DOMESTIC VIOLENCE AND CUSTODY: 
IMPORTING THE AMERICAN LAW INSTITUTE'S 
PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 
INTO OREGON LAW

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DOMESTIC VIOLENCE AND CUSTODY: IMPORTING THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION INTO OREGON LAW

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I. INTRODUCTION

Over the last two decades, Oregon, like other states, has adopted laws to address domestic violence in a more comprehensive and thorough manner. Commentators on Oregon law

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2. See, e.g., OR. REV. STAT. § 106.045(2) (1999) (imposing $25 surcharge on the
can no longer question whether Oregon will treat the problem of
domestic violence seriously because the Oregon Legislature has
done so. Now the relevant question is whether the Oregon Legis-
lature will continue to improve Oregon’s laws for domestic
violence victims and their children. The answer to that question
will emerge from the Oregon lawmakers’ response to the
American Law Institute’s Principles of the Law of Family Dis-
solution: Analysis and Recommendations [the Principles]. The
Principles contain forward-thinking guidelines to govern the allo-
cation of custodial and decisionmaking responsibility between
parents, and offer recommendations for how states should re-

marriage license (see for the benefit of the Domestic Violence Fund); OR. REV. STAT.
§§ 107.700-.732 (1999) (setting forth the Family Abuse Prevention Act); OR. REV.
STAT. §§ 107.755-795 (1999) (exempting victims of domestic violence from the re-
qurement that parties to a custody dispute submit to court-ordered mediation); OR.
REV. STAT. §§ 108.610-660 (1999) (setting forth Family Violence Prevention Pro-
gams); OR. REV. STAT. § 133.055 (1999) (requiring mandatory arrest upon probable
cause of an assault between spouses, former spouses, or adult persons related by blood
or marriage, or persons of opposite sex residing together or who formerly resided to-
gether); OR. REV. STAT. § 133.310 (1999) (requiring mandatory arrest without a war-
rant where officer has probable cause to believe suspect has failed to comply with pro-
visions of a restraining order); OR. REV. STAT. § 135.250(2)(a) (1999) (requiring a
court to include as a condition of release that a criminal defendant charged with dom-
estic violence not contact the victim); OR. REV. STAT. § 137.303(1)(i) (1999)
(allocating .820 percent of money in the Criminal Fine and Assessment Account to
the Domestic Violence Fund established pursuant to Oregon Revised Statutes section
108.660); OR. REV. STAT. § 163.160(3) (1999) (making the crime of domestic violence
a class C felony when the person commits an Assault IV and the person has previously
been convicted of assaulting the same victim or the assault is witnessed by the bat-
ter’s or the victim’s minor child or step-child or a minor residing in the home of the
victim or the batterer); OR. REV. STAT. § 181.642 (1999) (requiring that police officers
be trained to investigate, identify, and report crimes of domestic violence); OR. REV.
STAT. § 181.712 (1999) (requiring Department of Public Safety Standards and Training
to report to legislature on training police officers receive pursuant to Oregon Revised Statutes section 181.642); OR. REV. STAT. § 192.445 (1999) (permitting a victim of dom-
estic violence to petition a public body to avoid disclosure in a public record of her
home address and home telephone number); OR. REV. STAT. § 411.117 (1999)
(providing special assistance to victims of domestic violence under the temporary assis-
tance to needy families program); OR. REV. STAT. § 746.015 (1999) (prohibiting dis-
crimination by an insurer against victims of domestic violence). Despite these statu-
tory measures, there are still major gaps in victims’ services. See STATE OF OREGON,
1998 STOP VIOLENCE AGAINST WOMEN STATE IMPLEMENTATION PLAN 19-21
(hereinafter STOP VIOLENCE PLAN). The same report also suggests that some of the
existing legislation “lacks clarity, and in some instances is punitive toward the victim.”
Id. at 21.

CIPLES].
solve these issues when the parties have a history of domestic violence. The Principles' attention to the topic of domestic violence gives rise to a number of "second generation" suggestions about how courts should address domestic violence when deciding issues of physical custody, legal custody, and visitation.

Exploring how the Principles treat domestic violence is admittedly a narrow inquiry. After all, the Principles deal broadly with the topic of how courts should allocate responsibility for children, and the attention to domestic violence comprises but a small part of what the American Law Institute [ALI] hoped to accomplish. Yet a certain pragmatism undergirds the particular focus of this Article. Incremental change is always easier to effect than a large systemic overhaul. Adopting the Principles in their entirety would be a large systemic change in most states, including Oregon, while incorporating the details on how to address domestic violence in custody proceedings would constitute a much more modest reform. Consequently, this Article does not argue for or against the specific guidelines and procedures for resolving custody disputes set forth in the Principles, but rather examines a narrower subset of the ideas proposed in the Principles. If states adopted this subset of relatively uncontroversial reforms, a substantial number of domestic violence victims who must litigate custody and visitation would benefit, as would their children.

Focusing specifically on Oregon's potential adoption of the

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4. See, e.g., Katherine T. Bartlett, Introduction to Principles 13-14; id. §§ 2.06(2), 2.07(2), 2.08(2), 2.13(2).

5. For such an analysis, see Kathy T. Graham, Child Custody in the New Millennium: ALI's Proposed Model Contrasted with Oregon's Law, 35 WILLAMETTE L. REV. 523 (1999); Mitzi M. Naucler, Relocation of Parents in Modification of Parenting Plans in Oregon, 35 WILLAMETTE L. REV. 585 (1999). Similarly, this Article does not systematically consider the merit for domestic violence victims of adopting the Principles as a whole, although some of the Principles' major provisions are considered, albeit indirectly. See, for example, infra text accompanying notes 64-65, 206-208 for a discussion of the Principles' preference for parental agreements; infra text accompanying notes 66-68 for a discussion of the Principles' adoption of the approximation rule; infra text accompanying notes 69-70 for a discussion of the Principles' reliance on the best interest standard.

6. In a study of parents in dispute over custody and/or visitation who were ordered by the court to participate in mediation or evaluation services, 72% of the men and 80% of the women reported abuse. Lisa Newmark et al., Domestic Violence and Empowerment in Custody and Visitation Cases, 33 FAM. & CONCILIATION RTS. REV. 30, 35, 36 (1995) (84% of those surveyed were located in Portland, Oregon).
Principles' details regarding domestic violence narrows the analysis even further. However, such an analysis is particularly beneficial. Tentative Draft No. 3 of the Principles, with the excellent commentary and Reporter's Notes, has only sixteen references to Oregon law, despite the fact that Oregon's legislation specifically addresses domestic violence and custody. Washington State law, in contrast, is cited forty-one times. Therefore, it is not readily apparent from the text of the Principles how Oregon, as opposed to some other states, might be affected by adopting the Principles, in whole or in part.

In addition, an analysis of the Principles' potential benefits or disadvantages for Oregonians seems an appropriate topic of inquiry because the Oregon Task Force on Family Law, convened in 1993 and concluded in December 1997, never considered Tentative Draft No. 3 of the Principles. The Task Force reviewed Oregon divorce law, with a charge to formulate "a nonadversarial system for families undergoing divorce that provides the families with an opportunity to access appropriate services for the transition period."8 The Task Force recognized the devastating impact domestic violence can have on family members, acknowledged "that any system of family conflict management must protect the physical safety of all parties,"9 and declared that "[t]he safety . . . of family members shall be given priority."10 The Task Force ultimately recommended four important bills to the Legislature, and the Legislature adopted most of the Task Force's recommendations.11 However, the Task Force disbanded before the current version of the Principles was completed on March 20, 1998; therefore, the Task Force never studied the Principles' provisions.12

7. See infra text accompanying notes 36-41, 44-60.
9. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY, CREATING A NEW FAMILY CONFLICT RESOLUTION SYSTEM 5 (Dec. 31, 1997).
10. Id. at 7.
12. Discussions with Maureen McKnight, a member of the Oregon Task Force on
An Oregon-specific inquiry reveals, as this Article argues, that Oregon citizens would benefit from the integration of various ideas from the *Principles* into the Oregon statutory scheme. Because Oregon custody law has been cobbled together over time, considerations of domestic violence are not well-integrated into the custody adjudication process. In contrast, the drafters of the *Principles*, with the luxury of starting from scratch, considered and addressed domestic violence at each and every stage of the custody decisionmaking process. The result is that the *Principles* represent a coherent scheme that gives broad attention to domestic violence, and emphasizes the importance of domestic violence within particular areas much more so than Oregon law.

Not only do many of the *Principles'* ideas go beyond what Oregon law currently requires, but the *Principles'* omnipresent concern with domestic violence makes the whole greater than the sum of the *Principles'* individual parts. Simply, the *Principles'* attention to the topic helps ensure that domestic violence victims experience both procedural fairness and substantive justice. This Article highlights those areas where the specific concepts embodied in the *Principles* could enhance Oregon law and concludes by specifically listing those reforms that the author believes that Oregon should adopt.  

Despite its Oregon focus, this Article also may prove useful to lawyers, legislators, and judges outside of the Beaver State. By demonstrating the usefulness of a more limited state-specific

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Family Law, suggest that earlier drafts were not considered. This is not surprising because tentative draft number 3, completed on March 20, 1998, was the first draft disseminated to the membership of the ALI. Draft number 3, therefore, represents the first opportunity for the thoughts of the ALI working group to become public and known to the Task Force. See generally PRINCIPLES, supra note 3, at inside cover.

13. This Article does not address the adjudication of custody or parenting time under the Family Abuse Prevention Act, Oregon Revised Statutes sections 107.700-732, except as relevant to the analysis discussed herein. The *Principles* do not have a similar special statutory procedure for protecting domestic violence victims because that is not the *Principles'* focus. In an effort to keep the comparison of the respective approaches parallel, this Article primarily addresses Oregon's other statutory provisions that guide the adjudication of custody and parenting time disputes when families break up.

14. According to Charles Henry Carey, "The State of Oregon is sometimes called the Beaver State, on account of the Association of the little fur-bearing animal with the early history of the Oregon Country, as well as because of its intelligence, industry, ingenuity and other admirable qualities." CHARLES HENRY CAREY, HISTORY OF OREGON 808 (1922). The beaver was declared the official animal of Oregon in 1969. See S.J. Res. 1, 55th Leg. (Or. 1969).
and topic-specific analysis of the *Principles*, the Article may encourage others to engage in similar analyses. Those who are troubled by the *Principles* as a whole, or who seek more incremental change, may elect to cherry-pick from among the *Principles*’ provisions instead of accepting or rejecting the *Principles* in their entirety. In particular, it is hard to imagine that a state could not benefit from the *Principles*’ ideas about domestic violence in the custody context.

The Article begins by describing the evolution of Oregon’s child custody laws, as they relate to domestic violence. The Article thereby identifies three areas where Oregon law and the *Principles* overlap in the attention they give to domestic violence in a custody context: (1) both systems treat domestic abuse as a relevant factor in adjudicating custody and visitation, (2) both provide definitions of domestic abuse, and (3) both have a procedure for the mediation of custody and visitation disputes when domestic violence has occurred between the parties. A comparison of the *Principles* and Oregon law in these three areas demonstrates that the *Principles* attach significantly more importance to the fact of domestic violence than do the Oregon laws. The Article next demonstrates that the *Principles* also contain a greater breadth of provisions that explicitly address domestic violence. These provisions reflect three implicit goals: (1) maximizing the identification of cases that involve domestic violence, (2) enhancing substantive justice for domestic violence victims, and (3) ensuring domestic violence victims’ safety. The Article examines illustrative provisions within these three areas and recommends some that Oregon should adopt. Finally, the Article identifies several problems the *Principles* pose for domestic violence victims and counsels that Oregon lawmakers might choose to depart from the ALI *Principles* in certain respects.

II. THE CONNECTION BETWEEN CUSTODY AND DOMESTIC VIOLENCE IN OREGON

Before Oregon reformed its statutes to make domestic violence relevant in custody disputes, Oregon courts treated domestic violence inconsistently in custody determinations. As a whole, Oregon’s case law was no worse for domestic violence victims than was the case law in most states. One commentator reported that only a few cases around the country had held that
domestic violence was relevant to a custody adjudication, and these cases typically involved men who had killed the child's mother. Two cases, *Tingen v. Tingen*, and *In re Marriage of Remillard*, illustrate the variable approaches in Oregon. Evidence of domestic violence was relevant to the custody adjudication in the latter case only.

In *Tingen*, the trial court awarded custody of three of the couple's four children to the father. The mother appealed, and the appellate court reversed. The basis for the reversal was not the mother's undisputed testimony regarding the father's domestic abuse of her. Although the statute required that a custody award be based on the child's best interest, and this included consideration of "the conduct of the parties," the Oregon Supreme Court forthrightly said:

In determining custody we ought to consider conduct establishing grounds for a divorce only if such conduct was, or would be, directly detrimental to the child. The conduct which would render a parent unfit to have custody must have some relevancy to the parent-child relationship, including having some negative effect on the child's upbringing. We find no such conduct or moral impediment as to make either party unfit as a custodian of the children.

In contrast, the Court of Appeals in *In re Marriage of Remillard* found that domestic violence was very relevant to a motion to modify custody. In that case, custody originally was

15. See Joan Zorza, *Protecting a Battered Woman's Whereabouts from Disclosure*, DOMESTIC VIOLENCE REP., Oct./Nov. 1995, at 3 (citing cases). Zorza also reports that "a distressing number of other cases, some decided as late as the 1990s, have found that a father's violence against his female partner, even when it results in her death, is not relevant to the custody determination." *Id.*

16. 446 P.2d 185 (Or. 1968).

17. 569 P.2d 651 (Or. Ct. App. 1977); see also, e.g., Heisler v. Heisler, 55 P.2d 727 (Or. 1936) (disbelieving the wife's allegations of violence, granting the husband a divorce based on his counterclaim that included allegations of violence, and awarding the couple's sons to the husband and the daughters to the wife); Folkenberg v. Folkenberg, 114 P. 99 (Or. 1911) (granting the wife a divorce on the basis of cruel and inhuman treatment and awarding her custody of the child).

18. *Id.* at 446 P.2d at 185.

19. *Id.* at 186-87.

20. *Id.* at 187.

21. *Id.* at 186 (citing OR. REV. STAT. § 107.100(1) (1967)).

22. *Id.* at 187.

awarded to the mother.24 The mother remarried and “[o]n at least three occasions she was beaten quite badly by her husband.”25 She ultimately went to a battered women’s shelter, leaving her child with a friend.26 The mother returned home and she and her new husband entered counseling.27 The biological father, however, moved for a change of custody. His motion was granted.28 The trial court was explicit that the basis for the change in custody was the violence between the mother and her new husband.29 Three months after this custody modification, the mother moved for modification to regain custody.30 The trial court granted this second modification and said, “Time has run on. Mr. Dodge has quit his drinking. Mrs. Dodge (mother) is willing to make those changes in her life that are necessary to stabilize her marriage. It is now stabilized. She is seeking professional help. The violence has ended.”31 The Court of Appeals affirmed the second modification, emphasizing the improvement of the mother’s marital situation and the difficulty the child was having adjusting to life with the father.32

Approximately a decade ago, the first generation of legal reform began to make domestic violence more relevant to custody adjudications around the country. At that time, scholars advocated primarily for reform that would require (or encourage) judges to consider evidence of domestic violence in custody determinations.33 Change over the last decade has been rapid, with two-thirds of the states passing laws that require the consideration of evidence of domestic violence in custody determina-

24. Id. at 652.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id. at 652-53.
31. Id. at 653 (quoting the trial court below).
32. Id. at 654.
Other states have reached a similar result through case law. The Oregon Legislature reformed Oregon law to make domestic violence relevant in custody determinations earlier than many other states. In 1987, ten years after Oregon adopted its first protection order statute for domestic violence victims, the Oregon Legislature included domestic violence as a factor that a court could consider in custody determinations. Another ten years passed, and in 1997 the Legislature made domestic violence a factor that a court must consider in its custody adjudications. The 1997 Legislature also adopted a provision that addresses the importance of protecting parents' safety during visitation. The 1999 Legislature enacted a rebuttable presumption that an award of sole or joint custody to a parent who has committed domestic abuse is not in the child's best interest.

34. “About two-thirds of states require consideration of evidence of domestic violence in determinations affecting allocation of responsibility for children at divorce.” PRINCIPLES, supra note 3, § 2.13, Reporter's Note to cmt. c at 218 (citing cases therein).

35. See Zorza, supra note 15, at 3 (“every state now has case law allowing courts to consider domestic violence in their custody decisions”).

36. The states whose statutes recognized the connection between custody and domestic violence before Oregon included the following: Florida, see FLA. STAT. ANN. § 61.13(2)(b)(2) (1986), Alaska, see ALASKA STAT. § 25.20.090(b) (1983); California, see CAL. CIV. CODE § 4601.5 (West 1984), Colorado, see COLO. REV. STAT. § 14-10-124(4) (1984); Illinois, see ILL. ANN. STAT. ch. 40, § 602(a)(6) (Smith-Hurd 1980); and Kentucky, see KY. REV. STAT. § 403.270(2) (1984).


41. 1999 Or. Laws ch. 762, § 2 (amending OR. REV. STAT. § 107.137(2) (1997)). The change followed a call by the Oregon Gender Fairness Task Force to the Oregon Council on Domestic Violence to “consider recommending to the Legislative Assembly that Oregon statutes on child custody be amended to include a rebuttable presumption that a parent who has engaged in domestic violence toward the other parent or who has
Despite these efforts, and contrary to a commentator’s protestation in 1997 that “Oregon ranks among the most progressive states in domestic violence legal reform,” Oregon law does not embody the more recent innovative approaches for resolving custody disputes where domestic violence is a factor. The Principles demonstrate that Oregon lawmakers still have ample opportunity to increase the emphasis that domestic violence receives in custody decisions and the breadth of ways in which domestic violence can be important to custody determinations.

III. A MATTER OF EMPHASIS

This part compares how the Principles and Oregon law differ in those areas where Oregon’s law related to custody and visitation explicitly addresses domestic violence. In particular, this part compares how much weight domestic abuse receives in a custody or visitation adjudication under the Principles and Oregon law, the schemes’ definitions of domestic abuse, and their approach to the mediation option when allegations of domestic abuse exist. Because both Oregon law and the Principles address these areas, the discussion relates to the emphasis each system places on domestic violence, rather than on the breadth of attention each system gives to domestic violence.

