ that men are more likely than women to bring into family mediation.\textsuperscript{53} Conversely, women may be more likely to arrive with psychological impediments such as depression, fear of achievement, and guilt arising from the end of the relationship.\textsuperscript{54} Martha Shaffer suggests that mothers may have more difficulty than fathers do in distinguishing their own interests from those of their children.\textsuperscript{55} Resources and impediments of this nature contribute to disparities in “persuasive strength.”\textsuperscript{56} Desmond Ellis and Noreen Stuckless define this term as “power in use” or the “motivation and ability to use these resources to bring about a desired convergence on outcomes.”\textsuperscript{57} In short, the will to win, or lack thereof, is likely to play a role in power imbalances.

Experimental psychology studies have found that, when a quantifiable resource is being divided through negotiation, the average female subject will ask for, expect, and receive a slightly smaller share than will the average male subject.\textsuperscript{58} It has also been proposed that women tend to have more “expressive,” rather than

\textsuperscript{50} Howard S Erlanger, Elizabeth Chambliss, and Marygold S Melli, “Participation and Flexibility in Informal Process: Cautions from the Divorce Context” (1987) 21 Law and Society Review 585 at 597. In their interviews with divorce litigants, the authors also found that a “number of women report that they accepted poor settlement terms because their husbands were threatening custody battles.”

\textsuperscript{51} See, for example, Mnookin, supra note 41 at 1029-30.

\textsuperscript{52} Bryan, supra note 49 at 457; Nancy Ilman Meyers, “Power (Im)Balance and the Failure of Impartiality in Attorney-Mediated Divorce” (1996) 27 University of Toledo Law Review 853 at 864-5.

\textsuperscript{53} Cheryl Regehr suggests that men and women bring different expectations to the bargaining table and that this difference operates to the detriment of women. Cheryl Regehr, “The Use of Empowerment in Child Custody Mediation: A Feminist Critique” (1994) 11 Mediation Quarterly 361 at 364. For accounts of how risk aversion and other attitudes towards negotiation can affect divorce outcomes, see Kirsten Sandberg, “Best Interests and Justice” in Carol Smart and Selma Sevenhuijsen, eds, Child Custody and the Politics of Gender (New York: Routledge, 1989) 100 at 105; Mnookin and Kornhauser, supra note 41.


\textsuperscript{55} Martha Shaffer, “Divorce Mediation: A Feminist Perspective” (1988) 46 University of Toronto Faculty of Law Review 162 at 181.

\textsuperscript{56} Desmond Ellis and Noreen Stuckless, Mediating and Negotiating Marital Conflicts (Toronto: Sage, 1996) at 5.

\textsuperscript{57} Ibid.

\textsuperscript{58} Catherine Eckel, Angela CM de Oliveira, and Philip J Grossman, “Gender and Negotiation in the Small: Are Women (Perceived to Be) More Cooperative Than Men?” (2008) 24 Negotiation Journal 429 at 441. Deborah M Kolb, “Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years” (2009) 25 Negotiation Journal 515 at 520, observes that the gender disparity in negotiated outcomes is most pronounced when the parties are negotiating over a single financial issue. In the family context, this could occur (for example) in a case with no parenting issues.
“instrumental,” traits and that they are more likely than men are to see themselves as “interdependent” rather than “independent.” However, empirical evidence for these propositions, and for their effects on negotiated or mediated outcomes, is inconsistent. Much of the recent scholarship about gender and negotiation focuses on organizations and workplaces, and there is a dearth of recent empirical studies testing these theories in the family law context.

**Domestic Violence**

Violence is a feature of 50-80 percent of the conjugal relationships that dissolve before death and of 50-60 percent of those relationships that come to mediation. Women are much more likely than men to be victims of the more severe forms of domestic violence. One estimate is that almost one-third of women are subjected to physical assault at the hands of an intimate partner at some point during their lives. Restraining and protection orders become important issues in the numerous cases that involve domestic violence, in addition to money and parenting. However, violence can severely impede the victim’s ability to assert her rights and interests against the perpetrator.

Like power, domestic violence has also undergone a period of elaboration and categorization inspired by the feminist critique of family mediation. Many such

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60. Ibid at 291.

61. See, for example, Kolb, supra note 58; Catherine H Tinsley et al, “Women at the Bargaining Table: Pitfalls and Prospects” (2009) 25 Negotiation Journal 233.


64. Wiegers and Keet, supra note 5 at 736-7; Joan B Kelly and Michael P Johnson, “Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 Family Court Review 476 at 482.


efforts categorize violence on the basis of the aggressor’s motivations, which can include coercion, self-defence, or mental illness. Not all violence is equal, and some family violence may have relatively little effect on negotiating power. The effect of a single violent act on a party’s ability to negotiate depends substantially on the relationship context. However, the literature has established clearly that the species of domestic violence identified as “coercive controlling violence” or “patriarchal terrorism” can produce or exacerbate power imbalance. Some such relationships include a “culture of violence” in which systematic abuse leads to the total domination of the abuser over the victim. It can also be especially difficult for the victim to assert her rights and interests if doing so during the relationship was a trigger for violent retaliation.

What are the consequences of domestic violence for family mediation? Like other dispute resolution processes without an authoritative decision maker, mediation may also allow criminal violence to go unpunished. The reality of the abuse may become merely a fact or claim to be traded against others within the negotiation. Mediation in a custody or access case is typically “future-oriented,” focusing primarily or exclusively on parenting arrangements going forward. Violence may thus be treated as a page in the parties’ history, and this is a book that they are encouraged to close. Mediators may also be too quick to see domestic violence as a manifestation of conflict, rather than as a manifestation of control and domination. Martha Shaffer cites evidence that many 1980s family mediators even believed that the victims should bear some of the blame for the violence. Finally, if mediation occurs in an environment that is less secure than a courthouse, it may

70. Steegh and Dalton, supra note 68 at 456-7.
72. Beck and Sales, supra note 3 at 28.
77. Shaffer, supra note 55 at 183.
expose victims to a higher risk of actual physical harm from the perpetrators.\textsuperscript{78} The risk of violent assault is especially high in the period immediately following separation.\textsuperscript{79}

\textit{The Relative Merits of Mediation and Its Alternatives}

Concerns about power imbalance and domestic violence are foundational components of the feminist critique of family mediation, but there is less consensus about the merits of different dispute resolution options in responding to these realities. Some scholars are skeptical of both mediation and traditional bipartite negotiation. These authors point to the need for authoritative adjudication by a neutral third party, generally a judge. In the last four decades of the twentieth century, family law reform has given women substantial new entitlements and protections.\textsuperscript{80} A court (or perhaps an authoritative arbitrator bound by law) is required in principle to apply the law. Conversely, mediated and negotiated resolutions need not necessarily reflect what the law would provide or be objectively fair.\textsuperscript{81} They require only assent from both parties, however reluctant or disempowered one of the parties may be.

