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## DOMESTIC VIOLENCE AND MEDIATION: A TRAGIC COMBINATION FOR VICTIMS IN CALIFORNIA FAMILY COURT

### INTRODUCTION

*"I was forced to sit down with a man who for the past twelve years has abused me, intimidated me, controlled me by threats and scare tactics, emotionally wore me down and whom I truly fear."*<sup>1</sup>

Domestic violence is a complex problem facing today's society. A telling example of that complexity is the interplay of California family law with domestic violence situations. California's policy of mediating cases involving domestic violence ignores the immediate danger to the victims, while condoning abuse by the batterer. California legislation implies that violence against women is acceptable, as long as it is within the domestic relationship.<sup>2</sup> By continuing to allow these cases to reach mediation, victims receive inferior results, and are forced to endure years of unacceptable abuse without atonement. Until California changes their legislation to exclude domestic violence cases from mediation, and adequate measures are taken to sufficiently screen these situations, victims of domestic violence will continue to suffer at the hands of their abusers, and abusers will continue to commit criminal acts with little or no punishment.

Family Court mediation is a useful practice in California Family Court. Ordinarily, it allows parties to reach their own resolutions in a cost-efficient and less adversarial manner.<sup>3</sup> In California, Family Court mediation is mandatory.<sup>4</sup> Unfortunately, California is the only state that does not provide a complete exemption from mediation in cases where domestic violence has

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1. Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 279 (1992). These were the words of a battered woman named Kim, who went to the Harvard Legal Aid Bureau, and who was forced to mediate her divorce with her husband. *See id.*

2. *See* CAL. FAM. CODE § 3181 (West 1998). California requires mediation regardless of whether there is a history of domestic violence between the parties. *See id.*

3. *See* Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255 (1994). In the absence of domestic violence, the utility of mediation is successful. *See id.*

4. *See* CAL. FAM. CODE § 3170 (West 1998). "If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation." *Id.*

occurred.<sup>5</sup> Due to the nature of domestic violence, a man enjoys significant control over a woman, which provides him with advantages in a mediation session.<sup>6</sup> In the end, the wrong party is punished. Batterers walk away with little or no repercussions from the crime they commit,<sup>7</sup> while the victims essentially bargain away their safety as well as other important issues within the mediation, such as custody, visitation, or support.

These problems require strong solutions. First, California legislation must be changed to exclude Family Court mediation in cases where domestic violence is prevalent. Second, education must improve. Prosecutors, judges, and Family Court mediators must learn the intricacies of domestic violence—intricacies that include psychological, physical, and emotional patterns inherent in an abusive relationship. These solutions are imperative to address the problems that face victims of domestic violence in California Family Court mediation.

This article examines the weaknesses of mandatory mediation in California Family Court in cases where there is a history of domestic violence. Part I briefly discusses the mediation process and how it works in domestic violence cases. Part II discusses the nature of domestic violence. Part III analyzes California legislation and compares it with other jurisdictions. Part IV examines the problems that victims of domestic violence face in California Family Court mediation. Part V analyzes the criminality of domestic violence as it relates to Family Court mediation. Finally, Part VI concludes the article by offering possible solutions to the problems inherent in California's Family Court mediation statute.

## I. OVERVIEW OF MEDIATION

Mediation is a process in which disputing parties isolate disputed issues and interests in order to develop options, consider solutions, and voluntarily reach a mutually fair and acceptable agreement.<sup>8</sup> Parties to a mediation par-

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5. See CAL. FAM. CODE § 3181 (West 1998). California does not provide an exception for cases where there is a history of domestic violence. See *id.* The statute allows separate mediation, but not a total exemption. See *id.*; see also Gagnon, *supra* note 1, at 283.

6. See Carolyne R. Hathaway, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 671 n.20 (1986). Estimates indicate that 97% of domestic violence victims are female and for the purpose of this article, victims will be addressed in feminine terms. See *id.* at 671.

7. Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CAL. PENAL CODE § 240 (West 1998). "An assault is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment." CAL. PENAL CODE § 241(a) (West 1998). Battery is defined as, "any willful and unlawful use of force or violence upon the person of another." CAL. PENAL CODE § 242 (West 1998). "A battery is punishable by a fine of not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding six months, or by both the fine and imprisonment." CAL. PENAL CODE § 243 (West 1998).

8. See Knowlton & Muhlhauser, *supra* note 3, at 255. In Family Court, the hus-

participate on a voluntary basis and meet with a neutral third party who serves as the mediator during a confidential process.<sup>9</sup> In many cases, success is reached and the purpose of mediation is fulfilled.<sup>10</sup> The results of mediation are most acceptable when the parties have equal bargaining power.<sup>11</sup> Many times, both parties must make concessions to reach an agreement. For example, each side, realizing the need for compromise, may give in on certain demands in exchange for the other party's acquiescence of their own demands. Other times, one party may want another party to stop certain behavior.