A. Domestic Abuse as a Factor in Custody and Visitation Decisions

Oregon law and the Principles differ principally in the extent to which concerns about a party’s future safety can be used to deny a domestic violence perpetrator custody of or visitation with his children. A hypothetical fact pattern demonstrates the

battered a child should not be awarded custody of the couple’s children.” REPORT OF
THE OREGON SUPREME COURT, OREGON STATE BAR, Task Force on Gender
Fairness, S.B. 1075, 70th Leg. 57 (1998) [hereinafter OREGON GENDER FAIRNESS
Task Force Report].

42. Bryan J. Orrito, Comment, Ending the Domestic Violence Cycle Through Vic-
tim Education in Oregon’s Restraining Order Process, 33 WILLAMETTE L. REV. 971,
974, 977 (1997) (“Oregon has led the nation in the area of domestic violence legal
reform.”).

43. This Article refers to domestic violence victims generally with the female
pronoun and to domestic violence perpetrators with the male pronoun because of the gen-
dered nature of most domestic violence. The recent 1998 Oregon Domestic Violence
Needs Assessment confirmed that “the vast majority of victims of domestic violence
are women.” OREGON HEALTH DIVISION AND MULTNOMAH COUNTY HEALTH DE-
differences in the two approaches. Imagine two people, Helga and Jim, who are married and have a child together, named Billy. Billy is now seven years old. Jim has abused Helga consistently throughout their relationship, although Jim has never abused Billy. In fact, Jim and Billy have an excellent father-son relationship; in most situations, Billy prefers his father’s company to that of his mother. Jim’s abuse of Helga has become so severe that she fears for her life, and she has gone into hiding. As the primary caretaker, she takes Billy with her. Helga petitions for a divorce and seeks sole custody of Billy. She wants to deny Jim visitation because she fears for her safety if she has ongoing contact with him. She believes that even if future contact is solely between Jim and Billy, Jim will discover her whereabouts and harm her.

Jim’s abuse of Helga is relevant to the custody contest in Oregon. Oregon’s custody statute states that courts are to “give primary consideration to the best interests and welfare of the child.” In determining the best interest of the child, domestic violence is relevant in two ways. One of the six statutory factors a court must consider is “the abuse of one parent by the other.” This factor applies regardless of whether the father ever abused the child. Another factor, often called the “friendly parent” provision, states that the court must consider “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the
child.” This factor can be rendered inapplicable by the existence of past domestic violence and a future threat of harm toward the parent. A court may not consider a parent “unfriendly” if that parent “shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.”

While domestic violence is clearly relevant to the custody dispute, Oregon has a schizophrenic approach toward the weight domestic violence should receive in the custody adjudication. On the one hand, Oregon emphasizes the importance of domestic violence to the custody contest through a presumption “that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse.” On the other hand, the presumption is rebuttable. The presumed fact (here, that it is not in a child’s best interest to be awarded to a batterer) is no longer presumed to be true if the other parent presents sufficient evidence to counter the presumed fact. In the hypothetical, Jim may be able to present such evidence: his son prefers his company. Helga then would have to prove that, in fact, it would not be in Billy’s best interest for the court to award custody to Jim. Once the presumption is rebutted, domestic violence cannot be the determinative factor in the custody decision. Oregon law explicitly states, “the best interests and welfare of the child in a custody matter shall not be determined by isolating any . . . relevant factor, and relying on it to the exclusion of other factors.” Hence, the abuse of Helga, even if it entails a severe threat to her future safety, cannot be determinative in adjudicating custody. In a single statutory section, Oregon law simultaneously elevates the importance of domestic violence and minimizes its significance.

Oregon, like many states, also makes domestic violence

48. Id.
49. 1999 Or. Laws ch. 762, § 2 (amending OR. REV. STAT. § 107.137(2)).
52. See PRINCIPLES, supra note 3, at § 2.13, cmt. g (“Many statutes specifically mandate that, if custody or visitation is to be ordered in a case in which domestic abuse has occurred, the court must order appropriate protective measures for the safety of
relevant to the manner in which a noncustodial parent exercises visitation. It became the policy of the state in 1997 to “consider the best interests of the child and the safety of the parties in developing a parenting plan.” The parenting plan must detail, among other things, the noncustodial parent’s “parenting time” rights, the term used in Oregon for visitation. Consequently, as of 1997, courts must consider the safety of the parties when fashioning parenting time awards. The 1999 Legislature strengthened the law by requiring courts who award parenting time to an abusive noncustodial parent to “make adequate provision for the safety of the child and the other parent in accordance with the provisions of ORS 107.718(4).” Despite the

53. “Parenting time rights” are governed by section 107.105(1)(b) of the 1999 Oregon Revised Statutes, which states, in part,

If the parents have been unable to develop a parenting plan or if either of the parents requests the court to develop a detailed parenting plan, the court shall develop the parenting plan in the best interest of the child, ensuring the noncustodial parent sufficient access to the child to provide for appropriate quality parenting time and assuring the safety of the parties, if implicated. The court may deny parenting time to the noncustodial parent under this subsection only if the court finds that parenting time would endanger the health or safety of the child.

55. See OR. REV. STAT. §§ 107.102(2); 107.105(1)(b) (1999).
56. See 1997 Or. Laws ch. 707, § 34 (Or. 1997) (“The Legislative Assembly does not intend by changing the term ‘visitation’ to ‘parenting time’ to change any interpretation of prior law nor to abrogate any rights created by judgments and orders entered prior to the effective date of this Act.”); Hearing on H.B. 2718 Before the House Judiciary Comm., 64th Leg. 8 (Or. 1987) (comments of Representatives Burton, Bellamy, Hanlon, Springer, and Webber expressing their views that “parenting time” is the term of art for visitation).
58. S.B. 1075, 70thLeg., 1999 Or. Laws ch. 762, § (b) (amending OR. REV. STAT. § 107.105(1)(b)). Section 107.718(4) suggests various methods to enhance the safety of the child and the other parent, including supervised visitation, batters’ counseling as a condition of visitation, and exchanging the child at a protected location. See OR. REV. STAT. § 107.718(4) (1999).

The 1999 statutory changes also clarify that a court must consider a party’s safety when reviewing a plan prepared and agreed to by the parties. Previously, ambiguity existed because the statute suggested that a party’s safety was relevant only when the court “develops” a plan pursuant to a request by either parent or when the parents cannot develop the plan themselves. See OR. REV. STAT. §§ 107.101(5), 107.102(4)
statute's explicit reference to a parent's safety, a domestic violence perpetrator is ineligible for visitation only if the court finds that parenting time would "endanger the health or safety of the child."\textsuperscript{59} The statute does not say that a court could deny visitation when it believes that no adequate provision for a parent's safety can be made. Case law similarly suggests that the right to visitation is forfeited only if "the welfare of the child will be seriously affected by its exercise."\textsuperscript{60}

The \textit{Principles} are superior to Oregon law for someone like Helga because the \textit{Principles} attribute more importance to a parent's future safety than does Oregon law.\textsuperscript{61} The \textit{Principles} elevate the importance of a parent's safety with an implicit rebuttable presumption: when domestic violence exists or has existed, and the parents do not agree on an arrangement for physical custody, visitation, or legal custody,\textsuperscript{62} an award of any kind to the perpetrator is unacceptable unless the other parent's and child's safety can be guaranteed.\textsuperscript{63} This "safety presumption" forms an important part of the \textit{Principles'} approach to custody and visitation, and will be explained now in the context of how custody issues generally are resolved under the \textit{Principles}.

The \textit{Principles} require that parents formulate a parenting agreement that addresses the allocation of custodial and decisionmaking responsibility.\textsuperscript{64} If the parents agree on one or more provisions, the court must incorporate those provisions into an order, unless one party's assent was unknowing or involuntary, or the plan would harm the child.\textsuperscript{65} If the court needs to allocate

\footnotesize{\textsuperscript{59} OR. REV. STAT. § 107.105(1)(b) (1997).}
\footnotesize{\textsuperscript{60} Kellogg v. Kellogg, 213 P.2d 172, 175 (Or. 1945).}
\footnotesize{\textsuperscript{61} In other ways, the \textit{Principles} may not be as good as they could be, or as good as Oregon law, for someone like Helga. See infra text accompanying notes 348-356.}
\footnotesize{\textsuperscript{62} The \textit{Principles} use the terms "custodial responsibility" and "decisionmaking responsibility." See PRINCIPLES, supra note 3, § 2.03. The former term includes the responsibility exercised by the parent with primary physical custody, as well as the parent with visitation. The latter term corresponds to what is normally thought of as legal custody. See id. § 2.03(5).}
\footnotesize{\textsuperscript{63} Id. § 2.13(3).}
\footnotesize{\textsuperscript{64} See id. § 2.06; see also supra note 62.}
\footnotesize{\textsuperscript{65} See id. § 2.07(1). The fact that a court applying the \textit{Principles} would not re-}
custodial responsibility, the court must "allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action." This allocation rule favors the "status quo," and has been called the "approximation" approach. When the court cannot allocate custodial responsibility based on the time the child spent with each parent (as in the case of a newborn), or when an allocation would be manifestly harmful to the child, "the court should allocate custodial responsibility based on the child's best interest." The court is to allocate decisionmaking responsibility by considering a number of factors deemed relevant to the child's best interest.

In those instances when the court must allocate custodial or decisionmaking responsibility, the court cannot make any allocation without considering possible limiting factors, including domestic abuse. Section 2.13 of the Principles states, "If either of the parents so requests, or upon receipt of credible information thereof, the court should determine whether a parent who would otherwise be allocated responsibility under a parenting plan... has inflicted domestic abuse, or allowed another to inflict domes-

view the parenting agreement for substantive fairness to the victim or to assure her safety is addressed infra at the text accompanying notes 354-356.

66. For example, the court might have to allocate custodial responsibility when the parties do not resolve the issue for themselves, or if the parties' allocation is "manifestly harmful to the child." See infra text accompanying note 69.

67. See PRINCIPLES, supra note 3, at § 2.09(1).


69. PRINCIPLES, supra note 3, § 2.09(3).

70. These factors include the allocation of custodial responsibility, the level of each parents' past participation in decisionmaking on behalf of the child, the parents' wishes, the parents' past ability to cooperate in decisionmaking, the parties' prior agreements, and any limiting factors. See id. § 2.10(1). The Principles specifically state that "the court should presume that an allocation of decisionmaking responsibility to both parents jointly is in the child's best interests" if each parent has been exercising a reasonable share of parenting functions. Id. § 2.10(2). Unless otherwise provided, each parent who exercises custodial responsibility has sole responsibility for day-to-day decisions including "emergency decisions affecting the health and safety of the child." Id. § 2.10(3). "The presumption is overcome if there is a history of domestic abuse, or by a showing that joint allocation of decisionmaking responsibility is not in the child's best interests." Id. § 2.10(2).
tic abuse, as defined in 2.03(8)."\textsuperscript{71} The Principles, like Oregon law, then state, "[I]f a parent is found to have engaged in any activity specified by Paragraph (1), the court should impose limits that are reasonably calculated to protect the child or child’s parent from harm."\textsuperscript{72} A nonexclusive list of limitations is provided for the court’s consideration, including "exchange of the child between parents through an intermediary, or in a protected setting,"\textsuperscript{73} "restraints on the parent from communication with or proximity to the other parent or the child,"\textsuperscript{74} and "a requirement that the parent complete a program of intervention for perpetrators of domestic violence."	extsuperscript{75} Unlike Oregon law, however, one of the limitations includes "an adjustment of the custodial responsibility of the parents, including the allocation of exclusive custodial responsibility to one of them."\textsuperscript{76} Most importantly, and unlike Oregon law, the Principles include a rebuttable safety presumption. If there is a finding of domestic violence, the court may not allocate custodial responsibility or decisionmaking responsibility to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under Paragraph (2). The parent found to have engaged in the behavior specified in Paragraph (1) has the burden of proving that an allocation of custodial responsibility or decisionmaking responsibility to that parent will not endanger the child or the other parent.\textsuperscript{77}

Consequently, the rebuttable safety presumption emerges in three ways within the Principles’ structure for adjudicating custody and visitation issues. First, the “status quo” rule does not automatically apply if a parent “has inflicted domestic abuse, or allowed another to inflict domestic abuse.”\textsuperscript{78} Second, application of the “best interest” rule is made subject to the safety presumption when a parent has inflicted domestic abuse.\textsuperscript{79} Third, the pre-

\textsuperscript{71} Id. § 2.13(1)(b).
\textsuperscript{72} Id. § 2.13(2).
\textsuperscript{73} Id. § 2.13(2)(c).
\textsuperscript{74} Id. § 2.13(2)(e).
\textsuperscript{75} Id. § 2.13(2)(i).
\textsuperscript{76} Id. § 2.13(2)(a).
\textsuperscript{77} Id. § 2.13(3).
\textsuperscript{78} Id. § 2.13(1)(b). In addition, the court can depart from the status quo rule if necessary to achieve any one of seven objectives. See id. §§ 2.09(1)(a)-(g).
\textsuperscript{79} See id. § 2.09(1).
umption for joint decisionmaking is overcome if there is "a history of domestic abuse."\textsuperscript{80} The court cannot allocate responsibility in these situations unless it makes special written findings that the child and other parent can be "adequately protected from harm,"\textsuperscript{81} and the perpetrator "prov[es] that an allocation of custodial responsibility or decisionmaking responsibility to that parent will not endanger the child or the other parent."\textsuperscript{82} In short, the presumption applies whenever the parents cannot agree on custody and (1) the approximation approach is the rule of decision; or (2) the court is allocating decisionmaking responsibility; or (3) in those few cases where the best interest rule applies (e.g., the case of a newborn). In the case of Helga and Jim, a court could not award Jim custodial responsibility for Billy (which includes parenting time) unless Jim proved, and the court specifically found, that Helga would not be endangered by the allocation.

Although Oregon law and the \textit{Principles} both require a court to address domestic violence when ruling on custody and visitation, the increased emphasis that a victim’s future safety receives under the \textit{Principles} is palpable. First, there is an implicit recognition—as part of the \textit{Principles’} rebuttable safety presumption—that domestic violence may continue to endanger the child or parent. Second, the \textit{Principles}, unlike Oregon law, allow the existence of domestic violence to preclude an award of custody or visitation, regardless of whether the award might otherwise be in the child’s best interest. If the parents do not agree on custody and the perpetrator cannot establish that an allocation of custodial responsibility will not endanger the parent or the child, then the court should not grant the perpetrator such responsibility even if the perpetrator is otherwise a great parent. Third, before the court can award custody or visitation to a perpetrator of domestic violence, the court must make special written findings that the child or other parent can be adequately protected from harm. Simply put, the \textit{Principles} take domestic violence more seriously than does current Oregon law because the \textit{Principles} recognize that the safety of individuals should never be compromised.

\textsuperscript{80} See id. §§ 2.09(3); 2.13(1)(b).
\textsuperscript{81} Id. § 2.13(3).
\textsuperscript{82} Id. § 2.13(3).
It would be wrong to suggest that an Oregon court could never base a denial of custody or visitation on considerations of a parent’s future safety. Yet, an Oregon court would have to engage in legal, and perhaps factual, machinations to allow concerns about a party’s future safety to dictate its decision. In addition, the significant discretion that exists under the Oregon statute undercuts any assurance that a court would find a parent’s future safety important to the analysis, let alone determinative. For example, the court would have to equate a parent’s future safety with danger to the child’s health or safety in order to deny visitation under the Oregon statute.\textsuperscript{83} While social science research and scholarly opinion support this conclusion,\textsuperscript{84} courts

\textsuperscript{83} See OR. REV. STAT. § 107.105(b) (1999). The court drew such a connection in at least one Oregon case. See In re Troy M. v. Kenneth M., 555 P.2d 933 (Or. Ct. App. 1976) (upholding the termination of a father’s parental rights after the father murdered the mother in the children’s presence). In the custody context, an Oregon court is not limited to considering only the six enumerated statutory factors in determining custody, and therefore could consider a parent’s future safety in its evaluation of the child’s best interest. However, the court may not elevate “any other factor” above those enumerated or unenumerated. See OR. REV. STAT. § 107.137(2) (1999).


When making custody [and] visitation... orders in domestic relations... cases, judges must recognize that domestic violence is a relevant factor and that children who are exposed to abusive conduct are at serious risk of physical and emotional harm. Perpetrators of domestic violence can jeopardize children’s well-being and place them at significant risk. Children who witness domestic violence are more likely to experience behavioral, somatic and emotional problems. Perpetrators of domestic violence are also more likely to abuse their children. Boys who witness the violence of their fathers toward their mothers are at elevated risk for perpetrating domestic violence in their adulthood. Finally, girls who witness maternal abuse may tolerate abuse as adults more than girls who do not.

Id. (citations omitted); see also Cahn, supra note 33, at 1091 (“[D]omestic violence harms children. It traumatizes and terrorizes them when they witness their fathers abusing their mothers, and it teaches them that violence is acceptable.”); Zorza, supra note 15, at 3; PRINCIPLES, supra note 3, § 2.13 cmt. c (“There is general agreement that children are harmed by witnessing the abuse of their parent.”); id. § 2.02, Reporter’s
routinely have disaggregated abuse of a parent from the child’s best interest or the child’s safety when making custody and visitation awards.\textsuperscript{45}

A court might refuse to equate the risk of future violence to the parent with danger to the child for various reasons. First, a judge may believe that there is a fairly remote risk that the child will witness future violence. After all, a custody decision removes the child from a household where battering between the parents is occurring, and the court may believe that it can structure visitation to eliminate any risk to a parent. Similarly, the court may feel confident that any potential future violence can be addressed independently of the visitation award—for example, with a Family Abuse Protection Act order. Second, while odds are that a child will be harmed if he or she witnesses domestic violence,\textsuperscript{46} a specific child may not be harmed by the ex-

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Notes to cmt. h ("There is broad consensus that domestic violence is harmful to children, as well as extreme hostility between parents, especially when this hostility focuses on the children themselves."). For an example of the threat to children, see \textit{State ex rel. State Office for Serv. to Children & Families v. Frazier}, 955 P.2d 272, 278 (Or. Ct. App. 1997) (en banc) (affirming termination of the father's rights and explaining how violence put the child at serious risk of harm).

There is little doubt that Oregon's children are witnessing domestic violence. Sixty percent of Oregon children under 18 years of age living in abusive households are estimated to have seen or heard the abuse of their mothers or caregivers during the past year. This translates into more than 1 of every 6 (15% or 123,400) Oregon children who witnessed domestic violence during the past year. Two-thirds (81,400) of these children saw or heard the abuse at least once per month.

