

## MEDIATING CASES INVOLVING DOMESTIC VIOLENCE: SOLUTION OR SETBACK?

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Whatever the explanation, physical abuse of mothers and children, or the imminent threat of such ill treatment, is not tolerated in our American society. Whether the mother, the family, or the immediate social group accepts cruelty as the norm or as permitted, it is a minimum assumption of our twenty-first century United States that it will not be tolerated. The government has an obligation to stop it and to prevent its recurrence whenever it can.<sup>1</sup>

—Honorable Weinstein, Senior District Judge

### I. INTRODUCTION

While mediating divorce disputes has become a mainstream feature in family law scholars and practitioners have been resistant to the use of mediation in those cases where the parties are enmeshed in an abusive relationship.<sup>2</sup> Despite extensive debate concerning the advantages and disadvantages of mediating cases involving domestic abuse, most individuals consider mediation to be inappropriate.<sup>3</sup> Mediation is an appropriate means to resolve domestic violence cases only if it does so effectively and in accordance with notions of evenhandedness and fairness to both parties, particularly the victim, who is typically at a disadvantage during both litigation proceedings and mediation sessions.<sup>4</sup> Both the victim and abuser must receive equal opportunity to resolve their dispute. If the abuser perpetuates control of the victim in the proceeding, then our judicial system has denied those victims a fair

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<sup>1</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 164 (E.D.N.Y. 2002).

<sup>2</sup> The Note will explore the meaning of a fair or effective mediation in cases involving domestic violence. There is much debate as to what constitutes a “successful” mediation.

<sup>3</sup> *Compare Steegh, infra* note 4, at 204 *with Wheeler, infra* note 6, at 572.

<sup>4</sup> Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 166 (2003). “Women, including battered women, are less likely to be represented than men.”

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forum.<sup>5</sup> The best resolution of a domestic violence situation will involve the least amount of emotional friction at a level that remains fair to both parties.<sup>6</sup>

This Note will first explore the psychological and social aspects of domestic violence.<sup>7</sup> It will then examine the appropriateness of mediation for such cases, exploring viewpoints on the topic.<sup>8</sup> Lastly, the Note will propose a standard to guide cases involving domestic violence. Although the victim should always have the final word on whether to mediate,<sup>9</sup> a judge, psychologist, and mediator should collaborate and make a united recommendation as to how they suggest the victim should proceed. This will allow the victim to make a thoughtful and individualized assessment of her situation.<sup>10</sup>

## II. WHAT IS DOMESTIC VIOLENCE?

Relationships plagued with domestic violence involve an abuser who controls and intimidates his or her victim.<sup>11</sup> Victims remain powerless in the face of this abuse so much so that they may not be able “to bargain in their own self interest.”<sup>12</sup> Mediation involves compromise and concessions on both sides.<sup>13</sup> If a victim cannot advocate on his or her own behalf, then he or she may

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<sup>5</sup> See U.S. CONST. amend. XIV, § 1. “Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>6</sup> Obviously most divorces involve great emotional distress, but in cases of domestic violence, it is more likely that there will be greater trauma, such as a victim’s fear of recurrent abuse. See Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559, 561-562 (2002). Risk of pursuit and retribution by abusive spouses deter many women from leaving violent situations. *Id.*

<sup>7</sup> See, e.g. Krieger, *infra* note 23; Zosky, *infra* note 70.

<sup>8</sup> See, e.g., Steegh, *supra* note 4, at 203-04; Wheeler, *supra* note 6, at 572.

<sup>9</sup> See, e.g., Belzer, *infra* note 67, at 56-7.

<sup>10</sup> See Boxer-Macomber, *infra* note 129, at 906 (contending that victims should be informed of their rights during mediation proceedings). Boxer-Macomber believes that victims should decide whether to mediate or not.

<sup>11</sup> Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 255 (2001). “Domestic abuse is not about conflict, but about a need to control and dominate.”

<sup>12</sup> *Id.* at 256.

<sup>13</sup> *Id.* at 256-57

agree to terms which favor his or her abuser.<sup>14</sup> In such a case, mediation would unfairly disadvantage the victim.<sup>15</sup>

#### A. A Historical Perspective on Domestic Violence

In the past, the criminal justice system took note of violence among strangers but ignored violence among intimate partners.<sup>16</sup> Domestic disputes were primarily a private matter; if a domestic violence victim complained to the police, the police officer would ask the abuser to take a walk around the block and cool off.<sup>17</sup> A double standard emerged where the police could charge a stranger for committing a violent act whether there was a complaint called in to the precinct or not.<sup>18</sup> Police, however, would not charge a husband for committing a violent act against his wife unless the wife filed a complaint.<sup>19</sup>

In the 1980s and 1990s, with the passage of Domestic Violence Prevention Acts, many states began to recognize the problem of domestic abuse.<sup>20</sup> Police were allowed to arrest a potentially abusive husband if there was probable cause to believe that domestic violence had occurred.<sup>21</sup> Although today there is greater awareness of the domestic abuse problem, the problem does not end in

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Mediation can present the risk of physical harm to the victim as well. This topic will be discussed further in other sections of this Note.

<sup>16</sup> Honorable Pamela M. Macktaz, *Domestic Violence: A View from the Bench*, 6 MD. J. CONTEMP. LEGAL ISSUES 37, 39 (1995).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See, e.g., ARIZ. REV. STAT. ANN. § 13-3601B (Supp. 1993); CONN. GEN. STAT. § 46b-38b(a) (Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 770 (Supp. 1993); NEV. REV. STAT. § 171.137 (1992); OR. REV. STAT. § 133.055 (1990 & Supp. 1994); R.I. GEN. LAWS § 12-29-3 (Supp. 1993); S.D. CODIFIED LAWS § 23A-3-2.2 (Supp. 1994); WIS. STAT. § 968.075(1), (2) (Supp. 1993).

<sup>21</sup> Macktaz, *supra* note 16, at 40. However, in 1979 California enacted the Domestic Violence Diversion Program, which allowed defendants charged with misdemeanor spouse battery to enter a treatment program instead of the courtroom or prison. See Luisa Bigornia, *Domestic Violence: Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 59 (1997). The district attorney allowed these defendants to enter the treatment program if they had not been convicted of a violent offense within the past ten years; had never had probation or parole revoked; and had not been involved in another domestic violence offense within the past ten years. *Id.* After the defendants completed the treatment program, the arrest was wiped out of their records. *Id.* As of January 1, 1996, the Diversion Program was eliminated. Now defendants are tried based on the evidence brought against them and they can no longer avoid the justice system. *Id.* at 60.

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the criminal justice system; it impacts divorce and child custody proceedings and mediation of such issues as well.<sup>22</sup>

## B. The Phases of Domestic Violence

Battering in a domestic violence context involves the “establishment of control and fear” through intimidation and physical, as well as verbal, abuse.<sup>23</sup> The violence can occur at any time. The cycle of domestic violence occurs in three distinct phases: (1) “the tension building phase,” where the abuser begins to make the victim feel uneasy; (2) “the acute explosion phase,” where the abuser commits the act of violence; and (3) “the honeymoon phase,” where the abuser regrets his or her acts and begs for forgiveness.<sup>24</sup>

### 1. The Tension Building Phase

In the tension building phase, the abuser acts “moody” and degrades the victim both emotionally and physically.<sup>25</sup> The abuser may use drugs or alcohol, which contributes to this kind of debasing behavior.<sup>26</sup> The victim in turn might become quiet and exhibit introvert-like qualities.<sup>27</sup> Other victims try “to reason with” their abusers.<sup>28</sup>

### 2. The Acute Explosion Phase

The tension building phase sets the stage for the next phase of abuse.<sup>29</sup> In the acute explosion phase, the abuser may verbally or physically assault his or her victim.<sup>30</sup> This abuse may even involve rape.<sup>31</sup> “Unfortunately, the victim usually stays with the abuser,

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<sup>22</sup> The ways in which domestic violence can negatively impact mediation is the sole issue investigated in this Note.

<sup>23</sup> Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 *CARDOZO WOMEN'S L.J.* 235, 236-37 (2003).

<sup>24</sup> *Id.* at 238 (quoting Cycle of Violence, Catalog, Duluth Domestic Abuse Intervention Project: National Training Project, at <http://www.Duluth-model.org/daipmain.htm> (last visited (by Krieger) Mar. 11, 2002)).

<sup>25</sup> Krieger, *supra* note 23, at 238.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Krieger, *supra* note 23, at 238. “According to one source of women who reported being verbally and/or physically assaulted since the age of 18, three quarters (76 percent) were victimized by a current or former husband, cohabitating partner, date or boyfriend.” *Id.* at 238-39

tries to minimize the injury, downplays the extent of the damage, or even denies that the abuse has occurred.”<sup>32</sup> Rape victims possess the added shame of admitting to being raped, which is why many of them fail to report the abuse to the police.<sup>33</sup>

### 3. The Honeymoon Phase

Once the realization of the abuse sets in, the couple enters the honeymoon phase whereby the abuser regrets his or her own actions.<sup>34</sup> Many victims are lulled into believing that they are the cause of the abuse.<sup>35</sup> Both the victims and abusers downplay the extent of the abuse.<sup>36</sup> Thus, victims remain in dangerous relationships hoping that the violence ends with the honeymoon phase.<sup>37</sup> Many are not so lucky.<sup>38</sup>

Typically people think of abuse as either physical or verbal, but Mary Ann Dutton and others classify the “battered women experience” as including three potential categories:<sup>39</sup>

(i) **PHYSICAL VIOLENCE:** There is a strong connection between physical violence and poor mental health, including depression, suicidal behavior, and post-traumatic stress disorder;<sup>40</sup>

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(quoting *What Is Domestic Violence?*, National Statistics, National Domestic Violence Hotline, available at <http://www.ndvh.org/ndvh2.html> (last visited (by Krieger) Nov. 20, 2000)).

