# The Promise of (*Transformative*) Mediation: The Transformative Model in Divorce Cases Involving Violence

DAFNA LAVI*



* Senior Lecturer (Associate Professor) and Dean of Students, The Academic Center of Law and Science, Israel.

*Abstract*

This article deals with the interface between Bush and Folger's transformative mediation process and the phenomenon of divorce cases involving violence. It examines criticism of the judicial process in handling such disputes, through the lens of the judicial justice this process creates. This article asserts that there are substantive failures in judicial justice which explain the immanent limitation of the judicial process from constituting the ideal solution for women survivors of domestic violence and their children, and which of necessity give rise to the critical narratives voiced against the judicial system in its handling of such disputes. As an alternative, and through the presentation and mapping of the characteristics of alternative transformative justice that transformative mediation provides, this article proposes transformative mediation as a preferable solution for such disputes, both on the personal, individual level and in the sphere of general society and its values.

The central theme of this article is that basic characteristics and insights of the perception of transformative justice have special importance, even if only due to their potential to transform the attitude of the individual and of society regarding the serious phenomenon of divorce disputes involving violence and the means by which they should be dealt. Transformative mediation has something to say; if it takes root, it can be expected to make a significant contribution towards changing and advancing a different legal, societal, and cultural discourse with respect to this painful phenomenon, if we only listen.

## I. INTRODUCTION

*"Statistics show that more than one in three women around the globe are victims of domestic violence."*[1]

Domestic violence is one of the most complex problems that contemporary society faces. It is a frequent and broadening phenomenon, cutting across cultures, ages, social positions, educational levels, and professional occupations.[2] In spite of the fact that the definition is not uniform, the term "domestic violence" refers, in its simplest iteration, to a type of behavior, including elements of control, through coercion, over a spouse, with the structure of this behavior being likely to include physical attack, sexual attack, financial abuse, psychological abuse, and emotional abuse.[3]

In recent decades, in view of the changes in modern Western society's perception of the phenomenon of domestic violence, the means of handling divorce disputes involving violence and the attitude towards such disputes have indeed changed substantially, both in terms of societal perceptions and in terms of the law and the legal system.[4] A great deal of resources were invested in the legal system with the objective of improving the ways of dealing with disputes of this nature.[5] However, the developments on the legal plane did not always prove to be sufficiently

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[1] Caitlin Mahserjian, *We're All in This Together: A Global Comparison on Domestic Violence and the Means Necessary to Combat It*, 79 ALB. L. REV. 297, 297 (2015/2016).

[2] Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 76–77 (2008) [hereinafter Goodmark, *When Is a Battered Woman Not a Battered Woman?*].

[3] A similar definition is offered by Megan Thompson: "Domestic violence is a pattern of behaviors that one partner uses to establish power and control over the other partner. A batterer may use physical, emotional, psychological or sexual violence, manifested through behaviors that include intimidation, coercion, threats, isolation, financial control and insults." Megan Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 613 (2007); *see also* Jan Jeske, *Custody Mediation within the Context of Domestic Violence*, 31 HAMLINE J. PUB. L. & POL'Y 657, 694 (2010) ("Domestic violence is a broad concept encompassing behaviors ranging from 'isolated incidents to patterns of repeated violence involving physical, sexual, and emotional abuse that controls the victim.'"). The author notes several generally accepted concepts that are used to define domestic violence, such as coercive controlling violence, situational couple violence, separation-instigated violence, violence resistance, and intimate partner sexual assault. *Id.* at 663–70.

[4] DAFNA LAVI, ALTERNATIVE DISPUTE RESOLUTION AND DOMESTIC VIOLENCE: WOMEN, DIVORCE AND ALTERNATIVE JUSTICE 43–65 (Routledge, 2018).

[5] Leigh Goodmark, *Clinical Cognitive Dissonance: The Values and Goals of Domestic Violence Clinics, the Legal System, and the Students Caught in the Middle*, 20 J. L. & POL'Y 301, 319 (2012) [hereinafter Goodmark, *Symposium: Clinical Cognitive Dissonance*].

effective in dealing with the phenomenon. Narratives critical of the procedures before the court point to the limitations of such procedures due to, inter alia, the danger component, the opening created for manipulation (on the part of the violent party), and infringement of the victim's autonomy, her liberty, and at times even her interests, etc.[6] It transpires that in spite of the fact that the judicial process has a long history of resolving disputes in family matters, the extent of its success in protecting the victims of domestic violence in divorce disputes is doubtful, with the allegation against it being, in a general manner, that it *promises but does not deliver.*[7]

In spite of the foregoing assertion, only a small part of the current scholarly discourse forcefully and directly questions the efficacy of the judicial system's handling of divorce disputes involving violence, as well as alternatives for more appropriate handling of the phenomenon.[8]

This article proposes an alternative in the guise of *the transformative mediation model*. Transformative mediation is first and foremost mediation, i.e., a voluntary confidential process in which a neutral person, a mediator (who does not have to be a lawyer), assists disputing parties in identifying and discussing issues of concern, exploring various solutions, and guiding parties toward a settlement that is mutually acceptable to them.[9]

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[6] *See infra* Section II.A.

[7] Leigh Goodmark, *The Legal Response to Domestic Violence Problems and Possibilities: Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 18 (2004) [hereinafter Goodmark, *The Legal Response to Domestic Violence*]; Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 659 (2008) [hereinafter Ver Steegh, *Family Court Reform and ADR*].

[8] Most of the discussion of the legal system's handling of divorce disputes involving violence relates to changes occurring in the system in the last thirty years, and particularly to one aspect of these changes—the advent of mandatory arrest, no-drop policies, civil protection orders and custody laws. For the most part, the discussion focuses upon proposals for improvement of *particular* aspects of this system, in order to improve the way in which they address the needs of battered women. Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 45.

[9] The Model Standards of Practice for Family and Divorce Mediation define mediation as: "A process in which a mediator, an impartial third party, facilitates the resolution of family dispute by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements." Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001); *see also* UNIFORM MEDIATION ACT § 2(1) (2003) ("'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.").

Mediation constitutes a means for conflict resolution that serves as an alternative to the judicial process, and it is part of the Alternative Dispute Resolution (ADR) movement, which in general represents a model of dispute resolution, peaceably and outside of the courtroom.[10] The ADR movement, primarily mediation, with its entry into the public consciousness in recent decades, brought with it new currents of what might be termed "alternative justice" and ethical perceptions that raise questions regarding classic justice—judicial justice, which is at the basis of the judicial process in the courtroom. This movement proposes new perceptions of justice which try to overcome the theoretical criticism aimed at the legal system in the twentieth century.[11]

Transformative mediation, which first appeared in Bush and Folger's book, *The Promise of Mediation*,[12] is one of the most prominent and important forms of alternative dispute resolution.[13] Transformative mediation, as its name suggests, places emphasis on the transformation of conflict and parties to it. As distinguished from the reaching of an agreement, the principal goal of transformative mediation is transformation, i.e., ethical change or growth, composed of "empowerment" and "recognition,"[14] which the parties are meant to experience in the course of the mediation. This transformation is the true purpose and the promise inherent in mediation, and without it there cannot

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[10] The Alternative Dispute Resolution (ADR) movement developed in the United States in the 1970s in the area of civil and political law. It began as an attempt to find a practical way to relieve the workload of the courts. Its main feature is the presentation of a new systemic administrative approach that offers mechanisms alternative to that of the judicial process for the purpose of handling disputes and resolving them. MICHAL ALBERSTEIN, ALTERNATIVE JUSTICE: MEDIATION, RESTORATION AND THERAPY THROUGH LEGAL MECHANISMS 14 (2015) [hereinafter ALBERSTEIN, ALTERNATIVE JUSTICE].

[11] *Id.*

[12] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) [HEREINAFTER BUSH & FOLGER, THE PROMISE OF MEDIATION].

[13] This model was adopted in recent decades by various institutions and organizations in the United States, became a focus of the academic discourse and writing in the world, and led to a revolutionary change in the ways of thinking about conflicts and the people behind them. The textual discourse in the world has stated numerous times that this is what leads to the true result. Dorothy J. Della Noce, *From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model*, 19 OHIO ST. J. ON DISP. RESOL. 925 (2004); Drew Peterson, *Transformative Mediation*, ALASKA BAR RAG, 1998, at 6; Ann Begler, *The Transformative Mediation Model*, 3 LAW. J. 6 (2001).

[14] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 85 ("*Empowerment* means the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems."); *id.* at 89 ("*Recognition* means the evocation in individuals of acknowledgment and empathy for the situation and problems of others.").

be true growth for the parties or a hermetic end to the dispute (even if an agreement is reached at the end of the mediation).[15]

The central objective of this article is to present transformative mediation, with the alternative-transformative justice that it creates, as a true alternative to the judicial process, and as one that is likely to provide a true remedy to the victims of domestic violence and to their children. Through the mapping of the main characteristics of alternative-transformative justice, this article proposes an analytic infrastructure for understanding the failure of the legal system to properly deal with divorce disputes involving domestic violence on the one hand, and providing an appropriate alternative, in the guise of alternative-transformative justice, on the other hand.

By mapping the characteristics of alternative-transformative justice and presenting its contribution to issues of divorce disputes involving violence, this article will constitute an important stage in the development of alternative language to deal with this difficult issue. If the insights and the terms of the alternative-transformative discourse penetrate into the discourse of divorce disputes involving violence, they are likely to fashion a new perception of justice and a *different* social-moral attitude (and even personal-professional) regarding the entire issue–particularly with respect to women who are the victims of domestic violence. The characteristics of alternative-transformative justice and the basic insights of the theory and the transformative model are particularly important, if only due to the potential they carry for establishing a conceptual and practical revolution in the attitudes of society, the legal system, and judicial justice to the phenomenon of divorce disputes involving violence. It seems that not only the very existence of this serious social phenomenon, but the ways of dealing with it as well, are likely to teach us a great deal about ourselves as a society, particularly with respect to the ideals of justice that are being formed (or breaking down) among us.

This article is divided into two main parts. In the first part (I. Divorce Cases Involving Violence and Judicial Justice), the article discusses the correlation between the judicial process and the judicial justice that it creates, and divorce disputes involving violence. It presents a line of critical narratives of the judicial process in handling divorce disputes involving violence. These narratives arise both out of scholarly discourse and from the people on the ground dealing with disputes of this nature, and point out the clear failures of the judicial process in the manner in which it handles such disputes.

The continuation of this first part asserts that these failures of the judicial process are based upon an immanent limitation called "judicial justice" with its various characteristics. This article presents these characteristics and analyzes them against the background of divorce

[15] *Id.* at 73, 81.

disputes involving violence and through the treatment of them. The conclusion reached in this part is that, due to various immanent failures *upon which judicial justice* with its various characteristics is based, the judicial system, in many cases, becomes a sword rather than a shield for the women who are victims of domestic violence. Therefore, new systemic thinking is necessary with respect to a more realistic and humane alternative (for these disputes), which can, by its very nature, provide a response to the critical narratives that are voiced against the judicial justice system in dealing with the phenomenon.

The second part of this article (II. Divorce Cases Involving Violence and Mediation) presents the transformative mediation model as a proposed alternative for divorce disputes involving violence, with the added value of its application to disputes of this nature. The author examines each one of the characteristics of alternative-transformative justice that the transformative model creates ("*non-coercive justice that respects the parties' autonomy," "collaborative justice, focusing on relationships and emotions," "justice that believes in the parties' potential," and "individual, interests-based justice"*) through the prism of divorce disputes involving violence, and demonstrates the ways of overcoming the critical narratives voiced with respect to the judicial process (in handling such disputes) and to the potential contained in this model for refashioning the discourse of divorce disputes involving violence, both on the professional-legal level and on the societal-ethical level. The article even includes implementations which bring the transformative theory to the level of reality, and it explains how to refashion the means of relating and the handling of divorce disputes involving violence through implementation of this theory.

The continuation of this second part of the article provides a reflective look, through the presentation of main points of criticism (in the scholarly discourse) of the mediation process in dealing with divorce disputes involving violence. Alongside the possible means of dealing with this criticism, the article presents the assertion according to which those opposed to applying mediation to divorce disputes involving violence—who for the most part base their objection upon the concern of an infringement of *justice*—have not managed to understand the very existence of justice (albeit a different kind of justice than judicial justice) that characterizes mediation. This is particularly so for the transformative mediation model, and all the more so, for transformative mediation's potential contribution in providing a true remedy to the victims and their children.

In this article we seek, therefore, to constitute an additional link in the developing chain of efforts to promote proper redress for women survivors of domestic violence, where, in the opinion of many scholars and people on the ground, the litigation process and judicial justice has not been able to rescue them.

## II. DIVORCE CASES INVOLVING VIOLENCE AND THE JUDICIAL PROCESS

The judicial process was and remains the primary mode of response to domestic violence in the United States, for better and, unfortunately, for *worse*. On the one hand, the legal system provided and still provides an address for many women who are victims of domestic violence, while serving as a means of security and protection for them from future abuse.[16] Since the enactment of the Violence Against Women Act (VAWA), many means have been devoted to developing responses in both the criminal and the civil legal systems to address the needs of victims.[17] On the other hand, the fact cannot be ignored that the judicial process, in dealing with divorce disputes involving violence, has many critical disadvantages and limitations. It is clear that, in this sensitive area, a failure to provide the most appropriate care is likely to be deadly for the clients.

### A. *Criticism of the Judicial Process*

*"... [F]or some survivors and their children, courts have become a sword rather than a shield that batterers learn to use to continue their abuse."*[18]

#### 1. *THE DANGER COMPONENT*

One of the assertions voiced against the judicial process in its handling of disputes of this nature is that it increases the danger component. Many battered women are threatened by their violent husband not to contact the police, lawyers, or other enforcement authorities, while violence involved in the separation and breaking of the relationship, alongside making good on the threats, is frequently used against victims who dare to seek help.[19] Battered women who choose a path of criminal prosecution sometimes find that the abusive party is punished with no more than a period of probation, a remedy that would work if closely supervised and there were real consequences for violation.[20] In many

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[16] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 8.

[17] LAVI, *supra* note 4, at 60–62.

[18] Elayne E. Greenberg, *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence,* 24 ST. JOHN'S J. LEGAL COMMENT. 603, 606 (2010).

[19] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 23.

[20] *Id.* at 34.

cases, the only consequence of a violation of a probation period is a lecture that the judge delivers to the party in violation and a promise by the latter to improve his conduct in the future.[21] Even in cases in which the abusive party is sent to prison for the violation of the order, in most cases it is only for a brief period of time, with the domestic violence offenses only as misdemeanors rather than as felonies.[22] This inadequacy is also the case with the route of a civil action. The enforcement of a protective order through misdemeanor prosecution or civil or criminal contempt proceedings is very rare, and the punishment (if it exists at all) is, for the most part, insufficient to protect the victim of the violence.[23]

Moreover, the legal system, with its adversarial justice, creates additional dangers for the victim. One of the most prominent of these is the danger of arrest.[24] Dual arrests of both the attacker and the victim (e.g., due to conflicting versions with respect to the attack or due to injuries to the body of the attacker as a result of the victim's actions of self-defense) have become a more common practice since mandatory arrest laws became effective.[25] Additionally, in strict no-drop jurisdictions, the victim who is asked to testify against the attacker can be arrested if she fails to comply with a subpoena.[26]

Women who are victims of domestic violence and who are also mothers are exposed to a further danger—that of losing custody of their children in the divorce and custody adjudications.[27] It transpires that the existence of violence is itself not necessarily relevant to the decision with respect to custody. Quite the opposite, studies show that the abusive parent sometimes prevails in the custody battles.[28] Empirical data shows that the chances of the man, against whom there is a protective order, will receive

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[21] *Id.* at 34–35.

[22] The attitude towards parole violations is generally also not serious unless there is an additional violation. *Id.* at 35.

[23] *Id.*

[24] *Id.* at 23.

[25] *Id.*

[26] *Id.* at 23–24.