1998 OREGON DOMESTIC VIOLENCE NEEDS ASSESSMENT, \textit{supra} note 43, at ii; \textit{see also} id. at 6 ("[N]early three-fourths of the children living in abusive households during the past year were at home when the abuse occurred, and the number of additional children who might have seen or heard the abuse without their mother's or caregivers' knowledge is unknown."). The estimate that 15% of Oregon's children are exposed to domestic violence is consistent with the numbers at the national level. \textit{Id}.

\textsuperscript{45} \textit{See} Simmons v. Simmons, 649 So. 2d 799, 801 (La. Ct. App. 1995) (commenting that "nothing indicates that the father ever directed any anger toward the minors" in affirming the trial court's conclusion that violence against the mother did not rise to a level of "history of domestic violence" sufficient to trigger presumption against award of custody to batterer); Tingen v. Tingen, 446 P.2d 185 (Or. 1968) (finding that the father's abuse of the mother was irrelevant to the father's fitness as custodian of the children); \textit{cf.} Frazier, 955 P.2d 272 (Or. Ct. App. 1998) (en banc) (Edmonds, J., dissenting) (arguing that the father's parental rights should not be terminated because "[a]lthough father's conduct could have put [the child] in danger of harm, it was not directed at [the child]").

\textsuperscript{46} \textit{See} discussion \textit{supra} at note 84.
perience. 87 Third, to the extent that a strong link exists between partner abuse and child abuse, 88 child abuse is its own factor in any best interest inquiry. 89 Because evidence suggests that both battered mothers and battering fathers abuse children, 90 any statistical correlation between battering one’s partner and abusing one’s children would be, without more, an insufficient reason to bar visitation. Fourth, an Oregon court may be particularly disinclined to make the connection between a parent’s safety and the child’s best interest because the Oregon Legislature explicitly disaggregated the two factors in the visitation context: “the court may consider only the best interests of the child and the safety of the parties.”91 Even if the court equated the parent’s future safety to the child’s health and safety, the court still would have to consider any potential detriment to the child’s health from foreclosing contact with the abusive parent.

While Oregon law offers the advantage of greater flexibility for courts than the Principles, the wide discretion can also cause serious problems, 92 such as the undervaluation of a party’s safety

87. Janis Wolak & David Finkelhor, Children Exposed to Partner Violence, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 81 (“Many children are able to cope successfully with disturbing events.”).

88. See, e.g., PRINCIPLES, supra note 3, § 2.13 cmt. c.

89. See, e.g., In re Marriage of Tuma, 564 P.2d 1364, 1365 (Or. Ct. App. 1977) (modifying decree so that a parent who “engage[d] in a number of activities which may well be deleterious to [a] child” lost custody); see also Constance Canfield Jarvis et al., Custody and Visitation, in OREGON STATE BAR CONTINUING LEGAL EDUCATION, 1 FAMILY LAW 4-15, at 4-18 (“A parent’s conduct that endangers the child is clearly sufficient justification to award custody to the other parent.”).


92. See, e.g., Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Custody Decisionmaking, 101 HARV. L. REV. 727 n.92 (1988) (noting that the exercise of judicial discretion in custody cases is more a product of bias than of learning); Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1979) (discussing the impact of broad judicial discretion, especially the “best interests” standard, on the private ordering of custody disputes); Jennifer A. Hand, Note, Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Custody Rights, 71 N.Y.U. L. REV. 1251, 1274 (1996) (“[G]iving judges too much discretion in deciding what factors should be weighed in the best interests determination may require complex policy decisions which are best left to the legislature.”); see also PRINCIPLES, supra note 3, at 2 (“[T]he test is also condemned because those who apply it find it difficult to treat unconventional choices with complete neutrality. Gender and race, reliance on factors relating to religion, sexual conduct, and financial circumstances are also believed to be consequences of the best-interests test.”).
as a relevant factor in a custody or visitation award. Judges historically have been criticized for harboring the broader societal misconceptions about domestic abuse.93 Oregon judges, in particular, have come under attack for being "insufficiently educated concerning the dynamics of domestic violence,"94 for "treat[ing] domestic violence incidents as less serious than the same offenses between non-family members,"95 and for "not always appear[ing] cognizant of the safety issues involved in their decisionmaking."96 If judges minimize the significance of future domestic violence to children’s welfare, their misperceptions are shielded from appellate review by their vast discretion.97 Even those Oregon judges with the best intentions may sometimes undervalue the importance of future domestic violence to the child’s best interest because of the ubiquitousness of violence. The Massachusetts Supreme Judicial Court recognized this phenomenon: "The very frequency of domestic violence in disputes

93. See Joan Zorza, Protecting the Children in Custody: Disputes When One Parent Abuses the Other, 29 CLEARINGHOUSE REV. 1113, 1119 (1996) ("Many [judges] wrongly believe that abuse is provoked, consensual, or mutual or that it ends when the parties have separated."); Joan Zorza, Batterer Manipulation and Retaliation in the Courts: A Largely Unrecognized Phenomenon Sometimes Encouraged by Court Practices, DOMESTIC VIOLENCE REP., June/July 1998, at 67 (Zorza II) (describing some judges’ erroneous belief that women “frequently make false allegations of their own or a child’s abuse and are particularly likely to do so for purposes of tactical gain in divorce or custody cases”). In fact, “women seldom make false allegations of either domestic violence or child physical or sexual abuse.” Id. (citing AM. PSYCHOLOGICAL ASSN., VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 12 (Washington, DC: APA 1996); ADELLE HARRELL ET AL., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS (1993); Nancy Thoennes & Patricia G. Tjaden, The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes, 14 CHILD ABUSE & NEGLECT 151, 161 (1990)); cf. V. Paulani Enos, Prosecuting Battered Women: State Law’s Failure to Protect Batterer Women and Abused Children, 19 HARV. WOMEN’S L.J. 229 (1996) (arguing that the existing strict liability scheme under the “failure to protect” doctrine permits judges to apply commonly-held misconceptions about battered women and domestic violence to deny custody of the child to the nonabusive mother).

94. OREGON GENDER FAIRNESS TASK FORCE REPORT, supra note 41, at 56.
95. OREGON PROTOCOL HANDBOOK, supra note 43, at 45.
96. OREGON GENDER FAIRNESS TASK FORCE REPORT, supra note 41, at 56.
97. See, e.g., Reeves v. Chepulis, 591 N.W.2d. 791 (N.D. 1999) (giving the father physical custody despite an alleged incident of domestic violence that involved pushing the mother and breaking a door); Smith v. Purnell, 682 N.Y.S.2d. 889 (N.Y. App. Div. 1998) (awarding the father sole custody despite his admission that he was subject to a protection order and “that he had been ordered to enter a batterer’s program in connection with incidents of abuse directed toward the mother”).
about child custody may have the effect of inuring courts to it and thus minimizing its significance.\textsuperscript{98}

The \textit{Principles}' rebuttable safety presumption does not guarantee that judges will not harbor societal misunderstandings or discount the importance of domestic violence.\textsuperscript{99} No rule of law, regardless of its intended prophylactic effect, can accomplish those results. Yet the presumption can help appellate courts better monitor the trial courts and help ensure that judges take domestic violence seriously.\textsuperscript{100} The \textit{Principles} afford the judge little discretion when it comes to the relevance and importance of a parent’s safety; the \textit{Principles}' rebuttable presumption makes clear that a court must consider a party’s safety in making a custody or visitation award and that a parent’s safety should trump other considerations.

The \textit{Principles}' explicit attention to a parent’s future safety makes sense because visitation by the batterer, shared custody, or a custody award to a batterer with visitation by the domestic violence victim can force contact between a victim and her abuser, thereby endangering the victim’s safety and providing an avenue for the victim’s harassment. As the Oregon Task Force on Gender Fairness recently concluded, without qualification, “[w]omen are placed at risk of further domestic violence when courts allow batterers to have continued visitation with their children.”\textsuperscript{101} The Commentary to the \textit{Principles} recognizes the

\textsuperscript{98} \textit{Custody of Vaughn}, 664 N.E.2d 434, 439-40 (Mass. 1996) (holding that the trial court's failure to make findings of fact on domestic violence issues in making a custody determination constituted a reversible error). In \textit{Vaughn}, the appellate court imposed a requirement that trial courts make explicit findings about the effect of domestic violence on the child and the appropriateness of the custody award given that effect. See id. at 440.

\textsuperscript{99} See, e.g., State ex rel. A.C., 643 So.2d 743, 749 (La. 1994). The Court held unconstitutional the statutory provision requiring courts to terminate visitation when a parent sexually abused a child because the statutory standard was less than clear and convincing evidence. The court articulated concern over the statute's ability to supersede judicial discretion in “fixing such rights.” See id.; see also Even Strongly Worded Statute May Not Prevent Batterer from Receiving Custody, DOMESTIC VIOLENCE REP., Feb./Mar. 1996 at 7, 9 (explaining that the decision may be attributable to gender bias and false assumptions about domestic violence).


\textsuperscript{101} OREGON GENDER FAIRNESS TASK FORCE REPORT, supra note 41, at 57.
potential for problems: "[A]busers often use access to the child as a way to continue abusive behavior against a parent."\textsuperscript{102} The risk of abuse increases after separation, making attention to the safety issues imperative: "The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal interventions."\textsuperscript{103} A rebuttable presumption that elevates the victim's and child's safety above even the child's best interest honors the sacrosanctity of human life.

Frankly, the difficulty of crafting sufficient protection for the victim is heightened in Oregon, where few specialized visitation centers exist to protect victims and their children.\textsuperscript{104} As the National Council of Juvenile and Family Court Judges recognized, when protective interventions are not accessible in a community or a parent's safety cannot be guaranteed, "a court should not endanger a child or adult victim of domestic violence in order to accommodate visitation by a perpetrator of domestic or family violence."\textsuperscript{105} Visitation is not always an appropriate option, even where such visitation centers exist. The recent killing of Melanie Edwards and two-year-old Carli Fay at a Seattle visitation center demonstrates that visitation cannot always be safely accomplished.\textsuperscript{106} Therefore, it is imperative that courts

\textsuperscript{102} PRINCIPLES, supra note 3, § 2.13 cmt c.

\textsuperscript{103} MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 405 commentary (National Council of Juvenile and Family Court Judges 1994) [hereinafter MODEL CODE]. It was recently reported that for Oregon women who end their relationships, "the abuse becomes more frequent or stays the same 25% of the time; and harassment, trespassing, or stalking occurs 60% of the time." 1998 OREGON DOMESTIC VIOLENCE NEEDS ASSESSMENT, supra note 43, at iii. See also MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT & INTERVENTION 18, 45 (1992) (citing studies that suggest that a woman is in the greatest danger of being killed by her batterer when she leaves the relationship); Demie Kurz, Separation, Divorce, and Woman Abuse, in 2 VIOLENCE AGAINST WOMEN 63, 78 (1996) ("These data demonstrate dramatically how violence continues after separation and creates serious consequences for women."); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issues of Separation, 90 MICH. L. REV. 1, 98-110 (1990) (discussing the phenomenon of "separation assault").

\textsuperscript{104} Unlike most other counties in Oregon, Jackson County has a supervised visitation center.

\textsuperscript{105} MODEL CODE, supra note 103, § 405 commentary. The National Council of Juvenile and Family Court judges sees such centers as "an essential component of an integrated community intervention system." Id. § 406 commentary.

\textsuperscript{106} George Tibbits, Escape from Abuse Has Tragic Ending, THE OREGONIAN,
give serious attention to the parent’s and child’s safety in awarding custody and visitation.

A rebuttable safety presumption has other benefits apart from helping to guarantee individuals’ safety. It also facilitates victims’ law abidance. It helps assure a woman that playing by the rules will place neither her own safety nor her child’s safety at risk. It also encourages battered women to leave abusive relationships. While the safety presumption does not guarantee that the victim will obtain custody, and while many women remain in abusive relationships because they fear losing custody of their children, some women stay in abusive relationships because they perceive that leaving the relationship will heighten the risks to themselves, especially when their abusers have access to them through custody or visitation awards. Application of the safety presumption would mean that a court proceeding would enhance, not threaten, a victim’s and her children’s safety.

The benefits of a safety presumption have led many eminent groups to recognize its value. For example, the National Council of Juvenile and Family Court Judges recommended that the domestic violence perpetrator bear the burden of establishing that “adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made,” and that custody and visitation be denied if the other parent’s safety cannot be guaranteed. The Oregon Domestic


107. See infra text accompanying notes 115-118.
108. See discussion infra note 117.
109. See MODEL CODE, supra note 103, § 402 & commentary.

[The Act] elevates the safety and well-being of the child and abused parent above all other “best interest” factors in deliberations about custodial options in those disputed custody cases where there has been a finding of abuse by one parent of the other. It contemplates that no custodial or visitation award may properly issue that jeopardizes the safety and well-being of adult and child victims.

Id.

110. Id. § 405; see also PRINCIPLES, supra note 3, § 2.13(3).
111. MODEL CODE, supra note 103, § 402 & commentary, § 405. See also PRIN-
Violence Council has similarly concluded, "[t]he court should not compromise the safety of a child or a parent in order to accommodate the visitation interest of a domestic violence perpetrator." These ideas are replicated in the Principles and would benefit Oregon domestic violence victims and their children if enacted into Oregon law.

Adoption of the Principles' rebuttable safety presumption would be an important and beneficial supplement to Oregon's current approach. The Principles' rebuttable safety presumption is not itself a substantive standard for awarding custody. In fact, it is important to recognize that the safety presumption in the Principles differs from the "best interest" presumption, a substantive custody standard adopted by numerous states, including Oregon.114

Past domestic violence is simply irrelevant to the Principles' approximation and best interest approach in those situations where the parent's and child's safety can be assured.115 Imagine, for example, a perpetrator who has committed domestic violence and can convince a court that there is no danger to his partner in awarding him custody because a third party could act as an intermediary for all exchanges of the child. He may also convince the court that there is no danger to the child because he has never committed the violence in the child's presence. The Principles' presumption offers no further help to the victim in her attempt to obtain custody. This would be true even if the perpe-

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112. OREGON PROTOCOL HANDBOOK, supra note 43, at 52. The Protocol assumes that a judge can provide for the safety of the child and the custodial parent. It does not discuss what a judge should do if he or she does not think that such a goal is obtainable. See id.

113. "Many other states... presume that an award of sole custody to a perpetrator of domestic abuse is not in the child's best interest." PRINCIPLES, supra note 3, § 2.13, Reporter's Notes to cmt. c (citing statutes of Alabama, Arizona, Colorado, Delaware, D.C., Florida, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Nevada, North Dakota, Oklahoma, and Texas).


115. Although section 2.02 of the Principles defines a child's best interests as including "security from exposure to physical or emotional harm," that presumably is accomplished by the safety presumption itself. See PRINCIPLES, supra note 3, § 2.02(l)(e).
erator's violent actions had had a profound effect on the present allocation of custodial or decisionmaking responsibility. The Principles do not allow a court to discount the amount of time attributed to a father for performing caretaking functions when that father wrongfully kept the child away from the mother as part of his abuse. Similarly, the Principles do not allow a court to supplement the calculation of the mother's time spent performing caretaking functions when her past failure to perform such functions resulted from her victimization. Rendering this past violence irrelevant conflicts with the recommendations of various commentators who have been seeking to make domestic violence more, not less, relevant to the substantive custody decision. Consequently, a state may find it most advantageous to

116. As Zorza noted, the domestic violence victim may be disadvantaged generally in a custody dispute because the violence may have inhibited her good parenting:

Women's maladaptive behaviors often arise after the abuse begins, either as a coping mechanism to deal with the abuse and stress or through the force of their abusers. It is not uncommon for abusive men to force or entrap their female partners into substance abuse or crime or child abuse, all under threat of further violence if the women do not comply. Zorza II, supra note 93, at 67 (citations omitted). Similarly, the violence may have made her an "unfriendly parent" in terms of the contact she permitted between her child and the abuser. These facts should not be held against her.

117. Some commentators suggest that if domestic violence is not relevant to the substantive decision, then a woman might stay in the relationship so that she will not risk losing her children. One commentator explained that "[c]hildren often are a reason why women stay in abusive relationships.... The abused mother may fear losing the children to the custody of the batterer, as often the batterer has threatened to either kidnap the children or wage an expensive custody battle." Merrit McKeon, The Impact of Domestic Violence on Child Custody Determination in California: Who Will Understand?, 19 WHITTIER L. REV. 459, 459 (1998). See also 1998 OREGON DOMESTIC VIOLENCE NEEDS ASSESSMENT, supra note 43, at 17 ("Sixty-two percent of Oregon women surveyed in the 1998 Oregon Domestic Violence Needs Assessment indicated that a barrier to ending the abusive relationship was their fear that their partners would take their children."). In fact, batterers commonly threaten that the victim will lose custody if they separate. "Because abusers learn that they can hurt their victims by using their children, custody litigation is common, even when the abuser has never shown the slightest interest in parenting." Zorza II, supra note 93, at 74 (citing Marsha B. Liss & Geraldine B. Stahly, Domestic Violence and Child Custody, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 175, 179, 181 (Marsali Hansen & Michele Harway eds., 1993) (discussing the dynamics of fear of loss of custody)); see Dutton, supra note 103, at 138 (citing studies showing that fear of loss of their children is a common reason why women stay in abusive relationships); Ola W. Barnett & Alyce D. Laviolette, It Could Happen to Anyone: Why Battered Women Stay 49, 50 (1993) (citing studies indicating that fear of losing custody of children was one of the most often-cited reasons for staying with a batterer). The batterers' threats often prove true. Abusive fathers are more likely to fight for
adopt both a safety presumption and a best interest presumption.\textsuperscript{118}

B. Domestic Abuse Defined

Another area where the Principles give domestic abuse more emphasis than does Oregon law is in the definition of "domestic abuse." The definition of domestic abuse is fundamental to how important domestic violence will be in the custody determination. A narrow definition of domestic abuse—for example, only considering physical abuse of a life-threatening nature—obviously would miss the vast quantity of domestic abuse.\textsuperscript{119} Domestic abuse falls along a spectrum, covering not only serious physical violence, but also an array of actions that are meant to exert power and control over the victim. States’ domestic violence laws tend to define domestic abuse more narrowly than do advocates for domestic violence victims,\textsuperscript{120} al-

custody of their children than nonabusive fathers. See Zorza II, supra note 93, at 75 (citing Liss & Stahly, supra at 175-97, 181-83) ("Indeed, abusive husbands and fathers are considerably more likely to fight for custody than are non-abusive men."). Also, abusive fathers win contested custody battles more often than do nonabusive fathers. Martha McMahon & Ellen Pence, Doing More Harm than Good? Some Cautions on Visitation Centers, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 186, 187 (Einar Peled et al. eds., 1995) (citing studies). This is true despite the fact that abusive fathers are far less likely to pay child support. Zorza, supra note 93, at 1113-27, 1117 (citing Liss & Stahly, supra, at 175-97, 181-83; Mildred D. Pageow, FAMILY VIOLENCE 311 (1984); Lenore F. Walker, THE BATTERED WOMAN SYNDROME 10-11 (1984)). See also McKeown, supra, at 459 ("These fears are well founded, since some research suggests that abusive husbands have an excellent chance of convincing judges that they should have custody and can destroy their partners economically to the point of rendering them homeless.").

