Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases

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ABSTRACT: Today, an overwhelming number of states and local jurisdictions presume domestic violence victims unsuitable for divorce mediation. The National Council of Juvenile and Family Court Judges ("NCJFCJ") Model Code on Domestic and Family Violence ("Model Code") and similar state codes have codified this presumption. This Article argues that these statutes grew out of 1980s and early 1990s critiques articulating concerns that mediation threatens domestic violence ("DV") victims' safety and interests. These critiques imagined a model of mediation that ultimately did not comport with the model of mediation that emerged in family courts throughout the United States in the 1990s. Court mediation today tends to be evaluative rather than facilitative and settlement focused rather than understanding based. These features of court mediation both protect the victim's interests better than more facilitative models and allow certain precautions to be taken for victims who are less suited to the quintessential private mediation, with its specific and distinct goals. This Article argues that because legislation crafted in response to critiques of divorce mediation for domestic violence victims in the 1980s and 1990s inaccurately reflects the nature of court mediation today, this legislation fails to respond to the full range of DV victim experiences, needs, and abilities. Excessive focus on the danger of mediation for victims without consideration of the costs and risks of the most common alternative—litigation—is a mistake. These protocols are outdated and ineffective: they discourage or altogether prohibit DV victims from participating in mediation even as empirical studies have demonstrated a number of compelling reasons for their participation in it, and they do so in order to protect them from dangers that appear today to be largely illusory. We should reform policies accordingly.

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INTRODUCTION

When the modern mediation movement in the United States made its way into the family court system, fundamentally changing the divorce process for many litigants, resistance surged from those concerned with how this new dispute resolution process might affect victims of domestic violence ("DV victims"). In a decade in which many of the achievements of the battered women's movement—most notably, mandatory arrest and prosecution policies—remained young and largely untested, advocates for DV victims ("DV victim advocates") were especially sensitive to policies that failed due to ignorance of DV victims' needs. A score of critiques (in the form of advisory opinions, popular news, and scholarly articles) expressed concern that divorce mediation put DV victims at special risk of being exploited and endangered. I argue that these critiques influenced the National Council of Juvenile and
Divorce Mediation in Domestic Abuse Cases

Family Court Judges ("NCJFCJ") Model Code on Domestic and Family Violence ("Model Code"), versions of which were subsequently adopted by a number of states and remain in effect today.2

These 1980s and early 1990s critiques, however, reflect an understanding of mediation characterized by distinct features that ultimately did not comport with the court-sponsored mediation programs subsequently established across the United States. I will argue that, as a result, many family courts today offer models of mediation that do not reflect the structure and style of mediation imagined by the Model Code and corresponding state codes. Particularly in light of relevant social science published over the last fifteen years, the distinctions between the standard mediation model presumed by the Model Code and corresponding state codes and the standard model practiced by courts appear to be significant.

I will argue that legislation crafted in response to and in line with critiques of divorce mediation in the 1980s and early 1990s—legislation presuming DV victims unsuitable for mediation—inaccurately understands the nature of court mediation today. I will argue that such legislation fails to respond to the full range of DV victims' experiences, needs, and abilities both for this reason and because the image of the DV victim that emerged from the battered women's movement lent itself to the kind of oversimplification that the legislation reproduces.

I will also argue that excessive focus on the danger of mediation for victims is a mistake because it fails to consider the costs and risks of the most common alternative—litigation. By discouraging or altogether prohibiting DV victims from participating in mediation even as empirical studies have demonstrated a number of compelling reasons for their participation in it and by doing so in order to protect them from dangers that in 2010 appear to be largely illusory, these protocols show themselves to be outdated and ineffective. Public policy and similar private policies should be reformed to accommodate the nature of court mediation as it currently exists in the United States as well as empirical findings on DV and on the participation of DV victims in mediation.

I will discuss in Part II the mismatch between the model of mediation assumed in the Model Code and the prototypical model of mediation offered in American family courts. I will also examine the historical roots of policies that presume DV unsuitable for divorce mediation, tracing them in part to the dichotomies and cultural narratives that emerged from the battered women's movement. In Part III, I will return to policy analysis to discuss specific ways

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in which the presumption is ineffective at dealing with the relative competencies of mediation and litigation to respond to the interests of DV victims. I conclude with guiding principles for the future, recommending specific policy changes. But first, in Part I, I will provide a brief overview of the history of the modern mediation movement and the resistance by DV victim advocates seeking to protect DV victims from its effects.

I. A BRIEF HISTORY OF COURT-SPONSORED MEDIATION AND THE PRESCRIPTION AGAINST MEDIATING DOMESTIC VIOLENCE CASES

Changing attitudes toward divorce in the second half of the twentieth century, along with laws reflecting and producing those changes, left family court dockets in the United States overwhelmed by a growing number of divorce petitions and divorce-related disputes. At the close of the century, the National Center for State Courts reported that “[d]omestic relations cases are the largest and fastest-growing segment of state court civil caseloads,” having risen seventy percent between 1984 and 1996. It further reported that as of 1995, twenty-five percent of all civil filings—over 4.9 million—were domestic relations cases. Most of these were filed by women, and a disputed but indisputably large proportion of these cases involved couples with a history of domestic violence.

The concurrence of this phase of judicial evolution with the modern mediation movement led to a sweep of family court reforms nationwide. Courts faced both a swelling need for more efficient processing of cases and the growing popularity of a form of dispute resolution that was characterized by—indeed, prided itself on—low transaction costs and high satisfaction rates

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5. Margaret F. Brinig & Douglas W. Allen, “These Boots Are Made for Walking”: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126, 126 (2000); Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, 54 JUV. & FAM. CT. J. 57, 58-59 (2003). Because victims are typically women, I will use “she” for victims and “he” for abusers, but it is important to note that fifteen percent of victims of DV are men. See CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., INTIMATE PARTNER VIOLENCE (rev. ed. 2002) (reporting that eighty-five percent of all acts of domestic violence are against women and that women are victims of intimate partner violence five times more often than men).
Divorce Mediation in Domestic Abuse Cases

among participants. In 1980, California became the first state to establish court-sponsored, mandatory mediation prior to a hearing for every divorcing couple disputing custody and visitation. Court-sponsored forms of alternative dispute resolution ("ADR") in family law, both voluntary and mandatory, began to grow steadily in the United States. The Academy of Family Mediators, the first professional association for family and divorce mediators, was founded in 1982. As of 2001, thirty-eight states had passed state legislation on family mediation.

Responding to the wave of family court ADR processes, specifically mandatory ones, many lawyers, scholars, and policymakers in the early 1990s expressed concern that such mediation-like processes, with their focus on encouraging couples to "understand the other party's perspective" and "generate the solution to their own dispute," would be inappropriate for couples with a history of domestic violence. These theorists and advocates worried that victims of DV, deferential to their abusers and thus unable or unwilling to voice their true interests, would be victimized again, this time by the mediation process itself. They foresaw victims dominated by their spouses and ultimately stuck with unfair and undesirable agreements governing the very personal, high-stakes matters that arise during a divorce: who has custody of the children, what sort of visitation schedule is in place for the noncustodial parent, how much child support and alimony must be paid and in what manner, how assets are to be split, and, in high-conflict divorces, on what terms the former spouses are permitted to contact one another. The NCJFCJ responded to concerns that mediation endangers victims of DV and in 1994 integrated them into its Model Code on Domestic and Family Violence.

Currently, approximately thirty states have statutes specifically limiting court-affiliated mediation options for judges and mediators in domestic violence cases. Of these states, eight (plus Guam) have adopted substantially similar versions of the NCJFCJ Model Code. The purposes of these provisions are to protect the victim from being marshaled into mediation


9. Id. at 5 (citing Carrie-Anne Tondo, Rinarisa Coronel & Bethany Drucker, Mediation Trends: Survey of the States, 39 FAM. CT. REV. 431 (2001)).


11. Id. at 337-38.

12. MODEL CODE, supra note 1, at §§ 407, 408.

13. See MEDIATION IN FAMILY LAW MATTERS, supra note 2. Note that this number reflects state statutes only; it does not account for local jurisdictional rules within states, of which there are many.

14. Id. "Substantially similar" refers to the ABA's categorization of the statutes appearing in this source as adopting or not adopting the Model Code.
against her true wishes by the court or her abuser, and from the mediation process itself, in the event that she does find herself participating. It is important to recognize that these statutes condone principles that have also been adopted by private law and dispute resolution practices, legal aid organizations, policymakers, and training programs for judges. These principles generally include: 1) mediation should be presumed inappropriate in cases where DV has occurred between the parties or where it is alleged (although some jurisdictions allow the victim to request it under certain conditions); 2) litigation is better suited to protect victims’ interests; and 3) any mediator has a duty, upon learning that DV has occurred, to either terminate mediation (even against the will of the parties) or proceed under special protocol, provided that he or she is trained in handling DV.

In the next Part, I will discuss the ways in which these protections grew out of an understanding of mediation, most prevalent in the 1990s, to which court-sponsored mediation programs today do not generally conform.