<sup>32</sup> *Id.* It is important to note, however, that these are typical responses, but each abuse case is unique in its own right.

<sup>33</sup> *Id.* (“Thirty-two percent to fifty-nine percent of women who have been battered have also been raped by their partners.”) (quoting Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 *FAM. & CONCILIATION CTS. REV.* 335, 341 (1999)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 240.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.*

<sup>38</sup> “During the six months following an episode of violence, 32% of battered women are victimized again.” *BUREAU OF JUSTICE STATISTICS: PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN*, (1996), available at <http://www.dccadv.org/statistics.htm#recidivism> (last visited November 2005). “Forty seven percent of men who beat their wives do so at least three times per year.” *AMA DIAGNOSTIC & TREATMENT GUIDELINES ON DOMESTIC VIOLENCE, SEC: 94-677:3M: 9/94*, (1994), available at <http://www.yesican.org/dvstats.htm> (last visited November 2005).

<sup>39</sup> Mary Ann Dutton et al., *Patterns of Intimate Partner Violence: Correlates and Outcomes*, 20 *VIOLENCE AND VICTIMS* 483 (Iss. 5, October 2005), available at <http://proquest.umi.com/pdqweb?did=913607811&sid=4&Fmt=4&clientId=68805&RQT=309&VName=PQD>.

<sup>40</sup> *Id.* “Because domestic abuse is an ongoing cycle producing increasingly severe injuries over time, battered women are likely to see physicians frequently.” *CHILDREN’S SAFETY NETWORK, DOMESTIC VIOLENCE: A DIRECTORY OF PROTOCOLS FOR HEALTH CARE PROVIDERS*, I (1992), available at <http://www.dccadv.org/statistics.html> (last visited November 2005). “[Two hundred and forty three thousand] people receiving emergency room treatment for violence-related injuries in 1994 had been injured by an intimate. Female victims outnumbered males 9 to

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(II) SEXUAL VIOLENCE: This is also associated with post-traumatic stress disorder.<sup>41</sup> “Forced sex appears to be a marker for violence severity in battering relationships as it is associated with increased frequency and severity of violent episodes and increased risk for homicide;”<sup>42</sup> and

(III) PSYCHOLOGICAL ABUSE AND STALKING: In one study, women claimed that the psychological abuse was *worse* than the physical violence.<sup>43</sup> One study found that psychological abuse, not physical abuse, was an important forecaster of post-traumatic stress disorder.<sup>44</sup> Although there has been no extensive research in the area of stalking, one study found increased rates of depression and posttraumatic stress disorder where a greater extent of stalking occurred.<sup>45</sup>

Researchers and scholars have classified types of domestic abuse in other ways. For example, Janet Johnson and Linda Campbell classify domestic violence into five categories:<sup>46</sup> i. “ongoing and episodic male battering,” ii. “female-initiated violence,” iii. “male controlling interactive violence,”<sup>47</sup> iv. “separation-engendered and post-divorce trauma,” and v. “psychotic and paranoid reactions”<sup>48</sup>.<sup>49</sup> This categorization is an alternative or supplemen-

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1.” BUREAU OF JUSTICE STATISTICS: VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS (NCJ-156921), 5, (Aug. 1997), available at <http://www.yesican.org/dvstats.html> (last visited March 21, 2007).

<sup>41</sup> Dutton et al., *supra* note 39, at 483.

<sup>42</sup> *Id.* at 484. (quoting L.C. Campbell, & P. Alford, *The Dark Consequences of Marital Rape*, 89 AMERICAN JOURNAL OF NURSING, 946-49 (1989) and J.C. Campbell, J.C., et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study*, 93 AMERICAN JOURNAL FOR PUBLIC HEALTH, 1089-97 (2002)).

<sup>43</sup> *Id.* (quoting D. R. Follingstad, A. R. Brennan, E. S. Hause, & D. S. Polek, *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. OF FAM. VIOLENCE, 107-120 (1990)).

<sup>44</sup> *Id.* (quoting I. Arias, & K. T. Pape, *Psychological Abuse: Implications for Adjustment and Commitment to Leave Violent Partners*, 14 VIOLENCE AND VICTIMS, 55-67 (1999)).

<sup>45</sup> *Id.* (quoting M.B. Mechanic et al., *The Impact of Severe Stalking Experienced by Acutely Battered Women: An Examination of Violence, Psychological Symptoms and Strategic Responding*, 15 VIOLENCE AND VICTIMS, 443-58 (2000)). “Some advocates believe up to 80% of stalking cases occur within intimate relationships.” DOMESTIC VIOLENCE, STALKING AND ANTI-STALKING LEGISLATION, AN ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT, NATIONAL INSTITUTE OF JUSTICE RESEARCH 3 (Apr. 1996), available at <http://www.yesican.org/dvstats.html>. “If stalking occurs within an intimate relationship, it typically begins after the woman attempts to leave the relationship.” *Id.* at 1.

<sup>46</sup> Steegh, *supra* note 4, at 154 (quoting Janet R. Johnston & Linda E. G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282, 282-83 (1993)).

<sup>47</sup> *Id.* at 154. “Male-controlling interactive violence” involves a disagreement that escalates into a physical struggle, but one where the male does not use excessive force.

<sup>48</sup> *Id.* at 155. “Psychotic and paranoid reactions” refer to abusers who are psychotic and dangerous.

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tal view to the aforementioned three phases of abuse (tension building phase, acute explosion phase, and honeymoon phase).<sup>50</sup> Many women, however, are victims of more than one type of violence or possibly all eight.<sup>51</sup> This further illustrates the uniqueness of each domestic violence case.<sup>52</sup>

### C. Statistics and Factors Contributing to the Perpetuation of a Violent Situation

“More than six million women are battered by their husbands each year. Research has shown that ‘more victims are killed in the process of leaving than at any other time.’”<sup>53</sup> This risk of pursuit and retribution by an abusive spouse deters many women from leaving violent situations.<sup>54</sup> Other women fear financial independence, single parenthood, and the safety of their children.<sup>55</sup> “Between 50% and 70% of the men who batter their wives/partners also abuse their children.”<sup>56</sup> Many victims of domestic violence fear losing their children and thus prefer to stay with the abusive partner despite the abuse.<sup>57</sup> These facts highlight the risk of mediating domestic violence cases as the victim remains fearful of the abuser<sup>58</sup> and may concede on issues which are unfairly beneficial to

<sup>49</sup> *Id.* at 154-55.

<sup>50</sup> *Id.* at 154; *see also* Krieger, *supra* note 23, at 238.

<sup>51</sup> Dutton et al., *supra* note 39, at 483. In the study conducted in Dutton’s article, there were three pattern groups, one with moderate levels of violence; the second with high levels of physical violence, psychological abuse, and stalking but low levels of sexual violence; and the third with high levels of physical, psychological, and sexual violence.

<sup>52</sup> Additionally, it is critical that mediators, judges, and therapists recognize the particular danger of women who have separated from their husbands when determining the ripeness of domestic violence cases for mediation. “Separated/divorced women are 14 times more likely than married women to report having been a victim of violence by their spouse or ex-spouse.” BUREAU OF JUSTICE STATISTICS: FEMALE VICTIMS OF VIOLENT CRIME, (1991), *available at* <http://www.thesafetynet.org/index.cfm?id=47>. “Women separated from their husbands were 3 times more likely to be victimized by spouses than divorced women, and 25 times more likely to be victimized by spouses than married women.” BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY (NCJ-154348) 4 (Aug. 1995), *available at* <http://www.yesican.org/dvstats.html> (last visited Mar. 21, 2007).

<sup>53</sup> Wheeler, *supra* note 6, at 561.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 562. This is another area where the abusive spouse gains control over his victim. Abusers impact the victims’ self esteem so that victims believe they are to blame for the abuse.

<sup>56</sup> *Id.* (quoting Barbara J. Hart, *Domestic Violence Overview*, in *MANUAL FOR THE 1ST JUDICIAL CIRCUIT FAMILY VIOLENCE SYMPOSIA* § 1 (1998))( quotations omitted).

<sup>57</sup> *Id.*

<sup>58</sup> *See* Wheeler, *supra* note 6, at 562.

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the abuser. Furthermore, if the victim is leaving the relationship, mediation may place her in a perilous situation which could later prove fatal.

Domestic violence impacts various age groups and ethnicities in different ways.<sup>59</sup> In one study conducted in Texas, researchers found that women who were physically attacked were more likely to be under the age of 19 and have a child, and less likely to be white or a high school graduate.<sup>60</sup> Female victims of such physical violence “were younger at first intercourse (15.0 vs. 15.7 years) and at first birth (17.2 vs. 18.0); they were also less likely to have used a condom, hormonal contraceptive or both at last intercourse and to have used a condom consistently in the previous year.”<sup>61</sup> Employment status was also a factor in the abuse.<sup>62</sup> The most encompassing finding of this study, however, was that 95% of women who reported physical assault were also victims of verbal assault.<sup>63</sup> This study concluded that inadequate education, early motherhood, and lack of contraceptives were factors that predicted physical violence.<sup>64</sup>

#### D. The Uniqueness of Domestic Violence Cases

Not all domestic violence cases fall neatly into the cycle of violence. There is no such thing as a “typical” victim of domestic violence or a “typical” response.<sup>65</sup> Each case of domestic violence

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<sup>59</sup> Trevor Lane, *Women Have Different Risk Factors for Verbal, Physical Partner Abuse*, 35 *PERSP. ON SEXUAL AND REPROD. HEALTH*, 106 (Mar. – Apr. 2003), available at <http://www.jstor.org/view/15386341/sp030006/03x0108d/0?frame=noframe&userID=8162e159@yu.edu/01cc99331f00501ba08d8&dpi=3&config=jstor> (last visited Mar. 21, 2007).