\textsuperscript{118} This was the approach in H.R. 2810, 70th Leg. (Or. 1999), which this author helped draft. This bill did not get out of the House Committee on Judiciary.

\textsuperscript{119} For example, 5% of Oregon women were injured by a partner during the past year, but twice as many were physically assaulted. See 1998 OREGON DOMESTIC VIOLENCE NEEDS ASSESSMENT, supra note 43, at 4.

\textsuperscript{120} Compare 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, 848-76 (1993) (citing domestic violence statutes around the country) and Joan Zorza, How Abused Women Can Use the Law to Help Protect Their Children, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 147-69, 160 (Einar Peled et al. eds., 1995) (noting that state statutes defining domestic abuse do not include emotional abuse if it is not accompanied by threats of physical abuse), with OREGON PROTOCOL HANDBOOK, supra note 43, at 3 ("The Council defines domestic Violence as a pattern of coercive behavior used by one person to control and subordinate another in an intimate relationship. These behaviors include physical, sexual, psychological, and economic abuse.").
though states sometimes use a broader definition for data collection.\textsuperscript{[1]} How a state defines domestic violence for custody adjudications illustrates how seriously the system treats domestic violence.

Unlike child abuse and neglect, which the \textit{Principles} define by incorporation of individual state law,\textsuperscript{[2]} the \textit{Principles} adopt their own definition of domestic abuse.\textsuperscript{[3]} The \textit{Principles’} definition of domestic abuse is neither unduly restrictive nor expansive. Domestic abuse is defined as “the infliction of physical injury, or the creation of a reasonable fear thereof, by a parent or a present or former member of a child’s household against a child or another member of the household.”\textsuperscript{[4]} The \textit{Principles} continue, “[r]easonable action taken by a person for self-protection, or the protection of another person, is not domestic abuse.”\textsuperscript{[5]}

Until 1999, Oregon did not define domestic violence in the custody section of its laws.\textsuperscript{[6]} Now, however, Oregon’s rebuttable custody presumption is invoked by “abuse,” as defined in the

\textsuperscript{[1]} See, e.g., STOP VIOLENCE PLAN, \textit{supra} note 2, at 3 (defining domestic violence as “a pattern of coercive, abusive or threatening behavior used by one partner to establish or maintain power and control over the other through physical, sexual or psychological/emotional abuse” or “conduct for which a restraining order or stalking order may be issued or a violation found, when such conduct is perpetrated against an individual in an intimate relationship”). \textit{But see} 1998 \textbf{OREGON DOMESTIC VIOLENCE NEEDS ASSESSMENT, supra} note 43, at 1 (defining domestic violence for purpose of study as “physical assault, sexual coercion, or injury of women by their intimate partners”).

\textsuperscript{[2]} See \textit{PRINCIPLES, supra} note 3, § 2.13(l)(a).

\textsuperscript{[3]} See \textit{id.} § 2.13(l)(b).

\textsuperscript{[4]} See \textit{id.} § 2.03(8).

\textsuperscript{[5]} See \textit{id.} § 2.03(8).

\textsuperscript{[6]} Domestic abuse under the Family Abuse Prevention Act (FAPA) was defined for certain enumerated code provisions, and the provision that addresses custody adjudications was not one of them. See \textit{OR. REV. STAT.} § 107.705 (1997). Prior to the 1999 amendment to Oregon Revised Statutes section 107.137, Oregon case law did not clarify whether the FAPA definition applied in the custody context. There were only two reported cases where the appellate court considered domestic violence in adjudicating custody. In one case, the domestic violence clearly satisfied the statutory definition under FAPA; the mother, in fact, had obtained a restraining order against the father. \textit{In re} Marriage of Holcomb, 888 P.2d 1046, 1048 (Or. Ct. App. 1995) (the mother testified that “father threatened to ‘get her˙˙˙’ [f]ather verbally and physically abused her, that he grabbed her and dragged her across the floor, that he threw drawers, toys and other objects, and that on one occasion, he grabbed mother’s purse out from under the child while she was nursing, all of which frightened the child.”). In the other case, a mutual restraining order was in existence. \textit{In re} Marriage of Sleeper, 929 P.2d 1028, 1032-33 (Or. Ct. App. 1997), aff’d, 982 P.2d 1126 (1999). Because a mutual order existed, the court did not find it relevant. See \textit{id.}
Family Abuse Prevention Act (FAPA). 127 FAPA defines abuse as

the occurrence of one or more of the following acts between family or household members: (a) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury. (b) Intentionally, knowingly or recklessly placing another in fear of imminent bodily injury. (c) Causing another to engage in involuntary sexual relations by force or threat of force. 128

Interestingly, the FAPA definition of "abuse" applies only to the rebuttable presumption. If the presumption is rebutted and the court has to weigh the statutory factors to determine the child’s best interest, then it must consider only “the abuse of one parent by the other.” 129 "Abuse" in this context is not defined, and the explicit limitation on who must be the victim of the abuse is inconsistent with the more expansive FAPA definition. 130

When the FAPA definition of abuse is invoked under Oregon law for custody purposes, the definition of abuse proves narrower than the Principles’ definition in two ways. 131 First, under Oregon’s FAPA, domestic abuse based on threats requires that the victim be placed in fear “of imminent bodily injury.” 132 The Principles remove the imminence requirement: “The physical injury feared need not be ‘imminent,’ since in the domestic violence context injury is feared not only at the time of a violent encounter but at other times as well.” 133 The difference between

130. FAPA requires the requisite act to be between “family or household members.” Or. Rev. Stat. § 107.705(1) (1999). Oregon Revised Statutes section 107.705(3) defines “Family or household members” as any of the following: spouses; former spouses; adult persons related by blood, marriage or adoption; persons who are cohabitating or who have cohabited with each other; persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing of one of them of a petition under ORS section 107.710; and unmarried parents of a child.
131. In one way, however, the Principles’ definition is narrower. Under FAPA, domestic abuse includes “causing another to engage in involuntary sexual relations by force or threat of force.” There need be no injury or fear of injury, as required under the Principles. See Principles, supra note 3, § 2.03(8).
133. See Principles, supra note 3, § 2.13 cmt. c. However, “[w]hether there is a reasonable fear of physical injury is judged both subjectively and objectively. Fear of physical injury must be reasonably justified.” Id.
the approaches is that an Oregon court might not consider the threat “Next week I’m going to kill you” to be abuse, whereas a court operating under the Principles’ regime would.  

Second, when there is mutual violence, the Oregon statute does not differentiate between domestic violence perpetrators and domestic violence victims. That is not to say that Oregon courts would not make the distinction. Inherent in the word “abuse” is the notion that the violent acts are not in self-defense; Oregon courts have stated in dicta that self-defense is a legitimate defense to a FAPA petition. Instead of allowing judges to decide on a case-by-case basis whether acts of self-defense constitute domestic abuse for purposes of the custody determination, the Principles contain a clear rule to guide judges: “Reasonable action taken by a person for self-protection, or the protection of another person, is not domestic abuse.” The commentary repeats this point. Similarly, the Principles, unlike Oregon’s custody law, explicitly recognize the concept of the primary physical aggressor, a concept that has come into vogue recently in law enforcement circles, including those in Ore-

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134. Cf. State v. Charles, 634 P.2d 814 (Or. Ct. App. 1981) (affirming the trial court’s refusal to give the defendant’s requested jury instruction on self-defense because the requested instruction omitted the requirement that the threat of death or great bodily harm be imminent when self defense involved the use of deadly force).

135. See Obst v. Harmon, 150 P.2d 1089, 1092 (Or. Ct. App. 1997) (ruling that it was error to exclude an eight-year-old’s testimony when it may have been relevant to the respondent’s claim of self-defense).

136. PRINCIPLES, supra note 3, § 2.03(8).

137. Id. § 2.13 cmt. c (referencing sections 2.03(8) and 2.03 comment g).

138. See, e.g., Wis. STAT. ANN. § 968.075(2) (West Supp. 1994). The Wisconsin statute provides that law enforcement policies should include 1. Statements emphasizing that: . . . b. When the officer has reasonable grounds to believe that spouses, former spouses or other persons who reside together or formerly resided together are committing or have committed domestic abuse against each other, the officer does not have to arrest both persons, but should arrest the person whom the officer believes to be the primary physical aggressor. In determining who is the primary physical aggressor, an officer should consider the intent of this section to protect victims of domestic violence, the relative degree of injury or fear inflicted on the persons involved and any history of domestic abuse between these persons, if that history can reasonably be ascertained by the officer.

Id. See also VA. CODE ANN. § 19.2-81.3(B) (Michie 1998). That law provides:
A law-enforcement officer having probable cause to believe that a violation of § 18.2-57.2 or § 16.1-253.2 has occurred shall arrest and take into custody the person he has probable cause to believe, based on the totality of the cir-
The *Principles* state: "[I]n situations of mutual domestic abuse, when one parent’s aggression is substantially more extreme or dangerous than the other’s, it may be appropriate for the court to impose limits on the primary aggressor but not on the primary victim."  

One shortcoming of the *Principles*, however, is that the assessment of the primary physical aggressor becomes relevant only at the point of fashioning a remedy, and not for determining whether domestic abuse exists. Some states have taken a different, and more preferable, approach. Nevada, for example, addresses the disparity in violence in its formulation of the factors to be considered in awarding custody. Like Oregon, Nevada’s statute requires that the court, in determining a child’s best interest, consider whether the person seeking custody has engaged in domestic violence. Nevada also has a rebuttable presumption that it is not in a child’s best interest to award custody to a domestic violence perpetrator. The statute further
states:

If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;
(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;
(c) The likelihood of future injury;
(d) Whether, during the prior acts, one of the parties acted in self-defense; and
(e) Any other factors which the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. **If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.**

The Nevada approach minimizes the risk that the presumption will ever operate to the detriment of the true victim of domestic violence. Minimizing this risk is particularly important when the presumption is a “safety presumption.” Without a preliminary determination of the primary physical aggressor, the court might encounter a primary aggressor who could rebut the safety presumption and a true victim who could not, perhaps because the

presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

**NEV. REV. STAT. § 125.480(5) (1995).**

145. **NEV. REV. STAT. § 125.480(6) (1995) (emphasis added); see also Krank v. Krank, 541 N.W.2d 714, 715 (N.D. 1996) (statutory mandate required trial court to determine which parent was the primary physical aggressor).**
true victim, and not the perpetrator, was proceeding pro se. In that situation, the outcome would be exactly opposite of what the drafters intended.\footnote{146}

An Oregon court's assessment of who is the primary physical aggressor would play an important role in the vast number of cases that have some mutual violence.\footnote{147} For example, the assessment might affect the outcome in cases such as In re Marriage of Sleeper.\footnote{148} In that case, the court awarded the wife's husband, although not the biological father of her children, custody of the children after the court estopped the wife from asserting that he was not the biological father.\footnote{149} The husband was the primary caretaker of the children, and the emotional bond "weigh[ed] heavily in the husband's favor."\footnote{150} The court found him to have "displayed a more active interest in the children," and awarding him custody "would involve the least disruption in their existing parental relationships."\footnote{151} It appears that the children had lived with the husband since birth and he was initially awarded temporary custody of the children when they were two and four years old.\footnote{152} While evidence of domestic violence ex-

\footnotesize
\begin{itemize}
\item \footnote{146} Of course, a primary physical aggressor represented by an attorney might convince a court that the victim was the actual primary physical aggressor, especially if the victim is unrepresented. In this situation, the preliminary assessment of the primary physical aggressor would not help the victim. However, few batterers probably will be able to convince the court that they were not the primary physical aggressor. Disparities between the parties' power and physical size, as well as empirical evidence about who tends to sustain injuries from battering, suggest the difficulty of this position. See L. Kevin Hamberger & Theresa Potente, Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice, in DOMESTIC PARTNER ABUSE 53, 56-59 (L. Kevin Hamberger & Claire Renzetti eds., 1996) (citing studies discussing different patterns of violence perpetration in men and women, including frequency of assault, likelihood of injury including death, likelihood of using violence first, and likelihood that self-defense was the primary motivation to violence); see also Lisa D. Brush, Violent Acts and Injurious Outcomes in Married Couples: Methodological Issues in the National Survey of Families and Households, GENDER & SOC'Y, Mar. 1990, at 56, 62-63 (noting that in situations of mutual violence, "the probability of female respondents being hurt was significantly higher than that of male respondents").
\item \footnote{147} According to the National Survey of Families and Households, "among couples in which any violence occurred, the most common response . . . was that both partners acted violently." See Brush, supra note 146, at 61.
\item \footnote{149} Id. at 1029.
\item \footnote{150} Id. at 1032.
\item \footnote{151} Id.
\item \footnote{152} See id. at 1029.
\end{itemize}
isted, the Court of Appeals found that it did not weigh in either party's favor, since a mutual restraining order had been issued. The appellate court quoted with approval the trial court's statement that, "I have not been given any evidence . . . that it would be in these children's best interest to change the status quo." It appears from the appellate court's opinion that no court had ever analyzed which person was the primary physical aggressor.

When an Oregon court cannot use the FAPA definition of abuse, but must instead apply the statutory factor "the abuse of one parent by another," the Principles again prove superior. The Principles provide a wider definition of domestic abuse, defining domestic abuse to include violence "by a parent or present or former member of a child's household against a child or another member of the household." Most states employ a similar definition for use in custody decisions. Oregon, in contrast, is explicit that the "abuse of one parent by the other" is the only conduct that constitutes relevant family abuse for custody purposes once the rebuttable presumption is rendered inapplicable. The phrase "abuse of one parent by the other" excludes a parent's abuse of other adults in the household who are not the child's parent. For example, the Oregon statute does not require a court to consider a father's abuse of his domestic partner, not the child's mother, even if the child is present when the abuse occurs. The Oregon statute also excludes the abuse of children from its concept of relevant abuse, although an Oregon court

153. See id. at 1032-33.
154. Id. at 1033.
155. See PRINCIPLES, supra note 3, § 2.03(8).
156. See id. § 2.03, cmt. g (stating that the majority of states in this situation "define it to encompass abuse against any family member").
158. Id.
159. This violence, however, may be an Assault IV felony. OR. REV. STAT. § 163.160(3)(b) (1999). A parent's commission of a crime is a factor that Oregon courts could consider in adjudicating custody. See, e.g., In re Marriage of Ortiz, 801 P.2d 767, 770 (Or. 1990) (considering drug convictions of parent in a proceeding to modify child custody). The consideration of an arrest or a conviction for Assault IV is not mandatory, however.
160. Even under the FAPA, the abuse of a child will qualify as "abuse" only if the minor was married or formerly married to the abuser, or was sexually intimate with the respondent and the respondent was 18 years old or older. See OR. REV. STAT. § 107.726(1) (1999). Instead, an abused child would obtain protection under the dependency provisions of the Juvenile Code. See OR. REV. STAT. § 419B.005-.050 (1999).
undoubtedly would consider the parent's abuse of another child in the household in adjudicating custody.

Similarly, and finally, under the Principles, a single act can qualify as "domestic abuse," whereas Oregon law requires "a pattern of behavior of abuse" to negate consideration of the friendly-parent provision. In short, a woman who attends to her own or her child's safety after a severe, but single, act of abuse can face adverse consequences during a custody adjudication. Oregon's law fails to recognize that a single act of violence can be enough to put a woman in legitimate fear of her safety or her child's safety, triggering "unfriendly" behavior. Often the actual violent act has been preceded by acts of control short of violence, so that the recent trend experienced by the "unfriendly" parent has been one of escalating danger. In addition, some women experience single acts of violence that are sufficiently severe to cause these women to fear for their lives. Because separation is the most dangerous time for victims, an absence of prior abuse may not be predictive of what a woman legitimately fears during separation. Oregon would be wise to adopt a uniform definition of domestic abuse for all uses of that term, and the definition within the Principles, with a slight modification, seems to be an attractive option.