II. THE EVALUATIVE-FACILITATIVE SPECTRUM AND DOMESTIC VIOLENCE

A. Emergence of the Two Approaches

Although theories of mediation diverged prior to publication of the NCJFCJ Model Code in 1994, they had not yet splintered into the nominal categories that today capture important theoretical differences of opinion as to how mediation should proceed and what its primary goals should be. Leonard Riskin coined the terms facilitative and evaluative as distinctive categorical approaches the same year the Model Code was published. These modes, however, had been approximated by scholars in earlier work. Debra Kolb in 1983 labeled mediators “deal makers” or “orchestrators” depending on their orientation, and Susan Silbey and Sally Merry in 1986 described the same sort of tension as a “bargaining mode” pitted against a “therapeutic style of mediation.” These two characterizations of mediation have different origins.

The facilitative approach to mediation defined the early days of the modern divorce mediation movement in the United States in the late 1970s and early 1980s. Asserting that litigation excluded divorcing parties from the divorce process in a way that alienated them from decisions involving “the very personal and highly traumatic issues of child custody and visitation,” advocates urged that “dispute resolution should more fully involve participants in disputes.” Volunteer dispute resolution centers appeared, where volunteer mediators—seldom required to possess specific, if any, credentials—offered their services. Attorneys were rarely among them. Meanwhile, small pockets of attorneys began offering “non-adversarial legal services,” and a growing number of mental health professionals began to market themselves as divorce counselors, creating therapeutic interventions, offering mediation to help a family transition psychologically, and even facilitating the negotiation of contractual agreements regarding children and property.

The theoretical perspective that transpired from this approach gave way to facilitative modes of mediation, the term that eventually stuck in academic and professional circles. To describe a mediation as “facilitative” today is to imply that several key features will characterize it: the mediator will refrain from making recommendations, from offering opinions or advice regarding the legal strength of the parties’ positions, and from predicting how a judge might decide the case. Rather, the professional role of the facilitative mediator is to ask questions, to participate in brainstorming with the parties to generate a broad range of options, to seek to identify the “interests underneath the positions taken by the parties,” and often to “validate and normalize the parties’ points of view.” Riskin defined the quintessential facilitative mediator as one who “assumes that his principal mission is to enhance and clarify communication between the parties in order to help them decide what to do.”

Within the judicial system, however, a different style of mediation emerged with particular, context-specific goals. As mediation’s popularity rapidly spread for divorcing couples, courts facing steadily increasing numbers of divorce petitions saw potential for the new process to relieve some of the immense

20. Welsh, supra note 3, at 421.
23. Milne et al., supra note 8, at 4.
24. Id. at 5.
25. Mediator Orientations, supra note 17; see also Zumeta, supra note 22; Bernard Mayer, Facilitative Mediation, in Divorce and Family Mediation, supra note 3, at 29.
27. Id.
28. Id.
29. Mayer, supra note 25, at 31 (emphasis added).
pressure building on family court dockets. Mediation, in the courts' view, could provide a means of promoting and enabling settlement and conserve judicial resources. Court-sponsored mediation seemed a win-win situation: good for litigants, good for courts.

Thus, in part as a response to clogged family dockets, evaluative mediation emerged as a process that, while still mediative in nature (interest-based, involving a counseling component, and permitting the parties to enter into an agreement only if they voluntarily choose to do so), places a greater premium on efficiency and legally-influenced outcomes than do facilitative models. Its ultimate aim is not necessarily to promote understanding between the parties or to identify deeply-buried interests, but, at the most basic level, to produce settlement agreements. The central feature of the evaluative model is, as its name suggests, evaluation. Riskin's classic definition identifies three overall tasks for the evaluative mediator: 1) to assess the strengths and weaknesses of the parties' cases; 2) to develop and propose options to resolve the case; and 3) to predict the outcome if the dispute were litigated. Riskin notes that unlike a facilitative mediator, the evaluative mediator is “active, decisive, and involved.”

Randolph Lowry provides the following definition:

The evaluative approach to the mediation process either allows or, in many cases, establishes an expectation that the mediator will make assessments about the conflict as well as its resolution and communicate those assessments to the parties. It is an analytical process that focuses the mediator's attention on the substance of the conflict and what would be necessary in order to achieve a settlement. It ... assumes the mediator is capable not only of facilitating the mediation process but also making judgments about its content.

The evaluative role of the mediator is so institutionalized in court-sponsored mediation programs that it has been heavily criticized for its uncanny resemblance to settlement conferences held by judges. Cases are mediated “in the shadow of the law,” as the mediator educates the parties about legal and ethical norms and in some instances may even insist on

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33. Id.; see also Jessica Pearson, Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs, 14 MEDIATION Q. 319, 326 (1997).
34. Lowry, supra note 32, at 73.
35. Welsh, supra note 7, at 6.
incorporating them into the agreement. A distinctive structural feature is that attorneys, where available, are often involved, and the parties are not necessarily required to be present in the mediation. Alternatively, they may meet with the mediator in sessions in which the oppositional party is not present. This is referred to as "shuttling." The shuttling model—far less acceptable in facilitative models that seek to reach various psychological goals of mutual understanding and respect between the parties—is extraordinarily important in cases of DV (both for the victim’s physical safety and to prevent potential face-to-face intimidation), and as such some states have codified it as the exclusive mode for mediators upon a finding of DV. The evaluative approach in general has also been shown to be beneficial in instances of severe power disparity, where “parties . . . have little or no influence on the opposing party.”

This is not to say that the emergence of the court model just described was driven exclusively by efficiency. Though resource conservation was certainly the dominant goal, courts were also concerned with the safety of victims, hence such precautions as shuttling and the training of mediators to attend to power disparities. The difference between the evaluative and facilitative models helps explain why these extra precautions—shuttling and the special training of mediators to attend to power imbalances—were possible. Because courts were not committed to a facilitative model, they were able to implement these structural reforms to accommodate victims. Again, in a facilitative model, both shuttling and evaluation by a mediator would be discouraged at the very least and possibly prohibited.

The clash between mediation’s origins, which were more facilitative, and its ugly duckling spawned by the same name—evaluative and settlement-focused mediation—gave rise to heated debate. Court mediation’s heavy focus on law and heavy evaluative component led to concern over the “thinning” of self-determination as a priority in the court model, with several scholars questioning whether the term “mediation” was even applicable to it. The rate at which these evaluative court mediation programs were being made

38. Zumeta, supra note 22.
40. Ricci, supra note 6, at 402.
41. Lowry, supra note 32, at 78.
42. Welsh, supra note 7.
43. Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin’s Grid, 3 HARV. NEGOT. L. REV. 71, 80 (1998) (arguing that a mediator is “off the mediation map when the mediator has an attitude or identity of being an evaluator”); see also Waldman, supra note 37, at 755-56 (noting, however, that because “considerable negotiation [still] take[s] place in the open space” that normative guidelines leave uncertain and because the mediator still “uses mediative techniques to help the parties reach an agreement,” the process should still be called mediation, as “[t]o call it anything else would create needless confusion”).
mandatory did not ease the tension, as critics contended that to require participation in mediation contradicted its very nature as a voluntary process. In 1996, Riskin observed that, regarding the "is" and "ought" of mediation, "the largest cloud of confusion and contention surrounds the issue of whether a mediator may evaluate." Ultimately, the American Arbitration Association (AAA), the American Bar Association, and the Society of Professionals in Dispute Resolution, through a joint committee on standards of conduct for mediators, agreed on a standard intended to discourage evaluation in mediation. The Standards of Conduct for Mediators, published in 1994, state that "[t]he primary purpose of a mediator is to facilitate. . . . A mediator should refrain from providing professional advice." Facilitative mediation thus won the normative battle among private professionals and scholars—and advocates for DV victims tracked this success—even as evaluative medication was quietly winning in the nation's family courts.

B. Domestic Violence and Mediation: Facilitative Protections in an Evaluative World

In light of the skyrocketing number of court mediation programs popping up across the United States, DV victim advocates raised a public outcry, condemning mediation as dangerous for victims of abuse and even for women in general. Not only did they fear that a mediator would be helpless to stop an abuser from exploiting a victim, but they were also concerned that the requisite neutrality of such a person might inadvertently serve to condone or at least trivialize abusive behavior. This apprehension was heard widely. The prevailing view became to presume mediation—particularly mandatory mediation—inappropriate in light of DV allegations or proof, allowing for exceptions in limited circumstances defined by specific criteria. This view

47. See generally Gagnon, supra note 44; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); Shaffer, supra note 44.
48. Grillo, supra note 47.
49. Or. Judicial Dep't, Guidelines for Developing Domestic Violence Plans and Protocols: A Manual for Courts and Court-Connected Programs 9 (2005) [hereinafter Oregon Plans and Protocols] ("Mediator neutrality may support the abuser's belief that the abuse is acceptable. The future-orientation of mediation may discourage discussion of past abuse, which in turn invalidates the victim's concerns and excuses the abuser. This may result in agreements that are inherently unsafe.").
Divorce Mediation in Domestic Abuse Cases

reigned as the dominant one throughout the late 1990s and remains the prevailing view today.