Both one-on-one negotiation and mediation can be seen as forms of “privatization” of the divorce process, which have the negative effect of “removing it from the influence and interference of both social and legal scrutiny.”\textsuperscript{82} Susan Boyd suggests that these techniques create a private space in which men’s resource advantages can be used to maximum effect.\textsuperscript{83} In a similar vein, Penelope Bryan argues that informal

\begin{itemize}
\item \textsuperscript{78} Jessica Pearson, \textit{Divorce Mediation and Domestic Violence} (Rockville, MD: National Criminal Justice Reference Service (NCJRS), 1997), online: NCJRS <http://www.ncjrs.gov/pdffiles1/nij/grants/164658.pdf>; Pearson, supra note 62; Astor, supra note 73 at 179.
\item \textsuperscript{79} Beck and Sales, supra note 3 at 30.
\item \textsuperscript{80} Laurie Woods, “Mediation: A Backlash to Women’s Progress on Family Law Issues” (1985) 19 Clearinghouse Review 431.
\item \textsuperscript{81} Galanter and Cahill, supra note 8 at 1364. Whether the “objectively fair” outcome is that which reflects as much as possible the one that a court would provide is a matter of debate. See, for example, Craig A McEwen, Nancy H Rogers, and Richard J Maiman, “Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation” (1995) 79 Minnesota Law Review 1317 at 1327; Carrie Menkel-Meadow, “Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)” (1995) 83 Georgetown Law Journal 2663.
\end{itemize}
settlement systems de-emphasize “law’s ability to constrain power abuses and ensures that pre-existing power disparities, rather than law, will dictate divorce agreement’s terms.”84 In practical terms, removing a dispute from the litigation process may make it much more difficult to obtain full disclosure of the wealthier party’s assets and to prevent their dissipation.85 If private resolutions are less frequently subject to later challenge by the parties than are adjudicated ones, this discrepancy might be explained not by greater satisfaction but, rather, by the fact that their confidential and unrecorded nature gives exploited parties no documentary basis for challenging them.86

The feminist argument for adjudication in family law also highlights the issue of mediator bias.87 The experimental psychology literature has found that gender stereotypes—expectations of differential behaviour from men and women in negotiating contexts—are much stronger than the actual differences in behaviour.88 Although there is little evidence specific to the family mediation context, it is plausible that mediators also hold gender stereotypes. N. Zoe Hilton has suggested that a family mediator might expect the woman to be more conciliatory and therefore strategically focus efforts on obtaining concessions from her in order to maximize the prospects for settlement.89 A stereotypical mediator expectation that a woman will prioritize parenting could impede her ability to obtain desired financial outcomes, such as ownership of a business in which both spouses participated before the relationship dissolved (conversely, the same mediator gender stereotype could favour the woman over the man in a parenting dispute).

Of course, any third party involved in a family law case, including a judge, may be biased or hold gender stereotypes. However, Tina Grillo and Nancy Illman Meyers argue that adjudication provides procedural safeguards against judicial bias, such as cross-examination and appeal.90 Mediation and negotiation procedures are not evaluated against the requirements of procedural fairness.91 A mediator, unlike a judge, enters a “risky relationship of informality and apparent intimacy with the parties,” which can foster bias in decision making.92 Making mediation mandatory deprives the parties of choice regarding whether to enter

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84. Bryan, supra note 49 at 522.
85. Woods, supra note 80 at 435; Hilton, supra note 75 at 34.
86. Regehr, supra note 53 at 363.
89. Hilton, supra note 73 at 36.
92. Grillo, supra note 54 at 1589.
this relationship and may exacerbate the risks posed by power imbalance and domestic violence.  

Critics of private settlement have called attention to adjudication’s public benefits, such as creating precedents and moving the law forward. Litigation has played a key part in many family law reform victories for women, either by developing the law in women’s interests or by acting as a catalyst for legislative reform. Going forward, negotiated or mediated settlements are unlikely to serve either of these law reform functions. Ruth Phegan observes that, unlike mediation, the adversarial system has at least the potential to bring “formal attention . . . to gender, race, class and other discriminatory bases which determine the family.”

These arguments for public and formal dispute resolution tend to favour adjudication over either mediation or bipartite negotiation. However, in comparing the latter two options, some feminist critics suggest that mediation is actually worse for women than bipartite negotiation. Across Canada, approximately 40 percent of family litigants have the benefit of legal counsel, and the rate of representation is higher in many other jurisdictions. A spouse represented by a lawyer would

93. Ibid at 1596.
95. An example of the former phenomenon is Moge v Moge, (1992) 3 SCR 813, 43 RFL (3d) 345, which introduced the “compensatory” principle to the law of spousal support and led to more generous awards. See Carol Rogerson, “Spousal Support after Moge” (1996) 14 Canadian Family Law Quarterly 281.
97. See Menkel-Meadow, supra note 81 at 2678-82, for a thoughtful elaboration of, and response to, this argument.
99. Writing in 1991, Elizabeth Pickett found that most feminist critics of family mediation had “concluded that in general the legal process provides a more appropriate and effective instrument for the protection of the rights of individual women than mediation.” Pickett, supra note 82 at 27.
generally have that lawyer conduct private negotiations on her behalf. However, mediation culture, and mediators themselves, may encourage or require the parties to attend without counsel.\footnote{101} (Mediators may oppose lawyer involvement because it reduces the scope for party self-determination\footnote{102} or because the presence of lawyers reduces the likelihood of agreement in mediation.)\footnote{103} Excluding her lawyer leaves the weaker party without a valuable ally and may thereby foster exploitation.\footnote{104} For this and other reasons, Penelope Bryan concludes that “mediation unobtrusively reduces [the law’s] threat to patriarchy by returning men to their former dominant position.”\footnote{105}

One family law-specific factor mentioned by many of mediation’s feminist critics pertains to parenting disputes.\footnote{106} Mediators are likely to favour joint custody as a substantive outcome.\footnote{107} Feminist child custody scholarship has identified a natural ideological harmony between joint custody and family mediation, which came of age contemporaneously.\footnote{108} Joint custody or equally shared parenting also constitute simple forms of equality between the spouses, which can be presented to the parties as a good compromise.