<sup>60</sup> *Id.* at 107.

To examine characteristics associated with victimization of women by their male partners, researchers recruited sexually active women who visited either of two community-based family planning cities in Galveston, Texas between April 1997 and January 1998. Participants were aged 14-26, had a current partner or spouse, were not pregnant or postpartum, and were not mentally impaired.

These women answered a questionnaire which discussed the frequency of abuse, among other facts.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* Additionally, the researchers found “that verbal abuse precedes or accompanies physical abuse.”

<sup>65</sup> Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 *FAM. L.Q.* 53, 58 n. 27 (2005). “Variables may include the nature, extent and frequency of the abuse itself, . . . presence or absence of other individuals who may take a supporting role, whether and how the parties are employed and the

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involves different physical, psychological, social, economic, and legal elements.<sup>66</sup> Most domestic abuses cases, however, involve ongoing incidents of abuse.<sup>67</sup> Though the frequency of abuse may vary from case to case,<sup>68</sup> each situation must be assessed based on all the relevant variables which contribute to the abuse. The extent and frequency of abuse play an important role in assessing the role of mediation in a case involving domestic violence.<sup>69</sup>

Another key aspect of domestic violence, to which mediators must pay close attention, is the batterer's subconscious justifications for committing acts of violence.<sup>70</sup> The traditional and patriarchal explanation asserts that men abuse women to maintain power over them.<sup>71</sup> Based on social learning theory, many believe that men who batter have witnessed such aggressiveness against women during their maturation period.<sup>72</sup> Another possible cause of abuse involves men's "deep unconscious intrapsychic processes," known as projective identification.<sup>73</sup> Recognition of the deeper issues

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economic resources available to them, whether or not related proceedings. . . have taken place, and whether neither, one, or both parties are represented by counsel." See also Laurel Wheeler, *supra* note 6, at 561. "Domestic violence involves a continuum of behaviors ranging from degrading remarks to cruel jokes, economic exploitation, punches and kicks, false imprisonment, sexual abuse, suffocating actions, maiming assaults, and homicide." *Id.* (quoting Barbara J. Hart, *Domestic Violence Overview*, in *MANUAL FOR THE 1ST JUDICIAL CIRCUIT FAMILY VIOLENCE SYMPOSIA* § 1 (1998)).

<sup>66</sup> Murphy and Rubinson, *supra* note 65, at 58.

<sup>67</sup> Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 *LOY. J. PUB. INT. L.* 37, 44 (2003). 50 to 80% percent of couples who partake in court-based divorce and custody/visitation mediation programs suffer from domestic abuse. Women do not always admit to the abuse during the mediation sessions and many untrained mediators fail to recognize it either. *Id.* Thus, the exact number of domestic violence cases involved in mediation is unknown.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Diane L. Zosky, *Projective Identification as a Contributor to Domestic Violence*, *CLINICAL SOC. WORK J.*, 419 (Vol. 31, Iss. 4, 2003), available at <http://www.springerlink.com/content/n3jwk5u14674314314/fulltext.pdf> (last visited Mar. 21, 2007).

<sup>71</sup> *Id.* Zosky defines projective identification as a method "invoked by men to induce the other partner to carry split-off threatening parts of the self that are too anxiety provoking to retain." *Id.* at 420. Projective identification occurs "when a person projects a denied part of himself not so much on to but into another person and ends up by powerfully controlling the receiver from within like a glove puppet." See ANGELA MANOS, A PSYCHOTHERAPIST'S HARVEST (July 2, 1998) (unpublished manuscript), available at [http://net.klte.hu/~keresofi/psyth/a-toz-entries/projective\\_identification.html](http://net.klte.hu/~keresofi/psyth/a-toz-entries/projective_identification.html) (quoting Cynthia Rogers, *On Putting it into Words: The Balance Between Projective Identification and Dialogue in the Group*, *GROUP ANALYSIS*, 20(2), 99-107 (1987)). Projective identification may occur because an abuser needs to get rid of "bad parts" of himself by projecting his frustrations onto the victim. See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> Zosky, *supra* note 70, at 420

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plaguering the batterer, as opposed to limiting treatment to the victim of abuse, will help placate the problems of domestic violence and enhance the effectiveness of mediation.<sup>74</sup>

Projective identification, however, is a controversial means of treating and rehabilitating domestic violence abusers.<sup>75</sup> Many theorists feel that it transfers some of the guilt to the female victim.<sup>76</sup> So long as mediators and all the parties involved in the mediation of a domestic violence case recognize that the blame must lie solely with the abuser, the theory of projective identification may be explored for its needfulness in a particular situation.<sup>77</sup> This can help mediators and others better understand the dynamics of an abusive relationship. Additionally, a therapist or mediator must “develop a nurturing therapeutic relationship when one knows the details of the violence and the abuse.”<sup>78</sup> Projective identification is a useful tool in understanding the facets of a violent relationship.<sup>79</sup>

Although domestic violence can involve a female or male aggressor, studies have shown that women are more likely than men to be physically beaten.<sup>80</sup> Surprisingly, one study found that during

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<sup>74</sup> See Belzer, *supra* note 67. Many adults possess unresolved issues stemming from negative interactions with primary caretakers. This negativity formulates individuals' personalities and continues to afflict them into their adult years. “. . . [B]ad self and object representations may be projected onto partners to move the internal conflict to an external intimate partner where it can be more safely managed from a distance.” *Id.* (quoting J. Framo, *Family of Origin as a Therapeutic Resource for Adults in Marital and Family Therapy: You Can and You Should Go Home Again*, 15 *FAM. PROCESS*, 193-210 (1976)).

<sup>75</sup> *Id.*

<sup>76</sup> Zosky, *supra* note 70, at 419.

<sup>77</sup> See *id.* Additionally, projective identification can help the female victim reduce her own self-blame.

<sup>78</sup> *Id.* at 429.

<sup>79</sup> *Id.* Zosky even suggests that once abusive men develop a relationship with their therapists, they may use their therapists “as a recipient for split negative self.” Therapists may require clinical supervision in such cases. The same problems may arise during the course of mediation or when the decision to mediate is being assessed.

<sup>80</sup> Jeff Temple et al., *Physical and Mental Health Outcomes of Women in Nonviolent, Unilaterally Violent, and Mutually Violent Relationships*, 20 *VIOLENCE AND VICTIMS* 335 (Iss. 3, 2005), available at <http://www.atypon-link.com/spc/doi/pdf/10.1891/vivi.203.335?cookieSet=1>. “28% of all annual violence against women is perpetrated by intimates,” while “5% of all annual violence against men is perpetrated by intimates.” BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: NATIONAL CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN (NCJ-145325), (Jan. 1994), available at [http://iris.virginia.edu/irisonline/archive/10\\_19\\_05/saywhat.html](http://iris.virginia.edu/irisonline/archive/10_19_05/saywhat.html). Clearly there is a discrepancy between the violence committed against men and women. Additionally, “nearly 1 in 3 adult women experience at least one physical assault by a partner during adulthood.” AMERICAN PSYCHL. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10 (1996), available at [http://iris.virginia.edu/irisonline/archive/10\\_19\\_05/saywhat.html](http://iris.virginia.edu/irisonline/archive/10_19_05/saywhat.html). “90 - 95% of domestic violence victims are women.” BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: VIO-

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asymmetrical bidirectional violence,<sup>81</sup> the violence was more frequent and severe compared to cases where there was one attacker.<sup>82</sup> Nevertheless, the authors of the study admitted that the low numbers of women in the study groups may have over-estimated women's perpetration of violence.<sup>83</sup> Additionally, men under-report the brutality of their abusive activities.<sup>84</sup> This may skew the data to show an equal relationship between female and male violence, but that is not an accurate depiction.<sup>85</sup> These facts further suggest that females are not as violent as males, and they are more likely to be victims of abuse as well.<sup>86</sup>

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LENCE BETWEEN INTIMATES (NCJ-149259), (Nov. 1994), *available at* [http://iris.virginia.edu/irisonline/archive/10\\_19\\_05/saywhat.html](http://iris.virginia.edu/irisonline/archive/10_19_05/saywhat.html). "As many as 95% of domestic violence perpetrators are male." A REPORT OF THE VIOLENCE AGAINST WOMEN RESEARCH STRATEGIC PLANNING WORKSHOP SPONSORED BY THE NATIONAL INSTITUTE OF JUSTICE IN COOPERATION WITH THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, (1995), *available at* [http://iris.virginia.edu/irisonline/archive/10\\_19\\_05/saywhat.html](http://iris.virginia.edu/irisonline/archive/10_19_05/saywhat.html). "Much of female violence is committed in self-defense, and inflicts less injury than male violence." VIOLENCE IN FAMILIES: ASSESSING PREVENTION & TREATMENT PROGRAMS, 42 NATIONAL RESOURCE COUNCIL AND INSTITUTE OF MEDICINE, (Chalk & King eds., 1998), *available at* <http://deanofstudents.unc.edu/relationships/factfiction/index.html>. "During 1992-1993, women were 6 times more likely to experience violence by an intimate partner than men." BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY (NCJ-154348), 1 (Aug. 1995), *available at* <http://www.yesican.org/dvstats.html>. "The chance of being victimized by an intimate is 10 times greater for a woman than a man." BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: NATIONAL CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN, (1994), *available at* <http://www.yesican.org/dvstats.html>. "[Seventy percent] of intimate homicide victims are female." BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: VIOLENCE AGAINST INTIMATES (NCJ-149259), (Nov. 1994), *available at* <http://www.yesican.org/dvstat.html>. "Male perpetrators are 4 times more likely to use lethal violence than females." FLORIDA GOVERNOR'S TASK FORCE ON DOMESTIC AND SEXUAL VIOLENCE, FLORIDA MORTALITY REVIEW PROJECT, 44 (1997), *available at* <http://www.yesican.org/dvstat.html>.