Cases in the family courts often include highly emotional situations; as a result, mediation is particularly attractive.<sup>12</sup> Mediation offers a less adversarial atmosphere than does a divorce proceeding.<sup>13</sup> It focuses on the future, not on attaching blame to either party for past actions.<sup>14</sup> Mediation also is an attractive alternative because it empowers the parties to reach an agreement by allowing them to address their own individual needs and issues.<sup>15</sup> An individual's autonomy and empowerment are essential elements in their ability to reach a fair and equitable agreement.<sup>16</sup> Mediation is often a sound alternative to divorce proceedings because it is cost-efficient<sup>17</sup> and generally less adversarial than a trial.<sup>18</sup> However, cases that include a history of domestic violence do not lend themselves well to resolution through mediation be-

band/father and the wife/mother mediate issues of custody and support before a neutral mediator. *See id.* Usually, the mediation accompanies divorce proceedings. *See id.*

9. *See* Gagnon, *supra* note 1, at 274. California requires mediation, and participation is not voluntary. *See id.*

10. *See* Judge Chester B. Chance & Alison E. Gerencser, *Screening Family Mediation for Domestic Violence*, 70 FLA. B.J. 54 (1996). Approximately 70 percent of cases sent to mediation settle at that time and do not reach litigation. *See id.*

11. *See* Knowlton & Muhlhauser, *supra* note 3, at 255. Equal bargaining power allows both parties to advocate their positions, which leads to a fair result. *See id.* at 255-56.

12. *See* David Singer, *Mediation—A Growing Means for Settling Divorce Conflicts*, ARB. J., Dec. 1992, at 21. Distrust, anger, and tension often accompany the breakup of a marriage. *See id.*

13. *See id.* at 22. Due to the intimate nature of the dispute, the parties have significant emotional attachment to one another. *See id.*

14. *See* Barbara Hart, *Gentle Jeopardy: The Future Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 318 (1990). Mediation is generally considered to be a way to develop a strategic plan for interactive responsibilities by both parties in raising the children. *See id.* at 318.

15. *See* Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 50 (1995). The goal of mediation is to develop a solution, rather than determine who is right or wrong, which is the premise of adjudication. *See id.* at 50. *See also* Hart, *supra* note 14, at 318.

16. *See* Knowlton & Muhlhauser, *supra* note 3, at 256 (providing an overview of the issues of mediation and family law to guide the development of a system that would empower the needs of the family).

17. *See* Susan L. Steiger, *Mediation and Domestic Violence: Considerations for Mediators and Battered Women*, N.H. B.J., June 1994, at 32, 33. Mediation costs far less than attorney representation. *See id.* at 33.

18. *See* Singer, *supra* note 12; *see also supra* note 13 and accompanying text.

cause mediation requires equal bargaining power.

## II. OVERVIEW OF DOMESTIC VIOLENCE

Domestic violence is characterized by more than physical acts of violence. In addition to physical harm, domestic violence also takes the form of constant humiliation, insults, degradation, and ridicule.<sup>19</sup> Some women even feel that degradation and humiliation are the most painful type of abuse that they experience.<sup>20</sup>

At common law, a man was permitted to beat his wife with a rod or stick no bigger than his thumb.<sup>21</sup> The justification for such a law was that a man was the head of the household and needed to maintain control.<sup>22</sup> Today, television movies, books, public awareness campaigns, and legislation have increased public awareness of spousal abuse.<sup>23</sup> However, despite the increased publicity, battered women's advocates believe that in some parts of the country the public perception of domestic violence has not changed.<sup>24</sup>

### A. Causes

The primary cause of domestic violence is the batterer's need to control and dominate his spouse.<sup>25</sup> Abusers may restrict their spouses' access to money and may destroy their property in an effort to gain, and maintain,

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19. See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2122 (1993). Physical violence is only a small characterization of domestic abuse. See *id.* at 2121. It also is accompanied by acts of degradation. *Id.* For example, an unidentified woman described the following events. "He said, ' . . . I'm gonna take you somewhere and I'm gonna teach you a lesson.' . . . He turned around and he said to [the child], 'Well, you know . . . your mother is nothing but a lying bitch—a lying cold bitch.' . . . [He] drove us to the next town out on this . . . deserted road. . . . he raised his fist to me a couple of times and each time I'd duck . . . . [H]e was gonna leave me there to walk and to think things over—like I had really been doing something bad and he was punishing me." *Id.* at 2131. "'Abuse' means intentionally or recklessly to cause or attempt to cause bodily injury, or sexual assault, or to place a person in reasonable apprehension of imminent serious bodily injury to that person or to another." CAL. FAM. CODE § 6203 (West 1998).

20. See Fischer et al., *supra* note 19, at 2123-24. The psychological abuse that accompanies the physical violence remains long after physical scars heal. See *id.* at 2124.

21. See James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1157 (1995). This law resulted in coining the phrase, "rule of thumb." *Id.* at 1157.

22. See *id.*

23. See Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated*, 34 EMORY L.J. 855, 872-73 (1985).

24. See *id.* at 873. In some parts of the country, statutes are often disregarded by officers, judges, and magistrates. See *id.* Many judges refuse to grant temporary restraining orders. See *id.* Deep traditions in the public also cause community values to change slowly. See *id.* at 874.