However, feminists argue that joint custody is often contrary to women’s interests, usually because (1) the alternative would be sole custody for the mother; and (2) a sole custody order would mean more freedom and child support income for the mother.\footnote{109} Bryan also suggests that joint custody “perpetuates the pre-existing patriarchal family structure by ... solidifying the ex-husband’s power over important child related decisions.”\footnote{110} Joint custody in cases of domestic violence has

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\begin{itemize}
\item \footnote{101} McEwen, Rogers, and Maiman, supra note 81 at 1331 and 1354-5. Martha Fineman sees the exclusion of lawyers from mediation as part of a “rhetorical war” between the “helping professions” and lawyers. Martha Fineman, “Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-Making” (1988) 101 Harvard Law Review 727 at 746.
\item \footnote{102} Welsh, supra note 6 at 425.
\item \footnote{103} Ballard et al, supra note 63 at 21.
\item \footnote{104} Boyd, supra note 82 at 199.
\item \footnote{105} Bryan, supra note 49 at 441-4 and 519-20.
\item \footnote{106} Bailey, supra note 75 at 76.
\item \footnote{108} Fineman, supra note 101 at 732. Fineman argues that the introduction of mandatory mediation was actually a procedural mask for a substantive legal change making joint custody the norm. Fineman also suggests that mediators have a pecuniary interest in joint custody, insofar as it requires an ongoing family-restructuring process, which leads to more demand for mediators’ services (at 730-1). See also Pickett, supra note 82 at 30-2 and 38; Phegan, supra note 98 at 388-96.
\item \footnote{109} Regehr, supra note 53 at 365-6.
\item \footnote{110} Bryan, supra note 49 at 494-5; Fineman, supra note 101 at 758; Smart, supra note 26.
\end{itemize}
come in for particular criticism, due to its potential to perpetuate abuse and control.  

Another group of scholars has echoed the core observations regarding power imbalance and domestic violence, without seeing them as reasons to prefer mediation’s alternatives.  

Janet Rifkin applauds mediation’s “emphasis on the female concerns of responsibility and justice” as an alternative to the “male” focus on individual rights. In a recent article in this journal about women mediator heroes in film, Jennifer Schulz considers mediation as a feminist alternative to patriarchal law. Cathleen Grey and Susan B. Merrick suggest that courtroom divorce litigation is disadvantageous to women because “the legal system is fundamentally familiar and analogous to how men are socialized and is unfamiliar and alien to how women are socialized.” They suggest that mediation might speak in “a female voice” in contrast to litigation. Mary Adkins claims that we should not push domestic violence victims into formal divorce litigation, given the well-known financial burdens and process trauma that it involves. Instead, she proposes an evaluative, caucus form of family mediation to be used in domestic violence cases.

Linda Girdner argues that family mediation can represent either negative “social control” or positive “empowerment” for vulnerable spouses, and she suggests how it can take the latter form. For example, when a party is disempowered by a lack of legal information—for example, regarding her legal entitlement to child and spousal support—the mediator can provide the information and the power along with it. Girdner takes it for granted that mediators usually favour joint custody or shared parenting, and she suggests that empowering mediators avoid imposing this view upon the parties.

Some in this camp cite empirical evidence shedding doubt on the hypothesis that mediation produces worse outcomes for women than litigation does. In a 1988 comparison of divorce mediation programs in four Canadian courts, C.J. Richardson found that support awards were actually 22 percent higher in mediated cases than

111. Pearson, supra note 62 at 320; Hart, supra note 66 at 325-6; Hilton, supra note 75 at 36-7.
116. Ibid at 246.
118. Ibid at 130.
119. Girdner, supra note 107 at 147-8.
120. Ibid at 149-50.
they were in non-mediated cases.\textsuperscript{121} In a more recent American study, Mary Marcus and her colleagues compared 200 divorce files that had been litigated against 200 that had been mediated. In the mediated cases, women received the same average amount of parenting time and spousal support as well as larger property and child support awards compared to those who litigated.\textsuperscript{122}

Carol Bohmer and Marilyn L. Ray reached more ambiguous conclusions in their comparison of mediated, lawyer-negotiated, and adjudicated divorces in New York State and Georgia.\textsuperscript{123} In New York State, women tended to receive less child support in mediated outcomes, although with regard to asset distribution they fared better than they did under adjudication.\textsuperscript{124} In Georgia, however, none of the measured outcomes for women were worse under mediation than they were under the alternatives.\textsuperscript{125} The authors tentatively attribute this difference to (1) the fact that Georgia had then (like Canada has today) firm child support guidelines; and (2) the fact that mediators in Georgia were more likely to have legal training.\textsuperscript{126} There is evidence that the primary feature distinguishing mediated post-separation parenting arrangements from adjudicated ones is not that they are more or less favourable to women but, rather, that they are more detailed.\textsuperscript{127}

It appears that women who mediate their family disputes are at least as satisfied with the experience as are those who resolve them in other ways.\textsuperscript{128} In one recent survey, Ohio family court litigants were asked to indicate their satisfaction with various types of court services on a scale of one to seven. Female respondents gave mediation a mean score of 5.82, which was markedly higher than female satisfaction with attorneys (2.69) and judges (4.07) and also slightly higher than the mean satisfaction rating given to mediation by male respondents (5.53).\textsuperscript{129} Although one early study found that mediation was more satisfactory to men than it was to women,\textsuperscript{130} the preponderance of evidence now suggests that either the opposite is true\textsuperscript{131} or that there is no gender difference.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{121} Richardson, supra note 107 at 32. However, there was also some more ambiguous evidence that compliance was lower in mediated cases. Mediation also produced more joint custody orders and fewer sole maternal custody orders.
\item \textsuperscript{122} Marcus et al, supra note 10 at 147.
\item \textsuperscript{123} Bohmer and Ray, supra note 107.
\item \textsuperscript{124} Ibid at 232.
\item \textsuperscript{125} Ibid at 244.
\item \textsuperscript{126} Ibid at 245.
\item \textsuperscript{127} Pearson, supra note 12 at 519; Richardson, supra note 107 at 37.
\item \textsuperscript{128} Adkins, supra note 117 at 116.
\item \textsuperscript{129} Randall W Leite and Kathleen Clark, “Participants’ Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services” (2007) 45 Family Court Review 260 at 265.
\item \textsuperscript{131} Galanter and Cahill, supra note 81 at 1357; Marcus et al, supra note 10 at 145.
\end{itemize}
The feminist literature on family mediation is characterized by substantial consensus, despite differences of opinion regarding the relative merits of dispute-resolution options. It is widely agreed that (1) intimate relationships often involve power imbalance and violence and that (2) these facts have an impact on dispute resolution at the time of intimate relationship dissolution. Feminists have taken the lead in articulating this critique, but it is harmonious with insights from other areas of dispute resolution scholarship. Anyone who seeks to negotiate a resolution from a position of weakness may end up with less than the law would give. Differences in race, class, or education level, as well as gender, can compound the disadvantage. Intimate relationships and the domestic violence that can accompany them have the potential to produce power imbalances and unjust results in negotiations. These imbalances are exacerbated by the pervasive lack of legal representation in family law cases, which mediation may encourage.