[27] From the studies it transpires that abusive men often sue for custody of their children (inter alia, in a further effort to abuse their wives and to continue to control them). CARRIE CUTHBERT ET AL., BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS 16–17 (2002); ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, BATTERED MOTHERS' TESTIMONY PROJECT: A HUMAN RIGHTS APPROACH TO CHILD CUSTODY AND DOMESTIC VIOLENCE (2003).

[28] When questions of custody are being determined, the battered woman is liable to be at a disadvantage due to the lack of awareness about domestic violence, the failure to link battering and parenting under the law and the proliferation of "friendly parent" provisions. Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 28; Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 169 (2003) [hereinafter Ver Steegh, *Yes, No, and Maybe*].

visitation rights are greater than the chances of a man who is not under any such order.[29]

It bears remembering that when an abused woman receives sole custody, the visits of the other party can still be problematic. At times, the court does not accord sufficient attention to questions of safety with respect to these visits, which creates an opportunity for the violent party to continue to manipulate the family.[30] The opposition to joint custody, which requires regular contact with the violent party, can also mark the victim as an "unfriendly parent," which may be to her detriment in the judge's decision regarding custody of the children.[31]

Abused women who avail themselves of the criminal justice system with the hope of removing the abusive party from the home are likely to find themselves in a struggle against the welfare authorities in order to keep the children with them. This risk exists even in the civil aspect. Women who are victims of violence, who have applied for a civil protective order, have found themselves involved "with child protective services after the protection order judge makes a report to child protective services from the bench."[32] As long as this is the reality, recourse to the legal system—which is liable to report the matter to the welfare authorities—involves a great deal of risk.[33]

### 2. *AN OPENING FOR MANIPULATION*

In many cases, the abusive party uses the legal system in order to abuse his victim when he is no longer able to continue with the customary kinds of abuse.[34] This is a known phenomenon where men, who prior to the separation maintained only minor contact with their children, file actions for custody with the sole purpose of punishing their wives.[35] Further means of abuse may include visitation rights, and extensions, modifications, and violations of child support orders.[36]

A study of the Massachusetts courts found that the abusive party routinely files multiple harassing or retaliatory motions, raises false allegations and accusations against his victim, manipulates the system with the objective of avoiding payment of child support, and uses parallel actions in a number of courts and jurisdictions in order to gain an

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[29] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 28.

[30] Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 168–69.

[31] *Id.*

[32] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 27.

[33] *Id.*

[34] *Id.* at 34.

[35] LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 113–28 (2002).

[36] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 34.

advantage.[37] It transpires that there is very little that can be done in order to prevent such harassments.[38]

A further danger to which the victim is exposed is the danger of the manipulative use often made of the law by the violent party. One of the common manipulative uses of the legal system is the practice of filing for a civil protection order by the violent party (e.g., due to bodily injury of the violent party occurring as a result of self-defense on the part of the victim).[39] Absurdly, in many cases, the petition of the violent party precisely reflects the position of the victim in reverse; all of the victim's allegations are suddenly directed against her.[40]

### 3. *CRITICISM FROM PRACTITIONERS*

*"I forgot that my clients who had children with their abusers would be pulled into the courts by batterers using the legal system as a new forum for their abuse. I ignored the reality that batterers continue to stalk their victims—and in many cases, increase their violence—after separation. And I refused to hear the doubts my clients expressed about ending their relationships, turning a deaf ear to their intuitions that perhaps these relationships had not ended after all. I did not understand that finality within the legal system was not finality in the real world."*[41]

For years there has been a controversy in the scholarly literature, as well as among practitioners and attorneys representing abused women, regarding the degree to which the judicial process is effective for handling divorce disputes involving violence,[42] and what the costs are compared to the benefit derived.[43] Among attorneys representing abused women, there are even those who assert that the exclusive reliance upon the legal system is likely to be very problematic. At times, it can cause serious damage that

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[37] CUTHBERT ET AL., *supra* note 27 , at 59–62.

[38] *See, e.g.*, D.C. Code Ann. § 16-914 (Supp. 2003).

[39] Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases,* 13 S. CAL. REV. L. & WOMEN'S STUD. 35 (2003); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1074–78 (1993).

[40] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 24.

[41] *Id.* at 7–8.

[42] Many scholars have criticized the current civil response to domestic violence as being ineffective. *See, e.g.*, Elizabeth L. MacDowell, *VAWA @ 20: Improving Civil Legal Assistance for Ending Gender Violence*, 18 CUNY L. REV. F. 72 (2014) (discussing the failure of the Violence Against Women Act to address the limitations of civil responses to domestic violence).

[43] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 18–19.

may be greater than the benefit, and for some, even more serious implications.[44]

For example, in their article, Epstein and Goodman point out that laws intended to protect abused women and deter further abuse often fail to achieve their purpose, and that the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence.[45]

The authors note that their conclusions stem from:

a wide range of legal, psychological, philosophical and cultural sources, including the more than twenty-five years of experience each of us has had, individually and in collaboration, representing survivors in civil protection order cases, conducting empirical research with survivors of intimate abuse, and consulting with local and national domestic violence organizations.[46]

Additionally, some assert that even if the system reaches the correct conclusions, in many cases it infringes upon the woman's dignity along the way.[47] One practitioner noted that "[m]y experience, however, leads me to believe that the courtroom is the place where victims most often feel humiliated, embarrassed, controlled and discredited . . . ."[48]

Therefore, although the judicial process has a long history of resolving domestic disputes, the extent of its success in protecting the victims of domestic violence and their children in the course of divorce disputes is doubtful, and there is a serious question regarding the ability of the judicial system to truly address the needs of these women.[49] In this context, Greenberg presents five painful realities, based on empirical studies:

> 1. There is no agreement about what constitutes domestic violence.
> 2. There is no fool-proof screening for domestic violence.
> 3. Courts have been ineffective in stopping many forms of violence.

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[44] *Id.*

[45] Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 403 (2019).

[46] *Id.*

[47] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 33.

[48] Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255, 266 (1994).

[49] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 18; Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 160; Ver Steegh, *Family Court Reform and ADR*, *supra* note 7, at 659.

> 4. Batterers are statistically more successful than survivors at securing custody of their children.
> 5. Children are the casualties of their family's violence.[50]

In summary, it seems that no amount of judicial, police, prosecutorial, or family law training is likely to substantively change the depressing reality for many women who are victims of violence in divorce disputes involving violence. In many cases, and for various women, the legal system does not help. At times it is even likely to harm, in fashioning the relations of power, control, and the dynamic from which the victim of violence seeks to escape; and exposing the victim to additional violence, manipulation, and control as well as other dangers.[51] It seems, therefore, that while changes in the criminal justice system have assisted some victims, they have, to the same extent, increased the risk and the damage for others.[52] Consequently, when women who are victims of domestic violence turn to the legal system for help, they are liable to find themselves deprived of the ability to make critical decisions with respect to their best interests and safety, as well as that of their children.[53]

As a practicing attorney has summed-up, "[b]attered women engage these systems because they offer the promise of safety and accountability—but too often, the promise is illusory."[54]

### B. *Judicial Justice*

This article asserts that the deficiencies and limitations of the judicial system in dealing with divorce disputes involving violence did not arise in a vacuum.[55] Rather, they derive their vitality from a substantive limitation that is immanent to the judicial process. This limitation is such that it is prevented, by its very form, from providing, in many cases, appropriate and real address in disputes of this nature. This limitation is "judicial justice," which the judicial process creates within the courtroom and as set forth below.

In this section, we will concentrate upon four central characteristics of "judicial justice": "coercive-decisive justice," "adversarial justice," "truth-seeking justice," and "formal, general, rights-based justice." Alongside the presentation of these characteristics of

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[50] Greenberg, *supra* note 18, at 606–07.

[51] Such as in the case of custody over her children. Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 47–8.

[52] *Id.* at 32.

[53] *Id.*

[54] *Id.* at 35.

[55] *See supra* Part II.A.

judicial justice, we will demonstrate how each makes a direct contribution to the limitation of the judicial process in dealing with divorce disputes involving violence, and in providing a true remedy to the victims for their pain.

### 1. *COERCIVE-DECISIVE JUSTICE*

The judicial process is characterized by being coercive in all its aspects. Beyond the most coercive aspect of it—the fact that the process ends with a decision that is dictated to the parties "from above,"—there are additional coercive elements in the judicial process from its beginning until its end. For example, the parties cannot choose the judge, cannot leave the process at any point, and throughout the process, they are subject to the substantive and procedural law that is also dictated to the parties "from above." The judicial process rests upon the assumption that a judge can objectively determine who is right and who is wrong, what the best thing for the family is, and what the proper solution is.[56]

In the context of divorce disputes involving violence, this characteristic of judicial justice has an obvious disadvantage. The classic model with which the legal system deals with divorce disputes involving violence—including practices such as mandatory arrest and no-drop policies—is liable to be perceived as depriving the victim of her authority and dignity and is even liable to endanger her and her children.[57] These and other practices reflect an assumption that abused women are not capable of exercising discretion and making rational decisions during a crisis. Therefore, for the benefit of these women, it is only fitting that others will do so in their place.[58] However, many attorneys who represent abused women assert that it is imperative that a battered woman, who is abandoning a relationship involving abuse of power and control, does not replace it with another form of coercion, i.e., that of attorneys and other legal functionaries, who will issue orders to her about what she should do and how she should do it.[59] Coercive-decisive justice includes the danger of recreating the power and control dynamics that the battered woman is trying to escape.

One current issue, frequently discussed among legal scholars and practitioners, is whether (and to what extent) it is appropriate for the state to impose its discretion on the victim regarding decisions about arrests and the filing of actions against the abusive party. The opponents to mandatory

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[56] Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 162.

[57] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 23–24, 31–34.

[58] G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 303 (2005).

[59] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 30.

arrest and pro-prosecution policies assert that these things deny battered women the right to make decisions that will have a decisive effect on their lives, ignore the fact that battered women are in the best position to judge effectiveness versus the danger expected from the intervention of the criminal justice system, sacrifice the individual battered woman upon the altar of the best interests of all women, and in general "recreate the victim's abusive relationship, placing the state in the shoes of the batterer."[60]

Even those who support mandatory arrest and no-drop prosecution are aware that this policy denies the woman her choice and authority, but they assert that the advantage for the entire population of battered women, and especially for the weakest among them (or those who are afraid to impose criminal sanctions on the abusive husband) outweighs the damage caused to the individual.[61] It transpires, therefore, that the proponents also admit that in the short (and even in the long) run, this policy denies the battered women her authority to make critical decisions of life and death, regarding her life and the lives of her children.[62]

### 2. *ADVERSARIAL JUSTICE*

The judicial process is perceived as the antithesis to peaceful dispute resolution because the litigation taking place in a court is a naturally competitive and combative struggle.[63] In the judicial process, the objective is winning. Each of the parties strives to obtain victory through his attorney. The judicial process taking place in the court always ends with one victor only, and opposite him is the losing party. The judicial process is, in effect, a kind of zero-sum game, as defined in game theory.[64] This is because the victory of one automatically means the loss of the other, resulting in the total of wins and losses being zero. In other words, the victory of one is always at the expense of the other.[65] The departure

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[60] *Id.* at 31.

[61] Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 290–91 (1997).

[62] The question is therefore, whether it is appropriate for the state, in its intervention, to deny the victim independent discretion. *See also* Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 32.

[63] Yoram Alroi, *Dispute Resolution, Win-Win Solution—Another Way is Possible*, 1 HAMISHPAT 311, 315 (1993) (Isr.)

[64] Game theory is a mathematical theory that deals with analysis and structuring of models for predicting conduct in situations of conflict and for the purpose of decisionmaking. The basic and leading text on this subject is JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

[65] Alroi, *supra* note 63, at 318.

point is that the parties are competing for a limited number of resources and therefore they are competitors of one another, locked in an on-going struggle. Legal thinking is competitive and adversarial by its nature.[66] The adversarial system escalates the tension that exists in any event in the relationship between the parties. This system is built upon a competitive model, which causes each party to dig into his positions and to close himself off to other positions or cooperative stances. The maximum "peace" that the judicial process is likely to achieve is a "cold peace," and for the most part, even this kind of "peace" does not occur.[67] The decision, which is the objective towards which the judicial process strives, is in many cases an opening shot in the next struggle, whether in the office for executing judgments or in the appellate court.

This characteristic of judicial justice as adversarial and as escalating disputes explains the criticism in the scholarly discourse regarding the unsuitability of the judicial process for divorce disputes involving violence.[68] In such disputes, where a dangerous conflict already exists, the judicial process, which by its very nature exacerbates the dispute, is especially liable to cause harm and even place the woman in physical danger.[69] In the judicial process, and particularly in the pleadings, the parties (influenced by their attorneys) generally take extreme positions with the objective of painting the other party in the most negative light possible.[70] This is liable to escalate the level of danger when the violent husband discovers that a complaint has been filed against him for violence or when he receives the complaint, which includes allegations of use of violence.[71] In extreme cases of divorce disputes involving violence, the exacerbation of the hostility between the couple as a result of the judicial process even caused "the homicide of the battered parent and/or their children and the subsequent suicide of the batterer."[72] The assumption that the judicial process provides relative safety, as compared to the mediation process, is flawed from the outset. In fact, quite the opposite is true due to the unique character of the judicial process and the judicial justice it creates.[73]

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[66] *Id.* at 320 ("Almost all of the courses in law school are presented from the vantage point of the adversarial system . . . law schools educate their students to prepare for a legal *battle*. They teach civil procedure and the rules of evidence, which are completely devoted to the courtroom *struggle* . . . .").

[67] *Id.* at 321–322.

[68] *See supra* Part II.A.

[69] Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 162–63.

[70] Kara C. Utzig, *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 BUFF. WOMEN'S L.J. 51, 58 (1998).

[71] *Id.*

[72] Jeske, *supra* note 3, at 657–58.

[73] *See* Thompson, *supra* note 3, at 620 (quoting Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and*

### 3. *TRUTH-SEEKING JUSTICE*

As part of its global striving for truth, the judicial process concentrates upon seeking the truth.[74] Each party, by means of its pleadings and its evidence, is supposed to assist the judge, who was not present when the event occurred, to discern the facts that form the basis for the action, with the objective of advancing the process towards a judicial decision, i.e., a determination.[75]

However, with respect to the handling of divorce disputes involving violence, this truth-seeking characteristic of judicial justice serves as an obstacle. In divorce disputes involving violence, the traditional fault-based inquiry of the legal system, which focuses on the question of the actual occurrence of the violence, often encounters an obstacle in the absence of unequivocal proof.[76] Acts of violence occur, in the normal state of events, behind closed doors where the only witnesses are the attacker and the victim. Where they contradict one another in their testimony, and in the absence of physical or other corroborating evidence (as is sometimes the case), the difficulty is even greater.[77] Often, the violent party appears to be a more credible witness, the victim's testimony often sounds unreliable, psychological abuse is not always provable and all of this is accompanied by cognitive dissonance that makes horrific allegations more difficult to accept as reality.[78]

Absurdly, this deplorable state of affairs points to the fact that "[b]attered women enter the courtroom at a disadvantage."[79] Studies show that these women are perceived as less credible than the men and at times

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*Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 259 (2001)) (arguing that critics of mediation err in "comparing the best possible litigation scenario (where truth is found and justice served) to the worst possible mediation scenario for cases involving domestic violence (joint sessions with an untrained mediator)"); *see also* Lauri Boxer-Macomber, *Revisiting the Impact of California's Mandatory Custody Mediation Program on Victims of Domestic Violence through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 896 (2003). Additionally, many attorneys admit that in many cases, domestic violence remains hidden from their view in family cases they handle. *See* Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 331 (1997).

[74] HAIM H. COHEN, THE LAW 114 (1991).

[75] *Id.*

[76] *See* Gregory Firestone & Janet Weinstein, *In the Best Interest of the Children: A Proposal to Transform the Adversarial System,* 42 FAM. CT. REV. 203, 203–207 (2004).

