

Comment

Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence

By ALANA DUNNIGAN*

IN 1981, FUELED by soaring divorce rates and increasing burdens on court resources, California took the lead in the exodus from traditional adversarial proceedings when it became the first state to mandate mediation of custody and visitation disputes.¹ Since then, nearly every state has followed in California's footsteps by implementing some form of mediation for domestic disputes,² although California remains in a small minority of states that mandates mediation.³ Most significantly, it is the only state that will not, under any circumstance, exempt victims of domestic violence from the requirement to medi-

* Class of 2004. The author would like to thank Professor Jay Folberg for providing insight and contributions, and Sherry Murphy for her invaluable assistance in editing this Comment. The author would also like to thank Jean Dunnigan and Greg Buhagiar for their unwavering love and support. This comment is dedicated to the late Peter Dunnigan and Joseph Dunnigan, in appreciation of the indelible footprints that they left.

1. See JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 101-02 (1985); Hugh McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 152, 152 (Howard Davidson et al. eds., 1982).

2. See *infra* pp. 5-6 and note 30. See generally Carrie-Anne Tondo et al., Note, *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431 (2001) (listing state mediation laws as of 2001).

3. California is one of only eleven states that mandate mediation. See CAL. FAM. CODE § 3170 (West 1994 & Supp. 2002); DEL. CODE ANN. tit. 13, § 711A (1999); DEL. FAM. CT. C.P.R. 16; FLA. STAT. ANN. § 44.102 (West 1998); HAW. REV. STAT. § 580-41.5 (Supp. 2001); HAW. FAM. CT. R. 94(a); IDAHO CIV. P.R. 16(j); KY. CT. R. 1 & 509; ME. REV. STAT. ANN. tit. 19-A § 251 (West 1998); NEV. REV. STAT. ANN. § 3.475 (Michie 1998); N.C. GEN. STAT. § 50-13.1(b)-(c) (2001); OKLA. STAT. tit. 43, § 107.3 (2001); S.D. CODIFIED LAWS § 25-4-56 (Michie 1999); W. VA. CODE ANN. § 48-9-202(3)(b) (Michie 2001).

ate.⁴ At the same time that this official retreat from the public forum took shape, the battered women's movement of the 1970s had only recently begun to gain public exposure and legitimacy, prompting responses to the traditionally private problem of domestic violence.⁵ Although the movement created awareness of this age-old epidemic and spurred the genesis of important legal and social reforms,⁶ the scope and complexity of domestic violence is still only beginning to be fully understood.⁷ Yet, the pervasiveness of this problem is frighteningly well documented, with nearly one out of three women reporting physical or sexual abuse by a husband or boyfriend at some point in their lives.⁸

In California, the intersection of mandatory mediation with domestic violence poses significant dangers on two levels. On a societal level, California's requirement that victims of domestic violence mediate with their abusers has placed a hurdle in the battered women's movement by reprivatizing domestic violence, impeding the progress that is driven by public discourse and scrutiny. On an individual level, mandatory mediation leaves victims in a disadvantageous position, fending for themselves at a bargaining table that fails to promote the safety and welfare of victims and their children. California has not

4. See statutes and court rules cited *supra* note 3.

5. See generally MARGI LAIRD McCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 43-46 (1995) (outlining the chronology of legal and social responses to domestic violence); DAWN BRADLEY BERRY, THE DOMESTIC VIOLENCE SOURCEBOOK: EVERYTHING YOU NEED TO KNOW 18-21 (1995) (discussing the history of domestic violence and corresponding legal and social changes).

6. See Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 856 (1999) ("Until recently, domestic abuse was a hidden, private type of violence . . . [T]he problem of battering and the social and legal construct of the 'battered woman' did not exist in this country until the women's movement identified it.").

7. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Custody Decisions*, 44 VAND. L. REV. 1041, 1047-53 (1991). "Researchers have only recently begun to explore the sociological and psychological dimensions of the domestic violence problem. Until twenty years ago, woman abuse was neither publicly studied nor acknowledged." *Id.* at 1047.