Judges are advised and in many states required to refrain from referring to mediation any party who has alleged domestic violence. A majority of states have passed statutes limiting the circumstances under which couples between whom DV has been alleged are permitted to participate in court-sponsored or court-referred mediation. Again, the Model Code reflects this view, as do the state codes, local court rules, jurisdiction policies, and private and public interest organization policies that draw upon it. A self-described “Instructor’s Guide for Judges” published in 1999, Domestic Abuse and Custody Mediation Training for Judges and Administrators, includes an introductory slide that states, “If either [violence or fear of violence] is identified, the recommendation is against mediation.” A number of oft-cited articles themselves cite the guide as authoritative.

This view and the various rules that flow from it, however, are premised on an understanding of mediation programs that are more facilitative than evaluative, an assumption that is widely inaccurate given the evaluative nature of most court-sponsored programs today. Mediation “triage,” for example, defines a certain category of cases that should “never be mediated.” One condition that is widely accepted as rendering a couple “unable to negotiate” is when “the abuser discounts the victim and refuses to acknowledge how his behavior affects her.” This condition assumes that the abuser’s regard for the victim matters in an evaluative setting, which may or may not be true depending on the particular features of the mediation. Because facilitative...
mediation is designed around psychological goals, a psychological precondition for even entering the room seems reasonable; the link is clear. In contrast, in a court mediation for which the goal is mere settlement, 58 respect for the victim by the abuser is less vital and perhaps even irrelevant—and certainly not required. Not only does an evaluative mediator weigh in on issues of fairness and legality surrounding the parties' positions, but typically he or she is also charged with tending to any power imbalance that exists between the parties. 59

Likewise, claims such as the following respond to models focused on facilitative goals rather than the more legal-minded, quantifiable goals of evaluative processes:

The effectiveness of mediation depends upon the extent of the violence. If the abuser refuses to recognize the worth of his or her partner, no true compromise may be reached. 60

The role of the mediator is to function as a neutral facilitator who refrains from expressing a point of view on the dispute but instead helps the parties make their own decisions. 61

To determine whether mediation is appropriate for couples who have experienced domestic violence, the following definition of mediation is offered: "Mediation is a cooperative dispute resolution process in which a neutral third party tries to help contesting parties to reach a settlement of their differences . . . mediation stresses honesty, informality, open and direct communication, expression of emotion, attention to the underlying causes of disputes, reinforcement of positive bonds and avoidance of blame." 62

These statements are emblematic of the prevalent view that an equal psychological footing between the parties is necessary for mediation to succeed. As they illustrate, the view often relies on the idea that mediating parties will engage in "open and direct communication" and will attend to the "underlying causes" of their dispute.

Another common feature of justifications for presuming domestic violence inappropriate for mediation involves the idea that we should protect victims from coming "face-to-face" with their abusers. Scholars discuss how "airing concerns face-to-face" with an abuser can be dangerous because an "idiosyncratic manner" of communication between the parties can lead to

59. Ver Steegh, supra note 7, at 172 (noting JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 230 (1997) and Erickson & McKnight, supra note 57, at 60).
61. Ver Steegh, supra note 7, at 172 (emphasis added).
coercion of the victim in ways a mediator will not detect.63 Robert Geffner writes: "The potentially tragic irony is apparent: a woman who has been unable to protect herself from physical assault and abuse is now expected to engage in face-to-face, honest, direct, open discussion and negotiation with her abuser to reach a 'mutually acceptable agreement.'"64

These justifications rely upon a structure of mediation (face-to-face) that holds true for most facilitative models but is far from definite or even prevalent for many evaluative models. Rather, the concern is easily solved by shuttling or "caucusing." Under a shuttling model, the couple need not ever be present in the same room. Some state laws require caucusing in instances in which screening has led to the identification of DV.65 In fact, research suggests that the vast majority of court mediation programs—between seventy-three and ninety-six percent—employ special techniques and procedures when mediating cases in which domestic violence has been proven or alleged.66 These include not only caucusing, but also planning for the victim's safety going to and from the mediation by offering separate waiting rooms, staggering arrival times, and providing escorts.67 Research has also demonstrated that when mediators realize in the course of mediation that DV has occurred, they become more active and directive (when they do not terminate the mediation, which is required in some jurisdictions), and they encourage more detailed and specific agreements.68

Finally, consider the language of Oregon's Domestic Violence Plans and Protocols, which is representative of a number of comparable state policies. The Oregon plan states: "When domestic violence is present among parties in a dispute, the abuser's desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the victim from asserting needs."69

The "method" assumed here appears to entail a facilitative approach, for in an evaluative mediation in which the mediator is independently evaluating and directing the discussion, an abuser seeking to control the victim will, to a certain extent, need to control the mediator. In a shuttling mediation, of course, the risk of coercion is reduced even further because the parties do not interact during the negotiation. Shuttling, by physically separating the parties, precludes the possibility of both verbal manipulation and nonverbal cues intended to intimidate the victim. It is unclear what "objective" is assumed by this provision, but it also seems to rest on a facilitative notion. The objective of an

64. Geffner & Pagelow, supra note 30, at 156.
65. See MEDIATION IN FAMILY LAW MATTERS, supra note 2; Ricci, supra note 6, at 402.
66. Ver Steegh, supra note 7, at 198 (citing a study from 1997).
67. Id. at 198-99.
68. Id. at 199.
69. OREGON PLANS AND PROTOCOLS, supra note 49, at 8 (emphases added).
evaluative mediation is not mutual understanding but settlement. That goal is not necessarily precluded by one party’s desire to control the other, as long as that desire is sufficiently tempered by the mediator. This is the mediator’s job, and, as I discuss later, research shows that mediators are performing this job fairly well.

C. The Role of the Battered Women’s Movement

Before delving further into policy analysis, I would like to discuss two historical realities that I believe contributed to the present three-way mismatch between the codified protection (the presumption against mediation), the person being protected (the DV victim), and the danger from which she is being protected (the mediation). The first concerns the relatively early codification of the presumption against mediating DV cases. The presumption itself was adopted before most court mediation programs had fully developed and, in some jurisdictions, before mediation programs were even established. As a result, the safeguards that were pushed for and ultimately instituted are based not on what these programs actually look like, but what people imagined they would look like.

The spread of family court mediation took place in the wake of the battered women’s movement. Advocates who had spent the preceding years working tirelessly to draw state attention to the problem of domestic violence became aware of a new process of dispute resolution whose popularity was rapidly expanding throughout the United States. The achievements of the movement—new protections for DV victims and greater recognition by the state of the seriousness of intimate violence—were fresh ground still loose under their feet. Concerned about the vulnerable position into which victims might be thrown by this increasingly offered (and increasingly mandated) method of divorce, DV victim advocates pushed their own policy principles. Meanwhile, as discussed in this Section, court mediation was moving in a different direction from the one predicted by these advocates, the policymakers who listened to them, and ADR professional organizations. Movement participants, able to organize around a policy at its incipient stages, worked effectively early on and

70. The Model Code was published in 1994. Articles that appeared in the late 1980s and early 1990s arguing against mediation reported that state legislatures and family courts were “often turning to mandatory mediation,” Gagnon, supra note 44, at 272, and that mediation had “become a well-entrenched component of the judicial system,” Shaffer, supra note 44, at 163. In 1992, six states had passed statutes requiring mediation, and eighteen had statutes permitting courts to order mediation. Gagnon, supra note 44, at 272 n.2. These numbers grew dramatically throughout the 1990s. By 2001, only eleven states had no statute on family court mediation, fourteen states provided for mandatory mediation (some in specific circumstances, for example where children were involved), and twenty-five states plus the District of Columbia provided for discretionary mediation. See Tondo et al., supra note 9, at 445.
impacted it profoundly. Today, however, its codified achievement fails to accommodate the shape the policy eventually assumed.

We see something similar (though not identical) to this dynamic with mandatory arrest policies. Although the situations are hardly parallel—the story of mandatory arrest policies and the ensuing complexity surrounding them is less about timing and more about emergence of new information (perhaps alongside plain old resistance to the policies’ shortcomings)—the mandatory arrest story offers a relevant example of a policy goal that, although initially viewed as an achievement, has proven much more complicated over time and in some ways undesirable for victims.

The mandatory arrest story can be told as follows: in the 1960s a dominant and defining feature of the battered women’s movement was advocacy for intervention by the state to protect victims of domestic disputes. Advocates sought policies requiring law enforcement personnel to treat intimate crimes the same way they treat public or stranger crimes. Frustrated with law enforcement minimizing or ignoring domestic violence, they lobbied for mandatory arrest policies, mandatory prosecution policies, and mandatory reporting of DV by medical professionals (hereinafter “mandatory policies”). Theories driving the push for these mandatory policies included not only safety for “battered women,” deterrence, and responsibility-shifting (away from the victim, who theoretically could be pressured into dropping charges by her batterer or by state officials), but also equality (by forcing equal treatment of DV crimes and other crimes and eliminating racial discrimination).

