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Mandatory Family Mediation and the Settlement Mission: A Feminist Critique

Noel Semple

En Amérique du Nord, les conflits familiaux font très souvent l'objet de médiation où une tierce partie neutre tente de trouver avec les époux une résolution volontaire de leurs différends. La médiation familiale compte de nombreux partisans et de nombreuses partisanes enthousiastes, et dans plusieurs juridictions, elle constitue un passage obligé avant d'entreprendre les procédures traditionnelles. Cependant, elle a aussi donné lieu à une critique féministe puissante qui considère le déséquilibre des pouvoirs et la violence familiale comme des sources d'exploitation et de résultats injustes obtenus par la médiation. Le présent article synthétise la critique féministe de la médiation familiale, et évalue les efforts faits dans la pratique de la médiation contemporaine pour y répondre. Même en l'absence de médiation familiale formelle, les juges et les autres travailleurs et travailleuses de l'appareil judiciaire en matière familiale soumettront vraisemblablement les époux en litige à des pressions informelles pour trouver un règlement. Le présent article défend l'idée que la critique féministe est peut-être plus pertinente à cette « mission de règlement » qu'à la médiation familiale formelle telle qu'elle se pratique de nos jours.

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

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matters in the province.¹ Going further, the chief justice of Ontario recently called for mediation to be made a *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.

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1. Ministry of the Attorney General of Ontario, "Families Will Benefit from Justice Improvements," Press Release, online: Province of Ontario <<http://news.ontario.ca/mag/en/2010/12/families-will-benefit-from-justice-improvements.html>>.
 2. Tracey Tyler, "Chief Justice Urges Forced Family Law Mediation," *Toronto Star* (15 September 2010) A1; Cristin Schmitz, "Top Judge Proposes Free Court-Based Mediation, Ag Says 'No Money,'" *Lawyers Weekly* (8 October 2010), online: Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1264>>; Judy Van Rhijn, "Chief Justice Expands on Proposals to Redesign Family Law System," *Law Times* (8 November 2010), online: Law Times <<http://www.lawtimesnews.com/201011087841/Headline-News/Chief-justice-expands-on-proposals-to-redesign-family-law-system>>.
 3. Connie J Beck and Bruce Dennis Sales, *Family Mediation: Facts, Myths, and Future Prospects*, 1st edition (Washington, DC: American Psychological Association, 2001) at 7.

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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4. Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, revised edition (San Francisco: Jossey-Bass, 2005) at 8.
 5. Wanda Wieggers 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.
 6. American Bar Association, "Model Standards of Practice for Family and Divorce Mediation" (2001) 35 *Family Law Quarterly* 27. Standard 1 states: "[M]ediation is based on the principle of self-determination by the participants." See also Nancy A Welsh, "Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation" in Jay Folberg, Ann Milne, and Peter Salem, eds, *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 420 at 420.
 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.
 8. Marc Galanter and Mia Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339 at 1350.
 9. Lon L Fuller, "Mediation: Its Forms and Functions" (1971) 44 *Southern California Law Review* 305 at 316.
 10. Jo Daugherty Bailey and Susan P Robbins, "Couple Empowerment in Divorce: A Comparison of Mediated and Nonmediated Outcomes" (2005) 22 *Conflict Resolution Quarterly* 453; Mary G Marcus et al, "To Mediate or Not to Mediate: Financial Outcomes in Mediated versus Adversarial Divorces" (1999) 17 *Mediation Quarterly* 143. Regarding re-litigation rates, see Glenn A Gilmour, *High-Conflict Separation and Divorce: Options for Consideration*, Report no. 2004-FCY-1e (Ottawa: Department of Justice Canada, 2004), online: Department of Justice Canada <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/index.html> at 36.

four Cs.”¹¹ *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 attractive in the family law context. Because the parties are individuals rather than institutions 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 participate 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 jurisdictions had mandated mediation for custody and access cases.¹⁸

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

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11. Elizabeth Scott and Robert E Emery, “Child Custody Dispute Resolution: The Adversarial System and Divorce Mediation” in Lois A Weithorn, ed, *Psychology and Child Custody Determinations: Knowledge, Roles, and Expertise* (Lincoln, NB: University of Nebraska Press, 1987) at 45.
 12. Linda D Elrod and Milfred D Dale, “Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance” (2008) 42 *Family Law Quarterly* 381 at 408; Jessica Pearson, “A Forum for Every Fuss: The Growth of Court Services and ADR Treatment for Family Law Cases in the United States” in Sanford N Katz, John Eekelaar, and Mavis Maclean, eds, *Cross Currents: Family Law and Policy in the United States and England* (New York: Oxford University Press, 2000) 513 at 519-20.
 13. See, for example, Leonard Edwards, “Comments on the Miller Commission Report: A California Perspective” (2007) 27 *Pace Law Review* 627 at 631-2.
 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 mediation, she makes an exception for parenting cases. See Deborah R Hensler, “Suppose It’s Not True: Challenging Mediation Ideology” (2002) *Journal of Dispute Resolution* 81 at 82.
 15. Linda Diebel, “Unqualified Mediators Prey on Broken Families,” *Toronto Star* (14 January 2008) A1, quoting Toronto family lawyer Phillip Epstein.
 16. Welsh, *supra* note 6 at 423.
 17. Beck and Sales, *supra* note 3 at 7.
 18. James Melamed, “Attorneys and Mediation: From Threat to Opportunity” (1989) 23 *Mediation 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.¹⁹ In others, such as Australia, the parties must mediate as a precondition to bringing an application.²⁰ In Québec, the parties must attend a mediation information session in which the process is described.²¹ While most court-connected and mandatory mediation programs deal exclusively with parenting disputes, some also address financial issues between the separating partners.²² Some programs allow for the mediator to make recommendations to the court in the event that the parties do not voluntarily settle.²³

