

# THE DANGERS OF MEDIATION IN DOMESTIC VIOLENCE CASES

SARAH KRIEGER\*

## I. INTRODUCTION

There is an increasing trend towards using alternative methods of dispute resolution in family law cases in an effort to promote efficient justice and to better serve family relations. This Note will show how the trend towards mediation causes the re-privatization of family law resulting in a setback to the political and legislative progress of the battered women's movement. This Note will demonstrate this setback through an examination of the effects of mandatory mediation in family law cases involving domestic violence. Mediation serves as a way to resolve domestic disputes in a more informal, personal fashion with less of a traumatic impact on children and other family members. However, mandatory mediation has an overall negative impact on gender relations in general, and more specifically on the progress of securing legislative rights and protection for battered women.

It was not until the late twentieth century that battered women became more publicly recognized and their plight gained more legislative awareness through avid attempts at making the prevalence and seriousness of domestic violence widely known. Historically, family violence was seen as a private, family problem. Mandatory arrests and prosecution for battering were unheard of; the police, legislature, and judiciary all shied away from openly and publicly dealing with an issue which society at large saw as private. "The criminal justice system created a figurative 'curtain of privacy' to shield husbands who beat their wives from public view, in the belief that the parties should be left to work out their 'differences' privately."<sup>1</sup>

The criminal justice system did not begin to treat domestic abuse like other assault until the 1970's.

---

\* Benjamin N. Cardozo School of Law (J.D. June 2002); Rutgers College (B.A. 1999). Thanks to Kim Susser for all of her insight and resources on the elements, effects of, and legislative responses to domestic violence. Thanks also to the staff and editorial board of the *Cardozo Women's Law Journal* for all of their hours of editing. Finally, thanks to my mom for seeing me through this lengthy process.

<sup>1</sup> Linda A. McGuire, Esq., *Criminal Prosecution of Domestic Violence*, Violence Against Women Online Resources, at <http://www.vaw.umn.edu/BWJP/prosecuteV.htm> (last modified Oct. 30, 2000).

Until this century it was not illegal to beat your wife and until the advent of the battered women's movement, police were not empowered to arrest unless they witnessed the assault or the victim was willing to make a citizen's arrest . . . The development of mandatory arrest laws and model arrest policy legislation followed as advocates attempted to increase the likelihood that batterers are arrested and victims protected.<sup>2</sup>

The trend of the late twentieth century was to further publicize domestic violence and create more legislation that punished and deterred batterers and helped victims. Using mediation instead of adversarial adjudication in family law cases serves as a setback to that trend because of mediation's inherent private and non-adversarial function.

Part II of this Note provides a brief history of domestic violence and its progression into the public eye and state legislation. This section also discusses some of the dynamics of domestic violence and explores how the impact of physical and emotional abuse plays a role in the success of legislation. Part III defines and explains alternative dispute resolution and the different methods, such as mediation, that are used instead of litigation. Part IV discusses the inappropriateness of domestic violence victim and batterer participation in mediation and in other alternative forms of dispute resolution. Part V outlines some states' legislative responses to domestic violence and the use of mediation in family law cases where family abuse has been alleged or proven. Finally, Part VI explains the standards by which mediators are trained to deal with and screen for domestic violence cases and explains how both the training and screening processes are inadequate in resolving domestic disputes, in protecting victims, and in punishing perpetrators of family violence.

## II. DOMESTIC VIOLENCE

To understand why alternative dispute resolution cannot effectively co-exist with domestic violence and vice versa, one must understand what domestic violence is and how it works. Domestic violence is cyclical, and it affects many people of all cultures, races, religions, income levels, and ages.<sup>3</sup> Battering in the domestic violence context is defined as "the establishment of control and fear

---

<sup>2</sup> Rose Thelen, *Advocacy in a Coordinated Community Response: Overview and Highlights of Three Programs*, Violence Against Women Online Resource, at <http://www.vaw.umn.edu/BWJP/communityV.htm> (last modified Oct. 30, 2000).

<sup>3</sup> *Myths and Facts About Domestic Violence*, Domestic Violence Myths, at [http://www.famvi.com/dv\\_facts.htm](http://www.famvi.com/dv_facts.htm) (last visited Nov. 20, 2000).

in a relationship through violence and other forms of abuse. The batterer uses acts of violence and a series of behaviors, including intimidation, threats, psychological abuse, isolation, etc. to coerce and to control the other person."<sup>4</sup> The violence is unpredictable and a constant source of fear and terror in a victim's life; it may occur every day or once every two months.<sup>5</sup> Battering can begin at any stage of a relationship, but it often begins when a woman gets pregnant.<sup>6</sup> *The Journal of the American Medical Association* reports that "one in four pregnant women have a history of partner violence."<sup>7</sup> It has been estimated that a woman is beaten every fifteen seconds. Domestic violence is also "the leading cause of injury to women between ages 15 and 44 in the United States—more than car accidents, muggings, and rape combined."<sup>8</sup> Family violence is well-hidden, but it is a serious plague on our entire society. "[I]t is estimated that 25% of workplace problems such as absenteeism, lower productivity, turnover and excessive use of medical benefits are due to family violence."<sup>9</sup> It has also been reported that domestic violence is the reason stated for divorce in 22% of middle-class marriages.<sup>10</sup> According to the New York State Division of Criminal Justice Services, from 1983 to 1991 the number of reported cases of domestic violence increased by almost 117%.<sup>11</sup>

Domestic violence epitomizes the extreme inequality that can exist in a relationship. "At the root of family violence is the issue of power. Social theorists have long recognized that 'power [and] control [are the] rewards of family violence . . . . [F]orce or its threat is a fundamental part of all social systems, because all social systems are, to one degree or another, power systems.'"<sup>12</sup> The power imbalance between men and women causes potential problems with the use of mediation as a method of dispute resolution.<sup>13</sup> Mediation requires some form of parity in the decision-making process and may very well be impossible in domestic violence cases.<sup>14</sup> Victims of domestic violence are so broken down by

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Andre R. Imbrogno, Note, *Using ADR To Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 860 (1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 864.

a repeated cycle of abuse that they often get to a point where they will do whatever it takes to appease their batterers.<sup>15</sup>

The cycle of domestic violence has three major stages.<sup>16</sup> They are as follows: (1) the tension building phase; (2) the acute explosion phase; and (3) the honeymoon phase.<sup>17</sup> The first stage, the tension building phase, begins with the abuser acting moody and in ways that are threatening and upsetting to the victim.<sup>18</sup> The abuser may try to isolate his<sup>19</sup> victim, withdraw his affection from her, put her down, yell at her, criticize her, throw things at her, and behave in other threatening and intimidating ways.<sup>20</sup> Sometimes, he may begin to abuse drugs or alcohol and act in an erratic and depressed manner.<sup>21</sup>