C. Mediation

One of the principal ways Oregon addresses the importance

164. See discussion supra note 103.
165. There is one way in which the FAPA definition of abuse is superior to the Principles' definition of abuse. Oregon's FAPA defines abuse as "causing another to engage in involuntary sexual relations by force or threat of force." OR. REV. STAT. § 107.705(1) (1999). The Principles appear to require "the infliction of physical injury" that might not accompany a rape. See Proposed Act, supra note 3, § 2.03(8). See also Laura Slaughter & Carl R.Y. Brown, Colposcopy to Establish Physical Findings in Rape Victims, 166 AM. J. OBSTET. GYNECOL. 83 (1992) (13% of patients seen within 48 hours and who experienced penile penetration did not have positive findings through colposcopic magnification, including lacerations, ecchymosis, and swelling). Any new definition of abuse in Oregon's custody section should adjust the Principles' definition to incorporate this aspect of Oregon's definition.
of domestic violence to child custody adjudications is through its statutory provisions that discuss the mediation of custody disputes generally. Section 107.755 of the Oregon Revised Statutes requires that all judicial districts provide mediation “in any case in which child custody, parenting time and visitation are in dispute.” Courts must require parties in all cases involving disputes over child custody or parenting time to attend a mediation orientation session, except “upon a finding of good cause.” The legislature recognized that mediation may be inappropriate when domestic violence has been or is present in a relationship. The statute directs judicial districts to

[D]evelop[] a plan that addresses domestic violence issues and other power imbalance issues in the context of mediation orientation sessions and mediation of any issue in accordance with the following guidelines:

(A) All mediation programs and mediators must recognize that mediation is not an appropriate process for all cases and that agreement is not necessarily the appropriate outcome of all mediation;

(C) All mediation programs and mediators must develop and implement

(i) A screening and ongoing evaluation process of domestic violence issues for all mediation cases;
(ii) A provision for opting out of mediation that allows a party to decline mediation after the party has been informed of the advantages and disadvantages of mediation or at any time during the mediation; and
(iii) A set of safety procedures intended to minimize the likelihood of intimidation or violence in the orientation session, during mediation or on the way in or out of the building in which the orientation or mediation occurs;

(D) When a mediator explains the process to the parties,

the mediator shall include in the explanation the disadvantages of mediation and the alternatives to mediation;
(E) All mediators shall obtain continuing education regarding domestic violence and related issues; and
(F) Mediation programs shall collect appropriate data. Mediation programs shall be sensitive to domestic violence issues when determining what data to collect.\textsuperscript{169}

Each judicial district must consult with a statewide or local domestic violence coordinating council (or a nonprofit organization that has a grant from the state to address family violence prevention) in developing the district's plan.\textsuperscript{170} Projects around the state are attempting to ensure that custody mediators recognize and appropriately address domestic violence.\textsuperscript{171}

The \textit{Principles} also expressly address the mediation of custody disputes for couples when there is, or has been, domestic violence. They provide:

A mediator should not conduct a mediation, even by parental agreement, without first screening for domestic abuse. If credible evidence thereof exists, the mediator should take steps

(a) to ensure the voluntary consent of the victim of the abuse to participate in the mediation, and to any agreement reached as a result of the mediation; and
(b) to protect the safety of the victim.\textsuperscript{172}

Mediators' duties arise "not only when there has been a judicial finding of domestic abuse, but when the mediator becomes aware of any credible evidence of the abuse."\textsuperscript{173} In fact, the Commentary states: "Even when there is only a charge of do-

\textsuperscript{171} See, e.g., STOP VIOLENCE PLAN, supra note 2, at 13.
\textsuperscript{172} The Oregon Dispute Resolution Commission has arranged for Oregon to be the pilot state for a model curriculum on domestic violence and custody mediation to implement the Model Code on Domestic and Family Violence. The two-hour curricula for judges and the 16-hour mediator curriculum was presented in October, 1997, in conjunction with the annual circuit and district court judges' fall conference. This curriculum was developed under a grant from the State Justice Institute to the American Bar Association Center on Children and Law and the Academy of Family Mediators.
\textsuperscript{173} Id. § 2.08, cmt. b.
mestic abuse, without tangible evidence thereof, the mediator should take precautions to ensure that the voluntariness of the process or its results have not been comprised.174 Neither the Principles nor Oregon law allows the mediator to make a custody recommendation to the court, at least without the parties' written consent.175

Both the Principles and Oregon law afford the court discretion to order mediation. Under the Principles, a court "may" inform parents about "mediation or other non-judicial procedures designed to help them achieve an agreement,"176 and may order the parties into mediation.177 Oregon law requires parties to attend a mediation orientation session, unless excused for "good cause,"178 and the Oregon Legislature in 1999 clarified that courts need not always order people into mediation.179

Although Oregon law seems sensitive to the potential inappropriateness of mediation, the Principles have several advantages over Oregon law. First, when mediation is ordered, the Principles prohibit the court from ordering services "that require a parent to have face-to-face meetings with the other parent."180 Oregon, in contrast, does not require that parents be separated during the orientation or the screening session. This distinction, although seemingly minor, can have an impact on a domestic violence victim's ability to opt out of the process. For example, a face-to-face meeting gives a batterer the opportunity to intimidate a domestic violence victim so that she feels unable to opt out of mediation.181 Intimidation can occur quite subtly—for ex-

174. Id. § 2.08, cmt. b.
175. Id. § 2.08(4); OR. REV. STAT. § 107.765(2) (1999). In Oregon, the mediator may do so with the written consent of the parties or their counsel. See OR. REV. STAT. § 107.765(2) (1999).
176. PRINCIPLES, supra note 3, § 2.08(1)(d).
177. See id. § 2.08(l)(d). "Section 2.08 authorizes but does not require the court to mandate any particular set of services." Id. § 2.08, cmt. a.
179. S.B. 564, 70th Leg., 1999 Or. Laws ch. 59 (amending OR. REV. STAT. § 107.765(l)).
180. PRINCIPLES, supra note 3, § 2.08(2). The parents can voluntarily choose to meet in person, however. See id. § 2.08 cmt a.
181. See id. § 2.08 cmt. b ("Notwithstanding its potential benefits, mediation poses some risks of coercion and intimidation insofar as it enhances the opportunities for the
ample, with a certain look that a mediator may not see or interpret as threatening.\textsuperscript{182}

Second, the \textit{Principles} better assure that any mediated agreement is the result of voluntary consent by both parties. The \textit{Principles} allow mediators to testify about any threats of violence that occur during mediation. The \textit{Principles} state, "A mediator . . . may not reveal information that either parent has disclosed during mediation under a reasonable expectation of confidentiality except, upon questioning by the court, if relevant to fact-finding under section 2.07."\textsuperscript{183} Section 2.07, among other things, allows the court to conduct an evidentiary hearing to determine whether the parties entered into their agreement knowingly and voluntarily.\textsuperscript{184} Such a hearing becomes mandatory when there is credible information that domestic abuse has occurred.\textsuperscript{185} In contrast, Oregon law states the following:

All communications, verbal or written, made in mediation proceedings shall be confidential. A party or any other individual engaged in mediation proceedings shall not be examined in any civil or criminal action as to such communications and such communications shall not be used in any civil or criminal action without the consent of the parties to the mediation. Exceptions to testimonial privilege otherwise applicable under ORS 40.225 to 40.295 do not apply to communications made confidential under this subsection.\textsuperscript{186}

The difference is explainable, in part, by the \textit{Principles'} heightened commitment to ensuring that the parties knowingly and voluntarily assent to all agreements.\textsuperscript{187}

The \textit{Principles} also better assure that any mediated agreement is the result of voluntary consent through its presumption stronger parent to exploit vulnerabilities of the weaker one. The risks are especially high when domestic abuse has occurred or is occurring.")

\textsuperscript{182} Karla Fischer et al., \textit{The Culture of Battering and the Role of Mediation in Domestic Violence Cases}, 46 SMU L. REV. 2117 (1993) ("The relationship between a battered woman and her abuser frequently involves communication through subtle phrases and modes of interaction that have meanings and symbols idiosyncratically shared by the two parties."); see also \textit{id.} at 2118 (giving the example of how a nose scratch was a signal to the victim that the batterer might abuse her if she did not follow his lead).

\textsuperscript{183} PRINCIPLES, supra note 3, \textsection 2.08(4).
\textsuperscript{184} See \textit{id.} \textsection 2.07(2).
\textsuperscript{185} See \textit{id.} \textsection 2.07(2).
\textsuperscript{186} OR. REV. STAT. \textsection 107.785(2) (1999).
\textsuperscript{187} See infra text accompanying notes 216-243.
against mediation where domestic violence exists or has existed between the parties. The commentary to the Principles states: "When one parent is a victim of domestic abuse, mediation should be approached very cautiously, if at all." Oregon law has no similar directive that courts exercise their discretion to order mediation "very cautiously."

A specific orientation against mediation makes sense when the parties have a history of domestic violence. As the Oregon Domestic Violence Council stated,

Mediation is a process that presumes that participants can maintain a balance of power with the help of a mediator. It can be misused if the imbalance is great, and/or the imbalance is unrecognized. As this imbalance of power is characteristic of relationships in which there is domestic violence, mediation can be a dangerous process for those subjected to domestic violence.

In fact, research has documented that women who are afraid of their husbands tend to obtain worse results from negotiations than other women, probably as a result of subtle intimidation. A statewide Oregon group suggested that mandatory mediation for cases with child custody or parenting time disputes "may create obstacles for a victim of domestic violence in leaving an abusive relationship." While Oregon's recent elimination of mandatory mediation helps minimize the objections to mediation for domestic violence victims, a presumption against mediation when domestic abuse exists or has existed even further assures that domestic violence victims are not disadvantaged by the

188. PRINCIPLES, supra note 3, §§ 2.08(3), 208, cmt. b.
190. DEMI KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 138 tbl. 5-4 (1995) (noting that women who are afraid of their husbands receive less in negotiations over child support than do women who are not afraid); see also id. at 137 ("These women's fears are strongly related to their experience of violence during the marriage ... [or] during separation."); id. at 158 (38% of the women in the study reported fear during negotiations for custody and a statistically significant relationship existed between "these women's fears and their experience of violence in the marriage and during the separation"); Demi Kurz, Separation, Divorce, and Woman Abuse, in 2 VIOLENCE AGAINST WOMEN 63, 71-72 (1996) (30% of the women in the study were fearful during child support negotiations, these fears were "strongly related to their experience of violence during marriage," and "their fears caused some of these women to reduce their requests for child support").
191. STOP VIOLENCE PLAN, supra note 2, at 21.
process.

The Principles' orientation against mediation in these cases, while preferable to Oregon's absence of a presumption, is not as strong as that recommended by the Oregon Domestic Violence Council: "Where domestic violence is present, the case should be presumed inappropriate for mediation, unless compelling reasons justify the use of mediation."192 The Principles' presumption against mediation can be overcome by less than "compelling reasons." The mediator must take steps only to ensure that the victim's participation and the agreement are voluntary, and that her safety is protected.193 It is difficult to assess in the abstract the practical difference between the Oregon Domestic Violence Council's formulation and the Principles' formulation. The difference, in fact, may be nonexistent because both of these formulations appear to force the decisionmaker to take an extremely cautious approach to mediation where evidence of domestic violence exists. Such statutorily-mandated prudence seems appropriate given commentators' general skepticism of the mediation option in this context,194 and concern that "mediation in cases in which there is or has been domestic violence... can be dangerous to the participants and the mediator."195

Finally, the Principles better assure the voluntariness of a mediated agreement by permitting support persons to attend the mediation session. While the Principles are silent on whether advocates are welcome into the mediation session, support persons appear welcome because the Principles require mediators to take steps "to ensure the voluntary consent of the victim of the abuse to participate in the mediation, and to any agreement

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193. See PRINCIPLES, supra note 3, § 2.08 (3).

194. See, e.g., Fischer et al., supra note 182, at 2173 ("mediation should not be used in cases where a culture of battering exists"); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991) (discussing dangers to battered women from using the mediation process as a means of resolving custody disputes); Barbara J. Hart, Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation, 7 MEDIATION Q. 317 (1990) (rejecting mandatory mediation of custody disputes because of the great potential for harm to mothers and children).

reached as a result of the mediation." 196  The Reporter's Notes cite Isolina Ricci's work as "offering suggestions as to how mediators may help parties cope with power imbalances." 197  Ms. Ricci's book cautions, "If the wife cannot empower herself sufficiently for negotiating in her own self-interest, however, the mediator may need to insist on an outside coach, counselor or even a proxy." 198  Oregon law, in contrast, explicitly excludes domestic violence advocates and other support persons, other than attorneys or children, from attending the mediation session. 199  Many commentators favor the Principles' approach because support people can help to empower the victims. 200

Oregon law is superior to the Principles in one important way, however.  The Oregon statute requires that "all mediators" receive "continuing education regarding domestic violence and related issues." 201  The Principles, unfortunately, do not address this point, even though some states do not even "establish minimum credentials for mediators." 202  This oversight is problematic because the Principles' effectiveness requires mediators who are sensitive to the issues that can arise when parties have a history of domestic violence.

The foregoing discussion has suggested that Oregon's statutory provisions addressing domestic violence and custody do not afford domestic violence victims as much protection as do the Principles.  Oregon would benefit by strengthening its existing provisions.  It could adopt a rebuttable presumption that a do-

196. See PRINCIPLES, supra note 3, § 2.08(3)(a).
197. Id. § 2.08, Reporter's Notes to cmt. b (citing Isolina Ricci, Mediator's Notebook: Reflections on Promoting Equal Empowerment & Entitlements for Women, in DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD 56 (Craig A. Everett ed., 1985)).
198. Ricci, supra note 197, at 59.
200. See Newmark et al., supra note 6, at 59 (studying women's empowerment in court-ordered mediation when there are allegations of domestic violence and recommending that "parents should have the option of bringing a support person and/or legal counsel to assist them in any process that is intended to include negotiations over custody or visitation"); Anne E. Menard & Anthony J. Salius, Judicial Response to Family Violence: The Importance of Message, 7 MEDIATION Q. 293, 301 (1990) (advocating for the appointment of advocates to assist battered women through mediation process).
201. OR. REV. STAT. § 107.755(1)(d)(E) (1999); see also OR. ADMIN. R. 718-030-0060(1) ("The hiring authority shall ensure that a court-connected domestic relations mediator has completed seminar or graduate level course work which substantially covers . . . Domestic violence and child abuse.").
202. Fischer et al., supra note 182, at 2143.
mestic violence perpetrator should not have physical custody, visitation, or legal custody of the couple's children unless the perpetrator can assure the court that the other parent's safety and the child's safety can be guaranteed. The law also should define abuse to cover threats, even if those threats do not cause fear of "imminent" bodily injury. The law should explicitly excuse acts of self-defense and acts by the nonprimary physical aggressor from the definition of abuse. Abuse against any household member, not solely the child's parent, should qualify as domestic abuse. Single acts of domestic abuse should be sufficient to negate the court's application of the "friendly parent" factor. In addition, Oregon law should prohibit judges from sending parties to a mediation orientation session where face-to-face contact might occur. Mediators and judges should be required to presume that cases in which there is or has been domestic violence are inappropriate for mediation. The law should permit mediators to testify about threats and violence occurring during mediation. Domestic violence advocates or other support people should be allowed to attend mediation sessions. These reforms would place more emphasis on domestic violence during the resolution of custody and visitation disputes in Oregon.

IV. A Matter of Breadth

The other significant difference between the Oregon statute and the Principles relates to the number of individual provisions that address domestic violence. The Principles have the advantage of being a well-integrated scheme, rather than a series of legislative initiatives adopted over time. As such, they address domestic violence in nearly every provision. An analysis of each provision that addresses domestic violence reveals that the drafters of the Principles appear to have had three goals: (1) identifying all cases that involve domestic abuse; (2) enhancing substantive justice in each case; and (3) strengthening domestic violence victims' safety during and after the legal proceedings. This part addresses each of these goals and highlights some particular provisions of the Proposed Act that Oregon should adopt.

A. Identifying All Cases That Involve Domestic Abuse

Any legal system that believes domestic violence is relevant to custody determinations must confront the question of how
that information will come to a court's attention. Two basic options exist: the court can require that parties disclose relevant information to it, or the court can rely on the adversarial process to bring the relevant information to its attention. Generally, Oregon courts obtain information relevant to the adjudication of child custody and visitation disputes through a mixed system. For example, a party to a custody proceeding must state in the first pleading or an accompanying affidavit "the child's present address or whereabouts, [and] the places where the child has lived during the last five years." The party also must detail whether the party participated in any other custody or parenting-time proceeding concerning the child in any state. By requiring the parties to provide this information to the court, the legal system does not rely solely on the adversarial process to ensure that the court obtains information relevant to whether it has jurisdiction to adjudicate the case under the Uniform Child Custody Jurisdiction and Enforcement Act. Yet, the vast amount of information relevant to a child custody proceeding comes to the court's attention solely as a result of the adversarial process. Most relevant for purposes of this Article is the fact that Oregon law does not require the parties to file affidavits with the court addressing whether one party has abused the other. If a party fails to bring this information to the court's attention, the court will not consider the abuse during the proceedings.

The Principles, in contrast, require that information about domestic violence be shared with the court regardless of whether either party makes domestic violence an issue. Parties must file with the court, either jointly or singly, a parenting plan. The parenting plan must be accompanied by an affidavit that contains a description of "limiting factors," including "whether a parent who would otherwise be allocated responsibility under a parenting plan . . . has inflicted domestic abuse, or allowed an-

204. See OR. REV. STAT. § 109.767(1)(a) (1999). Similarly, a party moving for dissolution must file a written statement setting forth certain information, including the social security numbers of the parties, the names and ages of the children born to or adopted by the parties, and the ages of both parties. See OR. REV. STAT. § 107.085(3) (1999).
206. See PRINCIPLES, supra note 3, § 2.06(l).
other to inflict domestic abuse, as defined in 2.03(8).” Parties also must disclose “any restraining orders against either parent to prevent domestic abuse, by case number and jurisdiction.”

The Principles' explicit requirement that the parties address the topic of domestic violence in affidavits filed with the court would have a tremendous impact in Oregon. The requirement particularly advantages pro se litigants who are currently the majority of litigants in those cases. When a victim is represented, her attorney should call the court’s attention to any domestic violence. However, in pro se proceedings, the information may never come to the court’s attention because the victim may not understand its relevance. Pro se cases represent the vast majority of the courts' family law docket in Oregon:

[In family law cases], the number of pro se filings (where one or both parties have no attorney) is accelerating. In as many as 80 percent of family law cases in Oregon, at least one side is unrepresented. Between 1994 and 1996, the number of cases in which neither side was represented rose from 38 to 40 percent of filings in Oregon.

Undoubtedly, some victims will be reluctant to disclose the violence through the affidavit screening process.

A parent may be reluctant to provide information about abuse in an affidavit submitted in support of a parenting plan, for example, if that parent fears retaliation by the abuser, or if the parent believes he or she will be disbelieved, or have his or her credibility reduced in later proceedings with the court. A parent may be especially reluctant to disclose information about abuse if the legal significance of that information is not understood, or if resources are not available to help secure the child’s or the parent’s safety.