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.²⁴

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.²⁵ There is a broad scholarly consensus about the reality of these phenomena. However, different schools of thought emerge when mediation is

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19. *Rules of the Supreme Court (Newfoundland)*, 1986, SNL 1986, c 42, Sch D, R 37A: Court-Ordered Mediation; *Florida Statutes*, s 44.102(c): “Court-ordered mediation.” Connie J Beck et al, “Mediator Assessment, Documentation, and Disposition of Child Custody Cases Involving Intimate Partner Abuse: A Naturalistic Evaluation of One County’s Practices” (2010) 34 *Law and Human Behavior* 227 at 228.
 20. *Family Law Act 1975*, (Cth) (Australia), s 60I; Patrick Parkinson, *Parenting after Separation: The Process of Dispute Resolution in Australia*, University of Sydney Law School Legal Research Paper no 10/115 (2010), online: Social Science Research Network <<http://ssrn.com/abstract=1702639>> at 12.
 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.
 22. Jay Folberg, Ann Milne, and Peter Salem, “The Evolution of Divorce and Family Mediation: An Overview” in Folberg, Milne, and Salem, *supra* note 6, 3 at 10.
 23. Isolina Ricci, “Court-Based Mandatory Mediation,” in Folberg, Milne, and Salem, *supra* note 6, 397 at 407.
 24. Katharine T Bartlett, “Feminism and Family Law” (1999) 3 *Family Law Quarterly* 475 at 475.
 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.²⁶ Within a negotiation or mediation, power can be defined simply as the ability to bring about desired outcomes.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.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.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.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.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.³² The power to obtain something

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26. Carol Smart, “Power and the Politics of Custody” in Carol Smart and Selma Sevenhuijsen, eds, *Child Custody and the Politics of Gender* (New York: Routledge, 1989) 1 at 2.
 27. Ilan G Gewurz, “(Re)Designing Mediation to Address the Nuances of Power Imbalance” (2001) 19 *Conflict Resolution Quarterly* 135 at 136; Robert S Adler and Elliot M Silverstein, “When David Meets Goliath: Dealing with Power Differentials in Negotiations” (2000) 5 *Harvard Negotiation Law Review* 1 at 8; Desmond Ellis and Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks, CA: Sage Publications, 1996) at 5; Leroy J Tornquist, “The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry” (1989) 25 *Willamette Law Review* 743 at 760.
 28. Noel Semple, “Whose Best Interests? Custody and Access Law and Procedure” (2010) 48 *Osgoode Hall Law Journal* 287 at 288-9, note 4.
 29. Smart, *supra* note 26 at 1.
 30. Diane Neumann, “How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce” (1992) 9 *Mediation Quarterly* 227; Adler and Silverstein, *supra* note 27 at 9-12; Gewurz, *supra* note 27 at 137.
 31. Isolina Ricci, “Mediator’s Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women” (1985) 8 *Journal of Divorce* 49 at 50.
 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.³³ The leading authors of the 1980s distinguished between “tangible resources” (property and, in some formulations, education³⁴) and “intangible resources,” which was an umbrella term for anything other than property.³⁵ 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.³⁶

Desmond Ellis and Laurie Wight, for example, conducted a three-year longitudinal study comparing mediation with lawyer negotiation as family dispute resolution techniques.³⁷ 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.³⁸ 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.”³⁹

Other scholars have proposed alternative enumerations and categorizations of the sources of power in negotiation or mediation.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

33. Michael Lang, “Understanding and Responding to Power in Mediation,” in Folberg, Milne, and Salem, *supra* note 6, 209 at 213.

34. Gretchen M Walther, “Power Imbalances in Divorce Mediation” (2000) 14 American Journal of Family Law 93 at 95.

35. See notes 52 to 55 in this article.

36. Neumann, *supra* note 30; Desmond Ellis and Laurie Wight, “Theorizing Power in Divorce Negotiations: Implications for Practice” (1998) 15 Mediation Quarterly 227.

37. Ellis and Wight, *supra* note 36.

38. *Ibid* at 228.

39. *Ibid* at 230.