The above characteristics of the tension building phase are common behaviors, but they may not occur in every abusive relationship. In response to these characteristics, the victim may attempt to calm her abuser, nurture him, agree with what he says, and try to reason with him.<sup>22</sup> She may begin to withdraw from her family and her friends, and she often becomes quiet.<sup>23</sup> The abuser's strange behavior makes the victim of domestic violence insecure and uneasy.<sup>24</sup> Often "she denies it's happening, excuses it as some outside stress; blames herself for his behavior, denies that the abuse will worsen. He denies [it] by blaming the tension on her, work, the traffic, anything; by getting drunk, [he] denies his responsibility for his actions."<sup>25</sup>

The next stage in the cycle of violence is the acute explosion phase, where there can be any form of abuse from extreme verbal abuse to severe assaults and even rape.<sup>26</sup> According to one source, "Of women who reported being raped and/or physically assaulted

---

<sup>15</sup> *Id.* at 861.

<sup>16</sup> *Cycle of Violence*, Catalog, Duluth Domestic Abuse Intervention Project: National Training Project, at <http://www.Duluth-model.org/daipmain.htm> (last visited March 11, 2002) [hereinafter *Cycle of Violence*].

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

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

<sup>19</sup> Not all batterers are men, but for the sake of continuity and because a majority of batterers are statistically men, this Note will use the male pronoun when referring to batterers and the female pronoun when referring to victims. The National Domestic Violence Hotline reports that "[i]n 92% of all domestic violence incidents, crimes are committed by men against women." *What Is Domestic Violence?*, National Statistics, National Domestic Violence Hotline, at <http://www.ndvh.org/ndvh2.html> (last visited Nov. 20, 2000) [hereinafter *What Is Domestic Violence?*].

<sup>20</sup> *Cycle Of Violence*, *supra* note 16 (diagram of the cycle of violence).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

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

since the age of 18, three quarters (76 percent) were victimized by a current or former husband, cohabitating partner, date or boyfriend."<sup>27</sup> A victim's typical response to violence is to try to protect herself and her children.<sup>28</sup> She may also try to calm and reason with her abuser.<sup>29</sup> Unfortunately, the victim usually stays with the abuser, tries to minimize the injury, downplays the extent of the damage, or even denies that the abuse has occurred.<sup>30</sup> The victim may blame the violence on the batterer's drinking or drug abuse, claiming that he does not know what he is doing and cannot control himself.<sup>31</sup> Startling enough, studies show that "32% to 59% of women who have been battered have also been raped by their partners."<sup>32</sup> Many victims refuse to admit to being raped and then fail to report it.<sup>33</sup> The first two phases in the cycle of violence center on the weakening of the victim and ultimately end in her denial of her abuser's problem.<sup>34</sup>

The final stage in the cycle of violence is the "honeymoon" phase.<sup>35</sup> In this phase, a batterer acts with remorse and regret and often promises to end the violence.<sup>36</sup> He will apologize and beg for forgiveness, promise to seek treatment/help, send his victim flowers and gifts and declare his love for her, and may even cry.<sup>37</sup> The victim in turn may agree to stay with him or to go back to him.<sup>38</sup> She may attempt to stop any legal proceedings or promise to avoid seeking any outside help,<sup>39</sup> whether it is from a doctor for her injuries or from the police for assault. The victim often continues to minimize the situation and believes her abuser's promises of love and remorse.<sup>40</sup> In many cases, the victim refuses treatment for her injuries and does not seek any form of help from outside of the family.<sup>41</sup> The victim often believes that her abuser has problems which can be resolved by her submission, patience, and good be-

---

<sup>27</sup> *What Is Domestic Violence?*, *supra* note 19.

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

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

<sup>30</sup> *See Cycle of Violence*, *supra* note 16.

<sup>31</sup> *What Is Domestic Violence?*, *supra* note 19.

<sup>32</sup> 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>33</sup> *See Cycle of Violence*, *supra* note 16; *see also* Maxwell, *supra* note 32, at 338.

<sup>34</sup> *See Cycle of Violence*, *supra* note 16.

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

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Maxwell, *supra* note 32, at 342.

<sup>41</sup> Dorchen A. Leidholdt, *Interviewing Battered Women*, in *LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM* 15 (Julie A. Domonkos & Jill Laurie Goodman eds., 2000).

havior.<sup>42</sup> Frequently, the abuser succeeds in isolating the victim and in making her believe that she is the reason for the abuse, causing the victim to avoid seeking help out of shame, fear, and embarrassment.<sup>43</sup> Victims and batterers both go to extreme lengths to mask the extent of abuse.<sup>44</sup> Domestic violence has a variety of serious and complex effects on victims. While the obvious effects are physical, many other effects are less noticeable, yet equally troubling and problematic. Studies show that "almost half of victims of battering and sexual assault meet the criteria for [Post Traumatic Stress Disorder],"<sup>45</sup> the most prevalent symptoms of which are "psychological hyper-arousal, re-experiencing, and avoidance."<sup>46</sup>

### III. THE BATTERED WOMEN'S MOVEMENT

Since the 1970's, advocates of the battered women's movement have helped support and guide victims of abuse through various social institutions and the complexities of the justice system.<sup>47</sup> As a result of this movement, "the institutional obstacles faced by battered women in the religious, welfare, medical, mental health, educational, and civil and criminal justice systems were exposed and the practice of systems advocacy emerged."<sup>48</sup> One of the main goals of this new advocacy was to support battered women and to politicize and publicize domestic abuse to raise awareness and create protective legislation for victims.<sup>49</sup> Today's trends, mandating mediation in family disputes, including disputes where there is domestic abuse, have begun to re-privatize the issue of family violence.<sup>50</sup> Family law is once again becoming a "private" issue where the courts are pushed out.<sup>51</sup> Mediation removes the legal penalty for beating one's spouse, further deterring the small percentage of victims who seek help in the legal system.<sup>52</sup> Some argue that alternative dispute resolution is beneficial to the underprivileged be-

---

<sup>42</sup> *Id.* at 132.

<sup>43</sup> *Cycle of Violence*, *supra* note 16.

<sup>44</sup> *Id.*

<sup>45</sup> Maxwell, *supra* note 32, at 341.

<sup>46</sup> *Id.*

<sup>47</sup> Thelen, *supra* note 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*; see also Andre Rene Imbrogno & Salvatore Imbrogno, *Mediation in Court Cases of Domestic Violence*, 81 FAMILIES IN SOC'Y: J. CONTEMP. HUM. SERVICES 1 (2000), 2000 WL 15451336; Lois Presser & Emily Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOC. JUST. 175 (2000).