[77] Greenberg, *supra* note 18, at 605.

[78] *Id.*

[79] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 116.

no more reliable than children.[80] The attitude to these women's allegations is more skeptical, with their reliability examined from every angle.[81] Cynical opinions of judges with respect to these women are even voiced openly at times, with one of the unwritten points of consensus being that women who petition for protective orders generally do so only as a means to achieve an advantage in the divorce proceedings and to receive custody of the children.[82]

In many cases, judges and others improperly discount women's stories of abuse as implausible because they are unable to understand both the symptoms of neurological and psychological trauma, and the practical constraints on survivors' lives.[83] Similarly, gatekeepers minimize the woman's credibility when they rely on incorrect interpretations of survivors' courtroom demeanor and negative cultural stereotypes about women and their motivations for seeking assistance.[84] Obviously, the discrediting of survivors creates further damage all on its own, in the form of "an institutional betrayal that echoes the psychological abuse women suffer at the hands of individual perpetrators."[85]

An additional limitation of truth-seeking justice stemming, among other things, from the need for tangible evidence, is the focus of the legal system on an actual *physical* injury. The legal system is concerned primarily with physical crimes: assaults, batteries, harassments, stalking and destruction of property.[86] Physical injuries create, in many judicial districts, the admissible evidence for proving the alleged violence and provide the advantage in an action for child custody.[87]

However, while many abused women are victims of physical violence, the daily reality of violence that they experience is much more complex than simply physical violence. Stark, for example, writes about an "ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work." (emphasis omitted).[88]

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[80] *Id.*; *see also* Ronald L. Ellis & Lynn Hecht Schafran, *Achieving Race and Gender Fairness in the Courtroom, in* THE JUDGES' BOOK 91, 110 (2d ed. 1994).

[81] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 116.

[82] *Id.*

[83] Epstein & Goodman, *supra* note 45, at 399–400.

[84] *Id.* at 400.

[85] *Id.*

[86] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 28–29.

[87] *Id.* For a more expansive treatment, see Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 615–17 (2001).

[88] Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995).

Attorneys who represent battered women attest to the fact that their clients explicitly state that the more injurious part of the relationship with the abusive party is not the physical violence, but the emotional abuse.[89] Statements such as that they are fools, not worth anything, bad mothers; the coerced isolation from relatives and friends; the absolute dependence formed by control over finances and freedom of movement; the threats of losing custody of the children—were the more difficult aspects of the abuse.[90] And indeed, various studies show that psychological abuse is liable to be harmful to the health of the victim of the violence, at least to the same extent as physical abuse,[91] but the legal system, in many cases, fails to award compensation for this non-physical violence.[92] A daily reality, as detailed above, of psychological and emotional abuse as experienced by many victims is not, for the most part, reflected in the narrow range of conduct that the legal system can reach.[93]

Even in judicial districts with case law that demonstrates awareness of all aspects of abuse, the threshold requirement for receiving a civil protective order remains that there be a showing of a criminal act of physical abuse or the threat of physical abuse.[94] Thus, custody statutes, which also require a conviction of domestic violence or some sort of criminal violation (to consider the parameter of violence), deny abused women the relief that they could derive from them.[95]

Thus, in elevating the physical injury above the totality of all of the other injuries that most battered women experience, the legal system sets the standards for recognition of who is considered a victim, with all the implications stemming from it. The bottom line is that if there was no physical assault the woman is not a victim, even if she was subject to absolute control, experienced threats, social or financial isolation, and suffered severe emotional or psychological abuse. The argument is, therefore, that due to this vague and shallow perception of the nature of the phenomenon of domestic violence, the legal system, with the judicial justice that it presents, *characterized by truth-seeking justice*, leaves battered women without justice.[96]

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[89] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 29.

[90] *Id.*

[91] Health Behav. News Serv., *Psychological, Physical Abuse Equally Harmful to Health*, NEWSWISE (Oct. 25, 2002, 12:00 AM), https://www.newswise.com/articles/psychological-physical-abuse-equally-harmful-to-health.

[92] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 29.

[93] *Id.* at 29–30.

[94] *Id.* at 30.

[95] *Id.*

[96] *Id.*

### 4. *FORMAL, GENERAL, AND RIGHTS-BASED JUSTICE*

As early as the days of Thomas Aquinas, it was established that the doing of justice in law is—essentially—carrying out the law.[97] Law and justice, it is argued, are synonymous and a judge is not able to do better and more complete justice or to allocate rights and duties in a more just manner, than through fulfilling the commands of the law.[98] The role of the judge in the judicial process is perceived as deciding between the rights of the parties to a case by applying the relevant provisions of the law to their case.[99] The traditional promise of judicial justice is in the implementation (and enforcement) of legal norms.[100]

It is known that legal norms of a theoretical and objective-general character control the judicial process in the courts.[101] The legal norms were not enacted, as a matter of course, for certain and defined individuals.[102] Modern law is characterized by a prevailing process of universalism, with the aspiration for objectivity being expressed, inter alia, in the enactment of legal rules with general applicability, which are meant to apply in an equal manner to similar cases.[103] As a result, the general law is not always appropriate for the special circumstances of the specific case. Hence, the risk that the imposition of the legal norms on specific parties to a dispute is liable to create "*individual* injustice" for these individuals.[104]

Concerning the needs and interests of the battered woman, on one hand, we cannot ignore the fact that the legal system has indeed addressed the needs of many women who are victims of domestic violence, serving

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[97] Aquinas added, in effect, to the two types of justice a third kind, "legal justice." *See* THOMAS AQUINAS, SUMMA THEOLOGICA 1226–74 (Benziger Bros. ed., Fathers of the English Dominican Province trans., 1st ed. 1947).

[98] COHEN, *supra* note 74, at 91–92.

[99] *Id.* (Since the days of Aquinas, justice has assumed many forms, but its main feature remains to be—keeping the law, in the spirit of "there is no better and surer justice than the performance and assurance of enforcing the law.").

[100] *See* David J. Luban, *The Quality of Justice,* 66 DENV. U. L. REV. 381, 389, 407 (1989) (This "justice" is both formal and substantive: the term "formal justice" in the judicial process means granting the opportunity for a fair process and to "a day in court." The term "substantive justice" in the judicial process means the implementation of objective legal norms (the legal principles and enactments). The judge operates according to legal norms and he even imposes such norms on the parties to the dispute.). And, as stated, Aquinas added a third kind of justice—legal justice. He saw in the very existence of the law a kind of carrying out of justice. Hence it transpires that a judge cannot do more perfect "justice" than fulfilling the command of the law. AQUINAS, *supra* note 97, at 1226–74.

[101] *See* Goodmark, *The Legal Response to Domestic Violence, supra* note 7, at 34.

[102] Liora Bilsky, *The Violence of Silence: The Legal Procedure Between Allocation and Voice*, 23 TEL AVIV U. L. REV. 421, 445 (2000) (Isr.).

[103] *Id.*

[104] *Id.*

as means of security and protection for them from future abuse.[105] Since the enactment of the Violence Against Women Act (VAWA), many means have been used to provide criminal and civil solutions for the victims' needs.[106] However, most of the involvement of the legal system relies upon a *general assumption*, according to which *every* battered woman is interested in ending her relationship, harnessing the power of the judicial system to distance the violent husband and in the final analysis to break off all of her ties to the abusive party.[107] In accordance with this underlying assumption, the prosecutorial authorities have been trained to use strategies of filing actions and arrests as a bargaining tool, at the same time, for the most part, they find it difficult to provide individual redress for the *specific* case in situations of divorce disputes involving violence.[108]

This is the situation for attorneys as well. Attorneys work within a narrow professional-legal world, with limitations placed on them through legislation, precedents, and professional training.[109] Attorneys themselves testify to the limited arsenal of solutions that they can offer to their clients in the judicial justice system: civil protection orders, custody and visitation orders, divorces, alimony and child support, and assistance in understanding and negotiating cases in the criminal system.[110]

Attorneys who work in the civil law system use strategies such as civil protection orders, custody, divorce, and child support to protect their clients.[111] The use of these strategies often occurs without advising their clients as to the potential dangers attendant in the use of the legal system and without consulting with them as to whether such use is consistent with their interests.[112] Goodmark notes, "[a]s lawyers, we need women to need legal solutions or there is no role for us to play; as a result, we push our clients towards the system we know best."[113] However, it is important to remember that many victims of domestic violence are unwilling to prosecute their attackers due to a variety of reasons.[114]

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[105] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 8.

[106] LAVI, *supra* note 4, at 60–62.

[107] *Id.* at 80–81.

[108] *Id.*; *see also* Meg Obenauf, *The Isolation Abyss: A Case Against Mandatory Prosecution*, 9 U.C.L.A. WOMEN'S L.J. 263, 285 (1999).

[109] Linda G. Mills, *Intuition and Insight: A New Job Description for the Battered Woman's Prosecutor and Other More Modest Proposals*, 7 UCLA WOMEN'S L.J. 183, 193–194 (1997).

[110] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 8. ("Although I could help clients access shelter beds and counseling services, legal interventions were the primary remedies available to battered women in my jurisdiction, and the majority of women were steered towards those interventions. My community's situation was not unusual . . ..").

[111] *Id.*

[112] *Id.* at 45.

[113] *Id.*

[114] Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. ON DISP. RESOL. 349, 367–368 (2009).

If so, the question arises—what (if anything) is the legal system likely to propose to the significant number of women, victims of violence, who are not interested in filing an action against their husbands? And what about those women who are interested in staying with him?[115] What is the likely influence of the use of the legal system in the case of battered immigrant women? Is recourse to the legal system, in certain cases, liable to increase the risk for the woman or her children? These are only a few of the questions which may bring up likely individual interests of the battered women and that are not consistent with the formal overall interests-based justice, *that almost completely does not deal with individualized interests*. As practitioners who represent battered women attest, different women have different individual needs.[116] For some of these women, the judicial system is likely to provide a remedy and to save their lives.[117] But in some cases, the damage is likely to be greater than the benefit.[118] In other words, the battered woman is often likely to "find[] that the systems designed to furnish her with help and protection dismiss the importance of her experiences. Instead, all too often, the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse."[119]

The assertion is, therefore, that rushing headlong to use the system, which, by its very nature, is limited in providing individualized redress for the specific interests in any given case, is liable to harm and even to endanger life. The question that arises is, if due to focusing on the

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[115] Whether this is due to emotional, financial, religious, cultural or child-centered reasons, it transpires that this includes a significant number of women. *See* Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 20.

[116] *Id.* at 46.

[117] Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 744 (1999).

[118] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 46–48 ("We need to ask our clients questions like: What triggers your partner's violence? Will using the legal system make you safer or endanger you? What has your experience with the criminal system been? What tactics is your partner likely to use in litigation? Will your abuser be able to use your past against you? Do you really need a civil protection order or custody order? Are there other supports that might keep you and your child safer? What are the consequences in your community if you use legal strategies? Can you afford—economically and/or emotionally—to have your abuser jailed or deported? We must consider both the legal and nonlegal dimensions of a client's problem. . . . Counseling must also include an honest assessment of the local legal system and the actors the battered woman may encounter. Are the police attentive to the calls of victims, or do they still suggest a walk around the block? Do prosecutors work cooperatively with battered women, or is the reluctant witness likely to be subpoenaed? Are judges open to hearing about abuse in the context of custody and visitation? Do they weigh the parent's friendliness more heavily than a history of abuse? Will the judge report the battered woman to the child protection system or ensure that she has the tools she needs to be protected and protect her children through custody and support orders?").

[119] Epstein & Goodman, *supra* note 45, at 400.

classic ways and the general underlying assumptions at their base, the individual, together with her specific needs and interests, is forgotten. In other words, "[h]ave we focused our resources so narrowly on legal recourse that we have failed to develop other alternatives?"[120]

As an interim conclusion:

> For a victim of domestic violence, a process that . . . increases hostility, requires lengthy and ongoing contact with the batterer, and removes her ability to make empowered decisions is far from a perfect solution. Given these problems, requiring that domestic violence cases be litigated is not an ideal solution.[121]

From all of the above and given the limitations of the judicial process and the judicial justice that it creates, it seems that different systematic thinking is necessary, and the time is ripe to look outside of the legal system for solutions.

## III. DIVORCE CASES INVOLVING VIOLENCE AND MEDIATION

This part of the article looks outside of the legal system for solutions in divorce disputes involving violence. In effect, the phenomenon of the use of non-litigious methods, primarily mediation, to deal with divorce disputes involving violence has been gaining ground in recent years, with the beginning of the publication of positive results of empirical studies on the subject of mediation in victim—offender relations.[122] For example, it transpires that for mediation, which is one of the central mechanisms of the ADR movement,

> victims and offenders are more satisfied with the process and outcomes than with the courts, they are more likely to draft and complete restitution agreements, they derive psychosocial benefits, the process is less expensive, crime victims are more likely to receive apologies from

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[120] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 8.

[121] Thompson, *supra* note 3, at 621.

[122] Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 109 (2018).

> offenders, and offenders are less likely to recidivate.[123]

In this context, this article focuses on one of the central mediation models: the transformative model. It is the thesis of this article that due to its character, its substance, and the alternative-transformative justice that it produces, this model carries a true potential for a more realistic and humane alternative for the victims and their children and to overcome the critical narratives[124] voiced regarding judicial justice in the judicial process in handling divorce disputes involving violence.

### A. *The Transformative Model of Mediation*

The transformative mediation model appeared for the first time in 1994, in Bush and Folger's book, *The Promise of Mediation*, which constitutes a reflexive reaction to the classic mediation model, and the first model in the modern era, "the pragmatic mediation model."[125] In the transformative model, the focus is on the layer of feelings and the relationship of the parties, i.e., the atrophied human interaction between the parties to the conflict.[126] Bush and Folger believe that the mediation process provides "higher-quality justice," first and foremost due to its being an alternative to the judicial process and its judicial justice.[127] Dispute, as a social phenomenon, according to the transformative model, involves not only (and not even primarily) dealing with rights, interests, or power struggles, as transpires from the judicial process.[128] Disputes

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[123] *Id.* at 99.

[124] *See supra* Section II.A

[125] *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1981) (The model presented in the book is fashioned as a new approach for dealing with conflicts and for handling negotiations and in practice it is, even today, the dominant model in the world of ADR). *See also* Michal Alberstein, *Resistance to Mediation: Rights, Legal Consciousness and Multiculturalism,* 24 BAR-ILAN L. STUDIES 373, 376 (2008) (Isr.) [hereinafter Alberstein, *Resistance to Mediation*].

[126] Sally Ganong Pope & Robert A. Baruch Bush, *Understanding Conflict and Human Capacity: The Role of Premises in Mediation Training, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK 61, 63–64 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001) [hereinafter Pope & Bush, *Understanding Conflict and Human Capacity*].

[127] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 15.

[128] Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 72 (2002) [hereinafter Bush & Pope, *Changing the Quality of Conflict Interaction*].

primarily involve dealing with people and the relationships between them, as human beings.[129]

The transformative model perceives the conflict as a sort of crisis in the human interaction between the parties to it.[130] The point of departure of the transformative theory is that the conflict (with its metastases) negatively affects the personal experience of a party to the conflict with herself as well as the experience of her connection with the other party.[131] The authors term the former "internal weakening" and they break this down to feelings of helplessness, loss of control, confusion, self-doubting, etc., whereas they term the latter "external alienation" and break it down into feelings of suspicion, defensiveness, hostility, imperviousness, self-immersion, demonization and alienation towards the other party to the dispute.[132] According to this theory, these two groups of negative feelings feed on each other in a vicious cycle, created by what they term "the negative interaction of the conflict."[133]

Since, according to this theory, the above-described deteriorating human interaction, and not the frustration from the failure to satisfy a particular interest, is the focus of the pain in the conflict, this is where the remedy to this pain must be found. In other words, the remedy to the pain of the conflict cannot be provided in an *interest-based negotiation*, as the basic mediation model—the pragmatic model—proposes;[134] rather it must include the breaking of the destructive cycle. There must be a breakthrough of the negative interactions of the conflict by carrying out transitions from internal weakening to empowerment[135] and from external

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[129] This perspective of conflicts is supported not only by the practical experience of scholars but relies also on theories that analyze the conflict process with its metastases. Studies from the fields of communications, developmental psychology and social psychology also support this perspective regarding the significance of the conflict in the view of the parties to it. The theories confirm what the parties to the conflict express on the ground: the most influential and disturbing part of the conflict is the crisis in the human interaction. *Id.* at 85. For a more expansive treatment see AARON T. BECK, PRISONERS OF HATE 3–39 (1999); JEFFREY Z. RUBIN ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT 74–81 (Christopher Rogers et al. eds., 1994). *See also* Susan Beal & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice, in* DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK, *supra* note 126, at 11–12.