The Principles attempt to combat the victim's potential reluctance to disclose abuse by recommending that states implement

207. Id. § 2.13(1)(b).
208. Id. § 2.06(l)(f).
209. Of course, there is always the chance that the attorney is also unaware of the relevance of domestic violence to the custody determination. This ignorance would certainly constitute legal malpractice.
210. OREGON TASK FORCE ON FAMILY LAW, supra note 9, at 5.
211. PRINCIPLES, supra note 3, § 2.06 cmt. c; cf. Newmark et al., supra note 6, at 57 (finding that women who were abused were “more likely” than nonabused women “to report that the abuser can out-talk them, has gotten back at them in the past” and makes them “afraid to openly disagree because of possible future harm”).
a process that "early and routinely gives information about abuse, its significance in the legal process, and resources for addressing it." 212

In addition, the Principles require that the judicial system itself ferret out domestic violence information that relates to its litigants, 213 a provision that has no counterpart in Oregon law. The Principles suggest that a court, at a minimum, "inquire of the parents themselves or of their attorneys [to see] if they have knowledge of circumstances supporting a finding" that domestic abuse has existed in the relationship. 214 More ambitiously, the Principles recommend that court personnel "review" police and court records to check for prior complaints of abuse, convictions for crimes of domestic violence, or civil protection orders entered for domestic abuse. 215

A procedure for discovering past or present domestic violence is the hallmark of a legal system that really cares about domestic violence victims. Oregon courts would obtain an enormous amount of information relevant to the custody disputes before them by requiring parties in Oregon to disclose the existence of domestic violence in preliminary court filings and by requiring court-initiated fact-gathering about domestic violence. When so many litigants are pro se, and when victims' safety concerns may inhibit victims from bringing important information to the court's attention (especially if not required), such a change in Oregon's law is warranted.

B. Enhancing Substantive Justice for Domestic Violence Victims

The Principles explicitly address four areas where substantive justice can be particularly problematic for domestic violence victims. First, and perhaps counter-intuitively, domestic violence victims can be disadvantaged unfairly by parenting arrangements to which they have agreed. The problem arises when such agreements are not entered into voluntarily or when the

212. PRINCIPLES, supra note 3, § 2.06 cmt. c.
213. The Principles state, "The court should develop a process to identify cases in which there is credible information that child abuse, as defined by state law, or domestic abuse, as defined in 2.03(8), has occurred." Id. § 2.06(2).
214. See id. § 2.07 cmt. b.
215. See id. § 2.06 cmt. c. This search could include both criminal case files and child abuse and neglect files. See id. § 2.07 cmt. b.
agreements inadequately protect the victim's safety. Second, domestic violence victims can encounter substantive unfairness when courts punish them for violating court orders that threaten their safety. Third, the standard for the modification of orders can produce substantive injustice if the standard does not consider the onset or escalation of violence to be a sufficient trigger for modification. Fourth, the standard for relocation can harm domestic violence victims if the standard does not permit relocation to escape from danger.

1. Parenting Agreements

Parenting plans, as described above, are "a core concept" of the Principles. Under the Principles, parenting plans address custody and visitation, as well as future dispute resolution mechanisms. If the parents reach an agreement on these issues, then the court must adopt the plan, unless the court finds that the parents have not agreed to the plan knowingly or voluntarily, or unless the plan is manifestly harmful to the child. The court uses this uniform standard to review all provisions of a parenting plan, regardless of whether the parenting plan addresses sole physical or legal custody, joint physical or legal custody, or visitation.

Oregon law also favors parents working together to resolve their visitation and custody issues. However, in Oregon, in contrast to the Principles' uniform approach, three different legal standards guide courts in reviewing three different types of parenting agreements. First, Oregon courts can reject even a mutually agreed-on parenting plan that addresses parenting time (i.e., visitation), if the plan is contrary to the child's best interests

216. See supra text accompanying notes 64-65.

217. See PRINCIPLES, supra note 3, § 2.06 cmt. a. The Principles require parenting plans when a party seeks either physical or legal custody. See PRINCIPLES, supra note 3, § 2.06(1).

218. See PRINCIPLES, supra note 3, §§ 2.06 cmt a, 2.07.

219. See OR. REV. STAT. § 107.105(1)(a), (b) (1999). Oregon law requires that parties seeking to establish or modify a judgment that provides for parenting time file with the court "a parenting plan to be included in the judgment." OR. REV. STAT. § 107.102 (1999). The plan may be general or detailed, and the statute lists certain factors a detailed plan may address. OR. REV. STAT. § 107.102(1)-(3). Under Oregon law, the court "shall review" the plan but does not have to approve it. OR. REV. STAT. § 107.105(b) (1999).
and/or a party's safety. Second, Oregon law requires that a court adopt a joint custody plan if the parties agree to it. Third, the court evaluates other custody agreements by applying a best interest standard.

Oregon law appears to require that courts review parental agreements more for substantive content, and less for actual consent, than the Principles. For example, the Principles' substantive standard for reviewing custodial agreements is "manifest harm" to the child. This is a higher standard than Oregon's "best interest" standard, which Oregon courts use to evaluate custodial agreements other than joint custody. Yet for any of the three types of agreements described above, Oregon statutory law does not require courts to ensure that the parties enter into the agreements voluntarily and knowingly. While an Oregon court may consider whether an agreement (including joint custody) was voluntary when deciding whether to accept it, no reported case exists where a court refused to enter an


221. See OR. REV. STAT. § 107.169(4) (1999). In Oregon, the statutory provision refers to joint legal custody. "Joint custody" is defined as "an arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training." OR. REV. STAT. § 107.169(1) (1999).


223. See Katherine T. Bartlett, Reporter's Memorandum to PRINCIPLES, supra note 3, at XXV.

224. Both Oregon law and the Principles consider the safety of the party. Oregon explicitly allows a parenting plan to be rejected if it would jeopardize a party's safety. OR. REV. STAT. § 107.105(1)(b) (1999). Because the award of custody and parenting time often are intertwined, the court, in fact, may have to review the entire plan to ensure that it does not compromise the parties' safety. See supra text accompanying note 220. The Principles require a court to impose "appropriate protective measures" if abuse has occurred. See PRINCIPLES, supra note 3, § 2.07(2).

225. Few states currently address the voluntariness of an agreement in their statutes. See PRINCIPLES, supra note 3, § 2.07, Reporter's Notes to cmt. c (citing statutes from Alaska, Vermont, and Washington).

226. See Jarvis et al., supra note 89, at 4-21 (citing In re Marriage of Whitlow, 550 P.2d 1404 (Or. Ct. App. 1976)); see also id. at 4-24 ("A court's concern about overreaching on the part of one party may be resolved through a hearing to determine whether the parties actually entered into a voluntary agreement. If the court finds no voluntary agreement, it could refuse to award joint custody."). The case law that suggests a court "should consider the circumstances under which a separation agreement was made" in deciding how much weight to give to it when one party reneges on the agreement prior to its entry by the trial court. For example, in In re Marriage of Whitlow, the Oregon Court of Appeals affirmed the trial court who refused to honor a sepa-
agreement when both parties asked the court to adopt it. Similarly, anecdotal evidence suggests that Oregon courts rarely inquire into the voluntariness of an agreement. In fact, Oregon case law suggests that parental agreements are entitled to the courts' deference, provided an agreement is "the deliberate compact of the mother and father to which they came after many discussions." An agreement entered between a perpetrator and a victim may fail to qualify as a "deliberate compact," but courts simply do not raise the issue when the parties appear to be in accord.

Oregon should follow the Principles and include in its statute the requirement that any custody and visitation agreement be entered voluntarily and knowingly. The requirement seems especially important because Oregon courts appear not to review agreements for substance, despite the statutory standards.

ration agreement that gave custody to the husband when the wife reneged. 550 P.2d 1404 (Or. Ct. App. 1976). The Court of Appeal stated: "the agreement was signed within a few days of the parties' decision to separate and at a time of emotional turmoil" and "the wife did not have assistance of counsel and testified that the husband threatened to take the daughter away from her if she did not sign the agreement." Id. at 1406.

227. There are no reported Oregon cases in which the trial court considered, sua sponte, the voluntariness of the agreement and decided against entering it. See In re Marriage of McDonnell, 652 P.2d 1247, 1250 (Or. 1982) (discussing the rationale for allowing courts "to accept [separation] agreements at face value").

228. Telephone conversation with Mitzi Naucler, Oregon family law practitioner for eighteen years (Feb. 19, 1999).

229. Rorer v. Rorer, 500 P.2d 734, 736 (Or. Ct. App. 1972) (stating that such agreements are "entitled to very careful consideration," citing Flanagan v. Flanagan, 247 P.2d 212, 215 (Or. 1952)).

230. Whether Oregon courts actually review parental agreements pursuant to the substantive standards is an empirical question beyond the scope of this Article. However, national studies indicate that courts routinely enter parties' agreements, including custody agreements. See Marygold S. Melli et al., The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce, 40 Rutgers L. Rev. 1133, 1160 (1988) (citing Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979) (citing studies)); see also Sally Burnett Sharp, Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard, 68 Va. L. Rev. 1263, 1279 (noting the "well-documented fact that courts usually 'rubber-stamp' such agreements at the time of divorce"); id. at 1279 n.69 (citing authors commenting on the same). Commentators report the same occurring in Oregon. See Joshua D. Kadish, Formal Agreements, in OREGON STATE BAR, CONTINUING LEGAL EDUCATION, 1 FAMILY LAW 9-11 (1990) ("Oregon courts are not bound to approve marital settlement agreements. . . . In practice, however, it is rare for a court not to approve them."). These sources suggest that the courts review the agreements minimally, if at all.
Adding such a requirement would not be without precedent in Oregon law. Oregon already makes voluntariness an explicit statutory requirement, for instance, in the premarital contract area.\textsuperscript{231} Adding a similar provision to Oregon's custody law should encourage courts to inquire about voluntariness prior to approving parental agreements.\textsuperscript{232} This upfront inquiry seems warranted especially in the joint custody context because Oregon is one of the few states that requires the entry of a joint custody award when the parties agree to it.\textsuperscript{233} In fact, "many states have a rebuttable presumption or mandate against an award of joint custody upon a finding of domestic violence."\textsuperscript{234}

To best ensure that agreements are entered voluntarily, Oregon should also follow the Principles' lead by requiring that the court hold an evidentiary hearing to evaluate whether the consent was knowing and voluntary "when there is credible information that . . . domestic abuse . . . has occurred."\textsuperscript{235} The Principles' illustration is informative:

Abel and Sedona have filed for divorce, both pro se, and have jointly filed with the court a parenting plan setting forth their proposed arrangements for their three-year-old twin daughters. The parenting plan provides for each daughter to spend half of her custodial time with each parent. A routine cross-check with other court records reveals that Sedona has

\textsuperscript{231} See, e.g., OR. REV. STAT § 108.725 (1999). The timing of the inquiry into voluntariness obviously differs in the prenuptial agreement and custody agreement contexts. The custody agreement is evaluated for voluntariness almost immediately, that is, when parents ask a court to incorporate the agreement into a decree. The prenuptial agreement is evaluated for voluntariness long after its entry, that is, when a party asks a court to enforce it when the marriage dissolves.

\textsuperscript{232} There is the chance, of course, that the new provision would have little effect, especially because a similar standard embodied in case law currently seems to provide little or no impetus for court inquiries. However, a properly worded statutory mandate that the court must hold an evidentiary hearing should minimize a court's ability to ignore the standard. See infra text accompanying notes 235-243.

\textsuperscript{233} "While every state allows some form of joint custody, most states simply authorize it as a possible alternative rather than favor it." See PRINCIPLES, supra note 3, § 2.09, Reporter's Notes to cmt. a; OR. REV. STAT. § 107.169 (1999).

\textsuperscript{234} Id. § 2.13, Reporter's Notes to cmt. c. It is an open issue how Oregon's rebuttable presumption, discussed supra at text accompanying notes 49-50, interacts with the statutory mandate that courts enter joint custody awards when the parties agree to them. A court might reconcile the provisions by holding that the presumption is rebutted when the parents jointly request a particular custody disposition—e.g., joint custody.

\textsuperscript{235} Id. § 2.07(2).
filed two complaints against Abel for domestic abuse, both of which she dropped before trial. The court must order an evidentiary hearing to further examine the parents’ circumstances based on its suspicions about whether Sedona’s assent to the parenting plan is voluntary.236

Further, Oregon should adopt a mechanism by which courts gather facts related to domestic violence for any hearing on voluntariness. Simply, a court may need additional information at the hearing to resolve the issue of voluntariness. Section 2.15 of the Principles states,

When substantial allegations of domestic abuse have been made, the court should order an investigation under Paragraph (1) or make an appointment under Paragraph (2) or (3), unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such an order or appointment.237

Paragraph (1) authorizes the court to “order a written investigation or evaluation from an appropriate individual or agency,”238 paragraph (2) allows the court to appoint a guardian ad litem for the child,239 and paragraph (3) authorizes the appointment of an attorney for the child.240

Oregon has no similar statutory provision recognizing that fact gathering is needed when allegations of domestic abuse exist, or encouraging the court to initiate the fact-gathering process. While an Oregon court has the authority in a custody case to order “an investigation . . . as to the character, family relations, [and] past conduct . . . of the parties for the purpose of protecting the children’s future interest”241 or to “appoint coun-

236. Id. § 2.07 cmt. c., illus. 3.
237. Id. § 2.15(4).
238. Id. § 2.15(1).
239. Id. § 2.15(2) (“In its discretion, the court may appoint a guardian ad litem to represent the child’s best interests. The court should specify the terms of the appointment, including the guardian’s role, duties, and scope of authority.”).
240. Id. § 2.15(3).
sel for the children,\footnote{242} these efforts are not required. A court need not invoke these mechanisms even when the court knows that it will not receive sufficient facts about the domestic violence. In addition, the court's ability to order an investigation into a parent's character appears limited to cases in which the information may affect protection of the children's future interest, and not for purposes of protecting a party's safety or determining the voluntariness of an agreement.\footnote{243}

Courts should take a proactive approach and assess whether the parental agreements submitted for their approval have been entered knowingly and voluntarily. A pro se litigant, coerced into the agreement and fearful of her batterer, probably would not renege on an agreement prior to court approval even if she knows that an agreement must be entered voluntarily. While a woman might seek later to invalidate an agreement based on her involuntary assent, by that time the batterer may have further abused his victim and reaped the benefits of a custody and visitation arrangement that was coerced rather than consensual.

2. Violations of Court Orders

Both Oregon law and the Principles provide mechanisms to enforce court orders. The Principles' enforcement mechanism is an exclusive remedy and displaces even civil contempt: the section is "intended to cover the entire range of civil remedies for willful violation of a parenting plan."\footnote{244} In contrast, Oregon law provides parties with a variety of civil remedies for enforcing custody or visitation orders,\footnote{245} including contempt\footnote{246} and the "ex-

\footnote{242. OR. REV. STAT. § 107.425(3) (1999). This includes the ability to appoint counsel for children on appeal. See In re Marriage of Cerda, 901 P.2d 263, 267 (Or. Ct. App. 1995).}

\footnote{243. See OR. REV. STAT. § 107.425(1) (1999). The other limit to the court's ability to order an investigation is that the action must be a domestic relations suit (a suit for marriage dissolution, annulment, or separation), a habeas corpus proceeding, a motion to modify a domestic relations suit, or a proceeding to determine custody of a child born out of wedlock where paternity has been established. Id.; OR. REV. STAT. § 109.103 (1999).}

\footnote{244. PRINCIPLES, supra note 3, § 2.22 cmt. a. The Principles do not provide for, or regulate, criminal remedies, and recognize that "such remedies may be provided by other law." Id. Reading between the lines, it appears as if "criminal contempt" would be considered a "criminal remedy" and would not be affected by the Principles.}

\footnote{245. For example, a party could elect, when appropriate, to seek a writ of assistance or a writ of habeas corpus. Alternatively, a party might have a remedy under the Uniform Child Custody Jurisdiction and Enforcement Act. See S.B. 789, 70th Leg.,}
pedited parenting time enforcement procedure.”  The most common civil remedy in Oregon is “remedial” contempt, although the new expedited statutory remedy for violations of parenting time orders may also prove to be popular. 

Unlike Oregon law, the Principles explicitly permit a defense in an enforcement proceeding based on a party’s safety concerns. The Principles state that a parent will not be found to have violated the provisions of a parenting plan unless the parent acts “intentionally and without good cause.” The Commentary details what constitutes good cause: “Good cause excusing failure to comply with a parenting plan is established when a parent reasonably thinks his or her actions or failures to act are necessary to protect the child or the parent, or when compliance is simply impossible.” This includes the parent who acts “to escape domestic abuse.”

Oregon law does not require an absence of good cause to establish a prima facie case of remedial contempt, nor does the

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246. See OR. REV. STAT. §§ 33.015-155 (1999); OR. R. CIV. P. 78.


248. See Gilbert B. Feibleman, Enforcement, in OREGON STATE BAR CONTINUING LEGAL EDUCATION, 1 FAMILY LAW 10-12 (Rev. 1990) (stating that contempt is a “frequently used method of enforcing a custody or visitation provision”). Oregon uses the term “remedial” instead of “civil” contempt. OR. REV. STAT. § 33.045 (1999).

249. The “expedited parenting time enforcement” provision was adopted in 1997. See 1997 Or. Laws ch. 707 § 3 (codified at OR. REV. STAT. § 107.434) (1999)). See, e.g., Maya Blackmun, Divorce Laws Aim to Protect Children, THE OREGONIAN, Sept. 28, 1997, at 301 (“A law that takes effect Oct. 4 will require courts to come up with a streamlined procedure to enforce visitation. Soon, noncustodial parents with visitation problems should be able to go to their local county court, plop down $45, fill out some forms and get a hearing within 45 days . . . . At present, few parents can figure out the complex visitation enforcement process on their own, and many can’t afford a lawyer to help them.”); Layne Barlow, Editorial, Non-Custodial Parents Need Help Enforcing Visiting Rights, THE OREGONIAN, Sept. 4, 1996, at E8 (“There is nothing in the present [system] to help anyone enforce the visiting-rights provision of a divorce decree on domestic-relations judgment.”). The Legislature rejected a bill that would have made the imposition of a sanction mandatory. See H.R. 3452, 70th Leg., § 1 (Or. 1999).

250. PRINCIPLES, supra note 3, § 2.22(1).

251. See id. § 2.22 cmt. f.

252. See id. § 2.22 cmt. f. The Reporter clearly labels “without good cause” a defense; therefore, it is not an element of the petitioner's case. Id. (“Defenses to enforcement action”); id. § 2.22, cmt. e, illus. 3 (“good-faith belief that Margaret has been abused by Martha . . . provides a defense to his refusal to allow Martha to take Margaret for the weekend”).
law embody a "good cause" defense. The elements of contempt in Oregon are the following: "(1) a valid court order; (2) knowledge of the order by the contemnor; and (3) the contemnor's voluntary noncompliance with the order." The third element, the willfulness requirement, requires only that the defendant knew of the court order and failed to comply with it (or seek modification of it). The only affirmative defense to remedial contempt listed in the statute is "inability to comply with an order." No case law in Oregon indicates whether this defense would exonerate a woman who disallows visitation, in violation of a court order, to protect her own safety. An inability to comply with an order suggests lacking even the option to comply with the court's order, which seems very different from simply disobeying an order because one thought one had a good reason not to comply.