<sup>81</sup> Temple, *supra* note 80, at 335. In asymmetrical bidirectional violence, both parties commit acts of violence against one another. Bidirectional violence typically involves a low level act by one party, which provokes the other party to escalate the argument to relentless acts of violence. Moreover, one study showed that "women's violence increased only in reaction to men's violence or psychological abuse." *Id.* at 355. Women obviously bear a greater burden in the bidirectional violence situation.

<sup>82</sup> *Id.* However, "when males were the primary perpetrator in bidirectional violent relationships, women experienced more threats, violence, and sexual aggression than women in any other group [in this study]." *Id.* at 353. The author provides a helpful scenario: "An abusive husband slaps his wife. The wife shoves and scratches her husband. He then punches her in the face breaking her nose." *Id.* at 337. Even though both parties were violent, the wife has clearly received the brunt of the abuse.

<sup>83</sup> *Id.* Since women have a greater likelihood to be victims of violence, I may refer to domestic violence victims as females. For justification of this assertion, please see the statistics provided in footnote 57.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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Another unique aspect concerning domestic violence involves its relation to culture.<sup>87</sup> For some, “[a]ttitudes toward violence against women reflect gender norms and social ideologies about male domination over women,” as previously stated.<sup>88</sup> Couples in certain cultures adopt more traditional gender roles.<sup>89</sup> Male domination is not accepted in the United States today, compared to other countries, since gender equality is legally sanctioned by the government.<sup>90</sup> Nevertheless, that does not discount the fact that traditionalists remain in this country.<sup>91</sup> Relevant factors to detect such backward gender roles include sociopolitical, economic, historical, and religious pressures.<sup>92</sup> This serves as yet another key aspect that mediators and therapists must take into account when dealing with a domestic violence situation.

### III. MEDIATING DOMESTIC VIOLENCE CASES

#### A. An Overview of Mediation

Mediation is a form of alternative dispute resolution (ADR) whereby two adverse parties are encouraged and assisted by a neutral facilitator to resolve their dispute amongst themselves.<sup>93</sup> The

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<sup>87</sup> Madhabika B. Nayak, *Attitudes Toward Violence Against Women: A Cross-Nation Study*, 49 *SEX ROLES* 333, 334 (Iss. 7/8, 2003), available at <http://www.springerlink.com/content/n84145mn23130340/fulltext.pdf>.

Overall sociocultural theories of violence suggest that violence against women is a reflection of attitudes shared by a group that govern interpersonal interactions and permeate all spheres of activity (e.g. games, politics, community actions). Hence, sociocultural groups that differ in incidence of violence also differ in basic values or attitudes (such as those related to gender inequities) that extend to acceptance of violence in relationships between women and men.

<sup>88</sup> *Id.* at 339.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* Nayak’s study compared attitudes toward violence in the United States, India, Japan, and Kuwait. Unlike the United States, despite the fact that India, Japan, and Kuwait all have democratic governments, their paternalistic and hierarchal power structures remain and perpetuate the tolerance of violence against women in those countries.

<sup>91</sup> See *id.* at 333. “Regardless of the progress of the feminist and battered women’s movements, patriarchy is still a defining factor in American culture.” Krieger, *supra* note 23, at 241.

<sup>92</sup> See Nayak, *supra* note 87. Previously researchers have associated income level with abuse, but “analyses of the influence of political, social, historical, religious, and economic factors on gender ideologies is vital to a more complete understanding toward violence against women.” *Id.* at 341.

<sup>93</sup> Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 *FLA. ST. U.L. REV.* 43, 38 (1995). Leonard L. Riskin defines mediation as “a process in which an impartial third party, who lacks authority to impose a solution or determination, assists others to resolve a

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central aspect of mediation is the emphasis on active roles played by the disputing parties.<sup>94</sup> Each party negotiates based on the issues that he or she feels are important and both are open to compromise.<sup>95</sup> Such parties set the stage for their own settlements.<sup>96</sup> “The mediator’s role [is] to facilitate and to help. . .disputing parties find their own voices and solutions.”<sup>97</sup>

In divorce settlements, mediation provides parties with an opportunity to settle their divorce disputes on their own terms.<sup>98</sup> “The mediation process is supposed to ‘reduce the court’s docket, reduce the demand on judicial resources, accelerate the rate of case resolution, reduce the cost of resolving conflicts, increase the litigants’ satisfaction with the court system and improve relations between disputing parties.’”<sup>99</sup> While some states mandate mediation in the family law field, the decision to mediate is discretionary in others.<sup>100</sup>

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dispute or plan a transaction.” Brian Wessner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Program*, 4 CARDOZO J. CONFLICT RESOL. 1 (2002).

<sup>94</sup> Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135 (2004). “At most mediation sessions, the parties attend and contribute to the discussion either directly or through their attorneys.” *Id.* at 136.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* “The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS, available at <http://www.adr.org/sp.asp?id=21913> (last visited January 22, 2006).

<sup>98</sup> Gerencser, *supra* note 93, at 50. Mediation began as a means to deal with the costs of litigating divorce cases and the delays in the courthouse. Additionally, many divorcing couples are dissatisfied with their attorneys claiming that they lack interest in their case and do not afford adequate consideration to their cases. Steegh, *supra* note 4, at 163. Many attorneys, however, believe that clients have impracticable expectations about the prospects of their cases and “enter the system at a time of great emotional turmoil.” *Id.*

<sup>99</sup> Krieger, *supra* note 23, at 243 (quoting Gerencser, *supra* note 93, at 49).

<sup>100</sup> Gerencser, *supra* note 93, at 51. According to the Model Rules of Professional Conduct, lawyers have a duty to inform their clients about the option of mediation due to the widespread use and benefits of mediation. *Id.* at 53. Some lawyers conclude that if a lawyer fails to disclose this option to his or her client, the lawyer may be liable for malpractice. *Id.* Participants of the Wingspread Conference claim that attorneys have an affirmative duty to inform their clients about the prospects of alternative dispute resolution. Steegh, *supra* note 4, at 164 (quoting *The Wingspread Report and Action Plan, High Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146, 150 (2001)). Initially, mediation was used on a completely voluntary basis. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 23-4 (2001). When few people utilized this alternative means of dispute resolution, many courts imposed mandatory mediation. *Id.* at 24. This policy will be discussed later when I will analyze how domestic violence cases should be mediated. When courts force mediation upon parties, some

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On the surface, mediation seems like the most appropriate form of dispute resolution for divorce and other family-related cases.<sup>101</sup> Court cases can be impersonal and combative, while mediation emphasizes communication among the parties and private resolution of their disputes.<sup>102</sup> However, once familial tensions rise above mundane arguments and turn into physically and emotionally damaging abuse, the debate over whether mediation is an appropriate tool to resolve domestic violence cases arises.<sup>103</sup>

## B. Justification for Mediating Domestic Violence Cases

Some critics of litigation in domestic violence cases do not see mediation as an inappropriate means to conflict resolution. “Rather, mediation is designed as an alternative to present conflict resolution models, specifically litigation.”<sup>104</sup> But is an alternative desirable in such a situation? If the mediators are appropriately trained in both legal and psychological disciplines, perhaps they can help arrange a compromise to avert deep-seated abuse.<sup>105</sup> Courts do not have this dual capacity to provide both legal and psychological services which “families in transition typically require.”<sup>106</sup>

While critics may argue that mediation is never appropriate for cases involving domestic violence, the more common approach is to assess power issues on a case-by-case basis paying particular attention to: duration, severity, frequency, onset, abuse of

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say they have removed the self determination aspect from the process. *Id.* One of the core benefits of mediation, however, is the party’s decision whether to go through with mediation or undergo judicial litigation proceedings. *See Welsh, supra* note 94, at 137 (contending that “the process has become less focused on empowering citizens and more focused on forcing these citizens to confront and become reconciled to the legal, bargaining and transactional norms of the courthouse”). These issues of empowerment are particularly important in a domestic violence situation, where the victim typically possesses feelings of self blame and low self esteem. *See Zosky, supra* note 70, at 419 (asserting that the use of projective identification can be used to reduce victim’s feelings of self-blame). This can negatively impact the victim’s bargaining power in the mediation.

<sup>101</sup> *See* Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 858 (1999).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Zylstra, *supra* note 11, at 259.

<sup>105</sup> *See* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322-23 (2004).

<sup>106</sup> *Id.* at 323.

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alcohol or drugs, psychiatric disorder, and other family dysfunction.<sup>107</sup>

The effectiveness of mediation depends upon the extent of the violence. If the abuser refuses to recognize the worth of his or her partner, no true compromise may be reached.<sup>108</sup> Mediation may be an appropriate forum for the stages preceding such a devastating roadblock. The question arises as to the location of that line: How much abuse or domineering treatment is too much to allow for a fair mediation? Many authors look to well-credentialed mediators to answer this question.<sup>109</sup>

Moreover, mediation provides former spouses with an opportunity to resolve their disputes amicably and tailor compromises to their specific needs.<sup>110</sup> Particularly in cases where parents share custody of the children, their continuing relationship will forever benefit from its non-adversarial dissolution.<sup>111</sup> The agreements reached by mediation have a greater likelihood of long-term compliance compared to divorce settlements imposed on the parties by judicial decree.<sup>112</sup> When judges are asked to resolve disputes that the parties themselves could not undertake, they are positioned in an almost impossible situation.<sup>113</sup> Contrary to the premise of the

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<sup>107</sup> Zylstra, *supra* note 11, at 260-61.