[130] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 72–73.

[131] *Id.*

[132] *Id.* at 73.

[133] *Id.* at 74–75.

[134] The expression "interests-based negotiation" and the focus on the latent layer of the dispute has its most significant manifestation in the classic mediation model, its first model in the modern age— "pragmatic mediation." *See* FISHER & URY, *supra* note 125.

[135] For a definition of the term "empowerment," see *supra* note 14 and the accompanying text. Bush & Folger point to five categories of empowerment, which

alienation to recognition and responsiveness.[136] The layer that is not seen, therefore, exists in this model on the plane of relations between the parties, where the break that characterizes them is expressed by the appearance of the dispute.[137] The parties to the mediation process must go through morale-raising in two dimensions—empowerment and recognition—to switch from weak and concentrated on themselves (in view of the conflict) to strong and having the ability of recognition and responsiveness to the other party.[138]

The role of the transformative mediator focuses, therefore, on supporting the parties in their transformation from internal weakness to empowerment and from external alienation to recognition.[139] These two components—empowerment and the recognition—are the components of the "transformation" that the parties go through in the course of the mediation.[140] *This transformation is the purpose and the true promise of mediation, and without it, there cannot be true growth for the parties or a hermetic finish to the dispute, even if an agreement is reached at the end which satisfies some of their interests.*[141] This perception of the dispute, and the appropriate way to handle it, has a significant contribution to make with respect to divorce disputes involving violence, in terms of the attitude towards them and the manner of handling them, as set forth below.

### B. *Alternative-Transformative Justice*

Just as it is possible to characterize the judicial justice that the judicial process creates,[142] it is possible to characterize the alternative justice of the ADR movement, particularly mediation. Mediation can be characterized according to four characteristics: "non-coercive justice that respects the parties' autonomy," "cooperative justice focusing on

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the parties are likely to experience in the mediation process: empowerment with respect to goals, empowerment regarding options for a solution, empowerment regarding skills, empowerment regarding the means in his possession, and empowerment regarding decisionmaking. BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 85.

[136] For a definition of the term "recognition," see *supra* note 14 and the accompanying text. Bush & Folger point to five categories of recognition: the awareness of recognition, the desire for recognition, recognition in thought, recognition in speech, and recognition in deed. BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 89.

[137] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 80.

[138] *Id.* at 82.

[139] *Id.*

[140] *Id.*

[141] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 75–76.

[142] Coercive-decisive justice, adversarial justice, truth-seeking justice and formal, general, rights-based justice. *See supra* Section II.B.

relationships and emotions,"; "justice that believes in the parties" potential, and "individual, interests-based justice."[143] In this article, we assert that these characteristics of alternative justice have made a direct contribution to the construction of mediation. Transformative mediation, in particular, has proved an appropriate and effective tool for handling divorce disputes involving violence, as shall be demonstrated below.

### 1. *NON-COERCIVE JUSTICE THAT RESPECTS THE PARTIES' AUTONOMY*

Respect for the parties' autonomy and anti-coerciveness are prominent characteristics of the alternative justice of the mediation process. In effect, substantively, these principles are among the most inverse to the judicial process (which is coercive in every aspect[144]) and are the antithesis to the determinative justice that it produces, i.e., judicial justice.[145] At the basis of this value is a theoretical conception. Unlike the model of justice that is forced upon the parties by a third party—as is the case with the judicial process—negotiations in the course of mediation are perceived as enabling the parties to realize their personal autonomy, self-determination, and their interest in controlling their future through the exercise of their personal desires, without the determination of an external entity.[146]

Mediation legislation clearly recognizes that the parties' personal autonomy and self-determination are a central foundation of this process.[147] This autonomy is realized by the very definition of the process as volitional, leaving every substantive decision in the process in the hands

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[143] For a more expansive treatment of the principles of justice applicable to *all* of the alternative movements to the legal system, including therapeutic jurisprudence, restorative justice, and transitional justice, see ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10.

[144] *See supra* Section II.B.1.

[145] In the mediation process, for example, through the autonomy granted to them in the process, the parties can adopt the objective norms for their mediation. In other words, the parties in the mediation process are not subject to norms set forth in the law. The mediation does not silence the parties as the judicial system does through laws and precedents, rules of evidence, presumptions, burdens, etc. BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 11–12; *see also* Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. REV. 47, 56 (1996) [hereinafter Nolan-Haley, *Court Mediation and the Search for Justice Through Law*]. Regarding the principle of the voluntary process and the principle of the parties' autonomy or self-determination in the mediation process, see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775, 819–20 (1999) [hereinafter Nolan-Haley, *Informed Consent in Mediation*].

[146] Lon L. Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 315 (1971); BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 11–12.

[147] *See* AAA, ABA & ACR Model Standards of Conduct for Mediators §1 (2005).

of the parties and depriving the mediator (as distinguished from the judge) of any enforcement power. Additionally, as distinguished from the judicial justice of the courts, in the mediation process, the parties are entitled to present their arguments without limitations. They are not subject to the substantive or procedural law, and they even have the freedom to leave the process at any time.[148] The product of the process—the mediation agreement—is the creation of the parties according to their own choice (as opposed to a coercive decision in the judicial process), and it gives clear expression to the realization of their autonomy.[149]

In view of the criticism about the judicial justice system's prominent coerciveness when handling divorce disputes involving violence and battered women, these ideas—especially that battered woman can choose an alternative to court—have a special additional value.[150] Once the legal system enters the picture, it uses tools like arrest and prosecution to enforce a couple's separation.[151] These tools, which enable the state to intervene in the relationship even without the consent, or against the will, of the victim, are outside of the battered woman's control.[152] Mandatory arrest policies (which direct the police to carry out arrests whenever there is probable cause to believe that domestic violence occurred) and no-drop prosecution policies (which instruct the prosecution to continue processes in every case of domestic violence where there is sufficient evidence) require the continuation of the criminal-legal intervention without considering the consent—or absence thereof—of the woman in any specific case.[153] In jurisdictions with strict no-drop prosecution, the authorities are even likely, in the name of law enforcement (and to send a message of uncompromising war on domestic violence), to force women to testify against their will, even demanding their incarceration pending testimony.[154] Such actions ignore the relationship between the victim and the offender, as well as its attendant

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[148] *Id.*

[149] While in mediation this autonomy also includes "outcome consent," i.e., the fashioning of a substantive arrangement by the parties and their consent to it at the end of the process, there are other ADR mechanisms, such as arbitration, in which the autonomy applies only to "participation consent," i.e., consent to participate in the process and in the establishment of its content and framework, as opposed to its result. *See* Nolan-Haley, *Informed Consent in Mediation, supra* note 145, at 819–20.

[150] *See supra* Section II.B.1.

[151] Lois H. Kanter et al., *Northeastern's Domestic Violence Institute: The Law School Clinic as an Integral Partner in a Coordinated Community Response to Domestic Violence*, 47 LOY. L. REV. 359, 367 (2001).

[152] *Id.* ("Law enforcement, traditionally operating in a masculine, hierarchical, and authoritarian fashion, may want the client to provide information but reserve to itself the right to assess the situation and its implications, and decide upon a 'proper' course of action.").

[153] Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 318–19.

[154] *Id.*

dangers.[155] Thus, the system decides what the appropriate means are for dealing with the abuse that the battered woman experienced, all while forcibly replacing its discretion for that of the woman. This conduct is clearly the antithesis of the first characteristic of alternative justice as *non-coercive justice that respects the parties' autonomy*.

Alternative justice, which respects the parties' autonomy (in this case, that of the victim), relies upon the insight that, in the final analysis, the battered woman is the one who will have to live with her choices whether financial, social, or emotional, with all of their implications for her life and the lives of her spouse and children.[156] In view of all of this, the conclusion is that these decisions cannot be those of an outside entity, no matter how well-intentioned.[157] Alternative justice, therefore, overcomes the critical narrative[158] of judicial justice being—as far as divorce disputes involving violence are concerned—a form of justice that decides for the victim what is the one correct solution for her and for her children (with all of the attendant implications).

The transformative mediation model adds to and sharpens the value of "respect for the parties' autonomy" through *liberation from the concealed authority of the mediator*. According to this model, the transformation, the true promise of mediation, cannot be realized without respect for the autonomy and free will of the parties.[159] This respect is achieved by providing a space for activity for them *by restricting that of the mediator*.[160] Bush and Folger, among the fathers of transformative mediation, call for narrowing the boundaries of intervention and activism on the part of the mediator in the process.[161] This stems from the understanding that a mediator's broad autonomy is in inverse proportion to the broad autonomy of the parties to the dispute, and that providing them with maximum space for taking action is critical for their process of growth and transformation in the mediation process.[162]

These ideas also guide the mediation practice in the transformative model. Two of the signs of a transformative mediator (as Bush and Folger present them) are: "[i]t's ultimately the parties' choice," and "the parties know best."[163] The intent of the first sign is that the responsibility for the

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[155] *See supra* Section II.B.1.

[156] *See* Kanter, Enos & Dalton, *supra* note 151, at 366.

[157] *Id.*

[158] *See supra* Section II.B.1.

[159] *See* Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[160] *Id.*

[161] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 100–01.

[162] Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 267–68 (1996) [hereinafter Folger & Bush, *Transformative Mediation and Third-Party Intervention*].

[163] *Id.*

result is exclusively that of the parties.[164] The transformative mediator must be liberated from the sense of responsibility to bring about a certain result through his intervention. For example, he does not feel responsibility to achieve a particular agreement for a solution of the parties' problem, to produce a remedy for their pains, or to make peace between them.[165] In place of this, his responsibility focuses upon strengthening the connection through which the parties can develop their efforts in the areas of the discussion, decisionmaking, communications, and broadening perspectives.[166] With respect to the second sign, the intention is that the mediator refuses to judge between the parties' positions and decisions regarding their positions and their attitudes towards one another.[167] The value of empowerment in the transformative approach motivates the mediator to consciously refrain from serving as a judge regarding the parties' positions, or the options with respect to the situations and the decisions between them.[168]

In view of this, one of the obvious work skills of the transformative mediator is refraining from leading responses.[169] The transformative mediator supports, but never "pushes," with respect to the parties' decisionmaking. [170]Any pressure, groping, presentation of questions, or directing action or over-acting, will lead, according to the proponents of the transformative model, to nearly certain loss of the opportunities for empowerment and recognition.[171] In other words, it will lead to loss of the parties' transformation and the loss of the promise of the process.[172] All along, the transformative mediator does not do the work instead of the parties. Quite the opposite, he takes scrupulous care to leave the stage to the parties. He will never try to substitute his judgment for theirs or try to lead them in what he views as the direction of the best agreement for them.[173] He will not express his personal opinion regarding the case or the strength of a particular argument voiced by one of the parties, or regarding the chance that the particular argument will be accepted by a court.[174] Moreover, the transformative mediator will not render his opinion on the basis of previous mediation experience involving a similar issue, will not determine for the parties how the discussion will

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[164] *Id.* at 267.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 268.

[168] *Id.*

[169] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[170] *Id.* at 93–94.

[171] *Id.* at 94.

[172] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 93, 106.

[173] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[174] *Id.*

be conducted and what the target is for its continuation or termination, and he will not decide in place of the parties what is fair or unfair for them.[175] He respects the parties' choices and goals and trusts them with respect to their independent decisionmaking.[176]

In divorce disputes involving violence, the implementation of transformative mediation is expressed, foremost, by the insight that the battered woman and she alone (as distinguished from the judge or mediator) is the autonomous owner of her problems, and that only she, where she stands, is likely to be the best expert regarding her life.[177] Such understanding comes from her evaluation and correct prophesies regarding the implications of her choices about her security and well-being.[178] The underlying assumption is that the battered woman knows better than anyone else how to provide for her safety because she has a "unique ability to predict the abuse, to use techniques to minimize the violence, and to assess when it is safe to leave."[179]

In transformative mediation, giving advice and guidance to the battered woman about the best way to ensure her personal safety and that of her children is considered to be the most dangerous and unhelpful thing a mediator can do.[180] The transformative mediator must respect her choices non-judgmentally, even if it seems to him that they are wrong. For example, *the transformative mediator will never make the almost-automatic assumption of the legal system regarding the desire of the victim to leave her spouse*.[181] Instead, he will regard the situation through the eyes of the victims and will truly listen to them and to their desires and needs.[182]

Moreover, transformative justice offers the insight that respect for the parties' autonomy and non-coercion is the only way to reach the "empowerment" that is one of the clear objectives of the transformative model.[183] Empowerment and self-determination, hallmarks of transformative mediation, are an appealing option for those who prefer to rely on their own decisionmaking capacities in lieu of those of a judge, a

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[175] *Id.*; BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 101.

[176] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[177] Sascha Griffing et al., *Domestic Violence Survivors' Self-Identified Reasons for Returning to Abusive Relationships*, 17 J. INTERPERSONAL VIOLENCE 306, 315 (2002).

[178] *Id.*

[179] Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L. J. 605, 627 (2000).

[180] Folger & Bush, *Transformative Mediation and Third-Party Intervention*, *supra* note 162, at 264–267; BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 101, 106; Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[181] *See supra* Section II.B.4.

[182] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 93.

[183] *See supra* notes 12–14 and the accompanying text.

mediator, or any other third party.[184] It is impossible to overstate the importance of *empowerment* and the return of control over the process, as well as over the other choices regarding her life, in the situation of a battered woman who has been denied agency and authority in her relationships.[185]

These insights fit in with the argument, advanced in the scholarly discourse, that one thing needed by a battered woman, perhaps more than anything else, is a voice.[186] Having experienced being ignored by her surroundings (as well, at times, disappointments with the public justice systems or the general establishment), she needs a process that will return the power taken from her in the destructive relationship and the security gained from control over her own life. In the judicial process, the character of the proceedings and procedural rules prevent the injured woman from making her voice heard and from freely telling her story in her own voice. For example, her testimony on the witness stand passes through many filters, such as direct examination, cross-examination, etc.[187] Feminist criticism of the judicial process asserts that it silences and strangles the female voice, even outside the context of divorce disputes involving violence. However, these problems are particularly exacerbated in divorce disputes involving violence.[188] Silencing or strangling the female voice further contributes to the cycle of oppression that already exists and, of course, is the polar opposite of the empowerment that transformative mediation strives towards.[189]

Additionally, respect for the victim's self-autonomy also includes respect for *her truth*. However, the problem is that the chance of receiving such respect in the judicial system is very small. In the judicial process, it often happens that there is a restructuring of the narrative presented which does not properly express her true story, choices, feelings, and perspective regarding the entire web of violence and, quite the opposite, causes *disempowerment* of the victim.[190] In view of the characteristic of judicial justice as "truth-seeking justice,"[191] meaning its objective is to strengthen the woman's reliability (which is likely to be critical in offenses of this nature),[192] the victim's attorneys give in, at times, to the temptation to "edit" her testimony and her story in order to strengthen her reliability in

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[184] Greenberg, *supra* note 18, at 617.

[185] Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 30–31.

[186] Bilsky, *supra* note 102, at 437–38.

[187] *Id.*

[188] *Id.*

[189] *Id.*; *see also* Jeske, *supra* note 3, at 660–61.

[190] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 121.