After many states passed mandatory arrest and prosecution statutes, however, their feminist underpinnings began to appear less fortified. Fragmentation ensued within feminist circles over the effectiveness of these mandatory policies to respond to real victims’ needs and wishes. In a landmark article published in the Harvard Law Review in 1999, Linda Mills, legal scholar and a survivor of DV in her own marriage, wrote of mandatory policies, “Not until recently have we become aware of the ways these policies fail the particular interests of women and hence, have raised questions about their ongoing effectiveness as feminist strategies.” Mills went on to argue that mandatory policies could not only potentially increase the incidence of physical abuse, but also introduce victims to an entirely distinct violent interaction, one containing many of the emotionally abusive elements of the victim’s relationship with the abuser.

72. *Id.* at 557, 564-565.
73. *Id.* at 563-565.
74. *Id.* at 565.
75. *Id.* at 554-55 ("[S]uch policies as mandatory arrest, prosecution, and reporting, which have become standard legal fare in the fight against domestic violence and which categorically ignore the battered woman’s perspective, can themselves be forms of abuse. . . . [S]tate policies have the
Others noted the complex issues that had sprung from the implementation of mandatory arrest and prosecution policies. When victims became aware that a call to the police necessarily entailed arrest, it led many of them to evade state involvement altogether (whether for love, financial dependence, guilt, or a rational analysis of the advantages and disadvantages of having a present albeit abusive spouse or partner versus an absent or incarcerated one), effectively removing the threat of the state as a feasible self-defense tool for some women. New research suggests that arrest discouraged employed offenders from reoffending but led to twice as many offenses among unemployed offenders, a statistic with serious class implications and possible race implications as well. (Lawrence Sherman, the criminologist who conducted the study of mandatory arrest policies in Milwaukee, characterized the policy as preventing 2,504 acts of violence against primarily white women at the expense of 5,409 additional acts of violence against poor, primarily black women.) And, of course, the question quietly born during the victorious battle for mandatory policies was: if a mandatory policy is by its nature unresponsive to what an individual victim wants, how is it empowering her, and if it is not empowering her, is it a feminist policy?

The very policies for which DV victim advocates campaigned are today rife with controversy. Legislation conceived and won by the battered women’s movement has precipitated sufficient unintended, undesired consequences that contemporary feminists and advocates are asking, “Was that the best idea?” As a result, feminist scholars are revisiting mandatory policies—their benefits and unfortunate ramifications—decades after their conception.

Certainly the fallout of a given policy is not always foreseeable, and it remains unclear whether mandatory policies are “bad” for victims or just not as good as they appeared to be thirty or forty years ago. Their story, however, illustrates the importance of revisiting and calling into question a policy when new data emerge.

The mandatory arrest story can also inform discussion of the second historical phenomenon that contributed to the modern day mismatch, that is, the cultural notions that sprung from the battered women’s movement—first, the distinction between women who are battered and “everyone else,” and second, the rather monochromatic image of what the battered woman (or DV victim) looks like.

DV victim advocates in the 1960s and 1970s strove to bring about recognition of the problem of domestic violence as a political, not merely a

 inadvertent effect of rendering battered women less, rather than more, safe from violence... [and] rob the battered woman of an important opportunity to acknowledge and reject patterns of abuse and to partner with state actors (law enforcement officers, prosecutors, and medical professionals) in imagining the possibility of a life without violence.” (citations omitted)).

76. Deborah Sontag, Fierce Entanglements, N.Y. TIMES, Nov. 17, 2002 (Magazine), at E56.
77. See, e.g., Mills, supra note 71.
personal, problem. Susan Schecter has written that the women's liberation movement "set the stage for the battered women's movement" \(^{78}\) in this regard: "Domination was uncovered operating not only in the public political world, but also in the private political sphere of the family." \(^{79}\) The effort to enlighten mass numbers of people required a vivid narrative of the battered woman, and the movement produced one.

The image that emerged of the battered woman is unsurprisingly one that fit the movement's practical goals during this period—the creation of shelters and crisis centers, improved treatment of domestic "disputes" by law enforcement, and mandatory policies for the arrest and prosecution of alleged domestic violence perpetrators. Activists drew attention to women assaulted by their husbands who had nowhere else to turn and were forced to find refuge "in shelters for alcoholics, disaster victims, or homeless people" because there were no battered women's shelters prior to 1970. \(^{80}\) Advocates of mandatory policies drew attention to the horrific abuse endured by victims who would call the police only to see their abusers instructed to take a walk and cool off. Stories were told of law enforcement officers expressing that they preferred not to get involved in family disputes. The notions of victimhood advanced both implicitly and explicitly were designed to invoke sharp and pervasive sympathy and to demand urgent attention from policymakers and philanthropists. The "battered woman" was helpless and had nowhere to go and no one to whom she could turn. She had been physically brutalized and was, of course, female. In the wake of this movement, mandatory mediation began to sweep across the nation's family courts. \(^{81}\)

This historical narrative featured the bright-line identification of victims (abuse as a purely physical experience) and sacrificed nuance in order to offer a coherent, consistent, and captivating paint-by-number figure: if she is a battered woman, then she must look like $X$, and within $X$ there is no gradient shading. This image provided the background for the creation of the Model Code and corresponding state codes. These codes distinguish litigants as "abused" or "not abused" and assume that abused litigants possess certain traits and lack others (most relevant to the mediation question, the ability to negotiate and the willingness to vocalize opinions).

One might point out that generalizations must always be made for policy creation, since policies will always rely on them, and that generalizations will always be under- or over-inclusive. Perhaps, then, it is not so bad to rely on incidents or allegations of physical violence as an indicator of suitability for mediation, nor is it especially troubling to view all domestic violence victims as

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78. BARRIE LEVY, WOMEN AND VIOLENCE 144 (2008) (quoting SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE (1982)).
79. Id.
80. See id. at 142.
81. Gagnon, supra note 44, at 272 n.2; Shaffer, supra note 44, at 164.
victims in the worst possible sense—assaulted and psychologically impotent. But in the case of divorce mediation, these generalizations present a number of special concerns that should lead us to reevaluate them. I will discuss these concerns in Part III.

It may seem that in certain parts of this Article I am drawing attention to the differences between domestic violence victims and others, while in other parts I am minimizing this distinction. I aim to draw attention to the way in which “DV victimhood,” as a categorical basis for the presumption against mediation, is under-inclusive and in some ways quite elusive. Many people who experience power disparities are not victims of violence, and, given the difficulties that can arise in screening for violence (for example, victims have incentives to hide histories of physical violence in order to retain their option to mediate rather than litigate), it is potentially an ineffective filtering mechanism. To allocate divorce procedural options to litigants based on whether physical violence has occurred or has been alleged is to rely on a poor proxy, and it is on this level that I am “shrinking” the difference.

Within the world of the policy, however, there are issues that arise regarding the interests of DV victims, which the presumption against mediation claims to be serving. Taking on the policy by its own terms (basing suitability for mediation on victimhood status), I argue that some of these interests likely are not being met and other interests are being overlooked entirely. To support this argument, I tend to highlight interests and concerns unique to DV victims, thereby drawing attention to the ways in which they are different from “everyone else,” though this is not the purpose. The purpose is to expose the presumption’s inability to meet the interests of the group whose boundaries it has already set.

I now turn to the ways in which the misguided preoccupation with protecting victims from risks more symptomatic of facilitative mediation than court mediation has the effect of overshadowing other, more salient risks for DV victims. A new analysis of these dangers is required, one that responds to the court-sponsored mediation programs that have been established and accounts for the risks presented by their alternative—litigation.

III. RISKSPOSED BY COURT MEDIATION AND LITIGATION

There are two fundamental concerns that advocates raise with respect to court mediation and the interests of domestic violence victims: (1) concern that

82. While there are several goals in the divorce process and debate about how to prioritize these, the scope of this Article concerns the interests of the victim. The sections of the Model Code discussed are explicitly concerned with the interests of the victim, much of the relevant scholarship on mediation and DV is concerned with the interests of the victim, and mediation itself is characterized and generally accepted as an interests-based process. My analysis will focus on how court-sponsored mediation and litigation respond first and foremost to the interests of DV victims under current law and practice.
the victim will be unable to voice her interests and as a result will enter into an unfair agreement; and (2) concern that the victim’s safety is at risk.

I will first discuss the concern that a victim may not voice her true interests in mediation, taking into account litigation as the default alternative. I will then turn to the ways in which current protocol, by essentially electing a process for the victim, misunderstands several of her most important interests: her financial stability, her power to elect a dispute resolution process best suited to the needs of her and her family, and her safety.