8. See NAT'L DOMESTIC VIOLENCE HOTLINE, WHAT IS DOMESTIC VIOLENCE? DOMESTIC VIOLENCE INFORMATION FOR STUDENTS AND GENERAL PUBLIC: NATIONAL STATISTICS, at <http://www.ndvh.org/dvInfo.html#stats> (last accessed Aug. 9, 2003). This comment uses feminine pronouns to describe victims of abuse and male pronouns to describe perpetrators of abuse because most domestic violence is committed by men against women. See Christine Wicker, *The Seriousness of Female Violence Against Men Has Been Exaggerated*, in DOMESTIC VIOLENCE: OPPOSING VIEWPOINTS 34, 38 (Tamara L. Roleff ed., 2000) (reporting that according to the Department of Justice, women are victims of domestic violence eleven times more often than men); see also McCUE, *supra* note 5, at 2 (stating that between 91 and 95% of domestic abuse involves men hurting women).

only taken the power of the adversary system out of victims' hands, but it has simultaneously failed to provide commensurate safeguards in the mediation process to protect and empower victims. While most other states have recognized and addressed these implications in various ways, California stands alone in its refusal to initiate the appropriate modifications.

This comment seeks to expose and offer solutions to the prevailing problems of domestic violence and current mediation legislation. California's mandatory mediation systematically disadvantages battered women and their children because it undermines the principles that effective and fair mediation depend upon: it allows the batterer to capitalize upon the psychological ailments of the victim, it increases the risk of danger for the victim and the children, it stifles the progress begun by the battered women's movement, and it ultimately fails to empower victims and hold batterers accountable. Part I of this comment will introduce the foundational basis and current application of mediation, and the scope and dimensions of domestic violence. Part II will address the various problems in California's system of mandatory mediation. Part III will focus on solutions for restructuring California's existing legislation in a way that empowers, protects, and improves the precarious position of battered women and their children.

I. Background

A. Mediation

1. The Development and Theory of Mediation

As a means of dispute resolution, the practice of mediation has existed for centuries across different cultures, peoples, and institutions.⁹ In the New Testament, Paul advocated the use of mediation by encouraging the Corinthians to utilize people of their own community to resolve disputes instead of going to court.¹⁰ Mediation was the primary means of dispute resolution in Ancient China, and has also

9. See Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 3, 3-4 (Jay Folberg & Ann Milne eds., 1988).

10. See 1 *Corinthians* 6:1-6:4.

been used in Africa.¹¹ In the history of the United States, the early Quakers practiced mediation for their marital disputes.¹²

While the roots of mediation have been planted for ages, it was not until the twentieth century that the practice of mediation in the context of divorce began to significantly evolve. In 1939, California began to offer court-connected conciliation services, originally intended to provide marriage counseling in order to reconcile spouses.¹³ Major increases in divorce rates eventually created a shift in focus towards visitation and custody mediation.¹⁴ In 1953, the divorce rate in California produced an average of 3.6 divorces per thousand population, and by 1978 it had almost doubled to a rate of over 6.2 per thousand.¹⁵ In response, during the early 1970s several courts in California, Minnesota, and Wisconsin began utilizing Conciliation Courts for custody counseling in certain contested family cases as an alternative to the adversary system.¹⁶ During this time, divorce mediation was gaining in popularity. California developed nationally recognized mediation programs for custody and visitation disputes, and many counties found that mediation saved money for both the court and the couples involved.¹⁷

Finally, in 1981, California became the first state to require mediation of custody and visitation disputes.¹⁸ Proposed in 1979 and enacted on January 1, 1981, California Senate Bill 961 mandated mediation for couples settling custody and visitation matters.¹⁹ The bill was pending for nearly three years, and its passage was based largely on the notion that mediation was more efficient and cost-effective than litigation.²⁰

While California's trailblazing actions placed the ancient art of mediation on an elevated plane and transformed couples' dissolution experiences, the implications of this move on domestic violence were

11. See Milne & Folberg, *supra* note 9, at 4; Ann L. Milne, *Mediation or Therapy—Which Is It?*, in *DIVORCE AND FAMILY MEDIATION* 1, 4 (James C. Hansen & Sarah Childs Grebe eds., 1985).