[191] *See supra* Section II.B.3.

[192] In view of the fact that they happen in private for the most part and there is no evidence other than the victim's testimony.

the eyes of the judge.[193] This editing is likely to involve the omission of details such as the victim's self-defense efforts so that the victim's testimony comports with the myth of the weak and helpless victim.[194] In effect, the narrative voiced by the victim in the courtroom is, for the most part, a *narrative of victimization*, which is easier for the legal system to accept.[195]

The pressure that the battered woman's attorney exerts on her to edit her story (so that it comports to the stereotypical narrative) effectively replaces her discretion and locks her into a controlled form (similar to her position in her relationship with her husband).[196] When her attorney instructs her to omit part of her story, he transmits a message that denigrates the survivalist part of her conduct and reinforces the pitiable and helpless victim part. In this manner, her autonomy is weakened through the replacement of her story and her experience by external and professional judgment that determines, in her stead, the question of what is in her best interests. Editing the battered woman's story gives her the message that her judgment is impaired and that her actions and choices are defective and even unjustified. It transpires that the autonomy and power of choice, employment of her discretion, and decisionmaking from a place of ability and independence are taken from her. Instead, she becomes dependent, weak, and again controlled. The conclusion is that the legal system (together with all of its players) pushes the battered woman into a form and self-perception of being a "victim" and "controlled," as opposed to being "brave," "a survivor," or "a fighter."[197]

The polar opposite, the transformative mediation process, strives to empower the woman by, among other things, hearing her complete story without a filter or outside judgment, and with direct acceptance of her choices. Transformative justice understands that the narratives told by battered women out of the depths of their pain affect their ability to recruit help from those who hear them.[198] The foundation of interpersonal bonds, through relating their narrative to their surroundings, is, in many cases, the

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[193] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 117; Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 735 (2003).

[194] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 120–21.

[195] Kohn, *supra* note 179, at 735.

[196] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 120–21.

[197] Ignoring the life experiences, choices, and stories of these women is liable to cause them to "feel absent, impotent and even despairing." Stark, *supra* note 81, at 1011.

[198] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 80–81.

key to ensuring battered women's access to services.[199] If the battered woman's narrative fails to resonate, she may find the shelter door barred.[200] A legal judgment or decision finding that her story is not believable is liable to destroy the battered woman, who has garnered the remains of her energy to go before the court and describe the entanglement of abuse she has endured. When she discovers that she is not believed, the battered woman is likely to lose faith in the entire system or in any outside source of assistance. More terrible than this, she is likely to lose faith in herself.[201]

In summary, it may be said that the narrative helps the battered woman both in processing and understanding her experience and in serving as a bridge for calling for help and for receiving assistance from her surroundings to combat the violence against her.[202] When transformative mediation grants a platform to the battered woman, *to relate her narrative as it is*, it provides her with an important opportunity *for empowerment* (as one of its proclaimed objectives) and for building herself up.

### 2. *COLLABORATIVE JUSTICE, FOCUSING ON RELATIONSHIPS AND EMOTIONS*

The perception of the parties as partners and the importance of the relationship constantly return in the approach of alternative justice of mediation. For example, according to the pragmatic model of mediation, one of the four principles proposed by Fisher and Ury is the need to "separate the people from the problem."[203] The dispute must be de-personalized,[204] presenting it as a shared problem that the parties are supposed to solve. If the negotiators see themselves as adversaries in a personal face-to-face conflict, it is difficult to separate their relationship from the substantive problem and therefore it will be difficult, if not impossible, to solve the problem.[205] According to this model, the emphasis

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[199] ELAINE J. LAWLESS, WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE 38 (2001).

[200] *Id.* ("The woman telling her story may believe that she got into the shelter and received help because of what 'he did,' when, in fact, she receives aid and shelter based on what *she says*.")

[201] Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1375 (2002).

[202] Goodmark, *When Is a Battered Woman Not a Battered Woman?*, *supra* note 2, at 82.

[203] FISHER & URY, *supra* note 125, at 17–39.

[204] The accepted term in negotiations literature. *See* ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 58.

[205] According to the assertion of Fisher & Ury. *See* FISHER & URY, *supra* note 125, at 17–39.

is on the personal advantage accruing to the negotiating parties by adopting the model of solving the problem. The parties to the dispute, therefore, are asked to adopt this model because it will be effective for them personally and will lead to a win-win solution, i.e., one in which each party to the dispute wins.

The implementation of this theoretical perception of the victim-offender relation can be found in criminal mediation. The positive potential, which proponents of restorative justice[206] attribute to meetings between the victim and the offender, is connected to the assumption that the victim and the offender are linked and that the terror of the one is connected to the problem of the other.[207] The victim is hurt, her dignity has been violated, she suffers from nightmares connected to the demonic image of the offender, and dread lest the injury recurs, again violating her boundaries. The offender sometimes suffers from being emotionally cut-off, feelings of guilt, a low self-image, feelings of victimization, and an anti-social attitude. The restorative meeting enables the victim to deal with her fears face-to-face with the source of these fears. Her ability to ask the offender searching questions, to break down the demonic image (while understanding the offender's background), to put her experience into the context, and to understand that she, the victim, is not responsible for what happened to her— all of these create significant processes of healing and restoration, which cannot be achieved by standard psychological treatment or in a legal process. The offender also receives renewed support for his humanity and develops the ability to take responsibility for his actions and to correct the injustice that he caused.[208]

The transformative process takes a step forward while criticizing the "satisfaction story" of the pragmatic model,[209] and proposes instead a new story, "the transformative story." The transformative story relies, at its theoretical base, on the idea of the connection and concern, with the objective of mediation being process-oriented in the sense of *moral growth*, and not *result-oriented.* The transformation is composed of two dimensions, as stated above—empowerment and recognition—which

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[206] The restorative justice movement, which offers an alternative to the judicial process (similarly to the ADR movement), sees a criminal offense as an injury to people and to the fabric of their relationship and not just a deviation from the law and social norms. It expresses a moral and social attitude that differs from the approach of traditional criminal law with respect to the complexity of the issue of the commission of criminal acts. It concentrates on the righting of wrongs, rather than exclusively focusing on assigning guilt and imposing punishment (as is the case in the criminal process). *See* Tali Gal & Hadar Dancig-Rosenberg, *Restorative Justice and Criminal Justice: Two Faces of Criminal Law*, 43 MISHPATIM 779 (2013); *see also* ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 14.

[207] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 61.

[208] *Id.*

[209] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 16–17 (Bush and Folger present Fisher and Ury as promoting the "satisfaction story.").

express the moral growth that parties experience in the course of the mediation process.[210]

In the transformative model, the *relationships* receive the central emphasis, with the empowerment and recognition inextricably bound up in the *relationships between the parties.* The transformative theory speaks explicitly of the "theory of atrophy,"[211] which characterizes the relationship of the parties at the beginning of the conflict. The authors speak of the negative spiral of the conflict, which is composed of a dynamic of mutual fertilization between "internal weakening" and "external alienation."[212] With the progression of the process, the spiral becomes positive and it is composed of a dynamic of mutual fertilization between "empowerment" and "recognition in the parties" relationship.[213] In summary, it can be said that the transformative approach focuses on building dialogue and the transformation of the parties to the conflict.[214]

For example, the direct meeting often neutralizes the offender's denial mechanism. In the absence of a painful confrontation, he does not admit to his surroundings (and at times, not even to himself) that he committed the offense. The victim's presence restarts his moral senses, and he is forced to deal with the implications of his acts and to apologize to the victim.[215] In the language of transformative mediation, he undergoes self-empowerment and grants recognition to the other party. The transformative mediation model combines, therefore, the individual strength (empowerment) and relational skills (recognition).[216] The thinking is that the relationship between the victim and the offender is the central basis for the traumatic experience, with the transformation of the relationship containing possibilities not only for healing (as may happen in pragmatic mediation) *but also for true moral growth.*[217]

An additional point in this context, which distinguishes between alternative-transformative justice and judicial justice, is the attitude towards *feelings*. In the judicial courtroom process, there is no place for feelings. One of the critical narratives regarding judicial justice speaks of "patriarchal justice," which rests upon the "ethic of justice," and minimizes the granting of a place to *feelings*, in addition to its being

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[210] *See supra* notes 12–14 and the accompanying text.

[211] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 74–75.

[212] *Id.*

[213] *Id.* at 82.

[214] Through unifying texts, silences, self-observation and a great deal of advance preparation. This is suggestive, to a great degree, of the humanistic mediation of Mark Umbreit. ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 61.

[215] *Id.*

[216] *Id.* at 58.

[217] In effect, this assertion is also voiced in the restorative justice movement and criminal mediation in general. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIMINAL JUSTICE 51 (1990).

"determinative justice," which is inclined to ignore the *emotional* aspects of the conflict.[218]

Moreover, insofar as the legal system prioritizes physical injury over *emotional*-psychological (or other) injury, as stated above,[219] the system becomes almost useless for a large number of women, for whom, as stated, the physical injury (if there is any) caused by the abuse is secondary.[220] This situation is enabled only within a system of justice which does not emphasize relationships, feelings, and emotional injuries. A system that does not adopt as one of its values the idea of "focusing on relationships and emotions,"[221] fails, naturally, to grant compensation for non-physical violence.

By way of contrast, concerning alternative justice, *emotions* have a central and important role; the participants in the circle of restorative justice, which is likely to be composed of supporters of the victim and supporter of the offender, speak about their feelings in the wake of the injury. Some of what happens in the circle touches the relations between the parties. There is an effort to sharpen and to awaken the *moral sensitivities* of the offender and the entire community, through thinking about these sensitivities and focusing on relationships.[222]

In Fisher and Ury's model, emotions have an important place both in the first component of the model, the "people" component,[223] and in the "interests" and intangible needs component.[224] Implementation of this model for divorce disputes involving violence relates to dealing with feelings as a vital and necessary part of the process. It is under difficult circumstances and in a complex relationship, such as divorce disputes involving violence, that feelings are likely to arise which, if they are not

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[218] The feminist criticism of law argues, inter alia, that the language of law is 'masculine language' and that the inquiry into rights and justice upon which the judicial process is based is formalistic, hierarchical, adversarial, competitive, linear, rational, and *lacking emotion*. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1566 (1991); *see also* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 62–63 (1982).

[219] *See supra* Section II.B.3.

[220] *Id.*

[221] *See* discussion *supra* Section III.B.2.

[222] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 61–62.

[223] Fisher and Ury's model is divided into four components: people, interests, options, and criteria. With respect to the people component, the authors call for distinguishing between the people and the problem. *See* FISHER & URY, *supra* note 125.

[224] The intent is to interests that cannot be quantified in monetary terms, e.g., injury to dignity, desire for revenge, jealousy, desire to control, mutual respect, longing for recognition and a sense of importance, need for a sense of security and equality, etc. The assumption is that often they are the *true motivations* for the conflict, even though they do not fall within the purview of "legal grounds.". *See* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 44 (1982).

dealt with, will prevent the solution of the problem.[225] Identification, processing, and dealing with feelings, according to this model, are, therefore, part of arriving at a diagnosis, without which no treatment will succeed.

Transformative mediation, it transpires, in this context, is an additional level. "Emotions are also facts," according to Bush and Folger, and therefore they cannot be separated from the substantive deliberation.[226] As opposed to pragmatic mediation, which, despite all of its criticism of the judicial process and its attitude towards emotions, is, at times, likely to deal with emotions as if they are "noises" that must be aired out and gotten rid of, in the transformative mediation model, emotions are considered to be a rich means of expression, which are likely to expose, after they have been released and understood, a valuable cache of the parties' views of their position and that of their opponents, *with this information being the key to the process of empowerment and recognition*.[227]

In encouraging the parties to express their feelings, the transformative mediator does not intend to return the parties to a less emotional, more rational path or to delve into the sources of the feelings (as is likely to occur in pragmatic mediation). Addressing them and the work with the parties' feelings in transformative mediation does not stem from an attempt to achieve therapeutic goals but rather transformative results, since the expression of feelings at times hints, according to the transformative model, at opportunities for "empowerment" and "recognition."[228] In other words, rather than relating to feelings as an *obstacle* (or a disturbance) that must be overcome (even if there is the recognition that they should not be ignored), as pragmatic mediation often does, transformative mediation views feelings as presenting an *opportunity*. A positive opportunity, full of potential for transformation. "Empowerment" and "recognition" are the two keys to the transformation towards which, as stated,[229] transformative mediation strives. Through providing a platform for the battered woman's feelings and her story, transformative mediation is likely to contribute to her empowerment while giving her the recognition she needs.[230]

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[225] *E.g.*, a violent relationship in which the woman's inability to end the violence gives rise to feelings of failure and guilt. *See* BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 75 (1996).

[226] Folger & Bush, *Transformative Mediation and Third-Party Intervention*, *supra* note 162, at 272–274.

[227] *Id.*

[228] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 87–88.

[229] *See supra* notes 12–14 and the accompanying text.

[230] Knowlton & Muhlhauser, *supra* note 48, at 256 ("Several commentators, however, have argued that mediation is a vehicle for empowerment and an appropriate mode of intervention even when domestic violence has occurred."). *See also id.* at

Another component in the above-referenced model, "finding options for mutual benefit," requests that the parties use creativity, think outside the box and use techniques such as brainstorming to create a wide range of options for a solution, that will integrate between the interests of the parties and will assist in arriving at a win-win solution.[231] Here as well, the belief in the parties and their abilities is noticeable. A true solution, according to this assumption, requires the work of the parties to the process, who are likely to fashion solutions suitable to them, with the potential of enlarging the pie. Out of the difference between the parties, diversity of thinking, and the changing needs, new ideas can be created for an agreement, which could not have been imagined in advance and, in the final analysis, all of the true answers for a solution are held by the parties.[232]

Concerning the victim-offender relations, in the restorative justice movement, the optimistic perception of alternative justice, *that believes in the potential of the parties* and views every conflict as a basis for growth, reaches its apex. One of the criticisms of restorative justice regarding the classic criminal process is that the criminal court process ignores the empowering potential of returning the criminal conflict to those involved in it: the victim, the offender, and the community.[233] The assertion is that when the law intervenes in divorce disputes involving violence, it sees two individuals — the injurious man and the woman victim, who, from the moment the complaint is lodged, become a defendant and a witness. In the *judicial* justice system, the legal system, which ends with serious punishment, is considered the appropriate response to a violent act, and rehabilitative processes (if they are even offered) are often directed at the man, whereas in reality, this is not sufficient.[234] A further criticism is that the legal system is likely to cause disempowering of women, the victims of violence,[235] insofar as the system does a poor job of listening to them (if it does so at all), it operates based on presumptions regarding their goals and needs and prevents them from making decisions regarding their preferred method of dealing with the abuse they have and continue to experience.[236] In other words, the system does not have even a basic level of faith in them and their abilities.

As opposed to this, and as an alternative, the restorative justice movement proposes *belief in the parties' potential*. The assertion is that

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266–67 ("Well-trained mediators can and frequently do develop processes and establish guidelines that *empower and enlighten the victims* in domestic dispute…") (emphasis added).

[231] *Id.* at 60–63.

[232] *Id.* at 38, 50.

[233] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 35–36.

[234] *Id.* at 76–78.

[235] Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 319.