A. Concern That Victims Will Be Unable to Voice Their Own Interests

1. Evidence That Victims Fail to Assert Their Needs Is Lacking

The literature on DV and mediation is rife with claims about what the victim may do in the mediation room. “Victims may fear retaliatory violence if they disagree,”83 “The victim may feel pressure to settle or to compromise,”84 and even though a settlement is not required, women “may . . . be susceptible to any pressure to compromise”85 are a few examples. Notably absent are findings that this actually occurs. In fact, available research, though more research is needed,86 shows that women who feel they are being pressured into agreements usually terminate the mediation rather than submit to agreements they believe are unfair.87 Research shows that DV victims who do not terminate actually are able to negotiate effectively in mediation.88

These findings could be attributed to the effective implementation of DV policies requiring mediators to tend to power imbalances when they observe them during mediation.89 At least eighty percent of mediation programs screen for abuse (though only half of these do so using both written questionnaires and private interviews).90 The implementation of other precautions like the

83. Ver Steegh, supra note 7, at 184 (emphasis added).
84. Id. at 185 (quoting Leigh Goodmark, Alternative Dispute Resolution and the Potential for Gender Bias, 39 Judges' J. 21, 22 (2000)) (emphasis added).
85. Grillo, supra note 47, at 1605.
86. Updated research on family court mediation and domestic violence is lacking as a general matter. Articles on the subject rely heavily on studies from the 1990s, as far back as two decades ago. Additionally, satisfaction rates can be influenced by small sample sizes and failure to control for potentially relevant factors such as whether a party is represented by counsel, whether the victim opted in to the mediation or was required to participate, whether a shuttling model was used (and if not, what kind of model was used), and how active the mediator was during the mediation. Though the research on which this Article relies is not optimal in scope or methodology, it is nevertheless enlightening for the possibilities it suggests.
87. Ver Steegh, supra note 7, at 184.
88. Id. at 185.
89. Id. at 172.
90. Id. at 194.
caucusing model required in California could affect DV victims’ behavior as well.91

Women, including victims of DV, have reported finding mediation empowering and believe that it “enhances their ability to stand up for themselves, solve problems, assume responsibility for themselves, and express their views.”92 Satisfaction with the process of mediation is notably higher than it is for litigation. Satisfaction levels with the mediation process range from sixty to ninety-three percent for both men and women, including both violent and nonviolent couples.93 Participants in mandatory mediation specifically express “equal or higher” levels of satisfaction than voluntary participants, and when given an option, only fifteen percent of victims of domestic violence “opt out” of the mediation process.94 In contrast, DV victims report only a forty percent satisfaction rate and a fifty to seventy percent dissatisfaction rate with litigation.95 Even including mediation participants who do not reach a settlement, eighty-one percent of participants would “recommend the process to a friend,”96 and eighty-five to ninety-one percent “respond affirmatively to the idea of requiring all divorcing couples [to mediate].”97 One prominent study found that most women preferred mediation and that negative reactions had no correlation with a history of abuse or other “power related marital issues.”98 High satisfaction rates with the mediation process could be linked to the degree to which it saves costs. Litigated divorces cost significantly more than mediated ones.99

However, outcomes in divorce mediation are not very different from outcomes in litigation.100 Studies consistently show:

[N]ot only do women obtain similar percentages of family income and family liabilities in mediated versus adversarial cases but they also obtain similar amounts of periodic alimony and similar percentages of $1 per year alimony. . . . Surprisingly, women in mediated cases obtain a higher percentage of family assets, receive periodic alimony for more

91. Ricci, supra note 6, at 402.
92. Ver Steegh, supra note 7, at 183.
93. Id. at 175.
94. Id. at 191, 193.
95. Id. at 163; see also Carl L. Tishler et al., Is Domestic Violence Relevant?: An Exploratory Analysis of Couples Referred for Mediation in Family Court, 19 J. INTERPERSONAL VIOLENCE 1042, 1044-45 (2004) (citing studies that demonstrate, for example, more satisfaction with mediation than non-mediation).
96. Ver Steegh, supra note 7, at 176.
97. Id. at 191.
98. Id. at 183.
99. Id. at 174-75 (“In one study, mediating couples saved 134% in fees when compared to those using the two attorney adversarial process. In another study, couples saved 42% in attorney fees.” (citations omitted)).
years than their adversarial counterparts, and obtain greater amounts of child support.¹⁰¹

There is evidence that women fare better financially in mediation than in litigation, evidence that mediation yields better visitation and custody outcomes for males, and evidence that couples perceive their property settlements to be fairer after mediation than after litigation.¹⁰²

2. The Risk That Victims Will Fail to Represent Their Interests Adequately Is Not Necessarily Better Addressed by Litigation

Setting social science aside, it is important to compare the nature and current practice of the two possible proceedings in the family court context—mediation and litigation—before determining that one poses a greater risk to victims’ interests. Are DV victims more likely to raise their concerns before a judge than they are before a court mediator?

Formally, the two processes differ fundamentally in that litigation is a rights-based process, while mediation emerged as and remains an interests-based process, largely in reaction to feminist qualms with a rights-based approach.¹⁰³ This dichotomous understanding of the two processes has led to criticism on both sides. Critics of ADR processes, which include mediation, argue that justice is lost in the settlement process.¹⁰⁴ ADR advocates believe that imposing an adversarial, zero-sum approach on an idiosyncratic conflict can entrench false notions of diametrically opposed positions, making mutually beneficial outcomes nearly impossible.¹⁰⁵

There is growing support for the idea that this dichotomous understanding presents an inaccurate picture of both litigation and ADR.¹⁰⁶ In reality, judges, particularly in the family law context, are frequently managerial, becoming

¹⁰¹ Mary Marcus et al., To Mediate or Not to Mediate: Financial Outcomes in Mediated Versus Adversarial Divorces, 17 MEDIATION Q. 150 (1999).
¹⁰² See Ver Steegh, supra note 7, at 178-79.
¹⁰³ NATIONAL CONFLICT RESOLUTION CENTER TRAINING INSTITUTE, TRAINING MANUAL: INTRODUCTION TO MEDIATION 10 (2005).
¹⁰⁶ Beck & Sales, supra note 63, at 1017 ("[T]o date much of the theoretical and conceptual work on adversarialness in mediation has been based upon idealized and polarized conceptions of the mediation versus the adjudication process. ... Felstiner and his colleagues made this same observation about idealized comparisons between adjudication and mediation some two decades ago. Unfortunately, simplistic comparisons between these two complex systems are still carried out in research today and criticisms are still presented in black/white terms. Lawyers and the litigation process are portrayed as contentious and argumentative. ... Mediators, on the other hand, are portrayed as sensitive, caring, neutral, and able to identify and control the balance of power and empower parents to reach mutual decisions, which will then be complied with over time. Neither of these idealized visions reflect reality. ... [Q]ualitative research indicates that [reaching settlement] is the goal of most divorce attorneys. [L]awyers attempt to dampen conflict rather than inflame it, and ... there is also reason to suspect that mediators can be more coercive and directive than is generally realized.")
immersed in the interests of the parties as those interests are advanced and
dealing with rights only when they come into conflict. Likewise, mediators
in court settings conduct mediation in the “shadow of the law,” with individual
mediators and programs varying in the degree to which they respond, both by policy and by discretion, to legal influence.

In a “norm-advocating model” of mediation, the mediator will not only
educate the parties about legal and ethical norms but will insist on incorporating them into the agreement. But even court mediators who do not advocate norms are likely to ensure that the parties are informed of legal norms—what Ellen Waldman distinguishes as the “norm-educating model.”

Robert Mnookin describes how two parties negotiating, after the mediator
or their attorneys have educated them about their legal entitlements and advised them on the strength of their cases, will bargain within a range of outcomes that is limited to those leaving both as well off as they would be or would likely be if they were to proceed through litigation. He provides an example of a custody case in which both parents have a sense of the realm of possible trial outcomes and are therefore able to “negotiate some outcome that makes both better off” (based on idiosyncratic tastes within that range) but still falls within the scope of judicially feasible outcomes. It is important to keep in mind that court-mediated agreements remain subject to approval by a judge for them to be entered as court orders.

Finally, court mediators are most often judicial employees under the supervision of a director who reports to the chief judge. They have been described as having a “symbiotic relationship” with the court system. Like judges, they operate under the pressure of limited resources. Efficiency is necessary, hence the heavy evaluative component of mediation in a court setting.

108. Mnookin & Kornhauser, supra note 36.
109. Waldman, supra note 37, at 753.
110. Id. at 717 at n.59.
111. Id. at 732 (“Descriptions of ongoing programs [in divorce mediation] reveal the mediator is active in ensuring that disputant negotiations are informed by relevant legal and social norms, either by educating the parties himself or ensuring they are educated by retained counsel”). However, as of 1992 this was typically not required. See Beck & Sales, supra note 63, at 994 (“[T]here are no requirements that the parties be informed of the law or the practices in the local courts concerning the issues the disputants are discussing. Therefore, the parties are reaching decisions without knowing what might be available to them if the case were litigated.” (citations omitted)).
112. Mnookin & Kornhauser, supra note 36, at 969.
113. Milne et al., supra note 8, at 10.
114. Id.
115. Id. at 11.
116. Lowry, supra note 32, at 77.
Because judges behave managerially and mediators behave judicially, the discussion of legal entitlements becomes more integrated into mediation and the discussion of interests more integrated into litigation. Consider the following examples.

A *pro se* divorcing couple with children appears before a judge. Several financial issues are being contested, as is visitation, but not custody. There are many other litigants sitting in the courtroom or hovering in the hall, waiting to be called. The parties petition the court, each explaining their reasons for requesting certain orders—how debt should be divided, when the house must be sold, and what visitation schedule is most convenient. Resolving these issues is almost certain to become a discussion between both parties and the judge about interests, not rights. The judge will say, “Mr. X wants Fridays and every other Saturday. Is this okay with you, Ms. X? No, you’re busy? Mr. X, how about Fridays and every other Sunday? Now, when can we get this house sold? . . .”