<sup>50</sup> See Imbrogno, *supra* note 12, at 857; see also Imbrogno, *supra* note 49; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

<sup>51</sup> Dianne Post, *Mediation Can Make Bad Worse*, NAT'L L.J., June 8, 1992, at 2.

<sup>52</sup> Imbrogno, *supra* note 12, at 857.

cause it creates widespread access to justice.<sup>53</sup> The results, however, may actually lead to the "reduction of possibilities for legal redress of wrongs suffered by the poor and underprivileged."<sup>54</sup>

The major dynamic of domestic violence is a struggle for power and control that stems from the patriarchal system this society was founded upon and has evolved under.<sup>55</sup> If men and women are unequal in any one place, it is in marriage, where conceptions of public, private, and specific gender roles have been ingrained into society and promulgated from one generation to the next.<sup>56</sup> Regardless of the progress of the feminist and the battered women's movements, patriarchy is still a defining factor in American culture.<sup>57</sup> By privatizing family law and family violence through mandatory mediation, the legislature continues the trend of sexual subordination and sets back the progress women have made in the legal system.<sup>58</sup> Family law mediation diminishes justice for victims. One critic argues that while "recognizing that women have belatedly gained many new rights, including laws which protect battered women, . . . 'there is a real danger . . . that these new rights will become simply a mirage if . . . family law disputes are blindly pushed into mediation.'"<sup>59</sup>

#### IV. ALTERNATIVE DISPUTE RESOLUTION

Generally, alternative dispute resolution is a term referring to a "wide array of practices, the purpose of which is to manage and quickly resolve disagreements at lower cost and with as little adverse impact as possible on business and other relationships."<sup>60</sup> Although there are many different forms of alternative dispute resolution, mediation, one of the most widely recognized methods, is the primary choice in family law cases because it helps to maintain family relationships and to settle disputes without adding an adversarial climate.<sup>61</sup>

Family law cases deal with domestic issues which are emotionally sensitive, complex, and personal; these issues cannot be resolved by black letter law or by finding who is right and who is

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 872.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 873.

<sup>60</sup> 17 AM. JUR. 2D *Alternative Dispute Resolution* § 1 (1995) [hereinafter *Alternative Dispute Resolution*].

<sup>61</sup> Imbrogno, *supra* note 12, at 858-59.

wrong.<sup>62</sup> As a result, many proponents of alternative methods of dispute resolution support resolving family conflicts with mediation, as opposed to formal, adversarial litigation, which they believe better protects the feelings of the participants who are often children.<sup>63</sup> The movement from adversarial litigation to mediation is, however, a movement from the public realm to the private realm. Many believe that privatizing divorce and custody cases through the use of alternative forms of dispute resolution, rather than litigation, helps shield the parties from much of the emotional trauma associated with such cases.<sup>64</sup> For years, however, feminist advocates have pushed family law into the public eye in an effort to awaken an understanding of gender oppression and to generate an awareness of the prevalence of family violence.<sup>65</sup> Though privatizing divorce and custody disputes may be beneficial in some cases, it is not beneficial in domestic violence situations. Proponents of battered women's rights hope to increase public awareness of domestic issues to create a more equal setting for men and women and to develop greater protections for victims.<sup>66</sup>

#### A. Mediation

Mediation is a type of negotiation in which the parties use a neutral third party mediator to help them reach a voluntary settlement.<sup>67</sup> The neutral intervener assists the negotiating parties in reaching "mutually acceptable terms of settlement, but where the mediator is not authorized to impose a decision on the parties if they do not reach agreement through mutual consensus."<sup>68</sup>

The mediation process has three major steps.<sup>69</sup> First, the parties present their issues, and the mediator tries to help them reach an agreement. Next, the parties have their attorneys review their agreement and create a corresponding legal document to present to the court.<sup>70</sup> Finally, the judge enters the resulting order, creat-

---

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

<sup>63</sup> Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 49 (1995).

<sup>64</sup> *Id.*

<sup>65</sup> Imbrogno, *supra* note 12, at 856.

<sup>66</sup> *Id.*; see also Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits* (Jan. 1996), at <http://www.ncjrs.org/txtfiles/crimdom.txt>.

<sup>67</sup> *Alternative Dispute Resolution*, *supra* note 60, at § 16.

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

<sup>69</sup> Barbara J. Hart, *Custody and Divorce Mediation*, in *MANAGING YOUR DIVORCE: A GUIDE FOR BATTERED WOMEN* 9 (Donna Medley ed., 1998).

<sup>70</sup> While attorney presence is not mandatory, it is advised that the parties seek the advice of counsel. See, e.g., Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993).

ing a binding agreement between the parties.<sup>71</sup> The process is designed to be quick, fair, and just.<sup>72</sup>

[Mediation] as a mode of intervention, is expected to modify the power relations, resolve problems of physical violence, and bring about social adjustments in the family. This is all predicated on the belief that mediation is conducted in an open and free exchange between disputing parties outside the legal jurisdiction of the court.<sup>73</sup>

The mediation process is supposed to “reduc[e] the court’s docket, reduc[e] the demand on judicial resources, accelerat[e] the rate of case resolution, reduc[e] the cost of resolving conflicts, increas[e] the litigants’ satisfaction with the court system, and improv[e] relationships between disputing parties.”<sup>74</sup> Mediation is supported as an alternative to adjudication in family law cases primarily because of its non-adversarial function.<sup>75</sup>

The nature of family law is quite complex given the high level of emotions it involves and the diversity of interests it seeks to protect.<sup>76</sup>

The nonpublic, interpersonal nature of family conflict, almost by definition, makes the resolution of such conflict an appropriate task for social practitioners like therapists and social workers. 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>77</sup>

The process aims to empower parties to reach agreements specific to their needs and to reduce the trauma felt by all parties, specifically children, as a result of adversarial litigation.<sup>78</sup> Mediation also seeks to reduce litigation costs and disruptions in family life; since parties with children will have to maintain some kind of ongoing relationship, they should walk away from mediation with an inexpensive plan for dealing with future issues.<sup>79</sup> Unfortunately, most of these benefits do not quite work out in a practical setting. There is always a cost involved. Parties still have to retain counsel, and in

---

<sup>71</sup> *Id.*

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

<sup>73</sup> Imbrogno, *supra* note 49.

<sup>74</sup> Gerencser, *supra* note 63, at 49.

<sup>75</sup> Hart, *supra* note 69, at 10; *see also* Gerencser *supra* note 63, at 49.

<sup>76</sup> Treuthart, *supra* note 70, at 717.

<sup>77</sup> Imbrogno, *supra* note 12, at 858.

<sup>78</sup> Gerencser, *supra* note 63, at 50.