25. See Hart, *supra* note 14, at 318. A man who feels that the family should be patriarchal can not share power equally. See *id.* at 318-19.

control over them.<sup>26</sup>

In some cases, men feel that they have a right to obedience, services, loyalty, and exclusive intimacy from their wives.<sup>27</sup> In other cases, the abuser is unable to manage his anger, frustration, or low self-esteem, so he develops a subculture of control and domination within the home.<sup>28</sup> Ironically, abusers are often completely dependent on their victims, which results in an attempt to isolate them from outsiders.<sup>29</sup> Victims may be restricted from visiting family or leaving the house, thus enhancing the abuser's domination over them.<sup>30</sup> Abusers will then use this control and domination to exert complete autonomy within the home, relegating his victim to subservience.<sup>31</sup>

### B. Effect on Women

Constant fear permeates the life of a victim of domestic violence.<sup>32</sup> Violations of abuser-created rules and regulations provide the batterer with a justification for the use of physical harm.<sup>33</sup> A woman may compulsively obsess about pleasing her husband for fear that not doing so will provoke another beating.<sup>34</sup> Often times, a batterer may erupt for something that would appear quite petty in nature.<sup>35</sup> Having little or no warning, the only option for a victim is to ensure that the batterer is happy, regardless of whether the method of making him happy is reasonable or not.<sup>36</sup> She develops a pattern of selflessness, which serves as a complete compromise to her individuality

26. See Fischer et al., *supra* note 19, at 2121. Without access to money or property, a woman feels, and often is, unable to escape her spouse because she is unable to support herself or her children. See *id.* at 2121-22.

27. See Hart, *supra* note 14, at 319. Some abusers view their victims as a piece of property and feel that they can control the victim with whatever means are at their disposal. See *id.*

28. See Truss, *supra* note 21, at 1167. Abusers often isolate their victims from family and friends, and in some case, from any contact with the world outside the home. See *id.* at 1168. This allows the abusers to have control within a subculture of dominance in the home. See *id.* at 1167-68.

29. See *id.* at 1167-68. Abusers often are completely dependent on their victims because the abuser is often insecure outside the home, which causes him to be completely dependent upon something he can control, such as his spouse. See *id.*

30. See Fischer et al., *supra* note 19, at 2132. Restricted contact with family and friends prevents the woman from seeking help. See *id.* It also reinforces the man's domination over the woman because her entire life revolves around his needs. See *id.*

31. See Truss, *supra* note 21, at 1167-68; see also *supra* note 28 and accompanying text.

32. See Fischer et al., *supra* note 19, at 2126. The abuser may have instilled such a strong sense of fear and control over the victim that the use of simple gestures communicates to the victim that a potential threat of violence may ensue. See *id.*

33. See *id.* at 2127-28.

34. See Hart, *supra* note 14, at 319. Women's fear of being beaten causes them to do whatever necessary to avoid future violence. See *id.* One woman described life with her husband: "I felt forced to comply . . . [with mediation]. It reminded me of nights spent silently weeping as he raped me. If I complied, the pain ended more quickly." *Id.* at 319.

35. See Rowe, *supra* note 23, at 867.

36. See Fischer et al., *supra* note 19, at 2129. Abusers often "do anything" for the abuser for fear of the violent consequences. *Id.*

and liberty.<sup>37</sup>

Passivity towards the abuse causes women to forego their legal rights to property, to their liberty, and more importantly, to their right to not be beaten.<sup>38</sup> These fears do not spontaneously disappear upon entering into the quasi-safe atmosphere of a controlled environment in a mediation. Fear of the batterer is not the only factor that causes the victim to relinquish her rights. Perceived failures by the judicial system to adequately address the legitimate rights of the domestic violence victim cause her to believe that any effort to assert herself is futile.<sup>39</sup>

### C. *Effect on Batterers*

The batterer develops a belief system that is based on violence as a means to suit his personal needs.<sup>40</sup> Using violence as his method, he soon realizes that he is able to successfully get his way, with little or no adverse consequences.<sup>41</sup> For an abuser, humiliating and controlling his victims through degrading practices has no affect on his conscience.<sup>42</sup> In fact, a batterer often believes he has a right to use violence, that is, using violence is normal, and even good.<sup>43</sup>

## III. LEGISLATION REGARDING MEDIATION IN DOMESTIC VIOLENCE CASES

Many jurisdictions require mediation during divorce proceedings.<sup>44</sup> California is such a state.<sup>45</sup> However, California is the only state that does not provide a complete exemption from mediation in circumstances where domestic violence is prevalent.<sup>46</sup> California does allow a mediator to meet with

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37. *See id.*

38. *See id.* at 2135. Scholar Lenore Walker compares the "learned helplessness" theory to domestic violence victims by asserting that victims eventually stop all attempts to leave for belief that they could not escape. *See id.*; *see also supra* note 34 and accompanying text.

39. *See* Truss, *supra* note 21, at 1188-90. In a study by the Texas Supreme Court Task Force, one-half of the women surveyed believed that law enforcement officers frequently do not take domestic violence seriously. *See id.* at 1188-89.

40. *See* Hart, *supra* note 14, at 319.

41. *See id.* Especially if the woman does not alert the authorities, a batterer learns that he may beat his wife without being punished, while at the same time getting his way. *See id.*

42. *See id.* Many abusers believe that the subservience of woman is normal. *See id.*

43. *See generally id.*

44. *See* Gagnon, *supra* note 1, at 279; *see also* Fischer et al., *supra* note 19, at 2143 (discussing mandatory mediation in various states).