**Mediation Adapts in Response to the Critique**

If family mediation tends to avoid the worst case scenario for women, which some of its early critics feared, this result may in part be due to the response of mediation scholars and practitioners to the feminist critique. Family mediation practice now responds to power imbalance and violence in two ways. First, inappropriate cases are “screened out” of mediation and directed to litigation instead. Second, innovative mediator practices have evolved for dealing with power imbalance and domestic violence in those family cases that are still mediated. Assessing the extent to which these adaptations have penetrated the average Canadian private family mediation practice would require an empirical inquiry that is beyond the scope of this article. However, the practice literature and the guideline documents for court-adjunct family mediation show a widespread and concerted effort to adjust in response to the feminist critique.

**Identifying Power Imbalance and Violence**

The feminist critique has spurred practical efforts to better identify power imbalance and violence within a potential mediation case. During the 1990s, observers reported that mediators were becoming more cognizant of these issues, which was in of itself a step forward. The literature of this decade focused on

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133. However, Evangelina Holvino has argued that women of colour are less likely to perceive family and patriarchy as sites of oppression than white women are. Evangelina Holvino, “Intersections: The Simultaneity of Race, Gender and Class in Organization Studies” (2010) 17 Gender, Work and Organization 248 at 253-4.

building the capacity of family mediators to recognize power imbalance and domestic violence. However, doubts remained about the ability of mediators to detect these phenomena on an ad hoc basis.

The focus therefore gradually shifted to the development of formal screening and triage tools. Linda Girdner’s groundbreaking 1990 Conflict Assessment Protocol (CAP) was perhaps the first feminist-influenced tool to be published. In separate sessions with each spouse, a mediator using CAP would ask probing questions about (1) decision making, conflict, and anger within the relationship; and (2) specific abusive behaviours. Ellis and Stuckless’s 2006 Domestic Violence Evaluation (DOVE) is a mediator-administered interview that reflects theoretical and descriptive research advances subsequent to Girdner’s work. DOVE distinguishes between, and tests for, both control-motivated and conflict-instigated violence, which have very different consequences for family mediation practice. DOVE is “research-based,” insofar as it focuses on empirically verified predictors of violence and helps identify a safety plan that specifically responds to them. A somewhat similar screen that evaluates risk of assault is the Domestic Violence Screening Instrument (DVSI-R), which has been in use in Connecticut family courts since 2003.

The Mediator’s Assessment of Safety Issues and Concerns (MASIC) is perhaps most fully responsive to the feminist critique, insofar as it includes questions that focus on power imbalance even if they are unaccompanied by violence. MASIC is designed to be administered as an oral interview with parents who are family mediators.


138. Linda K Girdner, “Mediation Triage: Screening for Spouse Abuse in Divorce Mediation” (1990) 7 Mediation Quarterly 365. It was predated by assessment tools that were more focused on determining whether or not mediation would successfully produce an agreement. For example, Ngoh Tiong Tan, “Developing and Testing a Family Mediation Assessment Instrument” (1988) 19 Mediation Quarterly 53.


140. Some, but not all, domestic violence is part of a desire to control, intimidate, or coerce the victim. See, for example, Peter G Jaffe, Claire V Crooks, and Nick Bala, “A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes” (2009) 6 Journal of Child Custody 169 at 504-5; Joan B Kelly and Michael P Johnson, “Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 Family Court Review 476 at 481.

mediation candidates. Each parent is interviewed privately. MASIC asks direct questions about violence—for example, asking each spouse: “Did the other parent ever ... push, shove, shake or grab you?”142 Other questions are designed to assess future risks—for example: “Does the other parent own or have access to any weapons?”143 MASIC looks for evidence of coercive control and power imbalance by asking questions about decision making and power within the relationship.144

Most family courts in Canada and the United States now administer these written or oral interviews to potential mediation participants,145 often supplemented by background checks and clinical observations.146 Some, such as Connecticut’s Family Civil Intake Screen, evaluate domestic violence as part of a broader inquiry designed to determine what services will be most effective for a given family.147 The evolution of tools to evaluate violence and power imbalance in family mediation settings can clearly be credited to the feminist critique outlined earlier.

### Responding to Violence

What do court staff and mediators do with the information generated by screening and triage? Most mediators now accept that sufficiently severe power imbalance or domestic violence makes a case inappropriate for family mediation.148 They also generally agree that power imbalance and domestic violence are highly relevant in determining whether mediation is appropriate and that some or all such cases with these characteristics should be “screened out.”149 Some argue that any domestic violence makes a case inappropriate for family mediation.150 By the mid-1990s, many jurisdictions were excluding domestic violence cases from mandatory mediation requirements.151 In Australia, for example,
approximately 25 percent of referrals to family mediation are now screened out due to domestic violence.\textsuperscript{152}

However, screening out is not a complete answer to concerns about domestic violence and power imbalance. This is because the presence of these phenomena do not necessarily, and perhaps should not, lead to automatic disqualification from mediation. Cases of this nature may be mediated either intentionally (because the violence is not considered a sufficient reason to exclude it) or unintentionally (because the incidence or severity of the violence is not identified).\textsuperscript{153} Some argue that it is not possible to determine beforehand which cases are appropriate for mediation\textsuperscript{154} or that domestic victims are better off with mediation than they are in court.\textsuperscript{155} Depending on the nature of the litigation and the nature of the mediation, “screening out” domestic violence victims from mediation might do them a disservice,\textsuperscript{156} and 66 percent of Canadian family mediators surveyed in 1998 did not believe that spousal abuse should automatically preclude the use of mediation.\textsuperscript{157} Nancy Ver Steegh suggests that a more empowering response is to encourage domestic violence victims themselves to make informed choices about whether mediation is appropriate,\textsuperscript{158} and some jurisdictions do exactly that.\textsuperscript{159} A recent empirical study found that domestic violence cases were less likely to reach full agreement in mediation than were other cases.\textsuperscript{160} This might suggest that victims are not necessarily so intimidated that they will accept the demands of the perpetrators.\textsuperscript{161} Even if one prefers the more orthodox view that adjudication is better than mediation in cases of power imbalance or violence, screening is imperfect so not all such cases will be excluded. A recent study of a court-adjunct family mediation program in Arizona found that at least one partner reported intimate partner abuse in 90 percent of the cases, but only 7 percent of them were screened out.\textsuperscript{162}

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\textsuperscript{153} Astor, supra note 73 at 180.


\textsuperscript{155} Beck et al, supra note 19.