40. See, for example, Gewurz, *supra* note 27; Lang, *supra* note 33 at 211-12; John Wade, “Forms of Power in Family Mediation and Negotiation” (1994) 8 Australian Journal of Family Law 40, online: Bond University E-Publications <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1105&context=law_pubs>.

41. RH Mnookin and L Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale Law Journal 950 at 966-73; Robert H Mnookin, “Divorce Bargaining: The Limits on Private Ordering” (1985) 18 University of Michigan Journal of Law Reform 1015 at 1024.

42. *Ibid* at 1024-6.

43. *Ibid* at 1036-7.

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.⁴⁴ At the top level of Gewurz's classification scheme is a distinction between (1) "dispute-specific power dynamics" and (2) "the relationship context."⁴⁵ 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.⁴⁶

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."⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.

48. Kathleen A Lahey, "Women, Substantive Equality, and Fiscal Policy: Gender-Based Analysis of Taxes, Benefits, and Budgets" (2010) 22 *Canadian Journal of Women and the Law* 27 at 28; Gillian Ranson, "Paid and Unpaid Work: How Do Families Divide Their Labour?" in Maureen Baker, ed, *Families: Changing Trends in Canada*, 5th edition (Toronto: McGraw-Hill Ryerson, 2005) 99.

49. Penelope E Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 *Buffalo Law Review* 441 at 456; Tornquist, *supra* note 27 at 760.

entitlements in order to do so.⁵⁰ Many women entitled to child or spousal support from male ex-partners are in exactly this position.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.⁵² Status, dominance, self-esteem, and reward expectation are among the 'resources' that men are more likely than women to bring into family mediation.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.⁵⁴ Martha Shaffer suggests that mothers may have more difficulty than fathers do in distinguishing their own interests from those of their children.⁵⁵ Resources and impediments of this nature contribute to disparities in "persuasive strength."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."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.⁵⁸ It has also been proposed that women tend to have more "expressive," rather than

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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."
 51. See, for example, Mnookin, *supra* note 41 at 1029-30.
 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.
 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.
 54. Meyers, *supra* note 52 at 864-5; Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal* 1545 at 1579.
 55. Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *University of Toronto Faculty of Law Review* 162 at 181.
 56. Desmond Ellis and Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Toronto: Sage, 1996) at 5.
 57. *Ibid.*
 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.”⁵⁹ However, empirical evidence for these propositions, and for their effects on negotiated or mediated outcomes, is inconsistent.⁶⁰ 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.⁶¹

Domestic Violence

Violence is a feature of 50-80 percent of the conjugal relationships that dissolve before death⁶² and of 50-60 percent of those relationships that come to mediation.⁶³ Women are much more likely than men to be victims of the more severe forms of domestic violence.⁶⁴ 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.⁶⁵ 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.⁶⁶

Like power, domestic violence has also undergone a period of elaboration and categorization inspired by the feminist critique of family mediation.⁶⁷ Many such

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59. Noa Nelson, Adi Zarankin, and Rachel Ben-Ari, “Transformative Women, Problem-Solving Men? Not Quite: Gender and Mediators’ Perceptions of Mediation” (2010) *Negotiation Journal* 287 at 290.
 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.
 62. Jessica Pearson, “Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs” (1997) 14 *Mediation Quarterly* 319 at 320; Kelly, *supra* note 7 at 9; Desmond Ellis, “Divorce and the Family Court: What Can Be Done about Domestic Violence?” (2008) 46 *Family Court Review* 531 at 531.
 63. Robin H Ballard et al, “Factors Affecting the Outcome of Divorce and Paternity Mediations” (2011) 49 *Family Court Review* 16 at 17; Amy Holtzworth-Munroe, “Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children” (2011) 16 *Aggression and Violent Behavior* 319 at 319.
 64. Wieggers 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.
 65. Nancy Ver Steegh, “Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence” (2003) 9 *William and Mary Journal of Women and the Law* 145 at 149.
 66. Barbara J Hart, “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation” (1990) 7 *Mediation Quarterly* 317 at 318.
 67. For different typologies of domestic violence, see Kelly and Johnson, *supra* note 64; Ellis and Stuckless, *supra* note 56; Barbara Jo Fidler et al, eds, *Challenging Issues in Child Custody Disputes: A Guide for Legal and Mental Health Professionals* (Toronto: Thomson Carswell, 2008) at 98-101; Nicholas Bala and Rachel Birnbaum, “Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law” (2010) 48 *Family Court Review* 403 at 411-12.

efforts categorize violence on the basis of the aggressor's motivations, which can include coercion, self-defence, or mental illness.⁶⁸ Not all violence is equal, and some family violence may have relatively little effect on negotiating power.⁶⁹ The effect of a single violent act on a party's ability to negotiate depends substantially on the relationship context.⁷⁰ 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.⁷¹ Some such relationships include a "culture of violence" in which systematic abuse leads to the total domination of the abuser over the victim.⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ Mediators may also be too quick to see domestic violence as a manifestation of conflict, rather than as a manifestation of control and domination.⁷⁶ Martha Shaffer cites evidence that many 1980s family mediators even believed that the victims should bear some of the blame for the violence.⁷⁷ Finally, if mediation occurs in an environment that is less secure than a courthouse, it may