<sup>79</sup> *See* Hart, *supra* note 69, at 9.

some situations involving victims and batterers, there can be no real agreement, no real reduction in harm, and no really fair compromise.<sup>80</sup> Additionally, research shows that in order to create an "effective and fair agreement, the parents must engage in mediation voluntarily, [and they] should have relatively equal power, equivalent competence to protect their essential interests and [a] similar investment in the outcome."<sup>81</sup> In cases of domestic violence, however, these elements of fairness and equality are absent, and there is an overwhelmingly coercive atmosphere in which the batterer continues to manipulate his victim.<sup>82</sup>

Mediation's major benefit is that it:

encourages the parties to work together, isolate the issues, and learn through cooperation. Mediation produces stable agreements that are more likely to inspire long-term compliance by the parties. In addition, even when the parties do not reach agreement during the mediation process, research indicates that family cases often settle prior to trial as a result of issues discussed in mediation.<sup>83</sup>

Mediation purports to allow its participants the opportunity to discuss their situations, needs, and desires, and then an opportunity to reach a compromise.<sup>84</sup> The "emphasis in mediation is placed on establishing a workable solution."<sup>85</sup> Unfortunately, in practice, much of the ideals of mediation do not prove successful. Batterers use an array of tactics to continue controlling their victims.<sup>86</sup> They try to monopolize any and all speaking time, interrupt others, and use different methods of intimidation to win arguments.<sup>87</sup> In the interest of safety and self-preservation, the victim often attempts to placate the batterer rather than react to his control tactics. She knows that advocating her own desires and concerns may put her safety at risk. However, succumbing to the will of an abuser in cases where children are involved may compromise the safety of the children.<sup>88</sup> There is a serious imbalance of power in abusive relationships, destroying mediation's key element of cooperation.<sup>89</sup>

---

<sup>80</sup> *Id.* at 10-11.

<sup>81</sup> Barbara J. Hart, Esq., *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 38 (1992).

<sup>82</sup> *Id.*

<sup>83</sup> Gerencser, *supra* note 63, at 51.

<sup>84</sup> *Id.* at 51-52.

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

<sup>86</sup> See Hart, *supra* note 69, at 10; see also Hart, *supra* note 81, at 38.

<sup>87</sup> See Hart, *supra* note 81, at 38.

<sup>88</sup> *Id.* at 39.

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

This lack of equality in bargaining power removes the major component necessary for mediation: fair compromise and agreement.<sup>90</sup> Without a level playing field, mediation can never perform its proper function, and one party will always be unfairly harmed.

*B. Domestic Violence Victims Are Not Appropriate Candidates for Mediation*

The process of mediation assumes that the interested parties have a certain level of equality in their relationships, allowing for equal bargaining power.<sup>91</sup> What is problematic with this assumption of equality is that in reality many relationships, specifically relationships in which there is a pattern of domestic violence, are disproportionate in power. Domestic violence is perpetuated through the control of one party by another.<sup>92</sup> Such control is the central dynamic of the battering relationship. Another troubling fact is that 50-80% of the marriages referred to mediation to resolve divorce or custody and visitation cases involve domestic violence.<sup>93</sup> "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>94</sup>

"Commentators have stated that the 'initial wave of unabashed enthusiasm for divorce mediation and alternative dispute resolution (ADR) in general has given way to sober reassessment.'<sup>95</sup> It is impossible and absurd to mandate that alternative resolution is used in these cases because ADR is based on equal bargaining power, and here this does not exist. There are many factors that demonstrate why this is true.

First, a major goal of mediation is to provide a neutral, comfortable environment where parties can voice their concerns and desires and work towards an equally beneficial compromise.<sup>96</sup> Unfortunately, domestic violence adds complex elements to the family dynamic, having a devastating impact on the victim's emotional

---

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Imbrogno, *supra* note 12, at 860.

<sup>93</sup> Maxwell, *supra* note 32, at 335.

<sup>94</sup> 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).

<sup>95</sup> Gerencser, *supra* note 63, at 49.

<sup>96</sup> Maxwell, *supra* note 32, at 335.

and psychological state.<sup>97</sup> For example, consider the chart by Amnesty International, which describes the breakdown of an individual's psyche when she is subjected to certain elements of torture over extended periods of time.<sup>98</sup> The chart shows that many of the listed factors create personalities that are unsuitable for a system of resolution based on voluntary cooperation and equality.<sup>99</sup> The chart also shows how difficult it is for improperly trained mediators and judges to detect these traits.<sup>100</sup>

Second, mediators themselves are often completely unprepared for the results.<sup>101</sup> For example, in one study researchers interviewed female mediators who had themselves been in abusive relationships with their spouses.<sup>102</sup> According to these interviews, though the parties entered into the process with the appropriate mediation-oriented mindset, the trained female mediators were unprepared to deal with the mentality of their batterers.<sup>103</sup>

After one of her own divorce mediation sessions, a female mediator said of her batterer:

he only sees himself — his own needs. . . . I can do what I can do to make him feel comfortable [in mediation].<sup>104</sup> But if he needs to really release any power over me or really has to listen to me, I think that he will not sit [through mediation].<sup>105</sup>

Another female mediator, who once participated in divorce mediation herself as a client when she was married to an abusive husband, stated:

I went into [mediation] in good faith; I made the effort. . . . I believed that if he could feel my pain, he could look at me as a human being — it would be heart wrenching for him. Of course he could never get there. . . . He was not sorry about the things he had done to me, he was sorry for himself. He wanted to be babied — taken care of — he was the victim.<sup>106</sup>

This woman also went into the mediation experience with the right mindset, yet dealing with a batterer in that forum is not the same as dealing with a non-batterer.<sup>107</sup> Many of the above-mentioned reac-

---

<sup>97</sup> *Id.*

<sup>98</sup> Treuthart, *supra* note 70, at 720.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Maxwell, *supra* note 32, at 335-37.

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

<sup>104</sup> *Id.* at 335.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 336.