45. *See* CAL. FAM. CODE § 3170 (West 1998); *see also* CAL. FAM. CODE § 3181 (West 1998); Gagnon, *supra* note 1, at 283 (noting that separate mediation for domestic violence victims is available if requested).

46. *See* CAL. FAM. CODE § 3181 (West 1998); *see also* Gagnon, *supra* note 1, at 283. "With the exception of California, statutory exemptions from mediation provide battered women a total exemption from the mediation process." *Id.*

parties separately when there has been a history of domestic violence.<sup>47</sup> While this may seem to be an adequate solution, it fails to address the underlying problem of mediating domestic violence cases because it fails to empower the victim.<sup>48</sup>

Other states, such as Alaska and Alabama, provide an exception to mandatory mediation.<sup>49</sup> Alabama permits mediation despite domestic violence if various conditions are satisfied.<sup>50</sup> Alaska requires that mediation be ordered unless there has been a crime involving domestic violence.<sup>51</sup>

Colorado is perhaps the most progressive jurisdiction in considering the appropriateness of mediation in domestic violence situations.<sup>52</sup> Colorado law allows a complete exemption to mediation in situations involving domestic violence.<sup>53</sup> The Supreme Court of Colorado ratified the statute in 1996 because its purpose is to protect victims by taking the discretion away from the court.<sup>54</sup>

#### IV. PROBLEMS FACING VICTIMS OF DOMESTIC VIOLENCE IN MEDIATION

##### A. *California Judicial System*

California's Family Court system generally is unwilling to interfere in family matters.<sup>55</sup> From prosecutors to mediators, the design of the process is to allow the family to resolve their problems within the context of the privacy inherent in the familial structure.<sup>56</sup>

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47. See CAL. FAM. CODE § 3181 (West 1998); see also Fischer et al., *supra* note 19, at 2147-48.

48. See *supra* note 11 and accompanying text.

49. See Fischer et al., *supra* note 19, at 2148.

50. See ALA. CODE § 6-6-20 (1997). Alabama permits mediation despite domestic violence if three conditions are satisfied: (1) the victim requests mediation; (2) mediation is conducted by a certified mediator trained in domestic violence; and (3) the victim is permitted to have an advocate present. See *id.* § 6-6-20(f).

51. See ALASKA STAT. § 25.20.080 (Michie 1997). In situations of domestic violence, the entire case is heard by a judge. See *id.* § 25.20.080(f).

52. See generally COLO. REV. STAT. ANN. § 13-22-311 (West 1998).

53. See *id.* Colorado courts may not order mediation where one party simply claims that there is a history of physical or psychological abuse. See *id.*

54. See Pearson v. District Court, Eighteenth Judicial Dist., County of Arapahoe, 924 P.2d 512, 516 (Colo. 1996). The court ruled that the statute's purpose was to forbid a court from ordering mediation where a party claims domestic violence, not to allow the court discretion to order mediation. See *id.* at 516.

55. See David Mitchell, *Symposium on Domestic Violence: Commentaries: Contemporary Police Practices in Domestic Violence Cases: Arresting the Abuser: Is it Enough?*, 83 J. CRIM. L. & CRIMINOLOGY 241, 242 (1992); see also Rowe, *supra* note 23, at 875. Traditionally, courts are reluctant to interfere in family matters because the family is considered a private unit, and policy dictates that family matters are best settled within that framework. See *id.* at 875-76. This practice often protects abusers from criminal prosecution under the guise of family autonomy. See *id.* at 877.

56. See Rowe, *supra* note 23, at 875-76.



### 1. Prosecutors

Criminal prosecutors face difficult problems in convicting domestic violence offenders. One main problem is marital privilege, which makes evidence difficult to obtain.<sup>57</sup> Because a victim is not “forced” to testify, prosecutors have a difficult time obtaining testimony of the victim.<sup>58</sup>

Additionally, many victims initially have their abusers arrested, but later drop the charges because the abuser may either threaten further violence or promise to cease abusive behavior.<sup>59</sup> A victim may also be caught in a cycle of protecting their abuser, which makes it difficult for the prosecutor to receive cooperation from the victim.<sup>60</sup> These factors make it difficult for the prosecutor to convict abusers. Consequently, the abuser is not punished, which reinforces his belief that his behavior is acceptable.<sup>61</sup> The balance of equality widens to the victim’s detriment, equality that she will eventually need in mediation.<sup>62</sup>

Additionally, some prosecutors are not trained to understand the impact of domestic violence.<sup>63</sup> They may not understand, and therefore fail to recognize, that the victim may feel she must accept the abuse by concluding that their efforts to punish the batterer will be futile.<sup>64</sup> The result is that the victim becomes passive and accepting of the abusive relationship, and non-assertive in mediation.<sup>65</sup>

### 2. Mediators

Mediators face two serious problems when mediating domestic violence cases. First, the mediator is often untrained to deal with the psychological complexities of a domestic violence relationship, which may impede his ability to adequately recognize abusive relationships.<sup>66</sup> Second, the goal of a

57. See CAL. EVID. CODE § 970 (West 1999). “Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.” *Id.* See also Truss, *supra* note 21, at 1194. Marital privilege allows a spouse to keep marital communications private and confidential. See *id.* Because an abuser often has significant control over the victim, he can influence her into invoking the marital privilege. See *id.* at 1196.