[236] *Id.*

returning the conflict to the hands of the victim and the offender has a positive potential, through accommodation of the compensation mechanism, listening to the specific needs of the victim, and the restoration, which relates to the diverse dimensions of the conflict. All of these are considered the "creation" of the parties, a unique creation that must be carried out anew each time (per the specific circumstances) and which cannot be put into place without them.[237]

Specifically with respect to the victim, restorative processes, which include victim-offender mediation[238] and meetings with the participation of the victim, the offender, and friends from the community,[239] places a great deal of power in the hands of the victim, out of belief in her abilities. The power to decide if restorative processes are appropriate for a confrontation with her spouse is likely to lead to an admission and taking responsibility for his actions and can achieve healing. Restorative processes tend to be victim-centered, to occur exclusively in the wake of her request and in the manner that is convenient for her.[240]

Regarding the offender, restorative justice denounces the abuse itself, but refuses to damn the offender, and, quite the opposite, it presents him with the expectation of change and growth, while revealing *faith* in his sincere desire and his ability to do so, as long as it has not been proven otherwise.[241] The thinking is that in the criminal justice process, taking responsibility translates into conviction and punishment and therefore there is an effort to avoid taking responsibility. As opposed to this, the restorative justice process encourages taking responsibility for the injury and its results while also dealing with the future (instead of focusing on the past). The assertion is that only in this manner is a fundamental change and total negation of the violence on the part of the offender possible. In effect, by making intervention the priority, rather than punishment,[242] alternative justice focuses on *the human aspect of both parties and expressly believes in its existence.*

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[237] NILS CHRISTIE, LIMITS TO PAIN 29 (Martin Robertson ed., 1982).

[238] Susan L. Miller & LeeAnn Iovanni, *Using Restorative Justice for Gendered Violence: Success with a Postconviction Model*, 8 FEMINIST CRIMINOLOGY 247, 248 (2013).

[239] James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 9 (James Ptacek ed., 2010).

[240] Quince C. Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 307–09 (2004).

[241] Leigh Goodmark, *Stalled at 20: VAWA, the Criminal Justice System, and the Possibilities of Restorative Justice,* (U. of Md. Francis King Carey Sch. of L., Legal Stud. Res. Paper No. 2015-3) (Dec. 6, 2014) http://ssrn.com/abstract=2575646 [hereinafter Goodmark, *Stalled at 20*].

[242] *Id.*

Transformative justice also expresses a great deal of belief in the potential of the parties to the conflict. The transformative model believes in people, in the power of choice placed in their hands, in the power within them and most importantly—in their human ability for change and growth.[243] According to this model, the central objective is transformation, as distinguished from pragmatic mediation which focuses on "solving the problems"[244] and reaching agreements. The transformation is composed of empowerment and recognition. The term "empowerment" in this context refers to imbuing the party to the mediation with confidence in himself and his ability, in his judgment and in his assessment of himself, and in improving his self-image.[245] The term "recognition" refers to developing the ability of the party to the mediation to go out of himself, in spite of his being involved with his own problems, to consciously focus on the situation of the person who is different from him and who is on the other side of the conflict, and to connect at some level to the other's problems and situation, showing empathy and sincere concern.[246] All of these are realistic aspirations which are indeed realized on the ground, according to the assertions of transformative mediation, which points to this model's great faith in the parties to the process.

Moreover, in a later article,[247] Bush asks: out of what resources is this transformation created and how does it operate? His answer is that the determinative resources in transformation are *the parties themselves*.[248] More precisely, the basic humanity of the parties—the strength, decency, and basic compassion within people. The transformative theory of the conflict asserts that the conflict is exacerbated insofar as the human interactions atrophy, and this is due to our tendency as human beings to experience internal weakening and external alienation in the face of sudden difficulty.[249] However, transformative mediation also believes that

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[243] BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 30.

[244] According to this model, the conflict represents a problem in providing the opposing needs and interests of the parties. The mediator's objective is to come up with an agreement that solves real problems with realistic and fair terms. Good practice is based upon the identity of the issue, which brings up the options for the solution and effective persuasion to "close a deal." Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 368–69 (2001). *See also* BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 45.

[245] The growth or change on this level is connected to the party discovering his ability and power to deal with difficulties of various kinds, with disputes and conflicts, through a combination of awareness, self-judgment, choices and deeds. *See* BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 85.

[246] The intention is to instill in the parties to the conflict the ability to show empathy to the other party, to his situation, to the circumstances he is in, and to the problems that he is dealing with. *See id.* at 84–85.

[247] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128.

[248] *Id.* at 82.

[249] *Id.* at 82–83.

people have an inbred ability for empowerment and responsiveness as well as a natural ability for moral recovery, which enables these abilities to overcome the tendencies for internal weakening and external alienation.[250] Again, this is a clear expression of faith in the parties and their abilities.

In addition, within the perception of Bush and Folger regarding the mold of the transformative mediator's work, this model's faith in the parties is evident. The authors emphasize that the keys to transformation of the interaction in the conflict is the work the parties carry out on themselves.[251] The transitions from internal weakening to empowerment, and from external alienation to recognition, do not occur thanks to the mediator's expertise, advice, insights or knowledge, but rather, the transformative mediator must cede the stage to the parties and support their own work while undergoing these transitions.[252] The mediator places faith in the parties and relies upon them to succeed in discovering their strength and compassion. That "[t]he parties are able to do what is needed," is, therefore, one of the identifying marks of the transformative model.[253] Adopting an optimistic view regarding the parties' abilities and their motives is, therefore, a necessary condition of the transformative mediator's work.

Bush and Folger also discuss the situation of power gaps between the parties,[254] which is likely to be relevant in divorce disputes involving violence. In this context, the authors point out that an important test for the mediator's commitment to the transformative approach is the mediator's reaction to the evident power advantage of one of the parties. In this case, it is easy for the mediator to feel a need to protect and assist the party who appears to be weaker.[255] However, this feeling involves judgmentalism and assumptions on a number of levels: that the balance of power is indeed as it appears (even though power relations are at times more complicated and multi-layered); that the "stronger" party is using ruses (even when, in effect, it could be that he is not sure how to act and he is relying on the power relationship that he would prefer to alter); and that the "weaker" party wants to alter the power relationship (while, in practice he prefers for the situation to remain as it is, for reasons unbeknownst to the mediator).[256] Each of these acts of judgmentalism on the part of the mediator and the resulting strategies for balancing the powers between them, which are justified on the surface, cause the mediator to take

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[250] *Id.*

[251] Folger & Bush, *Transformative Mediation and Third-Party Intervention*, *supra* note 162, at 268.

[252] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 85.

[253] Folger & Bush, *Transformative Mediation and Third-Party Intervention*, *supra* note 162, at 267–68.

[254] *Id.* at 268–69.

[255] *Id.*

[256] *Id.* at 269.

measures that stand in opposition to the principle of empowerment in the transformative context.[257] In contrast, the commitment to the transformative approach brings the parties to a different kind of reaction in situations where there appears to be a power gap between the parties or a power balance that has been disturbed.

For example, in divorce disputes involving violence, the transformative mediator will believe, first and foremost, that the battered wife wants to, and is able to, participate in the process of growth and recognition of the mediation and to make important decisions regarding her life, and that the very act of placing faith in her and in her abilities will contribute to her empowerment.[258] Moreover, a transformative mediator will understand that there may be changes in the balance of power as part of the transformative approach, but he will not presume to initiate such changes. Instead of independently judging the balance of power, the mediator will be guided by the judgment that the parties carry out. The shift of power is not the result of the mediator's initiative or judgment, but rather it is one possible result of a series of steps that the parties take *on their own, based upon their own judgments*.[259] Thus, the faith in the power of the parties, as well as in their judgment, is clear here.

These ideas of transformative justice filter into the academic and personal discourse regarding divorce disputes involving violence and are being strengthened over time. In effect, from the beginning, the idea of empowerment was one of the motives of the battered women's movement,[260] with the definition of "empowerment" being associated with controlling one's environment; self-determination; and identifying, evaluating, and making choices.[261] As appears in the scholarly discourse, "[t]he mediation process, which is less adversarial than court proceedings, is characterized as more potentially *empowering* to the battered woman than the formality of the courtroom setting."[262]

This is the case with client-centered lawyering as well.[263] Attorneys trained in the client-centered lawyering approach expressly

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[257] *Id.*

[258] DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 9–11, 283 (2d ed. 2004).

[259] *Id.*

[260] Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions, in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 31 (2009).

[261] Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 309.

[262] Jeske, *supra* note 3, at 686 (emphasis added).

[263] According to this approach, clients are, first of all, the "autonomous 'owners' of their problems," and only the clients, from where they are situated, are likely to correctly evaluate the non-legal implications of a potential solution to a conflict and the degree of risk they are prepared to accept. Client-centered lawyers work in cooperation with their clients with the objective of examining, evaluating, and clarifying which legal and extra-legal options are the most suitable for the objectives

point out *the connection between faith in the abilities of the victim and her empowerment*. "Attorneys do not *save*—they *empower*," in the words of Jennifer Howard.[264] Howard adds, "I no longer feel it is my job to save my clients—I truly believe my role is to empower them to save themselves."[265]

The faculty of the Domestic Violence Institute also explain that it is difficult to understand the intensity of the psychological injury to the victim when service providers do not exhibit faith in her potential, fail to encourage her to be the one to make her own decisions, or, even worse, thwart her efforts to do so.[266] The assertion is that to the extent that these providers of service duplicate the disempowering behavioral mold of the violent husband, they increase the victim's weakness and vulnerability and neutralize her efforts to combat the abuse.[267]

This is also the case with respect to the *offender*. In recent years, scholars have called for an increased use of therapeutic and communications means. In effect, with the development of the feminist struggle against domestic violence directed at women, the focus has shifted to the effort to change the approach of the men within the gender-based relationship.[268] After the struggle to make the private public, and to criminalize the offense of abuse or the use of violence toward one's spouse met with only partial success, the feminists went on to use means such as negotiations and therapeutic processes.[269] The man's violence was attributed to low self-confidence, and the use of therapeutic means, with the goal of creating a change, was strengthened.[270] In these processes, the men were encouraged to relate to their spouses in an egalitarian manner and to resolve conflicts through communications and negotiations.[271] This can be viewed as *putting faith in the potential of the abusive party*, the potential for positive change and for transformation, composed of empowerment and recognition, in other words, insights of transformative justice, which has penetrated the existing discourse.[272]

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for their clients, regardless of what these objectives may be. Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 305.

[264] Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 167 (1995).

[265] *Id.* at 189.

[266] Kanter et al., *supra* note 151, at 366.

[267] *Id.*

[268] Sally Engle Merry, *Gender Violence and Legally Engendered Selves*, 2 IDENTITIES 49, 53 (1995).

[269] Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261, 1270–71 (2008).

[270] Merry, *supra* note 268, at 58.

[271] *Id.*

[272] Restorative justice also exhibits faith in the offender's potential for change and growth, as long as it has not been proven otherwise, with the insight being that only in this way can there be fundamental change and true and absolute negation of the violence. *See* Goodmark, *Stalled at 20*, *supra* note 241.

### 3. *INDIVIDUAL, INTERESTS-BASED JUSTICE*

In the mediation process, the parties are free to fashion, by themselves and for themselves, solutions appropriate for them, which address their true interests and which are fair in their view, without being subject to either substantive or procedural law.[273] The justice offered by the mediation process, as an alternative to the formal, general, rights-based justice of the judicial system,[274] is justice which flows from the norms which the parties have decided to adopt,[275] and not from *external* norms imposed upon them by law. This can be termed "*private*" or "individual" justice, in the sense that *the parties have chosen it as appropriate for them and as fair in their view.*

Moreover, the mediation process, as a matter of principle, includes a transition from rights-based negotiation or positions-based negotiation,[276] as is accepted in the judicial procedure,[277] to interests-based negotiation.[278] In pragmatic mediation, the recommendation is to focus on interests and not on positions.[279] According to Fisher and Ury, the focus on the declared positions of the parties to the conflict often obfuscates their true interests. The goal of the negotiation is to satisfy the interests that form the basis for these positions.[280] The fundamental problem of negotiations, according to Fisher and Ury, is not that of opposing positions,

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[273] Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, *supra* note 145, at 64. *See also* Fuller, *supra* note 146 (explaining that mediation is not intended for the purpose of implementing uniform norms, but rather in order to create the relevant norms themselves. When the mediator assists the parties in fashioning the format of the agreement between them (the agreement that defines the obligations and rights of each party vis à vis the other) there is no pre-existing format in accordance with which the mediation is fashioned, but rather it is the mediation itself that fashions the desired format).

[274] *See* discussion *supra* Section I.B.4.

[275] Fisher and Ury call these objective criteria "standards." They propose that the parties base the outcome of the mediation negotiation on objective criteria acceptable to both of them, instead of the attempt of one to bend the other to his arbitrary wishes. These objective criteria are likely to be various cultural, moral, religious, or ethical principles that are accepted by the parties, provided that they meet their personal sense of justice. These principles are not necessarily statutes and legal precedents. FISHER & URY, *supra* note 125.

[276] FISHER & URY, *supra* note 125, at 3.

[277] *See* discussion *supra* Section I.B.4.

[278] *Id.*; *see also* Stephen B. Goldberg, *Meditations of a Mediator*, 2 NEGOT. J. 345 (1986); WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 41 (1989) (explaining more on the distinction between rights-based negotiation and interests-based negotiation).

[279] URY ET AL., *supra* note 278, at 41.

[280] For a more expansive treatment of the "satisfaction story," see BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12, at 16 (explaining that "[t]he mediation process is a powerful tool for *satisfying* the genuine human needs of parties to an individual dispute.").

but rather a conflict of needs, desires, concerns, and fears of each of the parties.[281] The positions are the decisions of the parties, their interests are the reasons for the decisions. In other words, the interests or needs are the "why" and "for what purpose," behind the positions. The interests are the quiet motors placed behind the mixture of positions,[282] they define the problem and motivate the parties. Hence, if the true motors of the conflict are not dealt with, the true roots of the conflict will not be addressed, and the conflict will not be solved. Therefore, according to the alternative justice method, a true effort to end the conflict must focus on identifying the main aspirations or interests of each of the parties, regardless of whether they are "correct" in legal terms (i.e., whether they have a legal right).

Additionally, dealing with interests is necessary not only for the purpose of a correct diagnosis of the problem, as stated, but also for the purpose of coming up with an appropriate solution. The formulation of an integrative agreement, a "win-win solution"[283] that satisfies the desires of both parties, is only possible after clarifying what the parties' interests are, since the solution must be woven out of the various interests of both. "Finding options for mutual benefit," is another principle in the pragmatic model; Fisher and Ury explain this as the fashioning of diverse options which rely upon and include the various interests of the parties.[284]

The assertion is that when the focus is placed upon positions or rights, as in the judicial proceeding, the picture, both in terms of the diagnosis and the prognosis, will always be lacking and limited.[285] In contrast, when the focus is on the hidden level—the interests, i.e., the silent motors—a true diagnosis of the problem can be reached, the resources will not be limited, the claims will not be contradictory, and the solutions are likely to be creative and optimal.[286]

These ideas of alternative justice are also applicable in victim-perpetrator relations. When, as restorative justice asserts, it is understood that the criminal dispute attests to internal needs requiring repair,[287] a process that can satisfy the interests of the victim and the perpetrator is necessary. Restorative justice asserts that the victim needs order and meaning, empowerment, the opportunity to tell the true story and the creation of a safe place— needs that the normal criminal process is

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[281] FISHER & URY, *supra* note 125, at 41.

[282] *Id.*

[283] At times also called a "win-win approach." The idea of addressing the needs or interests that are beneath the surface with the objective of advancing through them winning solutions that enlarge the pie is attributed to Vilfredo Pareto. *See* Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

[284] FISHER & URY, *supra* note 125, at 41–46, 58–83.

[285] *Id.*

[286] *Id.*

[287] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 47.

generally not equipped to provide.[288] The search for *individual needs and interests-based negotiations, carried out by alternative justice*, changes the accepted perspective as to how to view the victims of crimes, the criminal act, and—more than that—the response needed from the establishment.[289]

For example, studies show that recognition, legitimization, return of control, return of faith, physical and psychological support, return to routine, creation of a safe place, processing the experience, receiving information, release from feelings of guilt, etc., are the central needs and interests of a person who has been sexually assaulted.[290] Revenge and proving the correctness of one's position are more marginal demands, hence, in most cases the criminal process does not address the victim's needs.[291] It is precisely restorative practices and supervised meetings which are at times likely to address the victim's true needs and interests.[292] The perpetrator of the offense also needs to re-integrate into the community and at times may need recognition of his own status as a victim.[293] These needs are likely to be addressed in the restorative justice process, which includes needs-based negotiations mediation.[294]

In the context of interests-based negotiations and divorce disputes involving violence, alternative justice relies upon the assumption that individual battered women have individual needs. For many women, the legal system is likely to be a powerful tool,[295] while for others it is liable to be destructive,[296] and in either event, it is liable to create more problems than it solves.[297] Regardless of the development of legislation and legal solutions, these developments can never alter the depressing reality that, in certain communities and certain cases, seeking redress from the judicial system is likely to be ineffective and may even be harmful in that it

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[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 509 (2003).