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

tions to the abusers are typical in mediation.<sup>108</sup> Unfortunately, mediators are ill prepared to deal with the various results of mediation.<sup>109</sup>

Another important factor to consider in evaluating the appropriateness of mediation is that the period between the separation of husband and wife and divorce can be the most dangerous time for the victim. Upon separation, women “[have] a victimization rate [one and one-half] times higher than separated men, divorced men, or divorced women.”<sup>110</sup> Research also shows that “seventy-five percent of all reported domestic violence [episodes] and most murders take place after the woman has left the relationship.”<sup>111</sup> Batterers appear to become much more violent once their partners leave them, and allowing victims to be placed in non-adversarial situations with their abusers puts them in greater danger of being beaten, harassed, or stalked.<sup>112</sup> Literature on domestic violence warns that intervention and mediation programs increase the risk of violence toward victims.<sup>113</sup> “Family systems interventions . . . [may] endanger the victim if not performed conscientiously . . . . Mediators seeking to build a perpetrator’s sense of enlightened self-interest, whereby both parties can meet their goals, may instead place the victim at an increased risk of injury or death.”<sup>114</sup>

Proponents of alternative dispute resolution claim that the mediation process is beneficial to family members. They claim that “mutually agreed solutions, rather than the public acrimony of an adversarial legal proceeding, are viewed as less destructive to family relationships.”<sup>115</sup> Some of the advantages of mediation are claimed to be “reduction of expense, efficiency, user satisfaction, and increased access to the legal system.”<sup>116</sup> Many of these advantages, however, do not always prove true. Many women claim that they do not walk away with satisfying results.<sup>117</sup> Often, a party feels that litigation would have brought more success and a better arrangement.<sup>118</sup> “The money saved by choosing mediators as opposed to lawyers is minimal, and the number of divorces or eventual court cases has not been reduced and may, in fact, have

---

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *What is Domestic Violence*, *supra* note 19.

<sup>111</sup> Post, *supra* note 51, at 2.

<sup>112</sup> *Id.*

<sup>113</sup> Maxwell, *supra* note 32, at 344.

<sup>114</sup> *Id.*

<sup>115</sup> Treuthart, *supra* note 70, at 717.

<sup>116</sup> *Id.*

<sup>117</sup> Post, *supra* note 51, at 2.

<sup>118</sup> *Id.*

risen."<sup>119</sup> Even in cases where mediation proves to be cost effective, "inexpensive, expeditious, and informal adjudication is not always synonymous with fair and just adjudication."<sup>120</sup>

Rather than helping the plight of victims, mediation serves as a setback. 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.<sup>121</sup> Prosecution and punishment are imperative in domestic violence cases. Mediation is neither successful nor beneficial enough to be a viable alternative to litigation.

Mediation also undermines the purpose of domestic violence laws, resulting in the perpetuation of spousal abuse.<sup>122</sup> Court adjudication of family law issues provides benefits not only for the parties involved but for society at large.<sup>123</sup> These benefits include "increased visibility of the domestic violence problem to the public, the continued development of legal rights for battered women, and the vindication of those legal rights which already exist."<sup>124</sup> In a system where advocates work vigorously for legislative and policy changes, mediation is a setback to progress. "Domestic violence and partner assault are complex behaviors. The range of sanctions for offenders has been limited, their deterrent effects mitigated by social and contextual factors, and their implementation constrained by practical operational contingencies."<sup>125</sup>

The battered women's movement has fought hard for change within the criminal justice system.<sup>126</sup> Battered women's advocates have brought domestic violence into the public eye and pushed for reform.<sup>127</sup> Their work has inspired great developments in the system to help ensure punishment in domestic violence cases.<sup>128</sup> They have tried to change policy and promote legislation to remove the impediments victims face when seeking help.<sup>129</sup> Some of these changes have included facilitating access to legal remedies, furthering mandatory arrest legislation, promoting batterers' pro-

---

119 *Id.*

120 Imbrogno, *supra* note 12, at 878.

121 Post, *supra* note 51, at 2.

122 Imbrogno, *supra* note 12, at 867 (citing Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986)).

123 *Id.* at 870

124 *Id.*

125 Fagan, *supra* note 66; Imbrogno, *supra* note 49; Presser, *supra* note 49.

126 See generally Fagan, *supra* note 66; Imbrogno, *supra* note 49; Presser, *supra* note 49.

127 See Fagan, *supra* note 66.

128 *Id.*

129 *Id.*

grams and mandatory, court ordered treatment, and creating special courts for the litigation and adjudication of family offenses.<sup>130</sup>

The battered women's movement has sought to generate more support for victims, publicize their pain, criminalize the abuse, deter batterers, and obtain more recognition for victims in the criminal justice system.<sup>131</sup> The call to "reorganize . . . court structures" and "create special forums for the adjudication" of domestic violence cases was not a call to create mediation schemes.<sup>132</sup> Mediation is antithetical to the goal of making domestic violence a public problem.

Furthermore, criminal sanctions have greater public influence than mediation, which privatizes family violence.<sup>133</sup> Mediation eliminates any punishment that may result from litigation because it is a private method of dispute resolution, performed outside of the judicial arena.<sup>134</sup> "Mediation, a private process that is largely immune from public scrutiny, leaves society in the dark as to how, if at all, its institutions are handling the perpetrator of domestic violence."<sup>135</sup> Many victims are both afraid and ashamed to step forward and press charges prior to mediation.<sup>136</sup> Often, these same victims are also afraid and ashamed to introduce the claims of domestic violence to the mediator.<sup>137</sup> If a victim fails for any number of reasons (e.g. fear, shame, embarrassment) to press charges or seek an order of protection from the violence, no penal measure is enforced against her abuser in mediation.<sup>138</sup> If that same woman proceeds with mediation in a child custody case, two major factors may harm her case and hurt her well-being in general.

First, failure to punish a batterer may reaffirm his sense of control.<sup>139</sup> In New York, the Lawyers Committee Against Domestic Violence wrote a position statement on alternative dispute resolution projects and domestic violence.<sup>140</sup> The focus of the committee position statement was a program in New York entitled "The Parental Education and Custody Effectiveness Program," known as

---

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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

<sup>133</sup> See Imbrogno, *supra* note 12, at 858; see also, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

<sup>134</sup> Imbrogno, *supra* note 12, at 871.

<sup>135</sup> *Id.*

<sup>136</sup> Leidholdt, *supra* note 41, at 17; see also Imbrogno, *supra* note 12, at 871.

<sup>137</sup> See *id.*

<sup>138</sup> Maxwell, *supra* note 32, at 335.

<sup>139</sup> Domonkos, *supra* note 94, at 2.

<sup>140</sup> *Id.*

PEACE.<sup>141</sup> "By urging cooperation and contact between parents, PEACE signals to the abuser that his acts of coercion, intimidation, and violence will go unpunished and that his victim's request to keep herself and her children separated from him will be suppressed. This will only serve to empower and embolden the abuser."<sup>142</sup> He may act out, knowing that his misbehavior will have no repercussions, and he will continue to intimidate his victim.<sup>143</sup> Such a perpetuation of power and control removes the equal bargaining power that mediation supports and requires.<sup>144</sup> A victim whose abuser remains unpunished is in no way equal in power to that abuser.