58. Truss, *supra* note 21, at 1195-96.

59. See *id.* at 1193-94.

60. See Mitchell, *supra* note 55, at 241-42. A victim of domestic violence often loves her batterer, and, despite the abhorrent behavior by their abuser, the victim attempts to protect him. See *id.* at 242.

61. See Hart, *supra* note 14, at 319.

62. See *supra* note 11 and accompanying text.

63. See Truss, *supra* note 21, at 1192-93. Prosecutors are often untrained in the area of domestic violence and may believe that such cases are petty or are a nuisance. See *id.*

64. See Hart, *supra* note 14, at 319, 321. Battered women often give up on improving their situation and feel “numbness or paralysis” towards the abusive relationship. *Id.* at 321.

65. See *id.* at 319, 321.

66. See Singer, *supra* note 12, at 25. Many states do not require mediators to undergo domestic violence training. See *id.* Those that do not voluntarily undergo training are often

mediator is to reach an agreement while remaining impartial and neutral,<sup>67</sup> and therefore, he is unable to significantly counteract the imbalance of power.<sup>68</sup>

In California, a Family Court mediator provides the court with a recommendation regarding his findings.<sup>69</sup> As a result, the training of a mediator is of utmost importance. In California, it is imperative that mediators have the skills necessary to recognize domestic violence because the cases will go to mediation and the mediator will ultimately submit a recommendation to the courts. Many mediators do not possess these skills.<sup>70</sup> Moreover, mediators tend to use a narrow definition of domestic violence that may not include psychological abuse.<sup>71</sup> Such failures to recognize domestic violence can lead to inferior results for victims.<sup>72</sup>

The role of the mediator is to remain neutral and refrain from placing blame on either party.<sup>73</sup> This creates problems when mediation is used to resolve cases that include domestic violence. The problems arise because it is psychologically essential that victims understand that they are not responsible for the abuse.<sup>74</sup> Because of the nature of mediation, this places the mediator in a difficult position because the mediator must not condemn either side in order to ensure fairness.<sup>75</sup>

### B. Perception That Domestic Violence is Conflict Induced

Domestic violence is not caused by conflict between the man and

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unable to effectively recognize and understand the complexities of domestic violence, including the inherent inequality of bargaining power. *See id.*

67. *See Gagnon, supra* note 1, at 274 (stating that mediator neutrality is an essential element of mediation).

68. *See Knowlton & Muhlhauser, supra* note 3, at 267-68. A mediator cannot recognize the long-term impact of power and control with special training. *See id.* Maintaining a balance of power in terms of physical safety, which a mediator can do, does not address the psychological effects of domestic violence. *See id.* at 268.

69. *See CAL. FAM. CODE* § 3183 (West 1999). Even when the parties do not reach an agreement, the mediator will submit a recommendation to the court based on his findings. *See CAL. FAM. CODE* § 3183(b) (West 1999).

70. *See Singer, supra* note 12, at 25.

71. *See Marianne Hester, Mediation Practice and Domestic Violence*, 27 *FAM. L.* 713 (1997). Mediators may not include those acts that typify control and domination, characteristics that are inherent in violent relationships. *See id.* Therefore, they may not recognize domestic violence. *See id.*

72. *See Gerencser, supra* note 15, at 61. "Before each proposed mediation, screeners must distinguish between a relationship where the parties are still able to mediate on equal terms . . ." *Id.*

73. *See Gagnon, supra* note 1, at 276; *see also Singer, supra* note 12, at 23.

74. *See Knowlton & Muhlhauser, supra* note 3, at 266. Some psychologists believe that a victim of domestic violence needs validation of her anger and emotion for therapeutic gain. *See id.*

75. *See Gagnon, supra* note 1, at 276. The element of mediator neutrality becomes problematic in domestic violence situations. *See id.* If the mediator does not condemn the abuse, the batterer believes that his behavior is acceptable. *See id.*

woman.<sup>76</sup> Focusing on conflict as the source of the abuse between the man and woman suggests to the woman that she shares responsibility for the abuse.<sup>77</sup> The woman takes responsibility for being beaten, which may cause her to compromise her issues and interests within a mediation.<sup>78</sup> One study revealed that seventy-seven percent of the attacks on women by their husbands were not due to a conflict, but were unprovoked.<sup>79</sup> Women may be beaten by their husbands in an assortment of situations that would not be considered conflict: because he is unhappy with his dinner, while she is sleeping, or after the woman leaves her husband.<sup>80</sup> Conflict is not the overlying cause of domestic violence because, in reality, the batterer is often unable to control his emotions and he unilaterally causes the abuse.<sup>81</sup>

### C. *Ideology of Mediation*

#### 1. *Equality of the Parties*

While equality between mediating parties is essential to the success of reaching a fair and equitable agreement, the nature of domestic violence precludes equality within a relationship.<sup>82</sup> Domestic violence is more than physical abuse; it involves years of psychological domination and control over a victim's life.<sup>83</sup> Because she has never had equality in the relationship, it is unrealistic to assume that a victim can enter into mediation and effectively assert her rights as an individual.<sup>84</sup> Attorneys, society, and her abuser have reinforced her belief that she is not entitled to address her needs as an equal member of the relationship.<sup>85</sup> Consequently, it is virtually impossible for a woman to mediate on equal terms when she believes that her abuser is above the law.