[296] *See* Goodmark, *The Legal Response to Domestic Violence*, *supra* note 7, at 47–48 (remarking:

No amount of tinkering around the edges of the legal system, no amount of judicial, police, prosecutorial, and family law attorney training is going to fundamentally change the reality that in some communities and for some women, the legal system is not helpful, and in fact can be harmful, recreating the power and control dynamics that the battered woman is trying to escape, exposing her to further violence and other dangers, jeopardizing her relationship with her children and her partner.).

[297] *See supra* Section I.A.

exposes the victim to dangers such as further violence towards herself or her children, damage to her relations with her children, etc.[298]

Hence, alternative justice criticizes the judicial justice system in this context. Scholars raise the assertion that the legal system engages in stereotyping of battered women, and that it decides for these women what their needs are while ignoring their real interests, individual goals, and priorities.[299] The actors in the legal system replace the battered woman's exercise of her own judgment with their own, which causes many women to feel weakened and pushed towards decisions that do not reflect their true choices.[300] Interests-based negotiations, in contrast, require listening to women's true interests while respecting her needs and desires and negating the option of recourse to the judicial process and the adversarial method, which can, under specific circumstances, endanger her and her children.

One of the relatively innovative legislative developments in the field of conflicts is the VAWA, as stated above in Part I.[301] The central argument against the VAWA, with respect to interests-based negotiations, is that the state's interests and objectives and those of the battered woman, whom the law is intended to serve, are not always compatible.[302] In fact, at times they are fundamentally in opposition to one another. The legislature's objective was to bring about the complete and swift end of the relationship between the battered woman and her violent spouse. The scenario that the "law sees in front of it" is women who have means and who are interested in leaving their violent spouse and ending the relationship.[303] For such women, the law and the entire legal system is likely to provide broad assistance and diverse response options: women can petition the court to evict violent men, they can move to a battered women's shelter, they can ask the police to arrest their partners, and, in some states, they can more effectively engage in a battle for child custody.[304]

However, studies of separation assault confirm what many battered women feel: separation is liable to be inconsistent with *their interests.* This is because separation is liable to further endanger the woman's safety; in many cases, the abuse continues for a long time after the separation, taking on new forms or new objects of abuse, such as

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[298] Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform,* 37 ARIZ. ST. L.J. 709 (2005).

[299] Goodmark, *Symposium: Clinical Cognitive Dissonance, supra* note 5, at 315.

[300] *Id.*

[301] *See supra* notes 15–16 and accompanying text.

[302] Goodmark, *Stalled at 20, supra* note 241.

[303] Goodmark, *The Legal Response to Domestic Violence, supra* note 7, at 19.

[304] SUSAN SCHECHTER, EXPANDING SOLUTIONS FOR DOMESTIC VIOLENCE AND POVERTY: WHAT BATTERED WOMEN WITH ABUSED CHILDREN NEED FROM THEIR ADVOCATES 7 (2000).

children.[305] Moreover, there are still those women who are not interested in filing a complaint against their spouse or in seeing him in jail.[306] These women include those who cannot separate from the violent partner for reasons such as immigration status, economic hardship, community sanction, religious beliefs, or children. Rather than breaking the connection, these women would rather preserve it, albeit while eliminating the component of violence.[307] The law ignores the fact that victims of violence are sometimes forced to choose to remain in contact with their partner precisely in order to preserve their safety, economic security, housing, child care, or other material needs.[308] For such women, VAWA and the legal system ignore these interests and offer very little assistance, if any.

The contribution of alternative justice in this context is that it places the emphasis on healing the injury, just as restorative justice does, instead of punishing crimes. Alternative justice relates to interests and the surrounding negotiations and gives the victim and the violent party the opportunity to engage in a dialogue regarding the injury, its effect on the victim, and the steps necessary to ensure that the perpetrator takes responsibility while addressing the needs of the injured party.[309] Therapists and entities from the community can be involved in handling the conflict. These professionals can form a multidisciplinary team for making decisions that includes defense attorneys and prosecutors who act together in order to resolve the problem. Such treatment, which integrates "rights and more," is directed towards the family as a unit. This approach requires special treatment and addresses the unit's needs. This approach is based on the insight that defending women without dealing with the entire family unit and without clarifying the interests can be ineffective.[310] Instead of formal, rights-based judicial justice, alternative justice proposes individual interests-based justice, which takes into account, inter alia, changing interests dependent on the circumstances, such as the danger of losing custody of children, the danger of escalation of the conflict or physical injury, and other dangers which are exacerbated in the adversarial surroundings of the judicial justice system.[311]

An additional positive contribution of alternative justice and interests-based negotiations in the context of battered women is the likely change in patterns of social thinking regarding these women. The interests

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[305] LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 81, 83–84 (2011).

[306] *Id.*

[307] Goodmark, *Stalled at 20*, *supra* note 241.

[308] Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 306.

[309] Loretta Frederick & Kristine C. Lizdas, *The Role of Restorative Justice in the Battered Women's Movement*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 41–45 (James Ptacek ed., 2010).

[310] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 76, 78.

[311] *See supra* Part I.

of victims of violence who are not interested, for reasons explained above,[312] in leaving the violent relationship, are not treated with understanding or recognition. As Goodmark states, "[w]omen who choose not to separate from their abusers invite suspicion and condemnation, as if by choosing not to separate, for whatever reason, they are asking to be abused, reviving myths of the masochism of women subjected to abuse."[313] The "interests-based negotiations," which are part of the restorative justice process, respect the victim's personal interests, rather than criticizing them. These refreshing insights, alongside fairer social norms regarding these women, are likely to penetrate the discourse regarding divorce disputes involving violence and influence the community and its perspectives.

In transformative mediation, the hidden level of the conflict is expanded *beyond the interests-based negotiations*.[314] Feelings, identities, ideologies, or narratives are perceived as hidden levels of the conflict and dealing with these factors assumes a major place in the process.[315] For example, in transformative mediation, the focus is upon the level of the feelings and the relationship of the parties, in other words, the human interaction between the parties to the conflict.[316] The transformative model asserts that a conflict, as a social phenomenon, as set forth above, is *essentially* a matter of dealing with people and *the relationships between them as human beings*.[317]

The remedy for the pain of the conflict, according to the transformative model, cannot make do with *interests-based negotiations* as the pragmatic model proposes, but rather must include a breakthrough of the negative interaction of the conflict through the carrying out of transitions from internal weakening to empowerment and from external alienation to recognition.[318] In other words, placing the emphasis on *the transformation*, is, as stated, the purpose and the promise of the mediation (for a true and lasting end of the conflict) and in light of the empirical experiments of the creators of the model.

For example, while in the judicial process, due to the "victimization narrative," as discussed above,[319] the part of the battered woman's story that reveals her strengths will be silenced and her attempts to rebel against the destructive features of the relationship will be played down. In transformative mediation, the attitude is almost the diametrical

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[312] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 72.

[313] Goodmark, *Symposium: Clinical Cognitive Dissonance*, *supra* note 5, at 318.

[314] Pope & Bush, *Understanding Conflict and Human Capacity*, *supra* note 126, at 63–64.

[315] *Id.*

[316] *Id.*

[317] *See supra* note 114 and accompanying text.

[318] *See supra* Section II.A.

[319] *See supra* notes 147–151 and accompanying text.

opposite—with the objective of empowering the victim before him, the transformative mediator directs the spotlight on the woman's attempts to rebel against the destructive features of the relationship and on her other expressions of strength.[320] With the mediator's support, the battered woman is likely to make the transitions from weakness to empowerment over and over again, with the goals of undergoing transformation and breaking out of the victim-abuser cycle.[321] Transformative mediation believes that these recurring transitions from weakness to empowerment help the woman to take responsibility for her life and to break through the cycle of oppression and violence.

This is the case with respect to the abusive party and his empowerment as well. In the criminal court process, taking responsibility translates into a conviction and punishment and therefore there is an effort to avoid taking responsibility. In contrast, the transformative alternative justice process encourages the abusive party to take responsibility for the injury and its consequences while also dealing with the future, as opposed to focusing on the past. The assertion is that only in this way can there be a fundamental change and the absolute negation of the violence on the part of the abuser. In effect, by placing priority on intervention rather than on punishment,[322] transformative alternative justice concentrates on *the human aspect* of the abuser. By empowering his humanity, the abuser receives renewed support for the humanity within him and develops the ability to accept responsibility for his actions and to repair the injustice he has created.[323]

In sum, while the criminal law removes the victim from the cycle of the dispute and treats the crime as the violation of a norm, committed against the state, criminal mediation believes that the alternative process contains further possibilities for removing the conflict from the control of the state, which expropriated it, returning it to the control of those involved in it, who are the true interested parties. The transformative model places the emphasis upon the *empowering potential* of returning the conflict to those involved in it: the victim and the perpetrator. Alternative transformative justice views the injury as an opening for change and learning, and views the restorative process as giving rise to new possibilities, which cannot be entertained when looking only at the past—without relating to the injury as an opening for change and growth.[324]

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[320] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 83.

[321] In the field as well, battered women report that traditional mediation has empowered them, because it assists them to stand up for themselves; to take responsibility for their choices, actions, and future; to present their positions; and to solve their problems. Thompson, *supra* note 3, at 622.

[322] Goodmark, *Stalled at 20*, *supra* note 241.

[323] ALBERSTEIN, ALTERNATIVE JUSTICE, *supra* note 10, at 61.

[324] For an expansive treatment of restorative justice, *see* GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES (2001); HEATHER STRANG & JOHN

In this section of the article, I have presented a basic theoretical foundation for understanding the substance of alternative justice and transformative justice and their principled, substantive contributions to fashioning solutions in divorce disputes involving violence. The transformative mediation model, which creates transformative alternative justice, in that it includes the characteristics of both mediation and the transformative model, seems to express the optimal accommodation for dealing with these conflicts and to handle the criticism voiced against the judicial process and the judicial justice it creates. However, this model is not devoid of criticism, as detailed below.

## C. *The Criticism*

### 1. *ABSTRACT OF THE SCHOLARLY DISCOURSE*

The transformative mediation model, proposed in this article as the best model for dealing with divorce disputes involving violence, is first of all a mediation model. The critical discourse regarding mediation as a tool for dealing with divorce disputes involving violence has provided a great deal of material for the scholarly literature in recent years.[325]

In short, there are critics who express total opposition to the use of mediation in divorce disputes involving violence.[326] The central assertion is the *danger component*. These critics perceive the mediation process as inherently dangerous to the woman,[327] exposing her to serious physical harm and even endangering her life.[328] Their concern is that mediation is not prepared to provide the woman the protection she needs,

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BRAITHWAITE, RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE (2000); HOWARD ZEHR, *supra* note 217.

[325] Fernanda S. Rossi et al., Shuttle *and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse,* 55 FAM. CT. REV. 390, 391 (2017).

[326] "Opponents argue that one should never mediate divorce matters when domestic violence is present." Utzig, *supra* note 70, at 52. *See also* Andree Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 279 (1992); Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Grillo, *supra* note 218; Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women,* 7 HARV. WOMEN'S L.J. 57 (1984).

[327] Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION COURTS REV. 335, 335 (1999); Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness,* 12 CARDOZO J. CONFLICT RESOL. 425, 438, 444 (2011).

[328] "Addressing the ethical and legal considerations of intervention with victims of domestic violence, Dutton (1992) cautions that 'a breach of confidentiality when working with a battered woman could place her at risk for serious physical injury or death.'" Maxwell, *supra* note 327, at 346.

during or after the mediation process.[329] The critics assert that while legal processes enable the operation of two deterrent mechanisms, preventing the abuser's access to the woman and providing effective sanctions, mediation does not enable such deterrence. The outcome of the mediation process, i.e., the agreement at its conclusion, also cannot provide a solution based upon real protection of the woman from the violent husband. This is, of course, in contrast to all of the existing enforcement means in the criminal and civil legal systems against violent husbands who do not abide by court orders issued against them.[330]

However, one response to the concern regarding the danger component is that "litigation is also dangerous."[331] In effect, supporters of mediation respond that the perception of the relative safety of the judicial process, as compared to mediation, is fundamentally in error.[332] Pearson, for example, notes that, although attorneys prefer legal intervention, many of them admit that domestic violence often eludes their notice in family law cases, and that the level of danger attendant to the judicial process is identical to that of the mediation process.[333] Additionally, according to the studies of Ellis and Stuckless, voluntary multi-session mediation is more effective in preventing future violence than lawyer negotiations.[334] Another response is that the mediation process does not necessarily render the criminal legal system unnecessary. If the victim of violence so desires, she can file a complaint, request a protective order, but still choose a mediation process.

Critics of mediation also assert that the existence of *power gaps* built into the relationship between the battered woman and her abuser, can cause the woman to waive too much out of fear.[335] Clearly, an agreement based on fear, lacking volitional agreement and a true meeting of the minds, of necessity renders the agreement defective and inappropriate.[336] It must be remembered that the violent party is likely to use verbal or non-verbal threats of future violence against the battered woman in order to procure an advantage in the balance of power. The battered woman is liable to easily agree to terms that will place her life and that of her children in danger simply in order to leave the room.[337] Fear is the name of the

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[329] Rogers, *supra* note 114, at 365–66.

[330] Pearson, *supra* note 73, at 320.

[331] *See supra* Section I.A.1.; *see also* Thompson, *supra* note 3, at 620.

[332] Quite the opposite, the assertion is that the mediation process is safer. *See* Boxer-Macomber, *supra* note 73, at 896.

[333] Pearson, *supra* note 73, at 331.

[334] DESMOND ELLIS & NOREEN STUCKLESS, MEDIATING AND NEGOTIATING MARITAL CONFLICTS 61–62 (1996).

[335] Pearson, *supra* note 73, at 320.

[336] Maxwell, *supra* note 327, at 338.

[337] Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559, 572 (2002).

game. In such a relationship, even in the absence of an outright threat, the battered woman is liable to be unable to stand up for her own interests.[338]

The scholars Fischer, Vidmar, and Ellis express total opposition to the use of mediation in divorce disputes involving violence. They characterize the relationship between the abuser and the victim in such disputes as a "culture of battering."[339] According to these scholars, neither the ideology nor the practice of mediation is suited for dealing with this "culture of battering," and therefore the foregone conclusion is that mediation should not be used where such a culture has been established.

The critics of mediation are also concerned with the *mediator's limitations*. The mediator is likely to be unaware of the degree of influence of the violent party over the battered woman during the mediation, even when this influence occurs right in front of him. Often the violent husband has the ability to control the battered woman with a word, a gesture, or even the hint of a gesture: a code or veiled threat of violence understood only by the parties.[340] Moreover, the mediator is subject to his duty of neutrality,[341] which is liable to impair his ability to function in an appropriate manner in such cases—if he intervenes to defend the battered woman, he infringes his duty of neutrality in the view of the violent party. On the other hand, if he does not intervene, due to the duty of neutrality, he thereby contributes to the continuation of the power differential and the violence.[342]

One proposed solution to address both the *danger component* and the *power imbalance between the parties* is the use of caucusing.[343] Supporters of mediation assert that through caucusing, the mediator is likely to control the balance of power between the parties and to contribute

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[338] Landrum, *supra* note 327, at 438.

[339] Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2171–74 (1993).

[340] Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 364–65 (1999).

[341] "Impartiality is key to the mediator's role." Karen A. Zerhusen, *Reflection on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169 (1992).