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68. Nancy Ver Steegh and Clare Dalton, "Report from the Wingspread Conference on Domestic Violence and Family Courts" (2008) 46 Family Court Review 454 at 458-9.
 69. Roselle Wissler, "Family Law Mediation" (1999) 6 Dispute Resolution Magazine 29; Pearson, *supra* note 62 at 324.
 70. Steegh and Dalton, *supra* note 68 at 456-7.
 71. Michael P Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women" (1995) 57 Journal of Marriage and Family; Michael P Johnson, "Gender and Types of Intimate Partner Violence: A Response to an Anti-Feminist Literature Review" (2011) 16 Aggression and Violent Behavior 289.
 72. Beck and Sales, *supra* note 3 at 28.
 73. N Zoe Hilton, "Mediating Wife Assault: Battered Women and the 'New Family'" (1991) 9 Canadian Journal of Family Law 29 at 35; Hilary Astor, "The Weight of Silence: Talking about Violence in Family Mediation" in Margaret Thornton ed, *Public and Private: Feminist Debates* (Melbourne, Australia: Oxford University Press, 1995) 174 at 180.
 74. Lisa G Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harvard Women's Law Journal 57 at 72.
 75. Martha J Bailey, "Unpacking the Rational Alternative: A Critical Review of Family Mediation Movement Claims" (1989) 8 Canadian Journal of Family Law 61 at 69; Regehr, *supra* note 53 at 364; Hilton, *supra* note 73 at 37.
 76. Karla Fischer, Neil Vidmar, and Rene Ellis, "The Culture of Battering and the Role of Mediation in Domestic Violence Cases" (1993) 46 Southern Methodist University Law Review 2117.
 77. Shaffer, *supra* note 55 at 183.

expose victims to a higher risk of actual physical harm from the perpetrators.⁷⁸ The risk of violent assault is especially high in the period immediately following separation.⁷⁹

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.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.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."⁸² Susan Boyd suggests that these techniques create a private space in which men's resource advantages can be used to maximum effect.⁸³ In a similar vein, Penelope Bryan argues that informal

78. Jessica Pearson, *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.

79. Beck and Sales, *supra* note 3 at 30.

80. Laurie Woods, "Mediation: A Backlash to Women's Progress on Family Law Issues" (1985) 19 Clearinghouse Review 431.

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.

82. Susan B Boyd, *Child Custody, Law, and Women's Work* (Don Mills, ON: Oxford University Press Canada, 2003) at 223. Regarding the "familial ideology" of privacy and its harmony with mediation as a dispute resolution technique, see Elizabeth Pickett, "Familial Ideology, Family Law and Mediation: Law Casts More Than a 'Shadow' " (1991) 3 Journal of Human Justice 27 at 30-1.

83. *Ibid.* See also Sandra A Goundry, Rosalind Currie, and Yvonne Peters, *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998), online: Depository Service Program (Government of Canada) <<http://dsp-psd.pwgsc.gc.ca/Collection/SW21-30-1998E.pdf>> at 39-40. See also Ann Bottomley, "What Is Happening to Family Law? A Feminist Critique of Conciliation" in Julia Brophy and Carol Smart, eds, *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge, 1985) 165 at 179.

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

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.

87. Cornelia Brentano and Alison Clarke-Stewart, *Divorce: Causes and Consequences* (New Haven, CT: Yale University Press, 2006) at 131.

88. Eckel, Oliveira, and Grossman, *supra* note 58 at 440-2.

89. Hilton, *supra* note 73 at 36.

90. Meyers, *supra* note 52 at 870-1; Richard Delgado et al, “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” (1985) 1985 Wisconsin Law Review 1359 at 1367-75.

91. Trevor Farrow, “Public Justice, Private Dispute Resolution and Democracy” in RONALDA MURPHY and PATRICK A MOLINARI, eds, *Doing Justice: Dispute Resolution in the Courts and Beyond* (Ottawa: Canadian Institute for the Administration of Justice, 2009), online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1167702> at 48-50.

92. Grillo, *supra* note 54 at 1589.

this relationship and may exacerbate the risks posed by power imbalance and domestic violence.⁹³

Critics of private settlement have called attention to adjudication's public benefits, such as creating precedents and moving the law forward.⁹⁴ Litigation has played a key part in many family law reform victories for women, either by developing the law in women's interests⁹⁵ or by acting as a catalyst for legislative reform.⁹⁶ Going forward, negotiated or mediated settlements are unlikely to serve either of these law reform functions.⁹⁷ 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."⁹⁸

These arguments for public and formal dispute resolution tend to favour adjudication over either mediation or bipartite negotiation.⁹⁹ 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.¹⁰⁰ A spouse represented by a lawyer would

93. *Ibid* at 1596.

94. See, for example, David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown Law Journal* 2619 at 2622–6; Farrow, *supra* note 91 at 48.