<sup>108</sup> *Id.* at 256; *but cf.* Brenda Smith, *Symposium: Battering Forgiveness, and Redemption*, 11 AM. U.J. GENDER SOC. POL'Y & L. 921 (2003). "While problematic in some respects, mediation has the potential to advance principles of forgiveness and redemption in domestic violence matters by permitting the parties to mediate or discuss issues tangential to the fact that violence occurred, but important to maintaining a cooperative relationship."

<sup>109</sup> Steegh, *supra* note 4, at 189 (quoting the Model Standards of Practice for Family and Divorce Mediation). "Mediators should only undertake such cases if they are trained to understand the dynamics of domestic violence and have been taught special techniques for working with abusive families. . ." *Id.* at 190.

<sup>110</sup> Gerencser, *supra* note 93, at 50.

<sup>111</sup> *Id.* at 50-51. In cases of divorce and shared custody of the children, the parties recognize that their bonds of marriage and union cannot be completely relinquished. This incentive benefits children and spouses alike. .

<sup>112</sup> *Id.* at 51. When cases are mediated, parties can resolve their disputes with their own standards of fairness, contingent on the consent of the court and the advice of their attorneys. Steegh, *supra* note 4, at 174. Research has proven that with mediation, the potential for compliance is greater compared to litigation due to the fact that the couple arrived at their settlement agreement voluntarily and on their own terms which best suit them. *Id.* at 176.

<sup>113</sup> Steegh, *supra* note 4, at 162. "A Maryland study found that some family judges display either a lack of interest, a lack of temperament, or a lack of understanding with respect to these cases." *Id.* (quoting Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 628 (1999)).

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adversary system, judges are not always able to reach a “correct” solution.<sup>114</sup>

While mediation may provide a more cordial alternative to litigation, in cases of domestic violence it is not only beneficial but sometimes necessary to provide victims with greater bargaining power, particularly where the abuser possesses the means to hire an attorney and the victim does not.<sup>115</sup> Although many disclaim the benefits of mediation due to its inability to place both parties on equal footing in domestic violence situations, they fail to realize the reality of litigating such cases; many battered women cannot afford to retain an attorney.<sup>116</sup>

### C. Fallbacks of Mediating Domestic Violence Cases

Where one party has clearly dominated another, mediation may be an inappropriate means to resolve the dispute, especially if the victim is not supported by an advocate or helped by a caucus.<sup>117</sup> Perhaps cases of severe physical, verbal, and psychological abuse demand the declaration of a clear winner, the victim, and a clear loser, the abuser. Should the victim have to compromise his or her entitlements under the law when he or she has been wronged and cannot be fully compensated via a mediation approach to spousal conflict resolution?

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<sup>114</sup> *Id.* at 162. Critics claim that judges are not adequately trained in the emotional aspects of the divorce, thereby further limiting the ability of judges to adequately adjudicate divorce cases, particularly in the context of domestic violence.

<sup>115</sup> *See id.* at 166. A 1993 survey found that pro se litigants in contested divorce cases were only satisfied with the results of the case 33% of the time. *Id.* (quoting Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 *PSYCHOL. PUB. POL'Y & L.* 989, 1059 (2000)). In such cases women will not have the means to adequately represent their interests and ability to advocate for themselves. Steegh, *supra* note 4, at 166-67. Court awarded alimony is typically insufficient to support mothers and children and without an advocate, such as a lawyer, battered women may not be able to maximize their potential for receiving spousal support. *See id.* at 169. Additionally, the presence of an attorney can have a severe effect on the custody of children. *Id.* at 167. “After controlling for gender, Maccoby and Mnookin found that represented parents were more likely to be awarded physical custody than unrepresented parents.” *Id.* (quoting Eleanor E. Maccoby & Robert J. Mnookin, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY*, 137 (1997)). This illustrates the potential need for a mediator to balance the playing field in cases of domestic violence.

<sup>116</sup> Steegh, *supra* note 4, at 166.

<sup>117</sup> Zylstra, *supra* note 11, at 256. Where the imbalance of power is too great, the victim will be unable to adequately participate and advocate on her behalf. *Id.* Mediators use caucuses when they feel that individual meetings with each party will be beneficial.

### 1. Lack of Trained Mediators

The greatest criticism of using mediation to resolve cases involving domestic violence is the lack of trained mediators.<sup>118</sup> Most mediators cannot recognize the existence of domestic violence.<sup>119</sup> That is particularly true where victims and abusers hide the abuse or deny its existence at all:<sup>120</sup>

Someone is often designated the “gatekeeper” for screening a case for a history of domestic abuse and evaluating its appropriateness for mediation, but this role is usually filled by the court, an attorney, a mediator, or the mediation program administrator, who might lack proper training. . .the battered and abused spouse is not easily identified.<sup>121</sup>

Some jurisdictions require such high standards of proof that victims do not possess the evidence to show that they have been abused.<sup>122</sup> This is particularly shocking considering the difficulty of victims coming forward in the first place.

### 2. Lack of Equal Bargaining Power

#### a. Abuser maintains power over victim

“The partner in a relationship who commits acts of domestic violence does so in order to gain power and control over the other partner. Physical, psychological, sexual, and financial abuse are the tools used to achieve power and control in the relationship, rather than ends in themselves.”<sup>123</sup> Mediation is an alternative dispute

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<sup>118</sup> *Id.* The Model Standards of Practice for Family and Divorce Mediation recommend that mediators have an understanding of family law; “training in the impact of family conflict on parents, children, and other participants, including knowledge of child development, domestic abuse, and child abuse and neglect;” an education in the mediation process; and the ability to decipher the influences of culture and diversity. Steegh, *supra* note 4, at 189 (quoting MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard X (2001)). However, not all mediators comply with those vaguely constructed standards. *Id.* Some states have not even adopted a required training program for mediators. *Id.*

<sup>119</sup> Zylstra, *supra* note 11, at 256.

<sup>120</sup> See Krieger, *supra* note 23, at 240.

<sup>121</sup> Belzer, *supra* note 67, at 46-47 (quoting Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, HOFSTRA L. REV. 825, 834 (1995)); see also Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J ON DISP. RESOL. 95, 99 (2001). Domestic violence also remains undetected because mediators lack discovery powers and cannot be assured that the parties are telling the whole story about their past.

<sup>122</sup> Belzer, *supra* note 67, at 47.

<sup>123</sup> Krieger, *supra* note 23, at 245 (quoting Julie A. Domonkos, *Lawyers Committee Against Domestic Violence Position Statement “PEACE” and Victims of Domestic Violence* (July 2000)(unpublished position piece)(on file with author)). This may stem from the fact that patriarchy continues to dominate American culture. *Id.* at 241.

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resolution method whereby parties can “work towards an equally beneficial compromise.”<sup>124</sup> Due to the psychological trauma inflicted by patterns of abuse, victims are not brought to the table as equal participants.<sup>125</sup>

Moreover, when victims live in a “culture of battering,” mediation can never afford both the victim and abuser equal footing.<sup>126</sup> Since many screenings for such deep-seated abuse are unsuccessful in distinguishing cases of severe abuse compared to situations involving a “culture of battering,” “the systemic pattern of control and domination” will always prevail at trumping the equality and openness of mediation techniques.<sup>127</sup>

b. Fear of physical harm and retribution

Additionally, fear of the batterer can prevent the victim from adequately advocating for him- or herself, which is the most important aspect of mediation.<sup>128</sup> The use of mediation may even cause

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<sup>124</sup> Krieger, *supra* note 23, at 246.

<sup>125</sup> *Id.* However, there are ways where mediators can equalize the power imbalance. Steegh, *supra* note 4, at 186. These methods include: devising ground rules, choosing the topic of discussion, allowing the parties to speak only with the mediator’s permission, limiting talk time, permitting parties to respond to one another, explaining one spouse’s comments to the other, ending the conversation, and writing the agreement. *Id.* at 186-87. “The mediator gradually transfers power from himself or herself to the divorcing couple as they become able to use it appropriately.” *Id.* at 187. A key factor of the role of mediators is that they are neutral with regard to the outcome of the mediation “but they are not value free with respect to the process and the safety to the participants.” *Id.* at 188. For example, mediators can ask questions which insinuate the unfairness of a proposed agreement when it disadvantages the victim. *Id.* at 187.

<sup>126</sup> Smith, *supra* note 108, at 935. There are three elements to a culture of battering: abuse (physical, emotional, sexual, or economic); “systematic pattern of domination and control by the batterer;” and concealment of abuse by the victim. Gerencser, *supra* note 93, at 59.

<sup>127</sup> Smith, *supra* note 108, at 935. The author believes that it is impossible or at least improbable for screeners to be adequately trained to distinguish between cases of explosive abuse and those that are less severe. *Cf.* Belzer, *supra* note 67, at 55; Andrew Schepard, *An Introduction to the Model Standards of Practice for Divorce and Family Mediation*, 35 *FAM. L.Q.* 1, 20 (2001). The openness of mediation may not always allow the violence to be revealed if the mediators abide by the Model Standards. *See id.* at 20. The rules require that mediators not act in a neutral manner when it comes to safety of the parties. *Id.* In cases of violence, it is important that mediators are trained to deal with such cases; that they properly screen the parties; that they ensure that the appropriate safety measures are put into place; and that they report incidents of violence. *Id.* Thus, a strict application of the Model Rules should ensure the physical safety of the parties; however, those safety measures cannot prevent any continuing psychological control that the batterers may have over their victims.