12. See Milne & Folberg, *supra* note 9, at 4.

13. See *id.* at 5.

14. See McIsaac, *supra* note 1, at 152.

15. See *id.*

16. See Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, in *MEDIATING FAMILY AND DIVORCE DISPUTES: CURRENT PRACTICES AND APPLICATIONS* (Jay Folberg et al. eds.) (forthcoming 2004) (manuscript at 3, on file with Jay Folberg).

17. See BLADES, *supra* note 1, at 102.

18. See *id.* at 101.

19. See S. 961, 1979–80 Leg., Reg. Sess. (Cal. 1979), 1980 Cal. Stat. 4607.

20. See BLADES, *supra* note 1, at 103.

yet to be realized. To understand the resulting relationship, it is first necessary to examine the nature of divorce mediation.

Divorce mediation is defined as a "non-therapeutic process by which the parties together, with the assistance of a neutral resource person or persons, attempt to systematically isolate points of agreement and disagreement, explore alternatives and consider compromises for the purpose of reaching a consensual settlement of issues relating to their divorce or separation."²¹ Mediation is valued for empowering the parties by giving them the responsibility to make choices about their own lives.²² The related aspect of voluntariness is at the "heart of the mediation process," because parties who reach their own resolution tend to be more satisfied and more likely to abide by their agreement.²³ Mediation is also deemed "fundamentally a process of assisted negotiation,"²⁴ and an acceptable outcome of mediation is premised upon the parties having equal bargaining power so that they are each able to advocate their positions effectively.²⁵ The mediator's purported role is both a neutral facilitator of communication between the parties²⁶ and a balancer of power between them.²⁷

Mediation advocates agree that confidentiality in the process is critical in order to ensure that the parties speak freely, thus creating an atmosphere of trust necessary to mediate successfully.²⁸ This aura of openness and trust hinges both on the confidentiality and neutrality of the mediator, allowing the parties to engage fully in the process without fearing that the mediator is taking sides or that the information will later be able to be used against the parties.²⁹

21. H. Jay Folberg, *Divorce Mediation—A Workable Alternative*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 11, 13 (Howard Davidson et al. eds., 1982).

22. *See id.*

23. ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 338 (Robert C. Clark et al. eds., 3d ed. 2002).

24. Kathleen W. Marcel & Patrick Wiseman, *Why We Teach Law Students to Mediate*, J. DISP. RESOL. 77, 84 (1987).

25. *See* Lisa G. Lerman, *Stopping Domestic Violence: A Guide for Mediators*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 429, 432 (Howard Davidson et al. eds., 1982).

26. *See* RAU ET AL., *supra* note 23, at 338.

27. *See id.* at 405.

28. *See id.* at 461; *see also* Jay Folberg, *Confidentiality and Privilege in Divorce Mediation*, in DIVORCE MEDIATION: THEORY AND PRACTICE 319, 319 (Jay Folberg & Ann Milne eds., 1988) (discussing the importance of confidentiality to promote openness and trust and ensure effective mediation).

29. *See* Folberg, *supra* note 28, at 319.

2. Current Application of Mediation in Domestic Disputes

Forty-three states and the District of Columbia have legislation regulating family mediation, and of those, California is one of only eleven states that uniformly order mandatory mediation.³⁰ While most state mediation programs are discretionary and provide exemptions to mediation, California is the only state that utilizes mandatory mediation without any exemptions.³¹

States vary as to what is required for an exemption to mediation. In Colorado, where mediation is at the court's discretion, the court cannot send parties to mediation when one of the parties claims to have been the victim of physical or psychological abuse.³² Florida's mandatory mediation is prohibited if the court finds there has been a history of domestic violence that would compromise the mediation process.³³ In North Carolina, where mediation is mandatory on issues involving custody or visitation,³⁴ mediation may be waived for good cause, which includes allegations of abuse, neglect, and substance abuse.³⁵

While most states refuse to force parties into mediation when there are mere allegations of domestic abuse, California prohibits