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.

96. For example, *Murdoch v Murdoch* (1973), [1975] 1 SCR 423, which generated substantial public outrage and led to property law reform. Mysty S Clapton, "*Murdoch v Murdoch*: The Organizing Narrative of Matrimonial Property Law Reform" (2008) 20 *Canadian Journal of Women and the Law* 197; Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008).

97. See Menkel-Meadow, *supra* note 81 at 2678–82, for a thoughtful elaboration of, and response to, this argument.

98. Ruth Phegan, "The Family Mediation System: An Art of Distributions" (1995) 40 *McGill Law Journal* 365 at 386.

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.

100. Office of Strategic Planning and Performance Management (Evaluation Division), *The Unified Family Court Summative Evaluation Final Report* (Ottawa: Department of Justice Canada, 2009), online: Department of Justice Canada <<http://www.justice.gc.ca/eng/pi/eval/rep-rap/09/ufc-tuf/ufc.pdf>> at 19. The number of self-represented litigants has increased substantially in recent years in Ontario. This phenomenon is in large part a consequence of the unaffordability of family lawyers to most people and cut-backs to state-funded civil legal aid programs. Nicholas Bala and Rachel Birnbaum, "Family Litigants without Lawyers: Study Documents Growing Challenges for the Justice System," *Lawyers Weekly* (5 August 2011), online: *Lawyers Weekly* <<http://www.lawyersweekly.ca/index.php?section=article&volume=31&number=12&article=2>>; DA Rollie Thompson and Lynn Reiersen, "A Practicing Lawyer's Field Guide to the Unrepresented" (2002) 19 *Canadian Family Law Quarterly* 529 at 529–30; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 *Queen's Law Journal* 825 at 832.

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.¹⁰¹ (Mediators may oppose lawyer involvement because it reduces the scope for party self-determination¹⁰² or because the presence of lawyers reduces the likelihood of agreement in mediation.)¹⁰³ Excluding her lawyer leaves the weaker party without a valuable ally and may thereby foster exploitation.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.”¹⁰⁵

One family law-specific factor mentioned by many of mediation’s feminist critics pertains to parenting disputes.¹⁰⁶ Mediators are likely to favour joint custody as a substantive outcome.¹⁰⁷ Feminist child custody scholarship has identified a natural ideological harmony between joint custody and family mediation, which came of age contemporaneously.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.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.”¹¹⁰ Joint custody in cases of domestic violence has

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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.
 102. Welsh, *supra* note 6 at 425.
 103. Ballard et al, *supra* note 63 at 21.
 104. Boyd, *supra* note 82 at 199.
 105. Bryan, *supra* note 49 at 441-4 and 519-20.
 106. Bailey, *supra* note 75 at 76.
 107. Carol Bohmer and Marilyn L Ray, “Effects of Different Dispute Resolution Methods on Women and Children after Divorce” (1994) 28 *Family Law Quarterly* 223 at 227; Linda K Girdner, “Custody Mediation in the United States: Empowerment or Social Control?” (1989) 3 *Canadian Journal of Women and the Law* 134 at 142; Howard H Irving and Michael Benjamin, *Family Mediation: Contemporary Issues* (Thousand Oaks, CA: Sage Publications, 1995) at 131; CJ Richardson, *Court-Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* (Ottawa: Department of Justice Canada, 1988) at 34-5.
 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.
 109. Regehr, *supra* note 53 at 365-6.
 110. Bryan, *supra* note 49 at 494-5; Fineman, *supra* note 101 at 758; Smart, *supra* note 26.

come in for particular criticism, due to its potential to perpetuate abuse and control.¹¹¹

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.¹¹² Janet Rifkin applauds mediation's "emphasis on the female concerns of responsibility and justice" as an alternative to the "male" focus on individual rights.¹¹³ In a recent article in this journal about women mediator heroes in film, Jennifer Schulz considers mediation as a feminist alternative to patriarchal law.¹¹⁴ 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."¹¹⁵ They suggest that mediation might speak in "a female voice" in contrast to litigation.¹¹⁶ 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.¹¹⁷ Instead, she proposes an evaluative, caucus form of family mediation to be used in domestic violence cases.¹¹⁸

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.¹¹⁹ 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.¹²⁰

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.

112. Michael Benjamin and Howard H Irving, "Toward a Feminist-Informed Model of Therapeutic Family Mediation" (1992) 10 *Mediation Quarterly* 129 at 130.

113. Janet Rifkin, "Mediation from a Feminist Perspective: Promise and Problems" (1984) 2 *Law and Inequality* 21 at 25.

114. Jennifer L Schulz, "The Cook, the Mediator, the Feminist, and the Hero" (2009) 21 *Canadian Journal of Women and the Law* 177.

115. Cathleen Gray and Susan B Merrick, "Voice Alterations: Why Women Have More Difficulty Than Men with the Legal Process of Divorce" (1996) 34 *Family Court Review* 240 at 242.

116. *Ibid* at 246.