\textsuperscript{156} Adkins, supra note 117 at 125; Kelly and Johnson, “Differentiation among Types of Intimate Partner Violence,” supra note 64 at 492; Desmond Ellis and Noreen Stuckless, “Domestic Violence, DOVE, and Divorce Mediation” (2006) 44 Family Court Review 658 at 658.


\textsuperscript{158} Ver Steegh, supra note 65.

\textsuperscript{159} Adkins, supra note 117 at 123.

\textsuperscript{160} Evidence for this proposition is found in Ballard et al, supra note 63 at 17 and 21. However, one earlier study found that reported violence did not reduce the likelihood of settlement in family mediation. Wissler, supra note 69.

\textsuperscript{161} Ballard et al, supra note 63 at 27.

\textsuperscript{162} “Intimate partner abuse” was defined to include “physical, psychological, sexual, and stalking abuse.” Beck et al, supra note 19 at 228 and 232.Comparable rates of screening out have been were found in earlier studies. Maxwell, supra note 135 at 337.
Because screening out is not a complete answer to the feminist critique, mediation practice itself has adapted with techniques designed to give couples with a history of violence access to safe, productive, and equitable mediation. National surveys conducted in the United States in the mid-1990s found that most family court mediation programs had implemented special procedures and training for domestic violence cases.\textsuperscript{163} Victims may be allowed to attend mediation with a support person as an ally.\textsuperscript{164} Shuttle or caucus mediation—in which the parties remain in separate rooms and the mediator acts as an information conduit between them—is often now used in domestic violence cases to avoid leaving the parties in a room together.\textsuperscript{165} To further reduce the chance of a violent encounter, the spouses might even be asked to visit the facility on different days.\textsuperscript{166}

Screening and triage tools are used not only to screen out the worst cases but also to help mediators respond appropriately to less severe ones. For example, Girdner’s Conflict Assessment Protocol suggests the exclusion of some cases but recommends that others can be mediated with special ground rules and precautions, including:

- acknowledgment of past abuse;
- encouragement of the abused spouse to pursue law enforcement remedies, such as orders of protection; and requiring and monitoring attendance at anger management classes or therapy for the abuser and services for battered women or therapy for the abused spouse.\textsuperscript{167}

Ellis and Wight’s DOVE sorts cases into four categories based on the risk of physical violence.\textsuperscript{168} For example, if the software indicates that a party is at “moderate risk” of physical violence, the mediator is instructed to ensure that “partners arrive and leave at different times ... and do not wait in the same room,” among other things.\textsuperscript{169} Because DOVE’s authors doubt the premise that mediation puts victims at greater risk than the alternatives do, an indication of “very high risk” does not lead to automatic disqualification but, rather, permits “telephone or on-line mediation” in some circumstances.\textsuperscript{170}

\textsuperscript{164} Ricci, supra note 23.
\textsuperscript{165} Adkins, supra note 117 at 105; Pearson, supra note 78 at 17.
\textsuperscript{166} Beck and Sales, supra note 3 at 31. In the latter model, the mediator acts as an intermediary, gathering information from each party and conveying it to the other.
\textsuperscript{167} Girdner, supra note 138 at 373.
\textsuperscript{168} Ellis and Stuckless, supra note 156 at 662.
\textsuperscript{169} Ibid at 664.
\textsuperscript{170} Ibid at 665.
Responding to Power Imbalance

Ensuring the physical safety of the parties is only a partial response to the feminist critique of family mediation. The critique suggests that, even in the absence of domestic violence, power imbalance can impede the emergence of fair outcomes from family mediation. Like domestic violence cases, power imbalance cases may not be screened out, meaning that mediators have had to learn how to work with them. They have done so in two ways.

First, most family mediators respond to power imbalance by simply seeking to ensure a “fair process.” A survey of Canadian family mediators found that 83 percent of them agreed that they should be “interventionist in regard to process . . . empowering the weaker party in the negotiations, and controlling the process of mediation.” For example, the mediator might pay close attention to the amount of time that each party is given to speak. Allowing the weaker party to speak first in a mediation can augment her power. Simply making legally relevant information available can also be helpful. A vulnerable party is less likely to have a firm statutory child support entitlement “bargained away” in mediation if the mediator has put that information “on the table” during the negotiation or asked the parties themselves to research the matter. Family mediators in some states are required to ensure that the parties have made full financial disclosure.

Craig McEwen, Nancy Rogers, and Richard Maiman argue that allowing or encouraging the parties’ lawyers to attend and participate in mandatory divorce mediation alleviates power and fairness concerns more effectively than other regulatory initiatives. A somewhat more interventionist approach is to arrange the physical environment or direct pointed questions so as to empower a vulnerable party while reining in the other. Another option is co-mediation, in which a male mediator and a female mediator conduct the session together to reduce perceived or actual mediator gender bias.

Ensuring a fair process or level playing field might be sufficient to counteract power imbalance in some cases. Ilan Gewurz, whose typology of power is described above, suggests that “broad framing of the issues” and “achieving a balanced

171. McEwen, Rogers, and Maiman, supra note 81 at 1325-6; Bryan, supra note 49 at 504-5.
172. Kruk, supra note 157 at 201.
174. Scott and Emery, supra note 11 at 45.
175. McEwen, Rogers, and Maiman, supra note 81 at 1332-3.
176. Ibid. Penelope Bryan’s view of lawyer participation is also positive, although more ambivalent. Penelope E Bryan, “Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation” (1994) 28 Family Law Quarterly 177.
177. Lang, supra note 33 at 213-14.
process” might be a sufficient response to purely procedural power imbalances.\footnote{179} This subtle form of power balancing can be exercised within the context of classical “facilitative” mediation, without the mediator opining about the substantive outcome.

However, mediators in some cases go beyond safeguarding procedure, and assume responsibility for ensuring that the mediated outcome is itself fair. When a power imbalance is rooted in the relationship context and psychological factors, Gewurz calls for “more substantive protection,” which can be offered by a judge or another authoritative and evaluative mediator closely linked to the legal system. A mediator may forthrightly pursue an outcome that accords with the law or with some other external criterion of fairness.\footnote{180} Mediators Joan Dworkin and William London describe a family mediation they conducted in which the wife was prepared to accept only 15 percent of the family’s assets—far less than her legal entitlement.\footnote{181} While their description of the case does not suggest a power imbalance or domestic violence, the result was clearly “unfair” if measured against the parties’ legal entitlements. The mediators intervened and asked the parties to reconsider, and the final property settlement gave 36 percent of the assets to the wife.\footnote{182} Dworkin and London described their approach as a reconciliation of the principle of self-determination with the principle of fairness.\footnote{183}