The parties will attempt to reach an agreement in discussion with the judge; only if and when they do not agree will the judge impose applicable law against the interests of one or both parties. This moment of transition may be the fundamental distinction between the contemporary family courtroom and many contemporary family court mediation rooms. The infrequency with which such transitions occur, combined with the potential benefits of mediation as chronicled in current research and the unique risks posed by litigation (discussed below), suggests that the extent to which litigation has been upheld in the relevant literature and the Model Code as the preferable process for DV victims is no longer justifiable.

Suppose in a mediation that is not norm-advocating, the same *pro se* DV victim decides she is willing to assume all marital debt, wishes to waive any entitlement she may have to alimony, and holds no desire for equity in the marital home or any marital property. She makes these concessions because she is intimidated by the abuser and frightened to voice her true wishes. In any court-sponsored mediation program, the agreement will be subject to mandatory judicial review. A judge will ask, “Did you agree to these concessions freely and voluntarily? Are you sure? Do you realize that by waiving alimony now, you are making yourself ineligible to return and ask for alimony at any time in the future [in some states]?”

This sample inquisition also illustrates what would likely occur in a courtroom where there had been no mediation if a DV victim stated before a judge that she wished to relinquish all entitlements to marital property and alimony, for a judge is unlikely to impose alimony on an unwilling beneficiary. Even if the judge were to do so, it would become the victim’s responsibility in most cases to report noncompliance if she wished for the order to be enforced.
Notably, compliance rates for child support orders are worse for couples with a history of DV than those without DV.117

The comparability of the two proceedings is enough to cast doubt on the idea that mediation inherently poses a greater risk to the victim’s interests based on the respective roles played by the judge and mediator. Perhaps the risk then can be found in the victim’s greater willingness to express her interests in the courtroom than in mediation. The hypothetical above illustrates the realm of interests-based litigation, in which parties are responsible for ensuring that their interests are represented to the court. Again, a judge retains the authority to impose rights, but as a neutral arbiter he or she must not advocate for one party over the other to the extent of imposing interests on one party. Within this realm, the victim must voice her interests just as she must in the mediation room.

There are many reasons to question the assumption that a victim is more likely to express her interests to a judge than to a mediator. First, the ability of an abuser to intimidate through “face-to-face” interaction is by definition greater in a courtroom than it is in a shuttling mediation in which the couple never actually participates in face-to-face engagement. Indeed, the abuser, a named party, is entitled to be heard, to “have his day in court.” This is particularly true where both parties are, or even the alleged abuser alone is, pro se, a situation that applies in the majority of divorce filings.118 Under these circumstances, if the victim wishes to allege DV in order to establish fault, which depending on the jurisdiction could be grounds for divorce or alimony, she must testify that the violence occurred, which then allows for her to be cross-examined by the pro se alleged abuser himself. The abuser may challenge her, question her, and imply she is to blame in open court.

The rules of adjudication that entitle a pro se litigant abuser to personally cross-examine a victim may in themselves intimidate that victim into shying away from advancing her true interests. At the very least, it is impossible to conclude that litigation, with its particular procedural and evidentiary requirements and public forums, is less likely to silence a victim litigant than mediation sessions, particularly with shuttling and/or a mediator attuned to the risk of intimidation.

Feminist theory on domestic violence has recognized the importance of investigating how the unique interests of minority groups are addressed by socioeconomic and political structures.119 Though one could devote extensive

117. Tishler et al., supra note 95, at 1055.
118. Beck & Sales, supra note 63, at 993; Ver Steegh, supra note 7, at 165; see also Pearson, supra note 33, at 321 (“It is clearly unrealistic to compare mediation to a system of strong, assertive advocacy when the absence of advocacy is increasingly the norm.”).
Divorce Mediation in Domestic Abuse Cases

discussion to this topic, I will briefly offer several examples of specific minority populations that may face special disadvantages under the presumption against mediation.

Designing effective policy means understanding that in particular ethnic communities, a victim may experience tension between her identity as a victim of abuse and her identity as a community member with communal commitments and values. For example, although many victims have reasons to remain silent about their abuse, it has been suggested that black women may harbor the fear that “to break the silence is to bring further shame and disapprobation on African American men from the wider society.” In Orthodox Jewish communities, a woman who seeks divorce must acquire a get, a Jewish divorce decree, from her husband who retains exclusive power to give or refuse it. Forcing the husband to give the get may invalidate the divorce. In practice, this often means the husband retains the exclusive power to grant or deny the divorce, even in abuse cases. Victims in the Orthodox Jewish community sometimes prefer to deal with the violence privately rather than publicly.

In these and similar instances, the choice between mediation and litigation can mean the difference between staying in the relationship, even if it means further abuse, and seeking a divorce, which requires involving the state. In the former example, the victim who is free to mediate has the option of choosing not to expose or vilify her abusive spouse in open court. Rather, she may enter into an agreement in the privacy of the mediation room, where the violence can be taken into account, but not under the watchful eyes of the public and not on the record. In the latter example, the mediation option is one that can be used to bargain for the get (by agreeing not to litigate in open court and expose the abuse, if the abuser will grant her the get) and one that may be preferable to both parties if they prefer a private negotiation to a public one. New approaches to addressing domestic violence in the Orthodox Jewish community have had notable success, suggesting exciting potential for the further development of similar models.


121. See generally Kefet, supra note 55.

122. Id. at 446.

123. Id. at 446-47.


125. Id. Dr. Zakheim presented her research on Healing Circles, a pilot project cosponsored by Project S.A.R.A.H., a domestic abuse project funded by the New Jersey Department of Law and Public Safety, and the NYU Center on Violence and Recovery. The community-based domestic violence
Fear of outcomes could motivate litigants who lack immigration status as well. Consider an undocumented immigrant victim who is financially dependent on her abuser. He is also undocumented and working illegally. Afraid to involve the state in their lives for fear of exposing her or her abuser’s lack of immigration status, the victim is cautious in her approach to seeking a divorce. It is quite conceivable that to petition for a support order before the court in an antagonistic proceeding with her spouse—exposing both of them to questioning on their ability to earn income and their means of support, which are actions both are undertaking illegally—is more daunting than to enter into a facilitated agreement of support through mediation. The latter is subject to judicial review, but the scope of questioning involves the voluntariness of the agreement, not the means by which the parties will comply with its terms. Whether or not the fear that a family court judge will alert the federal government of violations of immigration law is well founded, it is a rational concern that may encourage inaction. The option to mediate could assuage such a fear.

Finally, the degree to which litigants are confused and intimidated by the formality of court hearings, contrasted with their reported comfort and satisfaction with mediation, also calls into question the claim that a victim is more likely to voice her interests in the courtroom. Participants in mediation report that they generally find mediators to be “impartial, sensitive and skilled.” In part because most court mediators work in mandatory mediation programs, they often have expertise beyond the scope of standard training programs for private mediation. Most are licensed mental health professionals with over five years of court experience, and forty-four percent have over ten years court experience. Most have been trained specifically in dealing with DV issues which, while part of my argument is that this training is also misguided, demonstrates that courts are at least recognizing and responding to the unique challenges presented by DV cases.

126. Beck & Sales, supra note 63, at 1019 (pro se litigants report finding the adjudication process confusing and intimidating.).
127. Ver Steegh, supra note 7, at 189 (citing Joan B. Kelly, A Decade of Divorce Mediation Research, 34 Fam. & Conciliation Cts. Rev. 373, 378 (1996)).
128. Ricci, supra note 6, at 404.
129. Id.
B. Current Protocol Inconsistently Defines Victims’ Autonomy and Inadequately Considers Potential Interests and Safety Concerns


The Model Code and a number of state codes provide that where a history of domestic violence has been confirmed (by an order of protection) or alleged, the victim must “opt in” to mediation. That is, the judge may not order it or even refer the parties to mediation unless the “victim” requests it. These opt-in provisions are designed to protect her from risks that originate in and are specific to the mediation room, but by the same token they reflect a misunderstanding of circumstances outside the mediation room.

Where the fear regarding mediation is that a victim lacks the capacity to vocalize her true interests, there is no clear reason to conclude that she does possess this capacity as she faces the decision to mediate or not. The claim that a victim can be manipulated during the mediation is therefore coupled with an assumption that she is capable of exercising free choice in choosing the mediation. This is another example of how the protocol remains excessively focused on the imbalance of power during the mediation process itself rather than on how the history of abuse may play out in other aspects of the divorce process.

Placing the burden of opting into mediation on the victim and thereby imputing an ability to make decisions outside the influence of her abuser rely on the premise that the couple has ceased to communicate in a way that could lead to coercion, an assumption that simply is not reflected by empirical data. Rather, abusers frequently maintain communication with victims throughout and after the separation process. A number of states have recognized in benchbooks for judges that abusers frequently have unlimited access to victims.

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130. Not all states use the term “alleged victim.” See MEDIATION IN FAMILY LAW MATTERS, supra note 2.