117. Mary Adkins, "Moving out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases" (2010) 22 *Yale Journal of Law and Feminism* 97 at 125-8.

118. *Ibid* at 130.

119. Girdner, *supra* note 107 at 147-8.

120. *Ibid* at 149-50.

they were in non-mediated cases.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.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.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.¹²⁴ In Georgia, however, none of the measured outcomes for women were worse under mediation than they were under the alternatives.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.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.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.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).¹²⁹ Although one early study found that mediation was more satisfactory to men than it was to women,¹³⁰ the preponderance of evidence now suggests that either the opposite is true¹³¹ or that there is no gender difference.¹³²

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.

122. Marcus et al, *supra* note 10 at 147.

123. Bohmer and Ray, *supra* note 107.

124. *Ibid* at 232.

125. *Ibid* at 244.

126. *Ibid* at 245.

127. Pearson, *supra* note 12 at 519; Richardson, *supra* note 107 at 37.

128. Adkins, *supra* note 117 at 116.

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.

130. Robert E Emery, Sheila G Matthews, and Melissa M Wyer, "Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers" (1991) 59 Journal of Consulting and Clinical Psychology 410.

131. Galanter and Cahill, *supra* note 81 at 1357; Marcus et al, *supra* note 10 at 145.

132. Lori Anne Shaw, "Divorce Mediation Outcome Research: A Meta-Analysis" (2010) 27 Conflict Resolution Quarterly 447 at 448; Administrative Office of the Courts (California), "Snapshot Study 2008: Summary Findings," Research Update, online: Administrative Office of the

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.¹³³ 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.¹³⁴ The literature of this decade focused on

Courts (California) <http://www.courts.ca.gov/documents/Snapshot_2008_summary_findings_FINAL_Oct11_update.pdf> at 21.

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.

134. Pearson, *supra* note 62 at 324-5.

building the capacity of family mediators to recognize power imbalance and domestic violence.¹³⁵ However, doubts remained about the ability of mediators to detect these phenomena on an ad hoc basis.¹³⁶

The focus therefore gradually shifted to the development of formal screening and triage tools.¹³⁷ Linda Girdner's groundbreaking 1990 Conflict Assessment Protocol (CAP) was perhaps the first feminist-influenced tool to be published.¹³⁸ 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.¹³⁹ DOVE distinguishes between, and tests for, both control-motivated and conflict-instigated violence, which have very different consequences for family mediation practice.¹⁴⁰ 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 2003.¹⁴¹

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

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135. Jennifer P Maxwell, "The Use of Performance Art and Q Methodology for Increasing Mediator Recognition of Trauma and Domestic Violence" (1999) 16 *Mediation Quarterly* 269 at 269; Ellis and Wight, *supra* note 36.
 136. Amy Holtzworth-Munroe, Connie J Beck, and Amy G Applegate, "The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48 *Family Court Review* 646 at 647.
 137. See Donald T Saposnek, "Commentary: The Future of the History of Family Mediation Research" (2004) 22 *Conflict Resolution Quarterly* 37, regarding shifting priorities in family mediation research.
 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.
 139. Desmond Ellis and Noreen Stuckless, "Domestic Violence, DOVE, and Divorce Mediation" (2006) 44 *Family Court Review* 658.
 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.
 141. Peter Salem, Debra Kulak, and Robin Deutsch, "Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen" (2007) 27 *Pace Law Review* 741 at 757.

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,

142. Holtzworth-Munroe, Beck, and Applegate, *supra* note 136 at 658.

143. *Ibid* at 657.

144. *Ibid* at 656.

145. Ver Steegh and Dalton, *supra* note 68 at 460.

146. Pearson, *supra* note 62 at 325.

147. Salem, Kulak, and Deutsch, *supra* note 141 at 751, 754, and 760-1; Peter Salem, “The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?” (2009) 47 Family Court Review 371.

148. Gewurz, *supra* note 27 at 136.

149. Salem, *supra* note 147 at 383; Maxwell, *supra* note 135 at 337.

150. Nancy Johnson, Dennis Saccuzzo, and Wendy Koen, “Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect” (2005) 11 Violence against Women 1022 at 1025.

151. McEwen, Rogers, and Maiman, *supra* note 81 at 1336. Mary Adkins reports that thirty American states now have “statutes specifically limiting court-affiliated mediation options for judges and mediators in domestic violence cases,” in addition to numerous local court rules to similar effect. Adkins, *supra* note 117 at 101 and 106-7.

approximately 25 percent of referrals to family mediation are now screened out due to domestic violence.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).¹⁵³ Some argue that it is not possible to determine beforehand which cases are appropriate for mediation¹⁵⁴ or that domestic victims are better off with mediation than they are in court.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,¹⁵⁶ and 66 percent of Canadian family mediators surveyed in 1998 did not believe that spousal abuse should automatically preclude the use of mediation.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,¹⁵⁸ and some jurisdictions do exactly that.¹⁵⁹ A recent empirical study found that domestic violence cases were less likely to reach full agreement in mediation than were other cases.¹⁶⁰ This might suggest that victims are not necessarily so intimidated that they will accept the demands of the perpetrators.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.¹⁶²