Mediators are in a poor position to address the problem of inequality. As they are generally required to remain neutral towards the parties, mediators are unable to serve as a counter-balance to the abuser's domination over the victim.<sup>86</sup> In many cases, the mediator may not even recognize the abuser's

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76. See generally Fischer et al., *supra* note 19, at 2137-38.

77. See Rowe, *supra* note 23, at 866. The foundation of this approach, inherent in mediation, assigns responsibility for the problems to both parties and requires that they agree to change their behavior. See *id.*

78. See *id.*

79. See *id.*

80. See Fischer et al., *supra* note 19, at 2138-39.

81. See Rowe, *supra* note 23, at 867. Domestic violence offenders often cannot control their temper and anger, even for seemingly trivial matters. See *id.* The batterer does not react in a logical manner to provocation, and is unable to control his emotions. See *id.*

82. See Truss, *supra* note 21, at 1167-68; see also *supra* note 28 and accompanying text.

83. See Fischer et al., *supra* note 19, at 2161.

84. See generally Fischer et al., *supra* note 19, at 2163.

85. See generally Truss, *supra* note 21, at 1162-64. Prosecutors and judges tend to treat domestic violence cases as unimportant. See *id.* at 1163.

86. See *supra* note 68 and accompanying text.

ability to control the victim through use of words or movements known only to the victim as being threatening.<sup>87</sup> In such cases, the abuser can control and manipulate the mediation.

The victim of abuse does not often have the power to negotiate in a mediation.<sup>88</sup> Even if the victim does not receive any direct threats, knowing that she may have to deal with retaliation following the mediation may make her unwilling to say anything to upset the abuser.<sup>89</sup> The mediation becomes an antagonistic exercise that may ultimately cause grave danger to the victim.<sup>90</sup> The potential for this result is substantially increased when a victim does not have an attorney to advocate for her.<sup>91</sup> Without counsel, the victim often makes an agreement under duress by her abuser because he may be able to control and intimidate her, factors that would not hinder an advocate.<sup>92</sup>

California mediators, however, may employ various tactics in attempting to balance the power. One tactic is the use of confidential caucuses.<sup>93</sup> In a caucus, a mediator may speak individually with the victim in an attempt to assess her concerns and needs, without the presence of her abuser.<sup>94</sup>

There are significant flaws, however, in using caucuses in mediations involving domestic violence. Most notably, the use of caucuses assumes that a short discussion with a victim will uncover and rectify years of being silenced.<sup>95</sup> Another problem is that it assumes that a mediator will earn the trust of a victim.<sup>96</sup> A victim of domestic violence has continually been ignored and disrespected by the system of justice, and a victim views the mediator as a part of that system.<sup>97</sup>

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87. See Knowlton & Muhlhauser, *supra* note 3, at 267. For example, a hand gesture, or a blink, may signal violence only to the victim. *See id.*

88. See Rowe, *supra* note 23, at 864. Legal commentators believe that passivity of a battered woman makes it difficult for her to negotiate her needs, and reject solutions that do not meet those needs. *See id.*

89. *See id.*

90. *See id.*

91. See Knowlton & Muhlhauser, *supra* note 3, at 266. An advocate does not have the fears and experiences that the victim does when confronting the abuser. *See id.*

92. See Hart, *supra* note 14, at 321. Attorneys are unlikely to agree to an unfair settlement because they will not be coerced into an agreement. *See id.*

93. See Fischer et al., *supra* note 19, at 2163. A caucus is a tool used by mediators that allows the mediator to separate the parties and confidentially speak to them individually, which generally permits the parties to become less adversarial and confrontational. *See id.*

94. *See id.*

95. See Fischer et al., *supra* note 19, at 2163; see also Gagnon, *supra* note 1, at 273. See generally Knowlton & Muhlhauser, *supra* note 3, at 265.

96. See Fischer et al., *supra* note 19, at 2163.

97. *See id.* Legal commentators Stephen K. Erickson & Marilyn McKnight believe that spending such a short amount of time with a victim will not uncover and rectify "the effects of being silenced through months or years of abuse." *Id.*

## 2. *Post-Mediation Implications*

The most violent and deadly attacks on victims often occur when the victim attempts to leave the abuser.<sup>98</sup> Studies have found that there is more abuse following a mediation than there is following a trial.<sup>99</sup> Following the mediation, the victim is in considerable danger. The abuser may become desperate at the prospect of losing control of the victim and often resorts to more desperate measures to maintain his dominance over her.<sup>100</sup> Unfortunately, mediation does not provide a strategy for protecting victims from post-separation violence.<sup>101</sup>

The enforcement of a mediation agreement itself may also have severe consequences. For example, an agreement may state that the abuser must not be violent towards the victim in exchange for the victim's cooperation in visitation arrangements. The abuser may view a violation of the agreement by the victim as a license to resume the abuse.<sup>102</sup>