Second, permitting mediation where a victim not only fears her abuser but also fears the prospect of denouncing him essentially forces a victim to acquiesce to her batterer's demands, further increasing her fear of the system itself.<sup>145</sup> Prosecuting domestic violence cases is necessary because it shows batterers that they will be held accountable for their actions.<sup>146</sup> Privatizing these disputes contradicts this goal, and it also fails to publicize domestic violence, punish perpetrators, and end the pattern of abuse.<sup>147</sup>

Prosecuting people who assault their spouses or intimidate partners represents progress for the battered women's movement and the criminal justice system at large. Domestic violence is a crime in every state.<sup>148</sup> "A pro-active prosecution policy can make an important contribution to a community's efforts to end domestic violence."<sup>149</sup> Holding batterers accountable not only to their victims but to the public at large is an important step in obtaining justice for victims of domestic violence.

Prosecuting perpetrators of family violence forces accountability.<sup>150</sup> If a batterer knows that he will be prosecuted for spousal abuse, he is more likely to regard his actions as criminal.<sup>151</sup> When a batterer sees that his abuse will result in mediation, the message he receives is that there is no punishment for beating your partner. By failing to punish batterers, society basically condones domestic violence and allows the beating to continue without recourse.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 3.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see also Hart, *supra* note 69, at 9-10.

<sup>146</sup> Domonkos, *supra* note 94, at 3.

<sup>147</sup> See Imbrogno, *supra* note 12; see also Fagan, *supra* note 66.

<sup>148</sup> Hart, *supra* note 81.

<sup>149</sup> McGuire, *supra* note 1.

<sup>150</sup> See *id.*; see also Fagan, *supra* note 66; Imbrogno, *supra* note 12, at 878.

<sup>151</sup> McGuire, *supra* note 1.

Prosecution also helps "restore the power and respect that the victim lost as a result of the battering."<sup>152</sup> Criminal justice reform and strict punishment measures are imperative to curbing domestic violence. Unfortunately, however, domestic violence cases are subject to a low rate of prosecution.<sup>153</sup> Without the enforcement of laws through litigation, there is less likelihood of prosecution.<sup>154</sup> A lack of litigation opportunities results in continued reluctance by victims to seek assistance through the criminal justice system.<sup>155</sup>

Furthermore, "the low rate of prosecution in domestic violence cases undermines deterrence by neutralizing the actions of the police and reducing the likelihood of legal sanctions following arrest."<sup>156</sup> Without the threat of prosecution as a deterrent, many abusers feel that their actions will go unpunished and continue to abuse their victims.<sup>157</sup> "In many communities, the rate of prosecution remains extremely low, less than 10 percent for misdemeanor cases . . . . [F]ewer than 5 percent of 270 cases involving women with injuries were criminally prosecuted. . . . [C]onviction and sentencing are even rarer."<sup>158</sup> In failing to pursue batterers, the criminal justice system fails to protect victims and stop domestic violence. Mediation represents yet another such failure.

## V. THE LEGISLATIVE RESPONSE TO DOMESTIC VIOLENCE

Many critics of the criminal justice system who handle domestic violence cases have suggested the creation of specialized courts that can properly address the issues plaguing domestic violence victims and their batterers.<sup>159</sup> This suggestion comes in response to the "devaluation of these cases in mainstream courts."<sup>160</sup> Since victims are not taken seriously in court and since the severity of family abuse cases is downplayed, some suspect that the judiciary and legislative bodies punish crimes by comparing their severity, using available resources.<sup>161</sup> "This framework suggests that domestic violence cases may be assigned a lower priority for prosecution and punishment when placed alongside other violence cases involving strangers."<sup>162</sup>

---

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; see also Fagan, *supra* note 66.

<sup>154</sup> McGuire, *supra* note 1.

<sup>155</sup> *Id.*

<sup>156</sup> Fagan, *supra* note 66.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (citations omitted).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

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

<sup>162</sup> *Id.*

The proposal to create specialized courts has not been put into effect.<sup>163</sup> An examination of the statutes that have been enacted to resolve family law cases reveals the progress battered women's advocates have made and the setbacks mandatory mediation has generated. For instance, California, one of the first states to adopt mediation in family law cases, has adopted a mandatory mediation policy whereby domestic violence cases are handled in family court under the protocol of the Judicial Council of the court.<sup>164</sup> The Judicial Council adopted guidelines for different available family services.<sup>165</sup> "These services may include, but are not limited to, parent education programs, booklets, videotapes, or referrals to additional community resources."<sup>166</sup> California's legislation supports the trend of moving away from adversarial litigation in order to resolve conflict among family members.

Unfortunately, mediation is not a successful tool in these cases. "Battered women feel coerced by mediators, and more than 40 percent of the men studied resumed their abusive behavior within four-and-a-half months of completing mediation. Studies found more abuse after mediation efforts than after a formal trial."<sup>167</sup>

Based on these statutes, it appears that many state legislatures have taken account of the impact of domestic violence. Currently, thirty-two states and the District of Columbia have statutes that require their courts to consider domestic violence when determining custody and visitation awards.<sup>168</sup> Additionally, many states have statutes requiring the consideration of domestic violence issues and mandating that families attend mediation for diverse family issues.<sup>169</sup> For example, in Louisiana, the legislature has acknowledged the dynamics of domestic violence and has created a code on mediation.<sup>170</sup> The Louisiana legislature has stated that it is aware that family violence often increases when families separate but that:

---

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> ANN. CAL. FAM. CODE § 3170(b) (West 2002).

<sup>167</sup> Post, *supra* note 51, at 2.

<sup>168</sup> See Hart, *supra* note 69, at 29.

<sup>169</sup> See, e.g., Alabama [ALA. CODE § 6-6-20(d) (2001)]; Alaska [ALASKA STAT. § 25.24.060(f) & (g) (Michie 2001)]; Florida [FLA. STAT. ANN. § 44.102(2)(c) (West 2001)]; Iowa [IOWA CODE § 598.41(b) & (c) (2002)]; Minnesota [MINN. STAT. § 518.619(2) (2001)]; Nevada [NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie 2001)]; North Carolina [N.C. GEN. STAT. § 50-13.1(c) (2000)].