However, another author’s review of this article suggests that Dworkin and London “depart[ed] their role of neutrality” and “violated their commitment to self-determination.”\footnote{184} While the more ambitious, “substantive” form of power balancing promises a more muscular response to the problem, it is more difficult to reconcile with the core mediation ideologies of neutrality and self-determination.\footnote{185} Perhaps for this reason, the 1998 survey found only a minority of Canadian family mediators espousing this type of interventionism. Among the respondents, 60 percent said that the mediator should “be neutral in regard to outcome” and only 21 percent supported interventionism.\footnote{186}

\textit{The Work in Progress}

Family mediation’s effort to respond to power imbalance and domestic violence is a work in progress. Existing screening programs may miss many cases

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179. Gewurz, supra note 27 at 154.  \\
180. Ibid at 143.  \\
182. Ibid at 11.  \\
183. Ibid at 12.  \\
184. Walther, supra note 34 at 95, n 56.  \\
185. Ibid at 95; Bryan, supra note 49 at 505; David Greatbatch and Robert Dingwall, “Selective Mediation: Some Preliminary Observations on a Strategy Used by Divorce Mediators” (1989) 23 Law and Society Review 613 at 615.  \\
186. Kruk, supra note 157 at 201.  \\
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of abuse, especially if the victims of violence do not choose to disclose it. 187 Many victims are reluctant to do so in the early stages of working with a professional, which is the point at which initial screening takes place. 188 Hilary Astor has argued that victims’ silence about domestic violence is a critical problem for family mediation screening. 189 This silence is a result not only of the perpetrator’s control but also of society’s omerta on the subject. “Women deny violence” in family mediation, Astor suggests, “because they live in a society that denies that it happens.” 190 Racialized or aboriginal victims might face additional disincentives to speak of domestic violence, insofar as doing so might reinforce stereotypes or trigger child protection involvement in the family. 191

A recent study found that family mediators failed to identify domestic violence in approximately half of the cases in which it was detected by a standardized questionnaire. 192 Despite advances in the study of domestic violence, there is not yet any consensus about which types of violence justify which responses from mediators. 193 Some mediators may simply proceed in the normal way without any particular adaptation, and one study suggests that the presence of violence may have little effect on the mediator’s assessment of the case. 194

Some of the leading voices in the feminist critique have rejected the potential of mediation practice modifications to respond to power imbalances. 195 Cheryl Regehr sees power balancing as a well-intentioned but misguided response. 196 She suggests that the feeling of empowerment that mediation can generate is temporary and illusory for women. It lulls them into accepting joint custody, which in the long run allows their ex-husbands to exercise their wonted dominion. 197 Ruth Phegan suggests that mediators’ assertions of substantive neutrality are likewise disingenuous or naive. Her argument is that “problem-solving assistance is always based on a particular view,” and the neutrality assertion is simply a refusal to acknowledge it. 198 Phegan interrogates three of the leading family mediation methods and
concludes that all three rely on a manipulative version of systems theory, which renders “women ... unable to speak in their own voices and to be heard within that system.”

Other feminist family law scholars view the debate over mediation as a diversion. Elizabeth Pickett argued in 1991 that both child custody adjudication and child custody mediation were coming to reflect a dangerous “familial ideology” celebrating privacy and shared parenting. She therefore questioned the preference of many feminist mediation critics for formal adjudication, calling instead for a focus on the ideology itself. Writing in the same year, N. Zoe Hilton identified a “mediation philosophy of the ‘new family,’ ” which was infiltrating family dispute resolution in both its adjudicatory and mediatory variants. Pickett and Hilton therefore concluded that the pro or con family mediation debate was a gratuitous distraction from feminism’s real goals.

The feminist critique continues to be the source of live policy debates in family service delivery. One such debate pertains to the role of lawyers in mediation programs, which, as noted earlier, may often be discouraged. Many feminists and others see legal representation as an indispensable safeguard, although some criticize the assumption that independent legal advice is an effective safeguard for vulnerable parties. In Australia, the 2006 reforms originally forbade lawyers to attend mediation sessions at the new Family Relationship Centres. However, in 2009, the government adopted a more liberal policy regarding the role of lawyers in family disputes.

While these debates continue, it seems clear that family mediation theory has substantially internalized the feminist critique, and family mediation practice has adapted in response to it. Screening and triage are *de rigeur* in court-adjunct programs. Today, many mediators look for evidence of power imbalance and domestic violence, screen out inappropriate cases, and mediate the remainder in a manner that is sensitive to these concerns.

199. Phegan, *supra* note 98 at 413.
200. Pickett, *supra* note 82.
202. McEwen, Rogers, and Maiman, *supra* note 81 at 1329; Harvey Brownstone, *Tug of War: A Judge’s Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 38. There is a dearth of recent Canadian evidence about the proportion of family mediation sessions that include lawyers.
204. For example, Phegan, *supra* note 98 at 384, citing Diana Majury, “Against Women’s Interests: An Issues Paper on Joint Custody and Mediation” (National Action Committee on the Status of Women, 1987) [unpublished].
This progress is reflected in Ontario’s Family Mediation Service (FMS). These subsidized, voluntary mediation sessions are now available in every court that hears family matters.\(^{206}\) While a full analysis of FMS is beyond the scope of this article, the province’s lengthy 2011 request for proposals (RFP) for new family mediation providers indicates responsiveness to the feminist critique.\(^{207}\) The RFP makes domestic violence screening mandatory for FMS providers. Although the precise screening tool is not specified, mediators are required to comply with a policy setting out the format and required content of the interview.\(^{208}\) In keeping with the practices described earlier, some violence cases are to be screened out, while others can proceed with safeguards.\(^{209}\)

The RFP, like the scholarly literature, is somewhat less explicit about what power imbalance is and what it means for mediation. However, the RFP states that “mediation is only suited to people who are in a relatively equal negotiating position.” It adds that, when used in cases of violence or “clear and inherent power imbalance,” mediation can lead to “unfair results” and “perpetuate one party’s control over the other.”\(^{210}\) Mediation providers are required to screen for “issues related to power and coercive control” in addition to violence, both during the intake stage and continuously throughout the mediation process.\(^{211}\) No mediation is to occur unless “any inequality in bargaining power can be managed so as to ensure that negotiations are balanced and procedurally fair.”\(^{212}\)

The feminist argument for lawyers’ participation in family mediation is reflected in Ontario’s RFP. Although mediators are not required to include parties’ lawyers in every mediation, they are required to encourage parties to seek legal advice and to be “very flexible” regarding the inclusion of lawyers in the sessions.\(^{213}\) “Balanc[ing] bargaining power on a particular issue where one party is at a disadvantage” is one example the RFP gives of a good reason to include lawyers in a particular mediation.\(^{214}\)