Additionally, even a good faith intention by the batterer to honor the agreement may nevertheless result in abuse, regardless of whether the victim violates the contract. This is because an agreement made while calm and in an environment conducive to compromise will do little to control the future behavior of a perpetual abuser.<sup>103</sup>

Finally, the contact between the abuser and the victim as a result of mediation may also be a potential source of violence following the session. In situations in which the victim has separated from the abuser, information obtained in a session may provide the abuser with access to the victim.<sup>104</sup>

### D. *Screening Process*

California does not require screening for domestic violence and abuse before mediation begins.<sup>105</sup> Although many family mediators are highly trained in the areas of law, mental health, social work, or psychology, no ju-

98. See generally Hart, *supra* note 14, at 323-24 (providing statistical evidence of the gravity of separation violence); Truss, *supra* note 21, at 1172.

99. See Dianne Post, *Mediation Can Make Bad Worse*, 14 NAT'L L.J. 15 (June 1992) (discussing differences between post-mediation and post-trial situations.)

100. See Truss, *supra* note 21, at 1172-73.

101. See Hart, *supra* note 14, at 325.

102. See Fischer et al., *supra* note 19, at 2164. The abuser erroneously believes that the settlement agreement is a bargain that conditions the end of the abuse on the woman upholding her part of the agreement. See *id.*

103. See Rowe, *supra* note 23, at 865-67. Mediation is a crisis intervention technique and should never be a substitute for long-term therapy. See *id.* at 865.

104. See Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 36 (Winter, 1995). For example, a batterer may obtain the address of where the victim is currently residing. See *id.*

105. See Gerencser, *supra* note 15, at 44. Because California does not allow absolute preclusion of mediation in cases with a history of domestic violence, the need to screen for domestic violence is unnecessary. See *id.*

risdiction requires training in domestic abuse as part of its mediation certification program.<sup>106</sup>

Additionally, as noted, mediators may have a narrow definition of domestic violence.<sup>107</sup> They may fail to include psychological abuse,<sup>108</sup> which is the foundation of domestic violence.<sup>109</sup> This practice perverts the process of mediation and may directly result in an unfair agreement.<sup>110</sup>

#### V. CRIMINALITY OF DOMESTIC VIOLENCE IS COMPROMISED DUE TO MEDIATION

The misconception that domestic violence is a family matter, and not a criminal act, harms women in many ways. It proceeds through the system until it reaches the mediation.<sup>111</sup> As indicated, by failing to punish or assign blame to the abuser, the system is requiring the victim to bargain away her right to not be beaten.<sup>112</sup> For example, one such agreement may be that the wife will keep the children away from her husband when he is tired, in exchange for the husband not beating her. Although the goal of mediation is to reach an agreement, this type of arrangement is unacceptable because it suggests to the victim that domestic violence is not criminal, while expanding the disparity of power between the two participants.<sup>113</sup>

Additionally, mediation deals with the relationship, rather than the crime.<sup>114</sup> If the design of mediation were to address problems in a marriage and attempt to find solutions, this approach would be acceptable. However, Family Court mediation is meant to settle custody disputes, property matters, and other issues accompanying dissolution of the relationship.<sup>115</sup> The atmosphere is generally adversarial and confrontational because the parties involved are required to assert themselves to reach a fair and equitable settle-

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106. *See id.* at 69; *see also* Knowlton & Muhlhauser, *supra* note 3, at 263-64. Most literature finds that mediators and advocates agree that some screening should take place. *See id.*

107. *See* Hester, *supra* note 71, at 713. Mediators fail to include psychological abuse as "domestic violence." *Id.*

108. *See id.*

109. *See generally* Hart, *supra* note 14, at 318-19 (stating that control and domination are the primary causes of domestic violence).

110. *See* Fischer et al., *supra* note 19, at 2155. If cases that involve domestic violence are not properly screened, the agreement may have been made without knowledge of the imbalance of power that results from domestic violence. *See id.*

111. *See* Truss, *supra* note 21, at 1190-91. Victims often encounter police officers who do not treat domestic violence as serious or criminal. *See id.* at 1189. Judges and prosecutors may also treat domestic violence as a "family matter." *See supra* note 55 and accompanying text.

112. *See* Gagnon, *supra* note 1, at 277.

113. *See* Fischer et al., *supra* note 19, at 2153.

114. *See* Post, *supra* note 99, at 16.

115. *See* Singer, *supra* note 12, at 21. Divorces often involve legal conflicts such as child custody, support, and property settlements. *See id.*

ment.<sup>116</sup> Because of domestic violence, the appropriate forum is not Family Court mediation.

## VI. SOLUTIONS

### A. *Change In California Mediation Legislation*

California continues to require mandatory mediation in domestic violence cases.<sup>117</sup> The first solution to avoid the harm to victims of domestic violence is for California to re-evaluate its legislation and modify it to exclude mediation in cases of domestic abuse. Due to an imbalance of power, domestic violence victims are not able to assert their needs in mediation.<sup>118</sup> California legislation could follow the Colorado statute, which forbids mediation where domestic violence is found or one party claims that they are a victim of domestic violence.<sup>119</sup>

This solution would take the process out of the hands of the abuser and victim, where there may be a disparity of bargaining power,<sup>120</sup> and place it within the discretion of a judge. Mediators are constrained by the notion of neutrality, which is imperative to the success of mediation.<sup>121</sup> These constraints preclude the mediator from serving as an advocate for the victim,<sup>122</sup> and thus prohibit the mediator from balancing the disparity of power.<sup>123</sup> Because a mediator can not balance the equality of power between an abuser and a victim, judges, who have discretion to consider the inequalities, are in a better position to address the victim's needs.