<sup>170</sup> Hart, *supra* note 69, at 29.

child custody and visitation become the new forum for the continuations of the abuse . . . . Current laws relative to child custody and visitation are based on an assumption that even divorcing parents are in relatively equal positions of power and that such parents act in the children's best interest . . . . These laws often work against the protection of the children and the abused spouse in families with a history of family violence.<sup>171</sup>

Despite these statutory attempts aimed at protecting domestic violence victims from mediation in family disputes like child custody, visitation, and divorce, much of the legislation fails to work adequately. The success of anti-mandatory mediation lies in detecting domestic violence prior to ordering mediation and in training the mediators properly. In practice, "it is the rare case (fewer than 5%) that is excluded from mediation due to a report on domestic violence."<sup>172</sup> Some researchers have also pointed out that the negative effects of mediation in domestic violence cases are not always taken seriously.<sup>173</sup> Unless domestic violence cases are screened properly, "there is the potential that [a]lternative [d]ispute [r]esolution will result in the further victimization and isolation of battered women."<sup>174</sup>

Mediation proponents claim that mediation can be useful and appropriate in domestic violence cases if the "type of domestic violence is taken into account and mechanisms to ensure a safe and fair settlement for the victim are provided."<sup>175</sup> However, doing so is problematic for obvious reasons. First, it is difficult to determine the type of violence one has suffered.<sup>176</sup> Not all violence is physical, and physical abuse does not always pose the most serious risk to a victim.<sup>177</sup> One critic questions what should be done "about the party who was never abused as we have come to accept that term, because they acquiesced in complete subrogation for ten or twenty or thirty years? Are they candidates for mediation?"<sup>178</sup>

Furthermore, violence is very subjective, and victims often downplay or fail to classify their abuse.<sup>179</sup> Additionally, the creation of mechanisms to ensure safety and fairness may be quite diffi-

---

<sup>171</sup> Hart, *supra* note 69, at 29.

<sup>172</sup> Maxwell, *supra* note 32, at 337.

<sup>173</sup> Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, 23 HOFSTRA L. REV. 825, 834 (1995).

<sup>174</sup> Imbrogno, *supra* note 12, at 856.

<sup>175</sup> Maxwell, *supra* note 32, at 337.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Gangel-Jacob, *supra* note 173, at 834.

<sup>179</sup> *Id.*

cult, complex, and costly.<sup>180</sup> Finally, "no state *requires* screening for domestic violence and abuse before the mediation begins."<sup>181</sup> Although many mediation programs recognize a dire need to identify the problem and although "(96%) [of all mediation programs] use special techniques to address domestic violence problems, only 80% [of these programs] report that they actually screen for domestic violence, and only about [one-half] use separate private interviews to question clients explicitly about violence."<sup>182</sup> Given the prevalence of domestic violence, these numbers are quite startling.

Another problem with these statutes is that in many states, a person only qualifies for exemption from mandatory mediation when there is evidence of a history of domestic violence.<sup>183</sup> For example, a Florida statute mandates mediation in any case where there is a civil action for monetary damages if one of the parties to the action requests it.<sup>184</sup> According to the statute:

[where] a family mediation program has been established and upon a court finding of a dispute, [the court] shall refer to mediation all or part of a custody, visitation, or other parental responsibility issues as defined in s. 61.13. Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.<sup>185</sup>

The problem with this standard is that it requires a judicial finding in order for the victim to avoid mediation. Victims do not often seek judicial intervention, and they may lack the requisite finding of prior domestic violence because of the large number of cases that go unreported.<sup>186</sup> Not only is domestic violence very difficult to detect and prove, but many victims refuse to admit to being victimized, choosing instead to minimize the abuse and stay in the relationship.<sup>187</sup> In addition, many people blame victims rather than support them.<sup>188</sup> The problem begins as a fear of leaving the batterer, and it then becomes a fear of seeking help from outside the relationship.<sup>189</sup> Therefore, there are large numbers of people

---

<sup>180</sup> *Id.*

<sup>181</sup> Gerencser, *supra* note 63, at 44.

<sup>182</sup> Maxwell, *supra* note 32, at 340.

<sup>183</sup> See, e.g., FLA. STAT. ANN. § 44.102(2)(c) (West 2001); 750 ILL. COMP. STAT. 5/607.1 (2001).

<sup>184</sup> *Id.*

<sup>185</sup> FLA. STAT. ANN. § 44.102(2)(c) (West 2000).

<sup>186</sup> See generally Imbrogno, *supra* note 49.

<sup>187</sup> Maxwell, *supra* note 32, at 335.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

left unprotected by the exception.<sup>190</sup> They are subsequently forced into mediation without equal bargaining power or guaranteed protection for themselves or their children.

Illinois follows a pattern similar to Florida. The Illinois statute states that the court may order "counseling or mediation, except in cases where there is evidence of domestic violence, as defined in Section 1 of the Domestic Violence Shelters Act . . . ."<sup>191</sup> Illinois courts have interpreted this statute to mean that:

mandatory mediation may be inappropriate when, for example, there is a history of abuse or the parties have demonstrated an inability to cooperate . . . . [I]n [one] case, the trial court recognized that mandatory mediation is not appropriate for all disputes and exempted financial matters and emergencies from its order.<sup>192</sup>

The Illinois legislature and the Illinois courts have recognized that in some cases, namely domestic violence cases, mediation is not appropriate, but, like Florida, there must be a judicial finding of a history of domestic violence for a case to be exempt from mediation.<sup>193</sup>

Other states provide that a court may waive mandatory mediation upon a showing of good cause. For example, in North Carolina:

[F]or good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting . . . . [G]ood cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse or spouse abuse . . . .<sup>194</sup>

North Carolina's policy is more liberal than other states. It allows courts to waive mediation on the basis of good cause.<sup>195</sup> Additionally, it only requires allegations of abuse, as opposed to a finding of fact or even probable cause, to waive mediation.<sup>196</sup>

Another issue in mandatory mediation statutes is the element of mediator training and confidentiality. Many statutes directly name the situations where mediation is mandatory, but they then

---

<sup>190</sup> Imbrogno, *supra* note 49.

<sup>191</sup> 750 ILL. COMP. STAT. 5/607.1(c)(4) (2001).

<sup>192</sup> *In re Marriage of Duffy*, 307 Ill. App. 3d 257, 263 (Ill. App. Ct. 1999).

<sup>193</sup> *Id.*

<sup>194</sup> N.C. GEN. STAT. § 50-13.1 (2000).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

fail to address the specifics of the mediation or the required qualifications of the mediator.<sup>197</sup> Some states, however, specifically describe the requirements of mediation. In North Carolina, a "mediation proceeding shall be held in private and shall be confidential."<sup>198</sup> While it may be easier for victims in North Carolina to avoid mediation altogether, in situations where victims do end up before a mediator, confidentiality is the antithesis of what battered women need.<sup>199</sup>

Confidentiality sets back the movement to publicize family violence. "Violence against women and children cannot be controlled as long as it lurks behind closed doors."<sup>200</sup> It must be brought out into the open so that the perpetrators can be held accountable.<sup>201</sup> By decriminalizing the behavior of the batterer, mediation moves in direct opposition to battered women's advocacy over the last twenty years.<sup>202</sup> The general implication of mediation is "no-fault"—that both parties must change.<sup>203</sup> "The process deals with the relationship rather than with the crime."<sup>204</sup>

## VI. PROPER STANDARDS FOR DIVORCE AND FAMILY MEDIATORS

Another problem with using mediation to resolve family disputes is that mediators are not properly qualified to address domestic violence issues.<sup>205</sup> First, it is difficult for them to detect domestic violence.<sup>206</sup> As mentioned above, many factors affect detection including the reluctance of victims to step forward.<sup>207</sup> Also, many mediation programs fail to implement detection techniques.<sup>208</sup> Second, mediators often lack adequate training.<sup>209</sup> And, even with extensive training, the psychological effects of domestic violence may be more than mediators can handle; "without an awareness of the nature of dissociated coercion, coercive control, and the physiological and psychological dimensions of domes-

---

<sup>197</sup> See, e.g., Alabama [ALA. CODE § 6-6-20(d) (2001)]; Alaska [ALASKA STAT. § 25.24.060(f) & (g) (Michie 2001)]; Florida [FLA. STAT. ANN. § 44.102(2)(c) (West 2001)]; Iowa [IOWA CODE § 598.41(b) & (c) (2002)]; Minnesota [MINN. STAT. § 518.619(2) (2001)]; Nevada [NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie 2001)].