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152. *Family Law Act 1975* (Cth) at 60I(b)(iii); Helen Rhoades, "Mandatory Mediation of Family Disputes: Reflections from Australia" (2010) 32 *Journal of Social Welfare and Family Law* 183 at 184.
 153. Astor, *supra* note 73 at 180.
 154. Robert A Baruch Bush, "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation" (1989) 3 *Journal of Contemporary Legal Issues* 1 at 18-19.
 155. Beck et al, *supra* note 19.
 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.
 157. Edward Kruk, "Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation" (1998) 36 *Family Court Review* 195 at 202.
 158. Ver Steegh, *supra* note 65.
 159. Adkins, *supra* note 117 at 123.
 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.
 161. Ballard et al, *supra* note 63 at 27.
 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.¹⁶³ Victims may be allowed to attend mediation with a support person as an ally.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.¹⁶⁵ To further reduce the chance of a violent encounter, the spouses might even be asked to visit the facility on different days.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.¹⁶⁷

Ellis and Wight's DOVE sorts cases into four categories based on the risk of physical violence.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.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.¹⁷⁰

163. Nancy Thoennes, Peter Salem, and Jessica Pearson, "Mediation and Domestic Violence: Current Policies and Practices" (1995) 33 *Family and Conciliation Courts Review* 6; Pearson, *supra* note 62.

164. Ricci, *supra* note 23.

165. Adkins, *supra* note 117 at 105; Pearson, *supra* note 78 at 17.

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.

167. Girdner, *supra* note 138 at 373.

168. Ellis and Stuckless, *supra* note 156 at 662.

169. *Ibid* at 664.

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.”¹⁷¹ 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.”¹⁷² 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.¹⁷³ 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.¹⁷⁴ Family mediators in some states are required to ensure that the parties have made full financial disclosure.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸

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.

173. Angela Cora Garcia, “The Role of Interactional Competence in Mediation” (2010) 28 Conflict Resolution Quarterly 205 at 207; Janet Rifkin, Jonathan Millen, and Sara Cobb, “Toward a New Discourse for Mediation: A Critique of Neutrality” (1991) 9 Mediation Quarterly 151 at 162 n 2.

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.

178. Christine A Coates and Kon Dumas, “Family Mediation by the Community Mediation Service in Boulder, Colorado” (1997) 15 Mediation Quarterly 29 at 33; Pearson, *supra* note 78 at 53.

process” might be a sufficient response to purely procedural power imbalances.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.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.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.¹⁸² Dworkin and London described their approach as a reconciliation of the principle of self-determination with the principle of fairness.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.”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.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.¹⁸⁶

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

179. Gewurz, *supra* note 27 at 154.

180. *Ibid* at 143.

181. Joan Dworkin and William London, “What Is a Fair Agreement?” (1989) 7 *Mediation Quarterly* 3.

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.

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

187. Beck and Sales, *supra* note 3 at 31.

188. Loretta Frederick, "Questions about Family Court Domestic Violence Screening and Assessment" (2008) 46 Family Court Review 523 at 526.

189. Astor, *supra* note 73.

190. *Ibid* at 187. On the other hand, Mary Adkins has suggested that victims who know that domestic violence precludes mediation in their jurisdiction might deny the violence in order to retain the right to mediate. Adkins, *supra* note 117 at 114.

191. Astor, *supra* note 73 at 192; Hilary Astor, "The Weight of Silence: Talking about Violence in Family Mediation" in Margaret Thornton, ed, *Public and Private: Feminist Debates* (Melbourne, Australia: Oxford University Press, 1995) 174 at 121.

192. Holtzworth-Munroe, Beck, and Applegate, *supra* note 136 at 648.

193. Beck and Sales, *supra* note 3 at 35.

194. Johnson, Saccuzzo, and Koen, *supra* note 150 at 1027-8 and 1033.

195. Bryan, *supra* note 49 at 504-6; Grillo, *supra* note 54 at 1592.

196. Regehr, *supra* note 53.

197. *Ibid* at 369.

198. Phegan, *supra* note 98 at 395. See also Rosanna Langer, "The Juridification and Technicisation of Alternative Dispute Resolution Practices" (1998) 13 Canadian Journal of Law and Society 169 at 182.

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.”¹⁹⁹

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.²⁰⁰ 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.²⁰¹ 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.²⁰² Many feminists and others see legal representation as an indispensable safeguard,²⁰³ although some criticize the assumption that independent legal advice is an effective safeguard for vulnerable parties.²⁰⁴ 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.²⁰⁵

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 rigueur* 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.

201. Hilton, *supra* note 75 at 46 and 51-3.

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.

203. McEwen, Rogers, and Maiman, *supra* note 81; Rosemary Hunter, “Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law” (2003) 30 *Journal of Law and Society* 156; Becky Batagol, “Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution” (2008) 8 *Queensland University of Technology Law and Justice Journal* 24.