This solution would also allow victims to retain the assistance of an attorney. Most attorneys that represent victims of domestic violence understand the nature of domestic violence. They understand that abusers exert power and control over the victim. This allows the attorney to compensate for the imbalance of power in an abusive relationship.<sup>124</sup>

Although many victims are unable to finance an advocate, there are many programs that render free legal service for victims of domestic violence.<sup>125</sup> Although this is not the ideal situation for victims, free legal services provide a sound alternative to self-representation in an abuser-controlled mediation.<sup>126</sup>

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116. See *supra* note 8 and accompanying text.

117. See CAL. FAM. CODE § 3170 (West 1998).

118. See generally Fischer et al., *supra* note 19, at 2163.

119. See COLO. REV. STAT. ANN. § 13-22-311 (West 1998).

120. See *supra* note 28 and accompanying text.

121. See *supra* note 67 and accompanying text.

122. See *id.*

123. See *supra* note 68 and accompanying text.

124. See *supra* note 84.

125. See Steiger, *supra* note 17 (discussing financing an attorney).

126. See *supra* note 92 and accompanying text.

### B. Educating Process

Another solution, which is much more difficult, is to change prosecutors', judges', and mediators' views of domestic violence. The best way to do this is to educate those parties that deal with domestic abuse issues. They could be required to attend courses and seminars that deal with the emotional and psychological effects of an abusive relationship.<sup>127</sup> As it stands, continuing to ignore the problems inherent in domestic violence will lead only to abuse in the system of mediation as well as a failure to protect victims of domestic abuse.

A victim of domestic abuse is vulnerable<sup>128</sup> and is unable to adequately assert herself not only in her family,<sup>129</sup> but also in the system of justice.<sup>130</sup> Consequently, she heavily relies on others for protection, in particular, the system of justice. Educating the parties to this system is crucial to protect the rights of a victim, who is unable to protect her own rights.<sup>131</sup>

This advancement is especially important for mediators because they submit the final recommendations to the courts.<sup>132</sup> California could require mediators to become educated in domestic violence,<sup>133</sup> providing the mediator with the necessary skills to identify and recognize cases of abuse.<sup>134</sup>

Mediators who understand the psychological constraints of a victim, as well as the mind of an abuser, can better serve them in rendering fair and equitable recommendations to California Courts.<sup>135</sup> Education for mediators will provide them with the tools to recognize domestic violence and address the imbalance of power between the victim and abuser.<sup>136</sup> Additionally, the mediator must be educated to adequately address the issues involved in Family Court. Child custody, child support, and alimony are among the serious issues that need to be handled by an educated mediator, not a powerless victim.

127. See Chance & Gerencser, *supra* note 10, at 54. Several states have proposed amendments to the Mediation Standards and Procedures requiring all court certified mediators to be educated regarding mediation in cases that involve domestic violence. See Florida Supreme Court Committee on Mediation and Arbitration Rules, Mediation Training Standards and Procedures, Draft, Dispute Resolution Center (1995).

128. See *supra* note 32 and accompanying text.

129. See *supra* note 28 and accompanying text.

130. See *supra* note 55 and accompanying text.

131. See *supra* note 26 and accompanying text.

132. See CAL. FAM. CODE § 3183 (West 1999) (requiring mediator to submit a recommendation to the court based on his findings).

133. See generally Chance & Gerencser, *supra* note 10, at 56 (proposing several examples of specific initiatives).

134. See Gagnon, *supra* note 1, at 278. By educating Family Court mediators, they will be able to address the needs of an abuser, which would result in a fair and equitable agreement. See *id.*

135. See *id.*

136. See Steiger, *supra* note 17, at 32. The New Hampshire Mediation Association has recognized the power imbalance in domestic violence. See *id.*



## CONCLUSION

California's requirement of Family Court mediation is inappropriate in cases where there is a history of domestic violence. The nature of domestic violence precludes an equal partnership between the victim and the batterer, whereas mediation is a process that requires equal bargaining power. Because victims of domestic violence do not have equality in the relationship, it cannot be assumed that they are able to adequately assert themselves in a mediation session. To do so results in victims receiving inferior results from the mediation. Additionally, and perhaps more tragically, the abusive behavior continues, perpetuated by the legal system itself. California must change its legislation, ideally allowing an absolute exemption from mediation in cases that involve domestic violence. Otherwise, it is sanctioning the use of domestic violence under the precursor of family relations while failing to provide a remedy for victims of abuse.

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\* B.A. History (minor Business Law), University of Miami (FL); Candidate for J.D., 1999, California Western School of Law. Special praise to my Lord and Savior, Jesus Christ, for everything that I have and everything that I am in this world. I would like to thank my beautiful wife Jennifer for love, for support, and for believing in me when few others did.