[342] "If a mediator is truly going to balance the bargaining power differential, the mediator may have to compromise her neutrality, at least in the eyes of the batterer. It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator attempts to ignore or fails to give credence to the allegations of abuse, the victim may feel that the mediator is on the abuser's side, destroying the victim's belief that the mediator is neutral." Landrum, *supra* note 327, at 441.

[343] Caucusing refers to private meetings between the mediator and one party. The caucuses are a common tool of mediators and they assist the parties to open up more freely and enable the mediator to clarify information that a party would not agree to relay in the presence of the other party. Utzig, *supra* note 70, at 60–63.

to greater balance between the parties to the mediation.[344]This balance is, in part, due to the mediator's control over the information that is, and is not, exchanged between the parties. In addition, Ver Steegh notes that "[s]eparate caucuses give the mediator a chance to obtain direct feedback on power and safety issues."[345]

Another proposed solution is pre-screening[346] to identify disputes that are not suited for mediation—for instance, disputes in which the battered wife's consent to mediate is not genuine but given solely to placate the perpetrator.[347]

In response to critics' concerns of mediation in the context of domestic violence, some scholars suggest that the suitability of mediation in disputes involving domestic abuse should be determined on a case-by-case basis. This viewpoint has gained footing in recent years.[348] This viewpoint relies upon advanced articles in the field, which make clear that divorce disputes involving violence are not all cut from the same cloth; there are certainly many such cases for which mediation is appropriate.[349] This approach opposes the wholesale, a priori determination that every dispute between a separated couple involving any kind of violence cannot be handled in mediation. According to this viewpoint, *pre-screening*[350] is preferred to automatically ruling out the possibility of mediation.[351] As a result of the pre-screening, disputes not suitable for mediation will be

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[344] *Id.*

[345] Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 187.

[346] *See* Jeske, *supra* note 3, at 694–96 (regarding the importance of preliminary filtering as borne out by empirical studies); *see also* Susan Raines et al., *Safety, Satisfaction, and Settlement in Domestic Relations Mediations: New Findings*, 54 FAM. CT. REV. 603, 617 (2016).

[347] The perpetrator is demonstrably dismissive of the victim's words, feelings, desires, and acts and refuses to recognize her value even after the mediator speaks with him regarding the effect of his behavior on the victim; the abuse (of any kind) continues in the course of the mediation meetings and the violent husband refuses to respect the safety boundaries that were established at the outset; a party insists on carrying weapons; a party is under the influence of drugs or alcohol; a party violates the rules established in advance for the process and refuses to recognize the violation as a problem. Even the supporters of mediation recognize that mediation is completely unsuitable for these disputes at any point. Utzig, *supra* note 70, at 60-64.

[348] Landrum, *supra* note 327, at 426; *see also* Ver Steegh, *Yes, No, and Maybe*, *supra* note 28.

[349] Landrum, *supra* note 327, at 435–36.

[350] In the scholarly literature supporting mediation in divorce disputes involving violence, there are a number of types of pre-screening for the mediation process: screening through the use of questionnaires, screening through caucusing, screening through non-verbal clues, etc. *See* Utzig, *supra* note 70, at 60–63.

[351] Landrum, *supra* note 327, at 437; *see also* Maxwell, *supra* note 327, at 337 (explaining that "[s]ome proponents of mediation argue that mediation is appropriate in cases involving domestic violence if the type of domestic violence is taken into account and mechanisms to ensure a safe and fair settlement for the victim are provided.").

referred to other avenues of resolution, while those appropriate for mediation can go forward, with the rich variety of dispute resolution processes offered by mediation.[352]

### 2. *THEORETICAL ROOTS OF THE CRITICISM*

There is also a theoretical response to the criticisms of mediation set forth above.[353] In my view, the criticism of mediation as a tool for handling divorce disputes involving violence *has failed in internalizing the characteristics of alternative justice and alternative-transformative justice and in understanding their potential influence on divorce disputes involving violence.* In other words, the arguments in total opposition to mediation demonstrate that the critics have not yet internalized the contribution of alternative-transformative justice in dealing with such disputes.

For example, the assertion regarding the constitutive and absolute unsuitability of mediation for divorce disputes involving violence[354] reveals a failure to understand the characteristic of alternative justice as "individual, interests-based justice,"[355] which asserts that it is possible that the needs and interests vary between different battered women and even with respect to the same woman, depending on the period of time. This fierce opposition to mediation even demonstrates a lack of recognition of the importance of transferring the power of choice of an appropriate process to the women themselves, and in the principled-societal message provided thereby, as transpires from the characteristic of alternative justice as "non-coercive justice" that respects the parties' autonomy, as set forth above.[356]

A further criticism of the mediation process, which relates to inherent power discrepancies between the parties and to the woman as the *eternal* weak and helpless victim, is that mediation does not recognize

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[352] These include preliminary and on-going screening, training for mediators, frequent use of caucusing, use of parenting coordination or parenting education during the course of the mediation, use of separate legal counsel for each party, the participation of additional experts in the process (including professional entities and therapists), the presence of armed security personnel during the mediation sessions and the cessation of the process if needed, with a referral to an appropriate shelter or a counseling and assistance program that specializes in domestic violence. *See also* Utzig, *supra* note 70, at 60. For more on the various ways of handling such cases, including on-going screening throughout the mediation process, and decision-making by the victim, see Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 198–202.

[353] *See supra* Section II.C.1.

[354] *See supra* note 278 and accompanying text.

[355] *See supra* Section II.B.4.

[356] *See supra* Section II.B.1.

transformative justice concepts such as "transformation of the parties" within a "process of growth" with a "potential for change."[357]

Owen Fiss, the first opponent of mediation and alternative conflict resolution in general, echoes the criticisms of the opponents of mediation in divorce disputes involving violence. Specifically, these opponents express concern for the impairment of *justice* due to the very existence of inherent *power differentials* between the parties. In Fiss's well-known article from the early 1980's, *Against Settlement*, he came out against mediation and the ADR movement and asserted that every mediation or settlement was worse than the court's ability to *do justice*. According to Fiss, when we send parties to mediation, we deprive society of more justice and damage the central role of the law—advancing structural reforms and developing precedents and principled determinations. According to Fiss, the referral to alternative procedures transfers the control to market forces instead of principled, public, and ideological thinking. Among Fiss's arguments is a serious concern that the power differential between the parties to a mediation will lead to unjust results, and the weaker party will rush to compromise and waive his legal rights.[358] This argument fails to understand one of the prominent characteristics of alternative justice and "non-coercive justice," which respect the parties' autonomy.[359] This argument also fails to internalize the price of judicial justice, which is characterized as "coercive-decisive justice,"[360] and which often tramples the parties' autonomy—particularly the autonomy of the victim—in divorce disputes involving violence.[361]

The failure to internalize the contribution of alternative-transformative justice to divorce disputes involving violence, is also the case when Fisher, Vidmar, and Ellis present, as a reason for opposition to mediation, the institutionalization of a "culture of battering."[362] These authors ignore the strength of "collaborative justice, focusing on relationships and emotions" [363] (alternative justice), or of transformative justice, which places the emphasis upon transformation of the atrophied relationship in order to effect a change in the relation of controller-controlled and to do away with the power imbalance.

Additionally, concerns regarding the limitations of the mediator with respect to his abilities and his authority "to save" the battered woman through the mediation process, which are the rationale behind the "mediator's limitation," described above,[364] are premised on the idea that

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[357] *See supra* Section II. B.

[358] Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075–76 (1984).

[359] *See supra* Section II.B.1.

[360] *See supra* Section I.B.1.

[361] *Id.*

[362] Fischer et al., *supra* note 339, at 2171–74.

[363] *See* discussion Section III.B.2.

[364] *See supra* note 279 and accompanying text.

the battered woman was and remains a "victim," as opposed to a "survivor,"[365] whose abilities are limited, and that the role of the neutral third party is to be the "savior." These characterizations are in total opposition to the characteristic of alternative justice as "justice that has faith in the parties' potential," and which views the woman as a "survivor," not a "victim," *with her attendant strengths and abilities,* and also recognizes *the importance of this societal message*.[366] The total opposite of the characteristic of transformative justice, as that which supports providing maximum space for the woman to act and broad autonomy for her (at the expense of the authority and boundaries of power and the intervention of the third party) can be seen here as a critical component in her process of growth and transformation.[367]

The failure of the critics of mediation is, therefore, theoretical, occurring in the wake of the unjustifiable imposition of *the characteristics of judicial justice* and adversarial thinking to divorce disputes involving violence, instead of understanding and internalizing alternative justice or alternative-transformative justice, with their characteristics and language. In general, the reasons for the criticism, as set forth above do not take issue with the identity of the alternative justice at the basis of mediation or with transformative justice at the basis of transformative mediation. In effect, the opposition school has not yet internalized the existence of alternative justice, which is, as its name suggests, *an alternative to the judicial justice offered by the court system.* It is justice that seeks *to change directions from the existing,* in view of the criticism of the judicial process, and through its unique, alternative characteristics, to handle divorce disputes involving violence in a manner that is healing to the women survivors and their children.

## IV. CONCLUSION AND RECOMMENDATIONS

*According to what we and our colleagues call the "transformative" theory, conflict as a social phenomenon is not only, or primarily, about rights, interests, or power. Although it implicates all of those things, conflict is also, and most importantly, about human beings' interactions with one another.*[368]

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[365] With the abilities and strengths of a survivor. *See supra* note 153 and accompanying text.

[366] Jennifer L. Dunn, "*Victims" and "Survivors": Emerging Vocabularies of Motive for "Battered Women Who Stay,"* 75 SOC. INQUIRY 5, 21–22 (2005); Greenberg, *supra* note 18, at 614.

[367] *See supra* notes 133–43 and accompanying text.

[368] Bush & Pope, *Changing the Quality of Conflict Interaction*, *supra* note 128, at 72–73 (emphasis added).

Empowering a battered woman and returning control over her life to her begins with her choice of a process that will assist her in taking responsibility for her life and in breaking through the cycle of oppression and violence. When the possibility of choosing such a process ends with a judicial proceeding, the opportunity for empowerment decreases. Many women who suffer domestic violence will not avail themselves of the judicial process, for various reasons, in spite of their great suffering.[369] Similarly, due to a series of immanent failures on which judicial justice is based, and on which the judicial system rests, judicial justice becomes, in many cases, a sword rather than a shield for victims of domestic violence. Therefore, the conclusion is a need for a more realistic and humane alternative which can, by its very nature, provide a real response to the critiques voiced with respect to judicial justice in dealing with such disputes.

It is evident from scholarly discourse that the traditional mediation process also entails disadvantages.[370] Therefore, the very existence of an upgraded model of the mediation process, in the guise of transformative mediation, opens an additional choice of process, which is likely to be the first step on the path of empowerment and independence for victims of violence. Additionally, the transformative mediation model arises out of the chapters of the article as one that is creating alternative-transformative justice, the characteristics of which are likely to propose a suitable alternative in divorce disputes involving violence and to provide a true response in places where the law and its values have failed, and judicial justice is unable to come to the rescue.

*The Promise of Mediation* is the name of a well-known book by Bush and Folger, in which they first present the transformative mediation model and its unique contribution to alternative dispute resolution.[371] This article is entitled *The Promise of Transformative Mediation* in paraphrase of that title, since it seeks to take an additional step forward and to present the unique contribution of the transformative model in *divorce disputes involving violence*. This article asserts that transformative mediation is likely, by its very nature, to advance the transformation of the parties and the conflict and, as such, *to realize the potential of the promise for divorce disputes involving violence*. Characteristics and fundamental insights of the perspective of transformative justice have a great deal of importance in divorce disputes involving violence, if only due to their potential to give rise to a conceptual and practical revolution in their relation to society, law, and justice and to serious and common social phenomena (such as

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[369] *See supra* note 101 and accompanying text; *see also* Rogers, *supra* note 114, at 353 (explaining that "[i]n addition, prosecution of domestic violence is complicated because victims often refrain from participating in prosecution to protect their families.").

[370] *See supra* Section II.C.1.

[371] *See* BUSH & FOLGER, THE PROMISE OF MEDIATION, *supra* note 12.

divorce disputes involving violence) and the manners of dealing with them.

Another principled societal discourse is at times necessary with respect to serious social phenomena. The understanding of "transformative language" is likely to advance a deep perspective and to make a significant contribution to processing divorce disputes involving violence in a different manner from the classic one, while promoting new forms of justice and social order, refashioning the discourse on the professional level, and introducing *a different* legal-social-cultural discourse with respect to the phenomenon.

However, processes are not merely a matter of form. They are intended to *promote objectives for the needs of individuals,* and they are not holy in and of themselves.[372] This article does not presume to assert that transformative mediation will be appropriate for every case of a divorce dispute involving violence, or that it has no disadvantages. Quite the opposite: each case must be evaluated individually in order to fashion appropriate means of resolution.[373] Our recommendation is to adopt the transformative mediation mechanism for such cases for which a mediation process is appropriate, and to exclude cases of extreme violence and other circumstances which, according to the accepted view, make mediation inappropriate.[374] And, of course, transformative mediation should be used only when the battered woman is interested in it.[375] Additionally, transformative mediation is likely to occur alongside *additional tools* available to the parties.[376] It would seem, if so,[377] that the absolutist school of criticism of mediation in divorce disputes involving violence has not yet managed to understand and internalize the immanent failures of judicial justice in handling these disputes. Nor has the absolutist school

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[372] As with all processes and forums, the goal is to fit the "forum to the fuss." Frank E. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 61–66 (1994).

[373] Greenberg, *supra* note 18, at 608 (noting that "[c]ookie cutter responses or one-size-fits-all solutions will not do.").

[374] "[V]ery severe domestic violence cases may also be uniformly inappropriate for mediation. Nancy Ver Steegh argues that because abuse differs in severity, 'the existence of violence creates a red flag for the mediator signaling a need for a closer look at the victim's ability to negotiate and the level of the abuser's denial and control.' She suggests that a mediator exploring negotiation ability and levels of denial and control might look to such factors as use of weapons, the victim's fear of retribution, the batterer's failure to take responsibility for his actions, and the couple's inability to separate its interests." Thompson, *supra* note 3, at 623; *see also* Ver Steegh, *Yes, No, and Maybe*, *supra* note 28, at 196.

[375] As Thompson notes, "[M]ediation should never occur against the wishes of a victim. Mediating a domestic violence case against the wishes of a victim undermines her ability to protect herself and denies her capacity for self-determination." Thompson, *supra* note 3, at 622–23.

[376] *See supra* note 290 and accompanying text.

[377] *See supra* Section II.C.2.

understood the potential of the adoption of alternative-transformative justice to open a new channel for dealing with these failures and for a different social-principled discourse with respect to these sensitive issues and the women survivors.

This article comes to its conclusion, but not without a call for a continuation of the discourse regarding the integration of alternative means—particularly transformative mediation—into the resolution of divorce disputes involving violence. Various issues relating to adoption of transformative mediation in divorce disputes involving violence still require clarification and invite further writing. For example, the issue of training of transformative mediators specifically in disputes of this kind; the question of the required standardization for purposes of drawing lines of operation and for the development of ethical codes in the field; and the question of upgrading the transformative model to an *online* transformative model and accommodating it for use in disputes of this nature.

The call for alternative justice and for alternative moral solutions to the judicial process has echoed for several decades. The explicit statement that the time has come for new conceptions and new insights with respect to the role of mediation in our society was made in 1995 by one of the central writers in the field.[378] It seems that today the challenge is to take a step forward and to try to apply characteristics of alternative and transformative justice to means of handling serious social issues such as divorce disputes involving violence. Advancing this challenge is likely to reflect and to validate the true contribution of the mediation process to society and the law, as not merely dealing with the workload or promotion of reform of the court system. In place of this, we are speaking of a direct contribution to society in improved dealing with serious and common social phenomena and with challenging conflicts.

Transformative mediation has a statement. If only we would listen.

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[378] Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 241 (1995).