<sup>128</sup> Zylstra, *supra* note 11, at 256. This is particularly true since victims possibly possess the greatest likelihood of abuse during the period of separation. Steegh, *supra* note 4, at 198. Since 73% to 96% of mediation programs use special procedures when dealing with domestic violence cases, the victims’ safety can be maintained by “providing separate waiting rooms for both of the parties, staggering arrival and departure, and providing an escort to and from the car.” *Id.* at

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an abuser to take retribution and physically harm his or her victim.<sup>129</sup> Abused victims are at the greatest risk of physical violence when they leave their spouses.<sup>130</sup> If the abuser and victim meet for a mediation session, then the “conference may allow a batterer access to a spouse who has successfully evaded contact since the separation.”<sup>131</sup>

### 3. Lack of Victim Protection

Many of the advantages of mediation which typically yield positive results in non-violent situations may serve as detractors in cases of domestic violence.<sup>132</sup> Mediation involves a great deal of privacy, the use of unofficial proceedings, a lack of substantive rules, and the encouragement of compromise.<sup>133</sup> In domestic violence situations where the victim’s safety is at issue and the victim is alternatively willing to use the court, some believe the court can be the only authority to guarantee that the abuser is held accountable for his or her misdeeds.<sup>134</sup>

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198-99. Moreover, during the mediation session, the parties can spell out what conduct outside the mediation sessions is permitted (i.e. phone, email, face-to-face contact). *Id.* However, if the abuser has not yet resolved his abusive tendency, such agreements may not be respected. Mediators should take note of abusers’ ability to repeat the violence. Such considerations should impinge on the decision to mediate these disputes in the first place and in the midst of the mediation process, if the circumstances require it. Mediators have a continuing obligation to screen for abuse throughout the mediation process. *Id.* at 200-01. Evidence of renewed violence may include fearful body language, one party controlling the discussion, or the use of insulting remarks to intimidate the victim. *Id.* at 201.

<sup>129</sup> Zylstra, *supra* note 11, at 257. “Critics caution that merely implementing safety precautions does not remove the ‘psychological terrorism’ that may be perpetuated with a look, movement, or word during the mediation.” See also Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California’s Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1052 (2003). “Research has found that battered women are more likely to be abused after mediation than after a formal trial.” *Id.* But cf. Lauri Boxer-Macomber, *Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 896 (2003). California, which has a mandatory mediation requirement, mandates that there should not be face-to-face mediation in cases where there is an order of protection. *Id.* Even if there is no order of protection, when allegations of domestic violence have been made, parties have the option of separate mediations. *Id.* Additionally, California’s approach allows victims to raise issues concerning the insecurity of their physical safety. *Id.* at 897. They may not be so inclined to bring up those issues in a public setting (i.e. courtroom). *Id.*

<sup>130</sup> Rimelspach, *supra* note 121, at 98; Wheeler, *supra* note 6, at 561.

<sup>131</sup> Rimelspach, *supra* note 121, at 98.

<sup>132</sup> *Id.* at 95.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* Individuals who adopt this viewpoint hail the protection of the victims as nonnegotiable. Only through the use of an adversarial proceeding and strong court intervention can the victim’s right to safety be adequately protected. Additionally, critics have contended that by

IV. DIFFERENT APPROACHES TOWARD MEDIATING  
DOMESTIC VIOLENCE CASES

There are many alternatives to the use of mediation in domestic violence cases. No matter which position one takes, it has been argued that one must approach the matter using a utilitarian analysis, which involves weighing the advantages against the harms of mediation and other factors that affect both parties.<sup>135</sup> Courts can either mandate mediation in some domestic violence cases<sup>136</sup> or they can leave the decision of using alternative dispute resolution with the parties themselves.<sup>137</sup> Many have called for increased training and screening of mediators,<sup>138</sup> but that may not be enough

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mediating a case involving domestic violence, the court has failed to “treat domestic violence as a crime.” *Id.* at 99. In the words of Judge Weinstein, “[i]t is a minimum assumption of our twenty-first century United States that it [domestic violence] will not be tolerated.” *Nicholson v. Williams*, *supra* note 1, at 164. If abusers and victims are allowed to mediate, they are implicitly being told that the violence is not so heinous, which is evidenced by the fact that the two parties are negotiating as equals during mediation. Rimelspach, *supra* note 121, at 99. This also emphasizes the lack of accountability upon the abusers for their misdeeds. *Id.* Lastly, critics have said that by allowing mediation and concealing the heinousness of domestic violence from the public, the old attitude of domestic violence as a “family problem” will recur. *Id.*

<sup>135</sup> Rimelspach, *supra* note 121, at 100.

<sup>136</sup> Wheeler, *supra* note 6, at 565 (pointing to the Ohio courts as an example where courts possess the discretion to determine whether domestic violence cases should be mediated). Ohio courts look to the “best interest of the parties.” *See also* Rimelspach, *supra* note 121, at 104. The benefits of mediation outweigh the alternatives, even in some cases of domestic violence. *Id.* Nevertheless, various precautions must be set into place in order to limit any potential disadvantages to either of the parties and to placate the concerns of mediation opponents. *Id.* The initial screening for domestic violence and the extent of the violence is the best time to exclude some cases from mediation. *Id.* at 105. This is the period where the mediator must determine whether there is a “culture of battering” and whether the abuse is ongoing. *Id.* There should be safety procedures that take effect throughout the mediation, such as the assurance of safety measures in courts where the mediation takes place, attention to internal alarm systems and access to security personnel. *Id.* at 108.

<sup>137</sup> *But cf.* Wheeler, *supra* note 6, at 572 (contending that domestic violence cases should never be mediated); Boxer-Macomber, *supra* note 129, at 888 (citing California’s policy of mandatory mediation, which has been in existence for over twenty years)

Forty-three states and the District of Columbia have legislation regulating family mediation, and of those, California is one of only eleven states that uniformly order mandatory mediation. While most state mediation programs are discretionary and provide exemptions to mediation, California is the only state that utilizes mandatory mediation without any exemptions.

Dunnigan, *supra* note 129, at 1036.

<sup>138</sup> Zylstra, *supra* note 11, at 270. “Mediators can obtain the basic training through continuing legal education, domestic violence educational programs, or shadowing/mentoring programs with practicing family mediators.” The training must include any awareness of the dynamics of a relationship plagued with domestic violence, psychological dimensions of domestic violence, different screening methods, “recognition of domestic abuse cues, appropriateness of a mediator’s involvement in minimizing power imbalances, referral to appropriate community resources,

to level the playing field. Victims should be fully informed of all their options if they live in a jurisdiction without exemptions to court-mandated mediation.<sup>139</sup>

#### A. Allow Victims to Decide Whether to Mediate

Due to the issues of unfairness that can arise when a domestic violence victim undergoes mediation and the disadvantages that she may suffer as a result of her inability to advocate for herself, many contend that such victims must request mediation; otherwise, the mediation should not be allowed to go forward.<sup>140</sup> Victims are obviously most familiar with their own situations; thus, they should be the ones to decide the form of the decision making process.<sup>141</sup> There are various factors that the victim should consider, such as the severity of the abuse, possibility of immediate danger, likely behavior of the abuser, and the feasibility of the victim being represented by an attorney.<sup>142</sup>

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and special precautions needed to conduct mediations.” Although no such requirement yet exists, there has been a call for certification of mediators whereby they would be required to undergo a performance-based evaluation of their ability to mediate. Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 PEPP. DISP. RESOL. L.J. 37, 41 (2001). There is currently no consensus as to exactly what certification procedures should be conducted. *Id.*

<sup>139</sup> Rimelspach, *supra* note 121, at 110-11. Parties should be informed of all their options, so that they can pick an option that best suits them.

<sup>140</sup> Steegh, *supra* note 4, at 196. Section 407 of the Model Code states that mediation can be undertaken in cases of domestic violence where the victim has consented to this alternative form of dispute resolution. *Id.* at 191. The Model Family Mediation Standards Act calls for “informed consent” by the victims. This can be achieved by mediators conducting informational sessions to discuss the process of mediation, the need for an attorney, etc. *Id.* The mediator, of course, should speak with both parties and screen for violence at this preliminary stage. *Id.*

<sup>141</sup> Belzer, *supra* note 67, at 56-57.

<sup>142</sup> Steegh, *supra* note 4, at 196-97. Victims of domestic violence must be educated as to all of their options, which involve litigation and mediation alike. Boxer-Macomber, *supra* note 129, at 906. Victims should be allowed to enter into mediation, receive counsel or an advocate during the mediation proceedings, and be ensured that their physical safety is not in jeopardy. *Id.* California courts refuse to allow victims to take part in the decisionmaking aspect of custody mediation proceedings, as it requires court-mandated mediation for all family law cases and there are no exemptions for victims of domestic violence. *Id.* at 883.

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## B. Never Allow Mediation in Cases Involving Domestic Abuse

Others propose that the risks involved in court-mandated mediation are too great to justify its use.<sup>143</sup> Thus, they argue, an across-the-board prohibition on mediation in abusive relationships is necessary.<sup>144</sup> Where there is no such blanket exclusion, mediators will have to take upon the “role of investigator” to determine if the allegations of abuse are valid or if such abuses even exist where the victim does not openly discuss the violence that has plagued her family situation.<sup>145</sup> “To expect [mediators] to be aware

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<sup>143</sup> Wheeler, *supra* note 6, at 571; *see also* Krieger, *supra* note 23, at 259. An abuser will not be able to reach a mutually agreeable settlement agreement, since he will likely feel that the agreement is unfair to him. Rimelspach, *supra* note 121, at 98. If an abuser has been the dominating party of the relationship, then it seems obvious that he will not tolerate submission to his victim subsequent to the crafting of the settlement. That statement, however, is my own deduction from Rimelspach’s article. *But cf.* Rimelspach, *supra* note 121, at 101 (stating that “the nature of the adversarial process can actually exacerbate the relationship between abusive partners”).