The feminist analysis is also evident in the Chief Justice of Ontario’s mandatory mediation proposal mentioned at the outset of this article.\(^{215}\) Chief Justice Warren Winkler’s scheme (which has emerged piecemeal in a series of interviews and speeches) includes an initial judicial triage stage, which would direct some cases directly to court. While Winkler called for “mandatory” mediation in 2010, by

\(^{206}\) Attorney General News Release, supra note 1.
\(^{207}\) Ministry of the Attorney General (Ontario), Request for Proposals for Family Mediation and Information Services at the Ontario Court of Justice and the Superior Court of Justice Locations (Toronto: Queen’s Printer, 2011).
\(^{208}\) Ibid at 78.
\(^{209}\) Ibid at 80.
\(^{210}\) Ibid at 6.
\(^{211}\) Ibid at 8.
\(^{212}\) Ibid at 9.
\(^{213}\) Ibid at 10.
\(^{214}\) Ibid.
\(^{215}\) See sources listed in note 2 in this article.
In critically evaluating mandatory mediation, it is important to think carefully about appropriate comparators. If an abused and disempowered family litigant does not mediate, what will she do instead? The feminist critique outlined earlier has been alert to this issue, comparing mediation to both adjudication and bipartite negotiation as alternative dispute resolution processes. I will suggest here that mediation must also be compared to the “settlement mission,” which is the informal and unregulated encouragement or pressure to settle that judges and other family justice system workers apply to litigants. It goes beyond the (accurate) expectation that most cases will settle, it is the active effort on the part of these workers to bring about this result. The settlement mission is pursued in judicial pre-trial conferences and interviews with social workers, and participation in these meetings is often obligatory for family litigants. Experiencing the informal settlement mission is therefore often mandatory for them, potentially giving rise to the same concerns that feminists have articulated about mandatory formal mediation. Moreover, unlike family mediation, the settlement mission is not necessarily accompanied by screening, triage, or power balancing. From the point of view of the feminist critique, the informal settlement mission is therefore potentially more dangerous than formal family mediation.

The author coined the term “settlement mission” during empirical research in which he interviewed twenty-eight family justice system professionals in Toronto and New York City. The focus of the interviews was the work of formally neutral family justice system workers—judges and child custody evaluators (CCEs). A CCE is a social worker or mental health professional who investigates a family with a custody or access dispute and recommends a parenting arrangement in the best interest of the child.


218. Ethics approval was granted for the interviews by the York University Human Participants Review Sub-Committee (Certificate no. 2009-161, granted on 25 November 2009).
The author expected to find judges and CCEs pursuing the “analytical
mission”—which is to say, trying to identify the legally correct answers in a
given case. The most important legal questions in a family law dispute are
usually (1) how much money should be paid, on what terms, and by whom; and
(2) what post-separation parenting arrangement is in the best interest of the child
or children. Custody assessors almost invariably have formal roles that are analyti-
cal in nature. Statutes point to a decision-making job for these workers, especially in
the case of CCEs.\footnote{219} An analytical role is also what litigants probably expect from
both judges and CCEs.

In fact, however, these family justice system workers often pursue, and in some
cases prioritize, the settlement mission, which means encouraging or pressuring the
parties to voluntarily resolve their dispute.\footnote{220} They do so on the basis of a presump-
tion that settlement is in the best interests of the family. As one recent article
observed, the \textit{de facto} priority of family courts is not to make and enforce legal
decisions but, rather, “to resolve conflicts and encourage parents to put the past
behind.”\footnote{221} Family judges generally pursue settlement in the pre-trial conferences,
which are now mandatory for family litigants in Ontario and many other jurisdi-
cctions.\footnote{222} For example, one Toronto provincial court judge told the author that
“every court appearance is an opportunity to settle the case,” another said that
if litigants “think they have a chance of settling, that’s our job, that’s what we’re
here for.”\footnote{223}

CCEs generally pursue settlement towards the end of their investigative process,
often seeking to convince the parents to voluntarily settle so that the CCE’s report
need not be forwarded to the judge in charge of the case. One experienced child
custody evaluator told the author that his “whole process is designed to be one
that tries to create a mediational environment, so that there’s a higher probability
of settlement afterwards.” He does so because, “with limited exceptions ... the
research definitively tells us that it’s the plan the parents come up with and agree
to that always works best for the children in that family.”\footnote{224} This statement
was striking, given that the apparent premise of child custody evaluation practice
is that an expert’s opinion is necessary in order to identify the best interest of
the child.

In pursuing settlement, family justice system workers use many of the same tech-
niques that mediators do. Mediation methods have traditionally been divided into

\begin{footnotes}
\item[219] For example, regarding Ontario CCEs, see the \textit{Courts of Justice Act}, RSO 1990, c C43;
\item[220] Noel Semple, “Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy,”
\textit{Conflict Resolution Quarterly} [forthcoming in 2012], online: Social Science Research Network
\item[221] Jaffe, Crooks, and Bala, \textit{supra} note 140 at 170 and 175. See also Adkins, \textit{supra} note 117 at 119.
\item[223] Interview with Justice “BB,” Ontario Court of Justice in Toronto (4 January 2010).
\item[224] Interview with Justice “DD,” Ontario Court of Justice in Toronto (3 March 2010).
\item[225] Interview with “GG,” Psychologist in Toronto (4 February 2010).
\end{footnotes}
the “facilitative” and the “evaluative,” and the author found each of these in the interviewees’ descriptions of their settlement-seeking work. Pursuing the settlement mission may simply mean asking questions that are designed to show the parties their “common ground,” thereby leading them to consensus. It can also involve much more activist techniques such as “talking down” each party from their more ambitious claims. The author critically analyzes the settlement mission in another article.

Whereas the scholarship about formal family mediation has engaged with, and evolved in response to, the feminist critique, the same does not appear to be true of the informal settlement mission. By contrast to the mediation scholarship, there is very little literature on judicial settlement seeking that engages with the specificities of the family law context. Even less has been written about settlement seeking among CCEs—their role has been defined almost exclusively in terms of the analytical mission. Feminists have critiqued the analytical and decision-making work of judges and CCEs in family law cases, but the informal and almost clandestine nature of the settlement mission has sheltered it from this scrutiny.

So much for theory; what of practice? More research is clearly needed regarding whether or not the settlement mission is pursued in a different way, or perhaps not pursued at all, in cases of violence or power imbalance. The absence of scholarly engagement does not mean that settlement seekers are ignorant of these issues or that they do not respond to them. For example, the Office of the Children’s Lawyer, which provides CCEs in Ontario and pursues settlement while doing so, also runs incoming cases through a comprehensive triage system.