The Principles leave criminal contempt untouched. However, if Oregon were to follow the Principles and adopt a "good cause" defense in the civil contempt area, Oregon should also make the defense available in criminal contempt prosecutions.

253. Marriage of Douthit, 865 P.2d 469, 481 (Or. Ct. App. 1993); see also OR. REV. STAT. § 33.015 (1999) (requiring that contempt of court be "done willfully").

254. The Oregon Supreme Court has interpreted the willfulness requirement to require that the contemnor acted with bad intent, see Marriage of Couey, 821 P.2d 1086, 1088 (Or. 1991) (en banc) (discussing repealed OR. REV. STAT. § 33.010). However, "separate findings of willfulness and bad intent are not necessary to establish the noncompliance element of contempt." Douthit, 865 P.2d at 481.

255. See Mikkelsen v. Hill, 847 P.2d 402, 406 (Or. 1993) (explaining that a court initially ordering a child support award has assessed the obligor's ability to pay).

256. OR. REV. STAT. § 33.055(10) (1999); see also Robertson v. Robertson, 859 P.2d 550, 552 (Or. Ct. App. 1993) (en banc) (treating a father's argument that he was unable to pay child support as an affirmative defense to a civil contempt action). The Oregon Supreme Court has held that the defendant in a criminal contempt case also has the burden of production when arguing that he lacked the ability to pay child support, but the state has the burden of persuasion once the defendant puts on the evidence. Mikkelsen, 847 P.2d at 407.

257. See, e.g., Department of Revenue v. Bowker, 676 P.2d 299, 302 (Or. 1984) ("the inability cannot be brought on by defendant's own contumacious conduct"); Svehlaugh v. Svehlaugh, 517 P.2d 1073, 1075 (Or. Ct. App. 1974) ("plaintiff could have met his obligations had he wished to do so").

258. But see Linde v. Linde, No. C-970414, 1998 WL 754316, *2-*3 (Ohio Ct. App. Oct. 30, 1998) (affirming trial court's determination that the father was not in contempt of the visitation order because he was "unable to comply" given the mother's emotional instability and erratic behavior and the father's resulting concern for his children's well-being) (unpublished opinion).

259. A contempt action is criminal if the violator faces a punitive sanction. OR.
In Oregon, criminal contempt is governed by a different statutory provision than remedial contempt. The only affirmative defense to criminal contempt listed in the statute is the “inability to comply with an order of the court,” although the defendant is also “entitled to the constitutional and statutory protections . . . that a defendant would be entitled to in a criminal proceeding.”

Oregon’s statutory “choice of evils” defense, while analogous to the Principles’ “good cause” defense and potentially available to criminal contempors, is more limited than the Principles’ approach. First, the Principles, unlike Oregon law, employ a subjective standard of intent. Under the Principles, the disobedience must appear reasonably necessary to the victim; Oregon’s necessity defense requires that the disobedience be necessary “according to ordinary standards of intelligence and morality.” Whether consciously or not, the Principles’ authors appear to have incorporated into the formulation of the good cause defense the research and commentary about battered women who kill. This scholarship suggests that it is more appropriate to view reasonableness from a subjective standard because a particular victim may legitimately fear serious injury from her batterer, and the average person might not understand her fear.


263. OR. REV. STAT. § 161.200(1)(a), (b) (1999).

Unless inconsistent with other provisions of chapter 743, Oregon Laws 1991, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when: (a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury and (b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

Id.


or appreciate the seriousness of the situation. Second, Oregon law, unlike the *Principles*, requires that the threat be imminent. Third, the Oregon defense applies only if the defense is not inconsistent "with some other provision of law." Access to one's children is a very strong policy in Oregon, and that policy's codification may significantly restrict the availability of the necessity defense.

Oregon's newest remedy for violations of court orders is the expedited parenting time enforcement procedure. This remedy is available for the violation of the parenting time provisions of a parenting agreement. After a parent files a motion requesting enforcement, the purported violator must appear "and show cause why parenting time should not be enforced in a specified manner." The statute contains no enumerated defenses, nor any explicit intent requirement. While the remedies for a violation do not include imprisonment or fines, some substantial penalties still exist. For example, the remedies can include the termination, suspension, or modification of spousal support. There are no reported cases on Westlaw that involve the parenting time enforcement procedure, probably because the provision only became effective in 1997. It is unclear whether a court will read into the law an intent requirement, an inability to comply defense, or, assuming the court views the remedy as a "criminal" sanction, a "choice of evils" defense.

It is misguided to punish a victim who violates a parenting

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269. See, e.g., OR. REV. STAT. § 107.101(1) (1999) (describing state policy regarding parenting as to "assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child").

270. *Cf. Downtown Women Cir.*, 826 P.2d 637 (holding that the defense was not available as a matter of law in a criminal contempt proceeding because actions were inconsistent with a statutory requirement that it not be inconsistent with "some other provision of law," here a woman's right to obtain an abortion).


time or custody order for safety reasons. Sanctioning the disobedient parent focuses attention away from the true wrongdoer (the batterer), rewards the batterer for his battering (by imposing a sanction on his victim), and discourages women from taking the steps necessary to maintain their own and their children's physical safety. Because women are placed at risk when they exchange their children with their batterers, the law should recognize the necessity of an occasional self-help remedy. Otherwise some women will face unreasonable, and possibly lethal, outcomes when the inherent risk becomes an actuality. While a judicial modification of a custody or visitation order is always an appropriate avenue for a victim facing an unreasonable risk of harm, there may be inadequate time to accomplish a judicial modification before contact is scheduled to occur between the victim and her batterer.


The Principles expressly address the situation where domestic violence between the litigants starts, continues, or worsens after the court enters its order allocating custodial or decision-making responsibility. Similar to the approach found in the Model State Code on Family Violence, the Principles state that an occurrence or worsening of domestic violence constitutes a changed circumstance sufficient to obtain modification of an award. While the modification must also be "necessary to the

274. See OREGON GENDER FAIRNESS TASK FORCE REPORT, supra note 41, at 57.
275. A post-judgment ex parte temporary custody order requires immediate danger to the child. See OR. REV. STAT. § 107.139(1) (1999). A motion to modify custody or visitation requires 30 days notice to the opposing party. See OR. REV. STAT. § 107.135; OR. CIV. P. 7(c).
276. See MODEL CODE, supra note 103, § 404 (“In every proceeding in which there is at issue the modification of an order for custody or visitation of a child, the finding that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstance.”).
277. The Principles state:
Except as provided in 2.19 or 2.20, a court should modify a parenting plan order if it finds, on the basis of facts that were not known or have arisen since the entry of the prior order and were not anticipated therein, that a substantial change has occurred in the circumstances of the child or of one or both parents and that a modification is necessary to the child’s welfare.
PRINCIPLES, supra note 3, § 2.18(1). Further,
For purposes of Paragraph (1) of this section, the occurrence or worsening of a limiting factor, as defined in 2.15(1), after a parenting plan has been or-
child's welfare,” the Principles proclaim that “security from exposure to physical or emotional harm” is in the child’s best interest. In addition, “in exceptional circumstances,” the Principles allow modification even without changed circumstances if the plan is “manifestly harmful to the child.” This provision would permit modification when the continuation of domestic violence between parties causes “actual, demonstrated harm” to the child. A court that decided to modify an order would first consider imposing safety measures to protect the child or parent, but could alter the allocation of custodial or decision-making responsibility if the child or parent could not be adequately protected from harm.

In Oregon, modifying a custody award requires a substantial change in circumstances since the entry of the original award. The change in circumstance must relate to the custodian’s capacity to care for the child. The court also must assess whether the modification is in the child’s best interest. The movant bears the burden of proving both the substantial change in circumstances and that the modification is in the child’s best interest.

ordered by the court, constitutes a substantial change of circumstances and measures should be ordered pursuant to 2.13 to protect the child or the child’s parent.

Id. § 2.18(4). Another way to modify custody is by agreement, in which case changed circumstances are not necessary. See id. § 2.19(1) (“The court should modify a parenting plan in accordance with a parental agreement, unless it finds that the agreement is not knowing and voluntary or that it would be harmful to the child.”).

278. See id. § 2.18(1).
279. Id. § 2.02(1)(e).
280. See id. § 2.18(2).
281. Id. § 2.18 cmt. d. The need for “manifest harm” to the child is an unduly restrictive standard when the continuation of domestic violence is involved.
282. See id. § 2.18(4); id. § 2.18 cmt. c; id. § 2.18 cmt. c, illus. 7.
283. Id. § 2.13(3).
285. 963 P.2d at 155.
286. See id; see also In re Marriage of Greisamer, 555 P.2d 28 (Or. 1976). Stability is a factor that works against modification. “A prime consideration in modification proceedings is stability.” Jarvis et al., supra note 89, § 4-30.
substantial change of circumstance. 288 The sole consideration for
a modification of a visitation award has been whether the change
will benefit the children. 289 However, since Oregon law now
makes the safety of the parent relevant to the parenting time
award, 290 "safety of the parent" should now also justify a modifi-
cation of visitation.

In Oregon, the onset or worsening of domestic abuse can
potentially trigger a modification of custody. For example, in a
1977 case, In re Marriage of Remillard, 291 the trial court originally
modified and transferred custody of the child from the mother to
the father when the mother's new husband was seriously abusing
the child's mother. 292 After the violence ended, the mother
sought to have custody modified again, and the trial court
granted her motion to have custody returned to her. 293 The Ore-
gon Court of Appeals upheld the second modification, citing the
improvement in the mother's marital situation and the child's
difficulties adjusting to life with his father. 294 Remillard predated
the statutory inclusion of domestic violence as a factor for courts
to consider when fashioning initial custody awards. Today there
should be absolutely no question that domestic violence is rele-
vant to a request for modification given the statutory approach
to domestic abuse in initial custody adjudications. While un-
doubtedly relevant to a request for modification, there is no
guarantee that an Oregon court would consider the advent or
worsening of domestic violence to be a substantial change of cir-
cumstances justifying modification, 295 and the mere continuation

289. Id.
292. Id. at 652. See also In re Marriage of Marten, 677 P.2d 735 (Or. Ct. App.
1984) (upholding a change of custody when the mother married a man with an assaul-
tive personality who was in prison for 15 crimes and the children feared that the new
husband would beat them and their mother).
293. Remillard, 569 P.2d at 652-53.
294. Id. at 653.
295. See In re Marriage of Poulson, 690 P.2d 526 (Or. Ct. App. 1984) (holding that
the mother's failure to abide by court's order that her boyfriend not be in the house
"overnight" was not shown to affect the children's welfare to any "substantial de-
gree"); In re Marriage of Niedert, 559 P.2d 515, 518 (Or. Ct. App. 1977) ("Where proof
of changed of circumstances is based upon specific instances of purported parental mis-
feasance . . . these events must be of a nature or number that reflect a course of con-
duct or pattern of inadequate care which has had or threatens to have a discernable
of domestic violence may not be considered a change in circumstance at all.

The *Principles' explicit language about the relevance of domestic violence to a modification proceeding is preferable to Oregon's silence. As one domestic violence scholar explained, domestic violence should be relevant to the modification proceeding for the following reasons:

First, a custody award may encourage one parent to harass the other parent. For example, an award of reasonable visitation rights that does not explicitly set out the hours and times of visitation may cause the noncustodial parent to visit with the custodial parent at any time. When a joint custody award permits one parent to badger and abuse the other, the abused parent should be able to petition for a custody modification based on her continued harassment and abuse. Because domestic abuse has deleterious effects on children, if the parents' separation and a custody award do not prevent the abuse, the children will suffer. Second, in determining an appropriate modification to a visitation or custody arrangement, the court should weigh the father's behavior toward the mother, rather than focusing exclusively on whether the behavior has been directed toward the child, or even whether the child has witnessed it. If abusers know that courts may take action against them if they harass women about their visitation rights, then children will not become pawns between their parents, used by one parent as an excuse to abuse the other. In addition, mothers will be protected from further abuse caused by arrangements for visitation and joint custody. While adding another reason to permit modification may detract from the desired stability and permanence resulting from a custody order, continued abuse between the parents does not provide stability for the child. Rather than allowing the child to remain exposed to the abuse and perhaps causing more harm to her, courts should permit modification upon a showing of the continuation of the pattern of violence between the parents.  

Instead of the modification provisions in Oregon ensuring substantive justice for domestic violence victims, Oregon law may undermine a domestic violence victim's ability to attain substantive justice. For example, Oregon, unlike the *Principles,

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makes the “repeated and unreasonable denial of, or interference with, parenting time” a change of circumstances sufficient to modify custody or parenting time. 297 As discussed above, courts should elevate a party’s legitimate safety concerns above a non-custodial parent’s right to visitation. 298 While a court might deem a mother’s denial of visitation based on her safety considerations as “reasonable,” a court might also conclude otherwise. An explicit statutory provision limiting the court’s discretion in this situation would best ensure an interpretation that is fair to domestic violence victims. 299

4. Relocation Issues

Laws that inhibit the relocation of domestic violence victims can devastate the victims and their children. 300 These laws become batterers’ tools to continue harming their victims.

Moveaway cases are a microcosm of the broader domestic violence dynamic. Moveaway restrictions give violent men the power to prevent their ex-partners from escaping and to continue controlling essential aspects of their lives after separation and divorce. Batterers use social isolation to maintain their power over their intimate partners. Moveaway restrictions often prevent custodial mothers from returning to their families of origin for support and protection.

As the National Council of Juvenile and Family Court Judges acknowledged, “the enhanced safety, personal and social supports, and the economic opportunity available to the abused parent in another jurisdiction are not only in that parent’s best interest, but are, likewise and concomitantly, in the best interest of the child.” 302

298. See supra text accompanying notes 43-112.
299. See PRINCIPLES, supra note 3, § 2.20, Reporter’s Note to cmnt. c (citing statutes) (“Some statutes specify that a parent’s absence or relocation because of an act of domestic violence by the other parent may not be a factor that weighs against the parent in determining custody.”).
301. Bowermaster, supra note 300, at 450.
302. MODEL CODE, supra note 103, § 403 commentary.
The Principles generally accommodate relocation.\textsuperscript{303} If a relocation significantly impairs the other parent’s rights (assuming that parent has been exercising those rights),\textsuperscript{304} then the court should, “if practical, revise the parenting plan so as to both accommodate the relocation and maintain the same proportion of custodial responsibility being exercised by each of the parents.”\textsuperscript{305} If relocation renders it impossible to maintain the same proportion of custodial responsibility, and the relocating party has the significant majority of custodial responsibility, then the court should allow relocation as long as the parent requesting relocation “shows that the relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of the purpose.”\textsuperscript{306} The Principles state explicitly:

A relocation is for a legitimate purpose if it is ... to protect the safety of the child or another member of the child’s household from a significant risk of harm. ... A move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving.

If neither party has a significant majority of the custodial responsibility, then the relocation is evaluated “based on the best interest of the child, taking into account all relevant factors including the effects of the relocation on the child.”\textsuperscript{308} The best interest of the child is defined elsewhere as including “security from exposure to physical or emotional harm,”\textsuperscript{309} including domestic violence.\textsuperscript{310}

Oregon law requires court permission to relocate if the decree requires the court’s permission\textsuperscript{311} or if one party objects to

\textsuperscript{303} The Principles’ formulation is less favorable to victims than the Model State Code on Domestic Violence. The latter adopted a rebuttable presumption that it was in the child’s best interest to reside with the parent who was not the perpetrator of domestic violence in the location of that parent’s choice. MODEL CODE, supra note 103, § 403. For a more thorough examination of the Principles’ treatment of relocation, see generally Naucler, supra note 5.

\textsuperscript{304} See PRINCIPLES, supra note 3, § 2.20(l).

\textsuperscript{305} Id. § 2.20(3).

\textsuperscript{306} Id. § 2.20(4)(a).

\textsuperscript{307} Id.

\textsuperscript{308} Id. § 2.20(4)(b).

\textsuperscript{309} Id. § 2.02(l)(c).

\textsuperscript{310} Id. § 2.02 cmt. h.

\textsuperscript{311} See In re Marriage of Meier, 595 P.2d 474 (Or. 1979); In re Marriage of Smith, 624 P.2d 114, 116 (Or. 1981).
the move. There exists a narrow exception for parents who obtain custody of their children through a FAPA proceeding. The court's primary consideration is whether the move is in "the best interest of the child." The court can impose geographic restrictions on the custodial parent if it is best for the child. When the decree dictates the parent may not change residences without court approval, the custodial parent must prove that the move serves the child's best interest. When there is no prior court order restricting relocation, the noncustodial parent seeking to prevent a move bears the burden of proof. A commentator on Oregon law stated:

Recent case law confirms that the [noncustodial] party desiring modification [of custody because the custodial parent is relocating] has the burden of proving that the custodial parent's anticipated move will be detrimental to the children. When there is no evidence that the custodial parent was any less capable at the time modification is requested than at the time of the original decree, a change of custody is denied.

Two potential problems confront custodial parents in Oregon who are seeking to relocate to escape from domestic violence. First, if the custodial parent bears the burden of establishing that the relocation is in the "best interest of the child," she must convince the court that her safety should be equated with the child's best interest. In contrast, the Principles articulate that a relocation is for a legitimate purpose if it is "to protect the safety of another member of the child's household from a significant risk of harm." This "relieve[s] the relocating parent

313. Oregon law was modified in the last session so that a petitioner who obtains custody through a FAPA proceeding can move to a residence more than sixty miles from the other parent without giving notice to the other parent of the change of residence if the other parent was not awarded parenting time under ORS 107.718 (1999). See S.B. 1075, 70th Leg., 1999 Or. Laws ch. 762, § 4.
314. See Smith, 624 P.2d at 116; see also Perley v. Perley, 349 P.2d 663 (Or. 1960).
316. See Meier, 595 P.2d at 478.
317. Jarvis et al., supra note 89, at § 4-34 (citing, inter alia, Greene v. Greene, 812 P.2d 11 (Or. App. 1991) and Duckett v. Duckett, 905 P.2d 1170 (Or. App. 1995)).
318. Duckett, 905 P.2d at 1172.
319. PRINCIPLES, supra note 3, § 2.20(4)(a).
of the burden of convincing the court accordingly." Second, even when the abuser must prove that the custodian’s move will be detrimental to the children, the custodial parent must persuade the court that her safety is more important than the children’s existing level of contact with the noncustodial parent. To ensure that domestic violence receives its proper weight in the inquiry, Oregon law should expressly provide that a move is to be permitted if the relocation is to protect the custodian’s or children’s safety.