131. Jaffe et al., supra note 5, at 59 (noting that abused women often face continuing risks from their partners after separation and that twenty-four percent of DV victims report that the violence became more serious after separation. Thirty-nine percent report that the physical abuse first started after separation and that physical abuse, stalking, and harassment continue at significant rates post-separation).

132. MICHIGAN JUDICIAL INSTITUTE, DOMESTIC VIOLENCE: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS § 1.1 (3d ed. 2009) ("Domestic abuse perpetrators typically have unlimited access to their intimate partners. A perpetrator may live with the person being abused or share parental responsibilities with that person. The perpetrator’s knowledge of a partner’s daily routine or whereabouts may provide opportunities for harassment, intimidation, and physical violence that would not exist in other relationships"); see also DOMESTIC VIOLENCE BENCHBOOK (Institute of Public Law, University of New Mexico 1997).
Outside the mediation and courtroom, no legal authority can temper the desire and ability of the abuser to control the victim, unless she resists by soliciting police or third-party participation, which would reflect the autonomy that the Code presumes her incapable of exercising in the first place. This presumption of an untainted ability to opt in is particularly unrealistic given that even nonviolent couples tend not to opt in to mediation when given the option, but when they are required to participate they express approval both of the process and its mandatory nature. In other words, though couples tend to stick with the default option regardless of whether it is mediation or litigation, they express greater approval for mediation as an option, as the default option, and even as a mandate. The Model Code itself notes that because "[j]udicial referrals are compelling and often viewed by litigants as the dispute resolution method preferred by the court," judges should be prohibited from referring violent couples to mediation. To the extent that this is true, opt-in provisions presume that litigants are capable not of exercising average capacity to act independently of outside influence but of exhibiting exceptional capacity for independent action.

Finally, available descriptions of mediation, including court mediation, on the Internet and in popular media tend to present facilitative models, a factor that might lead a DV victim who conducts a simple online search to conclude, based on misinformation acquired, that the process is less appropriate for her than it actually is. When one searches for the phrase, "mediation and domestic violence," several of the top results either mischaracterize mediation, discourage readers from considering mediation if they are in abusive relationships, or both. Nancy Ver Steegh and others have celebrated the importance of "informed choice" for victims, but because widely available information on the nature, benefits, and risks of mediation inaccurately depicts mediation in the court system, the frequency with which truly informed decisions are being made may be lower than believed.

133. Ver Steegh, supra note 7, at 191.
134. MODEL CODE, supra note 1, at § 408(A) cmt.
136. See, e.g., Rose Garrity, Mediation and Domestic Violence: What Domestic Violence Looks Like (Mar. 1998), http://www.biscmi.org/documents/MEDIATION_AND_DOMESTIC_VIOLENCE. html ("All well trained mediators know that we cannot mediate violence."); Pia Mathys, Domestic Violence Resource Ctr. Victoria, Preparing for Mediation: Tips for Women Who Have Experienced Domestic Violence, http://www.dvirc.org.au/HelpHub/MediationTips.htm (last visited Apr. 25, 2010) ("The mediator does not give legal advice . . . their role is to help both people to identify and discuss the issues in a respectful environment and reach an acceptable solution. During the session(s), both people describe the dispute, what is happening at present, and then discuss solutions, looking towards the future." The language implies a facilitative session that is joint, not shuttling.).
2. The Presumption Against Mediation Misreads Victim Interests

The safety of the victim and of any children involved will be, of course, the first priority for any court overseeing a divorce where the couple has a history of DV. To the extent that safety is a priority, it will be important not to create strong incentives for the victim to avoid raising DV issues in the first place. Requiring her to litigate upon a DV finding or allegation is a demand that may run counter to (1) her financial interests, (2) her interest in regulating the process trauma she and her children may experience, and (3) her sense of physical safety. As a result, efforts to increase safety may backfire by leading victims to refrain from alleging DV altogether out of fear that certain results will ensue. I will discuss each of these factors.

a. Financial Interests

In her renowned 1991 article on the gendered dynamics of mediation (which continues to be cited with great frequency), The Mediation Alternative: Process Dangers for Women, Trina Grillo expressed concern that because “[w]omen have a more relational sense of self than men do,” they “will be at a disadvantage in a mediated negotiation.”137 Other feminist scholars during this period shared this concern that women, allegedly less skilled negotiators than men, would be harmed by mediation. In 1988, in Divorce Mediation: A Feminist Perspective, Martha Shaffer wrote, “Mediation rests on the notion of two equally competent and effective negotiators, an ideal which feminists point out does not conform to the reality of many male/female relationships. . . . [I]t is unlikely that mediation will produce substantively fair settlements for many women.”138 Shaffer at the time was concerned about the “virtual omission of any consideration of gender-based inequality from the mediation literature.”139

One of the greatest and most pressing concerns for divorcing female litigants, particularly for DV victims, is finances. Goodman, Bennett, and Dutton found in their study of ninety-two victims whose abusers were being charged with DV-related crimes that the need for “tangible support” was a primary predictor of whether or not the victim was likely to “follow through” and cooperate with the prosecutor.140 They write, “She may need . . . housing or a job. If she cannot access these resources, she may need to drop out of the process.”141 While the traditional wisdom is that victims who fail to cooperate

137. Grillo, supra note 47, at 1550.
138. Shaffer, supra note 44, at 166.
139. Id. at 162.
140. Lisa Goodman, Lauren Bennett & Mary Ann Dutton, Obstacles to Victims' Cooperation with the Criminal Prosecution of Their Abusers: The Role of Social Support, 14 VIOLENCE & VICTIMS 427 (1999).
141. Id.
with prosecutors do so because of "enduring attachment to the abuser," more recent studies have suggested that victims are "not helpless or passive." Rather, they remain in the violent relationship because they are financially dependent and uncertain of how to become unhooked. There is a growing body of research linking failure to leave to economic dependency.144

In a roundtable discussion of court responses to DV, sponsored by the Center for Court Innovation in 2006, the following comments were made by professionals working with DV victims:

We live in a world that is still very scathing to single women and many women are making a decision between the lesser of two very significant evils. It's often not about love, but about survival, maintaining the family. I also think we sorely need civil legal assistance for victims. That is the thing we are missing the most in Texas. Right now, the best advice I can give to most victims is sell all you have and borrow all you can, and that is pathetic.

Concern about lacking tangible support if an abusive spouse is incarcerated—both income and other means of livelihood (especially childcare)—can motivate victims to refuse to cooperate with prosecutors, more so than the loss of emotional support. Indeed, an abuser may ironically use threats of his incarceration against the victim to prevent her from reporting the violence. The victim who depends solely on her abuser to provide for her

142. Id.
143. ALYCE D. LAVOLETTE & OLA W. BARNETT, IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY 43-44 (2d. ed. 2000).
144. Id. at 43 (noting that many researchers "have observed the economic dependency-failure to leave connection" and citing several studies from the late 1980s). LaViolette & Barnett also discuss two surveys of shelter residents in which the probability of staying in the violent relationship was found to be highest for women whose husbands were the sole breadwinners and a study of 141 shelter residents in which researchers found that most of the women interviewed were in need of material goods and services, social support, education, healthcare, finances, legal assistance, employment, transportation, and childcare. A significant number (thirty-nine percent) were also in need of housing. The racial distribution was forty-five percent Caucasian, forty-three percent black, eight percent Hispanic, and one percent Asian-American. Sixty-eight percent had at least one child. Finally, they note that "one investigation determined that women who did not escape, compared to those who did, were significantly more likely to feel unable to make it in the work world because of poor job skills. . . . It is probable that survivors who decide to return to their abusive relationships perceive their alternatives within the marriage as more rewarding and less costly than their alternatives outside the marriage." Id. at 44.
145. CENTER FOR COURT INNOVATION, BRIDGING THEORY AND PRACTICE: A ROUNDTABLE ABOUT COURT RESPONSES TO DOMESTIC VIOLENCE 14 (2006) (emphasis added) [hereinafter ROUNDTABLE].
146. Id. at 11.
147. Goodman et al., supra note 140, at 439 ("Tangible support significantly predicted cooperation with prosecution in the final model: those who reported a higher level of availability of people to help with a range of practical issues (e.g., someone to help with daily chores, take care of the participant's children, or provide an emergency loan) were about twice as likely to cooperate with the prosecution.").
148. The author worked with a victim who was financially dependent on her abuser. To manipulate his victim, he often threatened that if he wound up in jail she would have no income, which was terrifying to a mother of two boys who had not worked in the nineteen years she was married to him because he did not allow her to work.
and her family finds the prospect of her abuser's incarceration just as frightening as he does, and if he is not incarcerated and continues to work post-divorce, compliance with child support and alimony orders will be critical.