<sup>144</sup> Wheeler, *supra* note 6, at 571. *See also* Krieger, *supra* note 23, at 259. Alaska, Alabama, New Jersey, Hawaii, and Michigan allow cases involving domestic violence and an order of protection to be exempt from court-mandated mediation. Zylstra, *supra* note 11, at 262. Pennsylvania typically requires a mediation orientation session and if the parties decide that they would like to continue with the mediation process, they may do so but are not required. *Id.* However, in cases involving domestic violence of a spouse or child, the state is proscribed from allowing the parties to take part in a mediation orientation session if the abuse has occurred “with twenty-four months prior to the filing of the action.” *Id.* Florida, Michigan, Nevada, Alabama, Louisiana, and Virginia exclude cases involving domestic violence from mediation. *Id.* at 262-63. “Local court rules in Illinois, Missouri, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, and Washington permit exclusion of cases from mediation where domestic violence has occurred.” *Id.* at 263. *But cf.* Zylstra, *supra* note 11, at 263-64 (noting that some jurisdictions allow mediation of cases involving domestic violence where certain conditions have been satisfied). Some of these requirements include victim consent to the mediation, prevention of face-to-face contact during the sessions, multi-tiered evaluations, and judicial training. *Id.* at 264-5. In Texas, if one party alleged that another was abusive but under a preponderance of the evidence standard that allegation cannot be substantiated, then a judge can send the case to mediation provided that the parties have no face-to-face contact. *Id.* at 264. West Virginia, contrastingly, leaves the decision of whether to allow face-to-face contact during a mediation session to a “special master.” *Id.* Alaska has an intricate evaluative method which its courts use to determine whether to authorize a mediation session: first, cases where there is an order of protection are prohibited from being mediated. *Id.* If there were instances of domestic violence but there is no order of protection, then the parties can nevertheless mediate the case provided that they are informed that they need not mediate the case. *Id.* Lastly, if a party requests mediation for a case that does not deal with divorce or custody of children and no order of protection has been put into place notwithstanding a domestic violence situation exists, then “the court must determine whether mediation may result in an equitable settlement.” *Id.* These examples show that even where courts are prohibited by law from allowing mediation sessions to take place, those prohibitions can be limited so that mediation can take place in less severe cases or where certain conditions have been met.

<sup>145</sup> Wheeler, *supra* note 6, at 571.

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of all the dynamics unfolding before them is simply too great a burden on the system.”<sup>146</sup>

### C. Grant the Court with Authority to Authorize Mediations

Although it might seem compelling to allow the victim to choose the conflict resolution forum, victims may not always be in such a position to choose wisely for themselves.<sup>147</sup> The Ohio courts have recognized such a risk; if an Ohio court determines that it is in a party’s best interest to mediate, even if there was an abusive partner, the court may authorize the mediation.<sup>148</sup> Colorado, on the other hand, exempts all cases of domestic violence from mediation.<sup>149</sup> This rule, however, creates a situation where the parties can manipulate the court by stating that their partners are abusive in order to avoid mediation.<sup>150</sup>

The literature on this topic is split.<sup>151</sup> Many individuals take the Colorado approach.<sup>152</sup> Some claim that not only is mediation an inappropriate means to resolve a domestic violence dispute, but it also serves as a setback to the resolution of that conflict.<sup>153</sup> Such individuals claim that mediation perpetuates the abuse in addition to leaving the dispute unresolved.<sup>154</sup>

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<sup>146</sup> *Id.* at 570. That statement is particularly true when the battered woman will not or cannot raise issues that will strengthen her case or ensure a fair settlement in mediation. See Rimel-spach, *supra* note 121, at 98. If the victim cannot reveal anything to advocate for herself, how can a mediator discover all those underlying issues?

The reality is that the battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, not free to identify and advocate for components essential for her autonomy and safety and that of her children, and not free to terminate mediation when she concludes it is not working. She is ultimately not free to agree or disagree with the language of the agreement. Her apparent consent is under duress.

*Id.* (quoting Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317, 321 (1990)).

<sup>147</sup> Zylstra, *supra* note 11, at 256.

<sup>148</sup> Wheeler, *supra* note 6, at 565.

<sup>149</sup> *Id.* at 564.

<sup>150</sup> *Id.* at 564.

<sup>151</sup> Compare Steegh, *supra* note 4, at 204 with Wheeler, *supra* note 6, at 572.

<sup>152</sup> Krieger, *supra* note 23, at 258.

<sup>153</sup> *Id.* at 248. “Statistics show that strong legislation and mandatory arrests best deter family violence; mediation fails to prevent the abuse or to resolve the issues involved in an abusive relationship. Prosecution and punishment are imperative in domestic violence cases.” *Id.*

<sup>154</sup> *Id.*

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Judges typically rely on the recommendations of lawyers and clerks when determining the ripeness of mediation.<sup>155</sup> However, if judges receive training in “substantive family law, mediation techniques, and domestic violence,” they may be better able to assess cases where domestic violence is present.<sup>156</sup> Some states already require training programs.<sup>157</sup> This will afford judges with the ability to become sensitized to the “culture of battering”<sup>158,159</sup>.

## D. Train Mediators and Screen Couples for Abuse

Many advocates of alternative dispute resolution propose that proper screening would create an effective ground to mediate cases involving domestic abuse.<sup>160</sup> Before a judge sends a couple to mediation, he or she should be sure that the mediator understands the components of domestic violence and is capable of asking appropriate questions.<sup>161</sup> Mediators must recognize that victims are typically fearful of retribution by their battering spouses;<sup>162</sup> thus, victims may not fully inform mediators of their situation or dodge certain questions asked of them.<sup>163</sup> Every disclosure of abuse, no matter how minute, should be carefully considered by the mediator.<sup>164</sup> The mediator must then determine if the parties are suitable participants for mediation where the parties would discuss their is-

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<sup>155</sup> Gerencser, *supra* note 93, at 66; *see, e.g.*, R.I. GEN. LAWS §§ 12-29-6 (C), (D) (1988) (requiring training for probation officers and all judicial personnel); W. VA. CODE § 48-2A-13 (1994) (authorizing judges and requiring magistrates to complete yearly training programs).

<sup>156</sup> Gerencser, *supra* note 93, at 66.

<sup>157</sup> *Id.* at 66-67.

<sup>158</sup> Smith, *supra* note 108, at 935.

<sup>159</sup> Gerencser, *supra* note 93, at 67.

<sup>160</sup> Belzer, *supra* note 67, at 55.

<sup>161</sup> *Id.*

<sup>162</sup> Gerencser, *supra* note 93, at 60.

<sup>163</sup> *Id.* Questions such as “Have you been abused by your spouse?” will clearly elicit a false response, even during pre-mediation sessions where the spouses are separated from one another. *Id.* at 62. Pre-mediation meetings with each spouse are critical to the assessment of the extent of abuse and the ripeness for mediation.

<sup>164</sup> *Id.* Alabama, Hawaii, Nebraska, and Oregon mandate that mediators must screen for potential cases of domestic violence when they are dealing with custody and visitation cases. Zylstra, *supra* note 11, at 266. Some states, including Alaska, require that all mediators screen for domestic violence for all family related mediation cases before the mediation sessions begin. *Id.* at 265-66. Specifically in Alaska, if one party committed a crime involving domestic violence, the mediator cannot proceed without proper training and the victim’s consent. *Id.* at 266.

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sues on equal footing or whether they are not fit for mediation in light of a “culture of battering.”<sup>165</sup>

Although many people recognize the need for proper screening for domestic violence,<sup>166</sup> there is no consensus as to the qualifications of mediators who make such vital determinations in these cases.<sup>167</sup> It seems evident that mediators cannot gain the skills they need to carefully assess each potentially abusive relationship by relying on their own experience.<sup>168</sup> Due to the complexity of the cases at hand, mediators must receive “cross-disciplinary training” in order to gain insight into the legal aspect of such cases and the psychological underpinnings of the parties.<sup>169</sup> The Model Family Mediation Standards state that mediators should possess “training in the impact of family conflict,” including “knowledge of child development, domestic abuse, and child abuse and neglect,” among

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<sup>165</sup> Belzer, *supra* note 67, at 56. The Model Standards of Family Mediation, however, states that the ultimate decision should reside within the parties themselves. *Id.* If a screener recommends mediation, but the victim does not want to go ahead with it, then her wishes must be respected. *Id.* The screener may not have been privy to all of the facts of the couple’s specific situation. *Id.* at 56-57. Pennsylvania is the only state that requires continuous screening for domestic violence throughout the mediation process, as they deem it to be a “continuing ethical obligation.” Zylstra, *supra* note 11, at 267. Pennsylvania requires the termination of a mediation session where a mediator determines that case is no long suitable for mediation. *Id.* Pennsylvania courts and mediators are prohibited from directing mediation in cases where domestic violence has occurred in the past twenty-four months. *Id.*

<sup>166</sup> Steegh, *supra* note 4, at 194. “The Model Code, Model Standards, and the American Law Institute require that mediators screen for domestic violence.”

<sup>167</sup> Kelly, *supra* note 138, at 41.