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].

205. Rhoades, *supra* note 152 at 185.

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.

2011 he was proposing “presumptive” mediation.²¹⁶ This change was reportedly motivated by protest from within the family bar regarding the unsuitability of mediation in some domestic violence cases.²¹⁷ While evaluating the efficacy of these screening processes is beyond the scope of this article, they at least show awareness of, and responsiveness to, the feminist critique of mandatory family mediation.

Family Mediation and the Settlement Mission

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.²¹⁸ 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.

216. Warren Winkler, “Remarks to the County of Carleton Law Association Annual Institute of Family Law 2011” (delivered in Ottawa, 8 April 2011), online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/2011-Annual-Institute-Family-Law-CCLA.htm>>.

217. Kirk Makin, “A Program to Fix Our Ailing Family Courts,” *Globe and Mail* (25 March 2011), online: *Globe and Mail* <<http://www.theglobeandmail.com/news/national/a-program-to-fix-our-ailing-family-courts/article1957443/>>.

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 analytical in nature. Statutes point to a decision-making job for these workers, especially in the case of CCEs.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.²²⁰ They do so on the basis of a presumption that settlement is in the best interests of the family. As one recent article observed, the *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.”²²¹ Family judges generally pursue settlement in the pre-trial conferences, which are now mandatory for family litigants in Ontario and many other jurisdictions.²²² For example, one Toronto provincial court judge told the author that “every court appearance is an opportunity to settle the case,”²²³ another said that if litigants “think they have a chance of settling, that’s our job, that’s what we’re here for.”²²⁴

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.”²²⁵ 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 techniques that mediators do. Mediation methods have traditionally been divided into

219. For example, regarding Ontario CCEs, see the *Courts of Justice Act*, RSO 1990, c C43; *Children’s Law Reform Act*, RSO 1990, c C12 at s 30.

220. Noel Semple, “Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy,” *Conflict Resolution Quarterly* [forthcoming in 2012], online: Social Science Research Network <<http://ssrn.com/abstract=1687268>> .

221. Jaffe, Crooks, and Bala, *supra* note 140 at 170 and 175. See also Adkins, *supra* note 117 at 119.

222. *Family Law Rules*, O Reg 114/99, Rule 17.

223. Interview with Justice “BB,” Ontario Court of Justice in Toronto (4 January 2010).

224. Interview with Justice “DD,” Ontario Court of Justice in Toronto (3 March 2010).

225. Interview with “GG,” Psychologist in Toronto (4 February 2010).

the “facilitative” and the “evaluative,”²²⁶ and the author found each of these in the interviewees’ descriptions of their settlement-seeking work.²²⁷ 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.²²⁸ The author critically analyzes the settlement mission in another article.²²⁹

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.²³⁰ Even less has been written about settlement seeking among CCEs—their role has been defined almost exclusively in terms of the analytical mission.²³¹ 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,²³² also runs incoming cases through a comprehensive triage system.²³³

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

226. Leonard L Riskin, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 *Harvard Negotiation Law Review* 7.

227. Semple, *supra* note 220, at ss II(1) and II(2).

228. Dorothy J Della Noce, “Evaluative Mediation: In Search of Practice Competencies” (2009) 27 *Conflict Resolution Quarterly* 193 at 205.

229. Noel Semple, “Judicial Settlement-Seeking in Parenting Cases: A Mock Trial (Draft)” (2011) [unpublished], online: Social Science Research Network <<http://ssrn.com/abstract=1898629>>.

230. Semple, *supra* note 220 at s I(2).

231. Jonathan W Gould and David A Martindale, *The Art and Science of Child Custody Evaluations* (New York: Guilford Press, 2007) at 4; Dana Royce Baerger et al, “A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations” (2002) 18 *Journal of the American Academy of Matrimonial Lawyers* 35 at 44-5; David A Martindale et al, “Model Standards of Practice for Child Custody Evaluation” (2007) 45 *Family Court Review* 70 at 71.

232. Rachel Birnbaum and Helen Radovanovic, “Brief Intervention Model for Access-Based Postseparation Disputes: Family and Court Outcomes” (1999) 37 *Family and Conciliation Courts Review* 504 at 507.

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.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.²³⁵ For example, one New York family court judge whom the author interviewed described her approach in settlement conferences as follows:

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.²³⁶

One interesting documentation of the judicial settlement mission is New York City's matrimonial judge Ellen Gesmer's "Custody Speech."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."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.²³⁹ Finally, the speech implies that not settling might undermine the parents' authority, with dire consequences for the child's well-being:

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.

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>.

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.

236. Interview of Justice "PP," of the New York State Supreme Court in White Plains, New York (16 November 2010).

237. Ellen Gesmer, "Sample of Judicial Philosophy/Approach: 'Custody Speech,' " Judicial Election Material [unpublished].

238. Interview with Justice "MM," New York State Supreme Court in New York (28 September 2010).

239. *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. *Sample*, *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.