Studies have consistently shown that rates of compliance with mediated agreements are higher than they are for judicial decrees, even controlling for selection bias by analyzing separately couples who participate in mandatory mediation and those who participate voluntarily.\(^{149}\) This is particularly important at a time when, for every dollar owed in child support in the United States, the overall compliance rate is fifty-five cents.\(^{150}\) It has also been found that couples participating in mediation over the course of several months have higher compliance rates than those who participate in a single session.\(^{151}\)

Finally, litigation is almost always going to be more expensive for victims than mediation. It is also more time-consuming, which for many litigants requires taking time off work. To the extent that counsel is participating, legal expenses can become debilitating. Recall that couples who mediate rather than litigate save between forty-two and 134 percent in attorneys' fees.\(^{152}\) Finally, Grillo and Shaffer's concerns have not been substantiated over the past two decades. As far as available research shows, in terms of negotiating financial matters, women seem to negotiate financial matters as well in mediation as in litigation.\(^{153}\) This could very well include victims of domestic violence.\(^{154}\)

b. Process Trauma

Fulfilling economic needs is only one concern that may lead a DV victim to prefer mediation. The level and duration of parental conflict has been linked to poor adjustment by children of divorcing parents.\(^{155}\) Because social science has revealed "overwhelming" dissatisfaction among divorcing couples with adversarial judicial processes,\(^{156}\) Nancy Ver Steegh notes that the process itself is unlikely to be "helpful to families already torn by violence."\(^{157}\) Indeed, while fewer than twenty percent of divorcing couples report that mediation harmed their relationship, nearly fifty percent report that litigation had that effect.\(^{158}\)

\(^{149}\) Ver Steegh, supra note 7, at 176; see Davis, supra note 60, at 267.


\(^{151}\) Ver Steegh, supra note 7, at 177.

\(^{152}\) Id. at 174.

\(^{153}\) Marcus et al., supra note 101.

\(^{154}\) See id., coupled with Belzer, supra note 6, at 45 (noting that most couples who enter the judicial system with a goal of divorcing have experienced some form of domestic violence).

\(^{155}\) ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT 184 (2000); see also Linda Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, 28 WM. MITCHELL L. REV. 495, 497 (2001); Ver Steegh, supra note 7, at 179.

\(^{156}\) Ver Steegh, supra note 7, at 163.

\(^{157}\) Id.

\(^{158}\) Id. at 179.
The victim's interest in her own psychological well-being may come into play as well. A former divorce litigant told the author that ten years after her divorce trial, it remains "the worst experience of my life." Reforming litigation to make it more pleasant for litigants is likely to implicate features of it that may not be—or should not be—modifiable because they embody certain well-established normative commitments or constitutional and/or statutory obligations. For example, the reason a pro se abuser is permitted to cross-examine a victim on her allegations of abuse is because, as a pro se litigant in a court of law, he has a right to do so.

Fundamental aspects of litigation that are unlikely to be waived or amended can create and exacerbate process trauma for a DV victim. The extent to which the divorce process itself is traumatic may lead a victim to elect mediation as an experience less likely to produce potentially long-lasting psychological repercussions for herself and her children.

c. Safety

Finally, the presumption that litigation is better able to protect the victim from future violence is ill considered given that a substantial portion of all domestic violence seems to follow a predictable and patterned dynamic. The abuse is used as a means to retain power and control over the victim. As a justification for precluding DV cases from entering into mediation, the Model Code provides:

This section requires mediators who receive referrals or orders from courts to screen for domestic or family violence between the parties. Screening must include an assessment of the danger posed by the perpetrator, recognizing that victims of DV are at sharply elevated risk as they attempt to end the relationship and utilize the legal system to gain essential protective safeguards.

The increased risk is not attached to mediation but to the divorce itself. By linking risk to mediation, the Model Code implies that the victim’s risk of harm is relieved or at least less likely to be exacerbated by litigation, even though litigation has been linked to the abuser’s perception of loss of control. Rendering mediation the alternative in DV cases and litigation the default, then, is ironic. To the extent that the abusing party retains—or at least has the sense of retaining—more overall control inside the mediation room than outside of it, terminating or refusing mediation in order to reduce the risk of increased violence may actually precipitate it. Likewise, the increased risk can

159. Interview with Anonymous Interviewee (Nov. 2008).
161. MODEL CODE, supra note 1, § 407 cmt. (emphasis added).
162. STARK, supra note 160.
potentially be mitigated by mediation, in that the abuser is more likely to maintain some perception of control.

Finally, mediating a case does not mean that abuse becomes irrelevant. The abuse may still be factored into the ultimate agreement and into the process itself. Imagine a situation in which a victim or her advocate alleges DV. The mediator will factor the allegations into his or her descriptions of what is likely to happen in court. The mediator, or the abusive party’s lawyer (if he is not pro se), might explain, for example, that the law bases alimony on fault and that a judge will weigh abuse accordingly. If the victim’s case is strong, the abuser is best off bargaining for an outcome with this in mind; defending allegations of domestic violence in court, particularly in cases of ready proof (photographs, orders of protection, police reports, or witnesses), could result not only in a poorer financial outcome but also in criminal charges being brought against him. He is better off reaching an agreement in mediation, even if it has been influenced by the history of violence.

CONCLUSION AND RECOMMENDATIONS

In the early days of court-sponsored mediation, a focus on potential risks led to the promulgation of policies that, fifteen years later, are poorly tailored to meet the needs and address the risks facing DV victims who enter the family court system today. Modifying these policies in order to better meet DV victims’ needs requires understanding the nature of court-mediation programs as they have flourished, responding to social science literature on victim and abuser behavior, and recognizing the ways in which the Model Code creates potentially undesirable outcomes for victims.

Those interested in family court reform in the United States should concern themselves with three overall goals regarding the interests of domestic violence victims: 1) disentangling DV victims’ financial dependence on their abusers from criminal sanctions, particularly incarceration; 2) providing DV victims with accurate and thorough information on the features and range of options available within mediation and litigation, particularly the idiosyncrasies of specific jurisdictions; and 3) updating and amending protections for DV victims who find themselves in jurisdictions that offer mediation, both mandatory and voluntary, in order to better accommodate the risks and needs of those victims.

With regard to the third goal, my recommendations are as follows:

(1) Screening guidelines for mediators and judges should focus on indicators specific to the parties’ abilities to represent their authentic interests both in court mediation, as it is offered to all couples, and in a caucusing model of mediation, if the caucusing model is not standard. This rubric may include unbalanced power dynamics and a history (or alleged history) of violence, but it will not rely exclusively or even primarily on a history of physical domestic
abuse. Rather, the rubric should be tailored to measures that more closely reflect what is required for meaningful participation in the model of mediation being offered in that jurisdiction. If the screening leads to a finding that there is a risk of coercion or intimidation, the following measures should be taken.

(2) Jurisdictions that maintain “opt-in” procedures should include two critical requirements: (1) the alleged victim should be required to meet privately with the mediator or outside the presence of the alleged abuser to discuss “opting in”; and (2) both parties should be counseled at this stage regarding the specifics of the procedure as well as the specifics of proceeding with any alternative processes (including litigation).

(3) If an evaluative model of mediation is not the standard model offered, mediators should lead the mediation in an evaluative manner—that is, make informed suggestions about the reasonableness of the parties’ positions, attend to power imbalances, and inform the parties of applicable law.

(4) If a caucusing model of mediation is not the standard model offered, mediators should make an exception and use a caucusing model.

(5) If the participant who is alleging victimization wishes to continue to mediate (using the caucusing approach), the mediator should not terminate the mediation for any reason that would not lead him or her to terminate the mediation in a non-DV case.

An evaluative, caucusing model of mediation spares the at-risk litigant from the financial and psychological costs of litigation and from the risks of facilitative mediation. The policy offers her an informed opportunity to weigh the benefits of and drawbacks to evaluative mediation or litigation and to apply them to her unique, personal circumstances as she sees fit. However, an evaluative, caucusing model of mediation protects against the risks inherent in a facilitative model, where facilitative models still exist. A DV victim should not be presumed unable to participate in mediation solely because she is a victim, but neither should she—or any party in a marriage with a dangerous power disparity—be forced into a facilitative mediation.

A mandate that courts offer only evaluative, caucusing models of mediation to parties between whom there is a demonstrable power gap (some of whom will be DV victims) recognizes the ways in which family court mediation has evolved while admitting that certain precautions should be taken for couples with a history of violence. These suggested guidelines are also informed by social science research showing that where evaluative models have

163. See, e.g., Parenting Act, NEB. REV. STAT. §§ 43-2920, 43-2939 (2007) (providing individual screening sessions in which the mediator screens not only for DV but also for “unresolved parental conflict” and “other forms of intimidation or coercion, or a party’s inability to negotiate freely and make informed decisions”).
164. See, e.g., id.
166. See, e.g., CAL. FAM. CODE § 3170 (2007).
been implemented, the fears of advocates who have pushed for the presumption against mediating domestic violence cases largely have not been realized.

A laudable feature of feminist theory is its capacity to evolve as new stories reveal unmet challenges and opportunities to reform the structures that limit and shape the lives of all people. By identifying and endorsing the reform of a policy won by feminists several decades ago, I am not suggesting that the policy has not in the intervening years operated as a “feminist” policy. It means, simply, that feminist theory must track society’s evolution. Reform of current mediation laws for the benefit of DV victims reflects an improved approach to protecting them in that it responds to what protections DV victims in the last two decades have shown they want and need, and what protections they are better off without.