<sup>168</sup> *Id.* at 39. “Practitioners need to retain and reshape the skill, experience, and knowledge of their own professional discipline, while simultaneously integrating new theoretical frameworks, information, and practices which are more specific to providing effective mediation.” See also, Leonard L. Riskin, *Understanding Mediator’s Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Riskin emphasizes the importance of “subject-matter expertise” or the “substantial understanding of the legal or administrative procedures, customary practices, or technology associated with the dispute.” *Id.* at 46. Although Mr. Riskin used a business and technology-oriented example in his article, the analogy applies to the case at hand. He says that the complexity of the issue should dictate the type of expertise of the mediator. *Id.* Just as a mediator should understand the technical and financial aspects of the computer service industry, so too must a mediator of family issues obtain expertise in the psychological and legal aspects of the case. See *id.*

<sup>169</sup> Kelly, *supra* note 138, at 39. Kelly provides two examples which depict the necessary training for mediators. For example, family lawyers need to shift their usual understanding of the resolution of legal matters. Instead of advocating on behalf of one party, the lawyers must learn to facilitate a mutually agreeable resolution without showing favor to one party over another. This can be done by using “neutral language, attentive listening, and the expression of empathy.” Lastly, lawyers must be trained in the psychological aspects that are affecting the mediating couple. Contrastingly, psychologists must learn not to solely focus on feelings, but to encourage a resolution utilizing a basic knowledge in substantive family and tax law. *Id.* at 39-40.

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other skills.<sup>170</sup> These standards are helpful in encouraging mediator training, but again, they are unclear as to the specific type of coursework and training needed to become a mediator of domestic violence cases.<sup>171</sup>

E. Judges, Psychologists, and Mediators Should Collaborate and Recommend a Proper Course of Conduct to the Victim.

Seeing as many scholars have cited screening problems<sup>172</sup> and lack of mediator<sup>173</sup> and judicial training<sup>174</sup> in domestic violence cases as some of the major flaws with the current state of mediation of abusive relationships, I propose an amalgamation of many of the recommended solutions to this divisive debate. Family court judges understand the law; psychologists understand the mental underpinnings of domestic violence; and mediators understand how to facilitate a compromise amongst two willing parties during a mediation session.<sup>175</sup> If a judge, psychologist, and mediator

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<sup>170</sup> Schepard, *supra* note 127, at 13.

<sup>171</sup> See Wessner, *supra* note 93. Family mediators would be most able to accomplish their goals by utilizing facilitative mediation by helping the parties discover and analyze their options for settlement and transformative mediation, where the mediator attempts to empower both parties so that they learn to respect each others' interests and opinions. See *id.* Evaluative mediation is not appropriate for family law cases, as it requires mediators to predict how a judge or jury would resolve the case. See *id.* In family mediation cases, the mediators should try to elicit a settlement from the parties themselves, since they will have to live with the consequences of that compromise. Moreover, in her article titled *The Top Ten Reasons Why Mediators Should Not Evaluate*, Professor Lela Love contends that the use evaluative mediation will give rise to a focus on the adversarial aspect of litigation, which mediation is trying to avoid. *Id.* (quoting Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997)). "Evaluation promotes positioning and polarization, which are antithetical to the goals of mediation." *Id.* (quoting Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 86 104-05 (1998)). Moreover, a faulty evaluation can lead to mediator liability for their mistake. Lastly, the purpose of mediation is to reach a conclusion, not decide who the winning party should be. Thus, in formulating a uniform mediation standard for mediation of family issues, only facilitative and transformative mediation should be used. The best rule of thumb is "the more mediation is made to look like a court or litigation procedure, the less social and practical utility it will have and the more it will take on the adversarial characteristics and shortcomings of litigation." *Id.* (quoting Stephen L. Schwartz, *International Academy of Mediators Oppose the Uniform Mediation Act*, available at <http://www.mediate.com/articles/umaiaim.cfm> (last visited Jan. 25, 2006)).

<sup>172</sup> Zylstra, *supra* note 11, at 256; see also Belzer, *supra* note 67, 46-47.

<sup>173</sup> Zylstra, *supra* note 11, at 256.

<sup>174</sup> Gerencser, *supra* note 93, at 66.

<sup>175</sup> If, however, Kelly's recommendation of cross-disciplinary training is enacted where lawyers are taught the framework of mediation as well as an understanding of the psychological aspects associated with domestic violence, three parties may not be necessary to make a recom-

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joined together to come up with a mutual recommendation as to whether mediation should be pursued, then all aspects of the multifaceted abuse can be taken into account.<sup>176</sup>

This collaboration should only apply to domestic violence cases where the judge, mediator, and/or psychologist have not received interdisciplinary training.<sup>177</sup> Otherwise fewer professionals may be able to adequately recommend a proper course of conduct to the victim. Once a victim has been informed of such a recommendation, in addition to all of the other options available to her, she must ultimately decide the fate of her divorce or family-related case.<sup>178</sup>

## V. CONCLUSION

The best solution to resolving family law issues in cases of domestic violence does not involve an all-or-nothing approach; mediation should not be outlawed across the board, nor should it be accepted in all cases either.<sup>179</sup> Judges, screeners with a background in psychology or knowledge of the underpinnings of domestic violence, and mediators should collaborate to make a mutual recommendation to the victim. As shown throughout this Note,

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mentation to the victim as to the course of her case. See Kelly, *supra* note 138, at 39-40. Until this inter-disciplinary training becomes the standard for family mediation cases, a collaboration amongst these professionals should be enforced in order to recommend the most appropriate resolution to the victim.

<sup>176</sup> See Dunnigan, *supra* note 129, at 1060. In response to California's mandatory mediation for victims of domestic violence, Dunnigan recommends that victims be referred to trained professionals (i.e. psychologists) before the mediation sessions begin. *Id.* The therapist must then evaluate the extent of the abuse and help the victim overcome any emotional issues that prevent her from advocating on her behalf as a coequal in a mediation session. *Id.* This will help empower the victims to overcome the "battering culture" that has become their norm. *Id.* at 1061. Although this proposition may seem unlikely in light of the financial and time constraints of courts and other professionals, I am setting forth an ideal situation where all the necessary professionals will take part in this process. The court system should strive to involve the three most useful professionals to help a victim of domestic violence make an informed decision.

<sup>177</sup> Kelly, *supra* note 138, at 40.

<sup>178</sup> Steegh, *supra* note 4, at 191. For example, North Carolina permits exemptions where there is good cause showing that there may be abuse or neglect of a child, alcoholism, drug addiction, spousal abuse, or psychological problems. Dunnigan, *supra* note 129, at 1055. North Carolina is unique in that it recognizes the linkage between alcoholism and domestic violence; as many as 93% of men who abuse their wives are alcoholics. *Id.* Similarly, another study concluded that 64% of reported child abuse and neglect cases involved parents or guardians who had drug or alcohol problems. *Id.*

<sup>179</sup> Steegh, *supra* note 4, at 204.

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mediation can be an appropriate tool for some family law cases involving abusive spouses.<sup>180</sup>

Mediation is a beneficial means to resolving family law cases due to the inevitable high emotional intensity of the parties.<sup>181</sup> “Mediation, with its focus on communication and private resolutions that are specially tailored to the needs of individual parties, is certainly closer to a therapeutic model than the method of adversarial dispute resolution embraced by the courts.”<sup>182</sup> Thus, if there is a way to incorporate this “non-adversarial”<sup>183</sup> method of dispute resolution, parties should embrace it. That assertion, however, must be qualified depending upon the extent to which domestic abuse has become entrenched in families.

“Four million American women experience a serious assault by an intimate partner during an average 12-month period.”<sup>184</sup> The task of deciphering cases ready for mediation is obviously great in light of the vastness of this problem. When judges and mediators craft recommendations, they must be careful not to deny victims an equal opportunity to have their disputes resolved in a court of law. Recommending a course of action to a victim should be determined by a collaborative decision made by a judge, mediator, and psychologist.<sup>185</sup> In the end, however, those professionals should only provide the victim with a recommendation, as the victim must have the final word.

Domestic violence is a crime. Thus, we must demand that the U.S. judicial system be held to a higher standard in order to ensure the safety, “justice,”<sup>186</sup> and “domestic tranquility”<sup>187</sup> of all domestic

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<sup>180</sup> *Id.* at 196 (contending that abuse survivors should be able to make informed decisions concerning the appropriateness of mediation).

<sup>181</sup> Krieger, *supra* note 23, at 243.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 236.

<sup>184</sup> AMERICAN PSYCHL. ASS'N, VIOLENCE AND THE FAM.: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10 (1996), available at <http://www.dccadv.org/statistics.html> (last visited November 2005).

<sup>185</sup> I cannot propose my own standard for determining whether a case is ripe for mediation because each case involves so many varied issues, whether they are legal, psychological, or otherwise. It is impossible for one to say that if a victim received a black eye, then such a case should not be mediated, whereas if a victim only received a slap on the wrist, then the professionals can recommend the case go to mediation. Although the extent of the violent behavior should be a factor, each case must be analyzed using the facts that are unique to it. See Zylstra, *supra* note 11, at 260-61. Therefore, I recommend that judges, mediators, and psychologists jointly undertake this endeavor on a case-by-case basis. See *id.*

<sup>186</sup> U.S. CONST. pmb.

<sup>187</sup> *Id.*

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abuse victims.<sup>188</sup> At the same time, however, the government should not encroach upon a victim's right to choose the manner in which her case is decided. Once all the parties involved recognize the grave risks in deciding the appropriate method of conflict resolution, mediation shall be used appropriately in the limited cases where it is fair and effective.

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<sup>188</sup> See Steegh, *supra* note 4, at 196 (contending that victims should have the final word on whether they want their divorce actions to be mediated or litigated).