<sup>198</sup> N.C. GEN. STAT. § 50-13.1 (2000).

<sup>199</sup> Post, *supra* note 51, at 2.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See *supra* notes 40-43 and accompanying text.

<sup>208</sup> Imbrogno, *supra* note 49.

<sup>209</sup> *Id.*; see also Maxwell, *supra* note 32, at 343.

tic violence, a mediator is ill prepared to understand the central dynamics of the relationship.”<sup>210</sup> Third, statutes that mandate mediation in family law cases concerning child custody and visitation and marriage dissolution fail to outline the required qualifications of a mediator.<sup>211</sup> One New York attorney and family mediator has proposed four requirements for maintaining the mediation process.<sup>212</sup> First, the mediator must have proper training in both domestic violence and mediation.<sup>213</sup> Second, the parties should be adequate candidates for mediation, meaning that they should possess equal bargaining power and be free from any form of domestic violence in their relationship.<sup>214</sup> Third, the parties should consult attorneys although it is not mandatory.<sup>215</sup> Fourth, the process should be one that allows the parties to graduate from the process with dignity.<sup>216</sup> Though these requirements sound thorough and appealing, the truth is that the dynamics of domestic violence and individual parties’ reactions to them are too diverse and complex for successful mediation.

The Association of Family and Conciliation Courts has published a set of model standards for mediation in family law cases.<sup>217</sup> While it is very conscious of the presence of domestic violence, it is still not adequate enough to aggressively safeguard victims from the power and control techniques of their abusers. One researcher has commented that “the most skilled and experienced mediator cannot offset the sharp disparities of power between men who batter and the women they abuse.”<sup>218</sup> The standards do not help to create equality in relationships—relationships that are incapable of ever standing on level ground.

To protect parties from being harmed by mediation and to promote efficiency in the process, model standards have been developed to help mediators.<sup>219</sup> However, these standards are ideal only in a society where all relationships are equal in bargaining power and where mediators are properly trained to screen for appropriate mediation cases. In practice, these standards appear to have many flaws. The Model Standards of Practice for Divorce and

---

<sup>210</sup> Maxwell, *supra* note 32, at 343.

<sup>211</sup> See *supra* note 169.

<sup>212</sup> Elayne E. Greenberg, *Family Mediation in Practice*, N.Y. L.J., Sept. 9, 1996, at 2.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Symposium, *Model Standards of Practice for Divorce and Family Mediators*, 38 FAM. & CONCILIATION CTS. REV. 110 (2000) [hereinafter *Model Standards*].

<sup>218</sup> Hart, *supra* note 69, at 38.

<sup>219</sup> *Id.*

Family Mediators (hereinafter the "Model") stresses in its introduction that mediation is not a substitute for legal advice and psychological counseling.<sup>220</sup> It also stresses that not all families are appropriate for mediation.<sup>221</sup> The question remains: if the parties to mediation must still pay for extra services, and if many of them are not even appropriate candidates for mediation, what good is the system?

Moreover, the Model states:

Experience has, however, established that, as a component of a multifaceted dispute resolution system, family mediation is a valuable option for many families because it can: (1) increase the self-determination of family members; (2) promote the best interests of children; and (3) reduce the economic and emotional costs involved in resolution of family disputes.<sup>222</sup>

Immediately, however, the authors point out that participants in mediation, a process designed to help lower costs and decrease adversarial tactics, should also seek the advice of counsel or therapy to help them come to a compromise in mediation.<sup>223</sup> Note, however, that the idea that mediation leads to greater "self-determination of family members" is much more practical in theory than in practice.

The Model then lists thirteen major standards which seek to properly mediate domestic disputes.<sup>224</sup> These standards state that mediation procedures should: allow for confidentiality in proceedings; provide information and promote self-determination so that the parties can make informed decisions and decide whether to participate voluntarily; provide proper education for mediators; and require mediators to maintain impartiality and disclose any fees or conflicts of interest.<sup>225</sup> Most importantly, in situations involving domestic violence, standard XI states that "a family mediator should recognize a family situation involving domestic violence and [should] take appropriate steps to shape the mediation process."<sup>226</sup> The problem with this idea, however, is that violence cannot be mediated; and, if a mediator recognizes domestic violence, the process should be discontinued, not shaped around the batterer's control over the victim.

---

<sup>220</sup> *Model Standards*, *supra* note 217.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

## VII. CONCLUSION

This Note has sought to point out the complex issues that arise when one uses mediation to resolve family disputes that involve domestic violence. This Note has also argued that the elements of mediation are antithetical to the dynamics of family abuse. Due to their complexities and personal nature, family law cases bring forth to the legal process some of the most dramatic, upsetting, and emotional issues. While proponents of the mediation process believe that mediation protects the privacy of familial relationships, the fact that it may result in more negative complications than positive successes prevents it from being a truly adequate method of resolution for family disputes. The mere risk that cases will be resolved unfairly because domestic violence was undetected creates uneasiness in advocating this method of resolution. "Many recent studies on mediation and violence show not only that mediation is an inadvisable judicial route for battered women to take, but that is also rarely provides sufficient benefit to encourage anyone in a potentially violent domestic situation to risk choosing this alternative."<sup>227</sup> Due to poor screening for domestic violence, the absence of legislative mandates for mediator training, and the inevitable re-privatization of domestic violence which will set back the legislative progress achieved by the battered women's movement, mediation continues to be an inadequate response to family issues. Mediation pushes domestic violence, a very public issue, and its repercussions on both family life and society at large into a private realm where it goes unnoticed. Society needs continued growth in the legal response to domestic violence, and that "legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between victim and the abuser."<sup>228</sup>

---

<sup>227</sup> Post, *supra* note 51, at 2.

<sup>228</sup> Imbrogno, *supra* note 49.