Nonetheless, it is clear that the settlement mission lacks many of the safeguards that have been brought to mediation practice in response to the feminist critique. While statutes exclude domestic violence cases from mediation in many

227. Semple, supra note 220, at ss II(1) and II(2).
230. Semple, supra note 220 at s I(2).
233. Salem, Kulak, and Deutsch, supra note 141 at 756.
jurisdictions, they conspicuously do not say that judges and CCEs must not pursue the settlement mission in cases of this nature.\textsuperscript{234} Since the settlement mission is pursued informally and off the record, its practitioners have a certain scope to apply their own values or biases.\textsuperscript{235} For example, one New York family court judge whom the author interviewed described her approach in settlement conferences as follows:

\begin{quote}
I feel very strongly about a child spending time with both parents, and as much time as possible with both parents. So if somebody’s trying to limit that, for whatever reason, then I push back at that . . . that’s not the way I view it . . . I think because it’s more subjective I tend to interpose more of how I look at that.\textsuperscript{236}
\end{quote}

One interesting documentation of the judicial settlement mission is New York City’s matrimonial judge Ellen Gesmer’s “Custody Speech.”\textsuperscript{237} Justice Gesmer regularly delivers this speech, in pre-trial conferences, to parents litigating over child custody or access. She had the speech transcribed and uses it as part of her campaign material in judicial elections to demonstrate her approach to these cases.

The key message of Justice Gesmer’s custody speech to parents is: “[B]y far the best thing for [your children] would be if you could make a decision together about these issues.”\textsuperscript{238} The speech then provides several reasons why the parents hearing it should settle instead of proceeding with litigation. These include the damage that a trial would do to the children; the financial and emotional cost of a trial; the fact that parents are in a better position to identify their child’s best interest than Justice Gesmer is; and the fact that a trial will make the parents angrier and therefore less able to co-operatively parent in the future.\textsuperscript{239} Finally, the speech implies that not settling might undermine the parents’ authority, with dire consequences for the child’s well-being:

\begin{quote}
Having a custody battle creates another risk for your teenager. She is at an age where she is facing social pressures, about drugs or alcohol or friends.
\end{quote}

\textsuperscript{234} However, some jurisdictions direct family disputes in which criminal domestic violence charges have been laid to specialized integrated domestic violence courts. See, for example, New York Courts, “Integrated Domestic Violence Courts,” online: New York State Unified Court System <http://www.nycourts.gov/courts/problem_solving/idv/home.shtml>.
\textsuperscript{235} This is largely true of formal mediation as well, but formal mediators do not have the actual and perceived authority that judges and child custody evaluators have.
\textsuperscript{236} Interview of Justice “PP,” of the New York State Supreme Court in White Plains, New York (16 November 2010).
\textsuperscript{238} Interview with Justice “MM,” New York State Supreme Court in New York (28 September 2010).
\textsuperscript{239} \textit{Ibid.}
I know that you hope that she will turn to you for help in making these difficult decisions. From her point of view, the most important decision that you have ever made or will ever make is what’s going to happen to her and her little brother. If you go to trial, she will know that the two of you were unable to make that decision, and that you had to turn to a total stranger—me—to make it. She might conclude that you’re not very good at making decisions, and that you’re not the kind of people that she can rely on when she has difficult decisions to make.240

Does this document tell us anything about the place of the feminist critique in the settlement mission? Justice Gesmer is a highly respected and experienced matrimonial judge and presumably entirely cognizant of the dangers of power imbalance and domestic violence. There is nothing in her custody speech that suggests that she exploits or ignores these issues. However, neither is there any mention of them within it. The preamble to the speech suggests that it is delivered to custody litigants as a matter of course—if parents “are fighting about their children, I speak to them at length about why they should come to an agreement about caring for their children, and the many reasons that it is damaging to their children to go to a trial.”241 Gesmer’s custody speech provides an interesting contrast to Ontario’s court mediation services RFP, discussed earlier, which takes some care to temper its settlement-promoting message with provisos attributable to the feminist critique of family mediation.

Two points arise from this comparison between mandatory mediation and the informal settlement mission. First, the fact that a jurisdiction does not have mandatory mediation does not mean that a family litigant will not be subjected to compulsory encouragement to settle her dispute. It is likely that a formally neutral third party such as a CCE or a judge will encourage her, or pressure her, to settle. Whether this pursuit of settlement is properly considered “mediation” or not is debateable, but from the perspective of the litigant the motivations of the intervention would probably seem similar.242

Second, many of the concerns articulated by the feminist critique seem to be more applicable to the settlement mission than they are to formal mediation. The settlement mission is pursued on an ad hoc and informal basis by judges and CCEs. Especially for judges, their choices about whether to pursue it are not constrained by statute, by formal screening mechanisms, or by any higher power. A litigant going into court (or into the child custody evaluator’s office) for the first time has no way of knowing whether, or how, the settlement mission will be pursued. While some are certainly alert to the issues raised by the feminist critique, training in this area is not the formalized requirement that it is for most mediators today.

240. Ibid at 5-6.
241. Ibid at 1.
242. Semple, supra note 220 at II(2).
Helen Rhoades has pointed out that, while Australian mediators are required to have special domestic violence training, judges and lawyers are not. To Rhoades, this reality casts doubt on the argument that victims of domestic violence are better off with legal professionals than they are with mediators.\(^{243}\)

It is not the author’s intention to suggest that most family justice system workers pursue the settlement mission in a way that leads to exploitative outcomes for women, domestic violence survivors, or other vulnerable parties. Nor does the settlement mission necessarily do more harm than good, given the demonstrable benefits that settlement has for family litigants and their children. Rather, the argument is that the feminist critique of mandatory mediation may be less applicable to modern mandatory mediation than it is to the informal and unregulated settlement mission.

Moreover, there are good reasons to believe that mandatory mediation and the settlement mission are, to some extent, alternatives. If more litigants resolved their disputes through non-judicial mediation, fewer of them would attend the pre-trial conferences in which judges pursue the settlement mission. Chief Justice Winkler, in arguing for mandatory mediation, implied that it could be accompanied by a rollback of the pre-trial conference system.\(^{244}\) If mediation were made available as a sufficiently early intervention, it might also reduce the need for child custody evaluations in which the settlement mission is also pursued. To the extent that avoiding mediation means increased exposure of vulnerable parties to the settlement mission, the feminist arguments developed earlier could weigh in favour of Justice Winkler’s proposal. This analysis points, however tentatively, to a paradoxical conclusion. The feminist critique of mandatory family mediation may be an argument for, rather than against, the adoption of mandatory family mediation in its modern form.

\(^{243}\) Rhoades, *supra* note 152 at 191.

\(^{244}\) Rhijn, *supra* note 2.