C. Ensuring the Protection of Domestic Violence Victims’ Safety

Much of the discussion throughout this Article highlights how the Principles incorporate concerns about victims’ safety into their substantive legal standards. For example, the Article discussed the importance of the victim’s safety to the actual allocation of custodial and decisionmaking responsibility, to an enforcement proceeding’s “good cause” defense, and to the substantive legal standards governing modification and relocation. The Article also illustrated how the drafters of the Principles appreciated that victims’ concerns about their own safety can skew the negotiation and litigation process, by hampering victims’ disclosure of domestic violence, by undermining the assumptions necessary for fair and effective mediation, or by rendering an agreement involuntary.

There is yet another way that the Principles give serious consideration to issues of victims’ safety. They contain multiple provisions relating to victims’ safety in and after the adjudication process. Concern about the parties’ safety during the adjudication process is, in fact, omnipresent in the Principles, much more so than in Oregon law. This concern is evident in, and perhaps attributable to, the systems’ differing policy objectives. In Oregon, the general policy statement regarding custody and visitation does not address the safety of a parent, although parental

320. Id. § 2.20 cmt. d.

321. This addition to Oregon’s law would go beyond the Principles’ formulation for parents who share custodial responsibility equally. In addition, if Oregon were to adopt the Principles’ formulation of “legitimate purpose,” it might consider expanding the wording to include a “risk of significant harm,” as well as a “significant risk of harm.” See supra text accompanying note 307.

322. OR. REV. STAT. § 107.149 (1999) states:
It is the policy of this state to assure minor children of frequent and continu-
safety is now a policy goal in the section discussing the development of parenting plans. The Principles make explicit that it is in a child's best interest to have "security from exposure to physical or emotional harm," including verbal conflict between adults. Presumably minimizing the possibility of domestic violence at each and every possible juncture, including during and after the adjudication process, facilitates this broad goal. Oregon's adoption of the Principles' details would help give full meaning to the command of the Oregon Task Force on Family Law: "Any system of family conflict management must protect the physical safety of all parties."

The Principles offer specific statutory language in particular substantive sections on the topic of safety. While an Oregon court might protect a victim in the same manner as would a court applying the Principles, the Principles' detailed attention to domestic violence minimizes the risk that a court may not adequately protect a victim. For example, when addressing the allocation of significant decisionmaking responsibility, the Principles state that both parents are to have access to school and health records, except "where the provision of such information might endanger a parent who has been the victim of domestic abuse." In Oregon, both parents likewise have access to school and health records "unless otherwise ordered by the court." There are no reported Oregon cases that indicate whether the safety of the custodial parent is a sufficient reason to deny access to the records. Similarly, the Principles' section on relocation states: "Domestic abuse may also excuse the failure to provide the

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324. PRINCIPLES, supra note 3, § 2.02(e).
325. See id. § 2.02 cmt. h.
326. OREGON TASK FORCE ON FAMILY LAW, supra note 9, at 5.
327. See generally PRINCIPLES, supra note 3, § 2.06 (permitting affidavits to keep some information, such as a parent's address, confidential when one parent has "a reasonable fear of domestic abuse" and disclosure of the information would increase that fear); id. § 2.11(1)(c) (limiting the methods of resolving future parental disputes contained in a parenting plan where domestic abuse exists).
328. Id. § 2.10(4). The court must find that such access would endanger the parent who has been the victim of domestic violence. See id. § 2.10 cmt. a.
dress of a relocation even when notification of the relocation is required.” Oregon law requires that a parent moving more than sixty miles must give the other parent “reasonable notice” of the change. However, that requirement is waivable upon an ex parte motion for good cause shown. “Good cause” is not defined by statute or by case law.

An excellent example of the specific attention given by the Principles to each parent’s safety during the adjudication process is found in the section that allows the court to make a temporary custody order pending a complete adjudication of the issues. The court’s temporary custody order can deny or limit access to the child “if there is credible evidence” that the parent has perpetuated domestic abuse and it is necessary “to protect the child or the other party, pending adjudication of the underlying facts.” The Reporter’s illustration is indicative of the protection afforded to victims:

Boris and Katrina have two children, ages 3 and 5. During the marriage, Katrina exercised most of the caretaking functions for the children while Boris worked outside the home providing all of the family’s economic support. Boris has moved out of the family home and Katrina has filed for divorce. . . . Boris has physically abused Katrina on a number of occasions. The abuse involved punching Katrina in the face with his fist, pulling her across the room by her hair and dunking her head under the water in the bathtub for about 30 seconds. The abuse is one reason for the divorce. Boris is very angry about Katrina ending the marriage and has threatened to teach her “that no one leaves me and gets away with it.” Katrina is extremely fearful of her own safety and believes that he will try to use the children to get access to her.

These facts constitute credible evidence of domestic abuse and of the risks to Katrina of contact with Boris. The court should impose limits that protect Katrina from Boris, including a requirement that visits with the children be ar-

330. PRINCIPLES, supra note 3, § 2.20 cmt. c.
332. See OR. REV. STAT. § 107.159(2).
333. See PRINCIPLES, supra note 3, § 2.06.
334. Id. § 2.06(5). The rule states: “Upon credible evidence of one or more of the circumstances set forth in 2.13(1), the court should issue a temporary order limiting or denying access to the child as required by that section, in order to protect the child or the other party, pending adjudication of the underlying facts.” Id.
ranged through, or supervised by, a third party, or that visits be suspended altogether. Even if a formal finding of abusive behavior is not made under 2.13, credible evidence of it is sufficient to justify an interim order, pending an adjudication of the underlying facts.\textsuperscript{335}

The court can enter this order ex parte in appropriate circumstances.\textsuperscript{336}

In Oregon, a woman is virtually precluded from securing a temporary custody order that would suspend parenting time altogether, pending a full adjudication of the underlying facts, even if the suspension is essential for her own safety. While an Oregon court can enter a temporary order regarding a child that is the subject of ongoing litigation,\textsuperscript{337} that temporary order is governed by the standards for custody and visitation generally.\textsuperscript{338} These standards, as discussed above, insufficiently protect domestic violence victims' safety.\textsuperscript{339} Recall, for example, that visitation can be denied only if “parenting time would endanger the health or safety of the\textsuperscript{340} child.” Even Oregon's “temporary protective order of restraint” may be an insufficient option for this victim because the statute allows a court only to maintain the status quo,\textsuperscript{341} unless “the child is in immediate danger.” A temporary custody order under the FAPA,\textsuperscript{342} which permits an ex parte hearing,\textsuperscript{343} may be unavailable to the victim if her abuse has not occurred within the preceding 180 days\textsuperscript{344} or if she has experienced threats not qualifying as threats of “imminent bod-

\begin{footnotes}

\textsuperscript{335} Id. § 2.06 illus. 1, 2. The Principles describe these sorts of cases as “exceptional.” Id. § 2.06 cmt. c.
\textsuperscript{336} Id. § 2.06 cmt. h ("Ex parte orders in appropriate cases may be justified; ordinarily an order lasting more than a few days requires an opportunity for both parties to present evidence.").
\textsuperscript{337} OR. REV. STAT. § 107.095(1)(b) (1999).
\textsuperscript{338} See OR. REV. STAT. §§ 107.095(1)(b) (1999); 107.105(1)(a), (b) (1999).
\textsuperscript{339} See supra text accompanying notes 43-119.
\textsuperscript{341} See OR. REV. STAT. § 107.097(2)(a) (1999).
\textsuperscript{343} OR. REV. STAT. §§ 107.700-.732 (1999); see also OR. REV. STAT. § 107.718(a) (1999).
\textsuperscript{344} See OR. REV. STAT. § 107.718 (1999) The court must then hold a hearing within 21 days following a request by the respondent. OR. REV. STAT. § 107.716(1) (1999).
\textsuperscript{345} OR. REV. STAT. § 107.710(1) (1999).
\end{footnotes}
ily injury.”346 Even if she qualifies under FAPA, a FAPA order that awards custody to the petitioner is “subject to reasonable parenting time rights of the non-custodial parent, which the court shall order, unless such parenting time is not in the best interest of the child.”347 The bottom line is that Oregon law makes it much harder than the Principles do for a court to suspend visitation pending the adjudication of the issues, even if a domestic violence victim’s life potentially depends on it.

The Principles remind us that even minor provisions, just like the major substantive rules of decision, can affect domestic violence victims differently than their abusers. Conscious efforts must be made to ensure that Oregon law does not compromise victims’ safety, but rather that it helps protect victims and their children from further abuse.

V. PROBLEMS WITH THE PRINCIPLES FOR DOMESTIC VIOLENCE VICTIMS

This Article argues that Oregon law can be improved for domestic violence victims by incorporating provisions and ideas from the Principles into Oregon law. While this Article does not focus on the limitations of the Principles for domestic violence victims, some of the Principles’ shortfalls were exposed in the course of the discussion.348 In addition to emphasizing here one of the weaknesses already discussed, two new weaknesses will be

347. OR. REV. STAT. § 107.718(1)(a) (1999). Assuming that the court cannot deny parenting time, however, the court must structure visitation to protect the victim’s safety. See OR. REV. STAT. § 107.718(4) (1999).
348. See supra discussion at notes 131, 164 and accompanying text (requiring injury or fear of injury even for sexual assault); 139-144 and accompanying text (making the assessment of the primary physical aggressor relevant only at the point of fashioning a remedy, and not for determining whether domestic abuse exists); 191-194 and accompanying text (adopting a lower standard than “compelling reasons” for rebutting the presumption that a case in which domestic abuse exists or has existed is inappropriate for mediation); 201-202 and accompanying text (discussing the Principles’ silence on training mediators about domestic violence); 259 and accompanying text (extending “good cause/safety defense” only to civil enforcement tools); 280-281 and accompanying text (requiring “actual demonstrated harm” to the child to obtain modification of award where domestic violence has continued between the parties); 303 and accompanying text (imposing a substantive standard for relocation less favorable than that proposed in the Model State Code on Domestic Violence); 307, 321 and accompanying text (defining “legitimate purpose” in relocation context solely as “significant risk of harm”).
mentioned. These three specific criticisms, along with the other critiques previously made, indicate areas in which Oregon lawmakers should consider going beyond the Principles’ formulation to best address the unique issues that domestic violence victims face in custody and visitation contests.

First, the Principles do not contain a “custody presumption,” but only a “safety presumption.” Given that reformers’ emphasis of the last two decades has been on making the fact of domestic violence relevant to the custody decision itself, the Principles represent a dramatic change. If Oregon lawmakers decided to cherry-pick from the Principles, as opposed to adopting it in toto, they should keep intact Oregon’s newly enacted custody presumption.  

Second, the Principles require a “history of domestic abuse” to rebut the presumption that “an allocation of decisionmaking responsibility to both parents jointly is in the child’s best interests” when both parents have been exercising a reasonable share of parenting functions. Their use of the word “history” instead of “act” is unduly restrictive. For example, a Louisiana court has found that “a single past act of family violence” does not constitute a “history of perpetrating” violence. Yet the American Psychological Association has found that even one episode of abuse can sometimes establish the power and control that characterizes battering relationships. Moreover, requiring a history of domestic abuse gives batterers “one free hit” and minimizes the problem of each and every episode of

349. See OR. REV. STAT. § 107.137(2) (1999). Senate Bill 1075, which proposed the new rebuttable presumption that it is not in a child’s best interest to be awarded to a perpetrator of domestic abuse, passed the Senate on May 19, 1999 with a 28-1 vote and passed the House on June 8, 1999 with a 48-0 vote. See S.B. 1075, 70th Leg., 1999. Status Report for Senate Measures at S-165 (July 24, 1999).

350. PRINCIPLES, supra note 3, § 2.10(2).

351. Id. Unless otherwise provided, each parent who exercises custodial responsibility has sole responsibility for day-to-day decisions including “emergency decisions affecting the health and safety of the child.” Id. § 2.10(3).

352. Simmons v. Simmons, 649 So.2d 799, 801 (La. Ct. App. 1995) (affirming the trial court’s conclusion that “occasional existences [sic] of violence are not enough to constitute a history of violence” as required to trigger the rebuttable presumption that a perpetrator of violence should not have custody of the children) (the mother claimed that the father physically abused her throughout their marriage, requiring law enforcement intervention on several occasions as well as medical attention for her injuries, and the father admitted having hit the mother on occasion).

353. AM. PSYCHOLOGICAL ASS’N, supra note 93, at 2.
domestic violence.

Third, advocates for victims in Oregon may (or may not) be troubled by the Principles' lack of paternalism in those situations where it is arguably appropriate. Imagine a case where a domestic violence victim assents to an agreement that gives her far less substantively than what she is entitled to by law or that compromises her safety. The Principles recognize that a domestic violence victim's acceptance of a parenting plan can be both voluntary and also harmful to her at the same time. While section 2.07 of the Principles prohibits a court from accepting a voluntary agreement that would harm a child's interests, it permits an agreement that is unfair to the victim. "Section 2.07 does not rule out any particular types of agreements as invalid." Some observers may feel that the Principles correctly respect a victim's decisionmaking autonomy, especially because her assent is "voluntary." Others, however, may question the effectiveness of the "voluntary" screen and prefer that the court help ensure the victim's safety, as well as substantive fairness between the parties, when there has been domestic violence between them.

VI. CONCLUSION

This Article has not addressed the entire universe of potential legal reforms that would benefit victims of domestic violence

354. Cahn, supra note 33, at 1058 ("[A] battered mother often can be manipulated into relinquishing custody when the parents separate.").
The facts are as otherwise stated in illustration 3. The court holds an evidentiary hearing, at which it is established that Sedona has performed nearly all caretaking functions for the children in the past; that Abel has physically abused Sedona on a number of occasions, sometimes in the presence of the children; that the children are extremely fearful of Abel because of his sharp temper and his abusive behavior toward Sedona; and that Abel has become violent and abusive on several occasions toward the children in the past when he spent extensive period of time with them. These facts are sufficient to justify a finding that the equally shared custodial responsibility arrangement agreed to by Abel and Sedona would be harmful to the children. See 2.13.

Id.
356. Id. § 2.07 cmt. d. It is even permissible for a custodial parent to waive some child support in exchange for a noncustodial parent's agreement not to seek access to the child, see id. § 2.07 cmt. d, subject to principles in Chapter 3. See id. § 2.07 cmt. d (referencing section 3.11) ("limiting agreement that provides for substantially less child support than would otherwise be awarded to cases in which the court determines that child support terms are consistent with the interests of the child").
who are involved in custody and visitation disputes with their batterers.\footnote{357} However, this Article has shown how Oregon citizens would benefit from the adoption of certain provisions contained in the Principles. To summarize, the following are the specific changes that I recommend be made to Oregon’s law:

1. Adopt a rebuttable “safety” presumption that a domestic violence perpetrator should not have physical custody, legal custody, or parenting time unless the perpetrator establishes that the other parent’s and child’s safety can be guaranteed.

2. Require courts to make written findings that the other parent’s and child’s safety can be guaranteed before awarding custodial or decisionmaking responsibilities to a perpetrator of domestic violence.

3. Define domestic abuse consistently throughout the custody section of the Oregon statute.

4. Define “domestic abuse” as “the infliction of physical injury, or the creation of a reasonable fear thereof, by a parent or a present or former member of a child’s household against a child or another member of the household, or causing another to engage in involuntary sexual relations by force or threat of force.”

5. Make explicit that self-defense does not constitute domestic abuse, and that if mutual abuse exists, the safety presumption will apply only to the primary physical aggressor.

6. Prohibit judges from ordering mediation orientation sessions that require a victim of domestic violence to have face-to-face contact with her batterer.

7. Allow mediators to testify about threats and violence that occur in mediation sessions.

8. Adopt a presumption that where there is or has been domestic violence, the case is inappropriate for mediation unless the mediator takes steps to ensure that the victim’s participation and agreement is voluntary, and that her safety is protected.

9. Allow domestic violence advocates, or any other support person, to attend the mediation session if the victim desires

\footnote{357. For example, this Article does not address the problem that some battered women are charged with parental abduction when they leave their batterers and take their children with them.}
10. Require parties seeking custody or visitation to file an affidavit with the court setting forth whether either parent has inflicted domestic abuse, or allowed another to inflict domestic abuse, and whether any restraining orders exist against either party.

11. Require courts to give parties early in the process information about abuse, its significance in the legal process, and resources for addressing it.

12. Require courts to ask parties whether either parent has inflicted domestic abuse, or allowed another to inflict domestic abuse, or whether a restraining order has been issued against either party.

13. Require court personnel to check court records and available databases to see if there have been prior complaints of abuse, convictions for abuse, or FAPA or stalking orders issued.

14. Hold an evidentiary hearing whenever there is evidence of domestic abuse to ensure that any parental agreements regarding custody and visitation, including joint custody, were agreed to knowingly and voluntarily.

15. When there is an evidentiary hearing and the court believes adequate information about domestic abuse will not be forthcoming, require the court to order an investigation and/or appoint either a guardian ad litem or attorney for the child.

16. Adopt the following defense to both contempt and the expedited parenting time enforcement procedure: that a parent reasonably believes that her actions or failure to act are necessary to protect the child's or her own safety.

17. Make the initiation, escalation, or continuation of violence a change of circumstance substantial enough to warrant modification of a custody or visitation award.

18. In a modification proceeding premised on “unfriendly parental behavior,” allow the following defense: that a parent reasonably believed that the actions or inactions were necessary to protect the child's or her own safety.

19. Allow a custodial parent's relocation if the relocation is to protect the custodian's or child's safety.

20. Expand Oregon’s custody policy goals to include the secu-
rity of all parties from exposure to physical or emotional harm.

21. Modify section 107.154 of the Oregon Revised Statutes to make explicit that both parents have certain authority, including access to school and health records, unless such authority might endanger the victim of domestic abuse.

22. Adopt a statutory provision that domestic abuse may excuse the failure to provide notice of a relocation.

23. Permit entry of an ex parte order awarding temporary custody and suspending visitation where necessary for the victim's or child's safety.