30. See ALA. CODE § 6-6-20 (Supp. 2002); ALASKA STAT. § 25.20.080 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-381.01-.24 (West 2000 & Supp. 2002); ARK. CODE ANN. § 9-12-322 (Michie 2002); CAL. FAM. CODE § 3170 (West 1994 & Supp. 2002); COLO. REV. STAT. § 13-22-311 (2001); CONN. GEN. STAT. ANN. § 46b-53 (West 1995); DEL. CODE ANN. tit. 13, § 711A (1999); DEL. FAM. CT. C.P.R. 16(b); U.S. DIST. CT. R. D.C., App. C II; FLA. STAT. ANN. § 44.102 (West 1998 & Supp. 2002); HAW. REV. STAT. § 580-41.5 (Supp. 2001); HAW. FAM. CT. R. 94(a); IDAHO CIV. P.R. 16(j); 750 ILL. COMP. STAT. ANN. 5/404 (West 1999); ILL. FAM. LAW. P. 11, 18; IND. CODE ANN. § 31-15-9.4-1 (Michie 1997); IOWA CODE ANN. § 598.41 (West 2001); KAN. STAT. ANN. §§ 23-602, 23-604 (1995 & Supp. 2002); KY. CT. R. 1, 3, 509; LA. REV. STAT. ANN. §§ 9:332, 9:363 (West 2000); ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998); MD. PUB. GEN. LAWS R. 9-205; MICH. CT. R. 3.216; MINN. STAT. ANN. § 518.619 (West 1990 & Supp. 2002); MONT. CODE ANN. § 40-4-301 (2001); NEB. REV. STAT. §§ 43-2906, 43-2909 (1998); NEV. REV. STAT. ANN. 3.475 (1998); N.H. REV. STAT. ANN. § 458:15-a (1992 & Supp. 2002); N.J. CT. R. 1:40-5; N.M. STAT. ANN. § 40-12-5 (Michie 2002); N.C. GEN. STAT. § 50-13.1 (2001); N.D. CENT. CODE § 14-09.1-02 (1997); OHIO REV. CODE ANN. §§ 3109.25, 2919.25 (Anderson 2003); OKLA. STAT. tit. 43, § 107.3 (2001 & Supp. 2003); OR. REV. STAT. § 107.755 (2001); 23 PA. CONS. STAT. ANN. § 3901 (West 2001); R.I. GEN. LAWS § 15-5-29 (2000); S.C. CODE ANN. § 20-7-420(39) (Law. Co-op. Supp. 2002); S.C. CT. R. 2; S.D. CODIFIED LAWS § 25-4-56 (Michie 1999); TENN. CODE ANN. § 36-4-131 (2001); TEX. FAM. CODE ANN. § 6.602 (Vernon Supp. 2003); UTAH CODE ANN. § 30-3-10.2(5) (1998); VA. CODE ANN. § 20-124.4 (Michie 2000); WASH. REV. CODE ANN. § 26.09.015 (West 1997); W. VA. CODE ANN. § 48-9-202 (Michie 2001); WIS. STAT. ANN. § 767.11 (West 2001 & Supp. 2002).

31. See statutes and court rules cited *supra* note 30.

32. See COLO. REV. STAT. § 13-22-311(1).

33. See FLA. STAT. ANN. § 44.102(c).

34. See N.C. GEN. STAT. § 50-13.1(b).

35. See *id.* § 50-13.1(c).

such a complete exemption. Instead, California allows the mediator to meet with the parties separately at the request of the party alleging domestic violence.³⁶ Additionally, an abused person can bring along a “support person” or attorney during mediation, but the mediator has the authority to exclude them.³⁷

California outlines the purposes of mediation:

- (a) To reduce acrimony that may exist between the parties.
- (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child
- (c) To effect a settlement on the issue of visitation rights of all parties that is in the best interest of the child.³⁸

Although the purposes of mediation are clearly focused on reaching a settlement that reflects the best interest of the children and alleviates conflict between the parties, these goals are not effectively achieved under California’s current system of mandatory mediation. Given California’s general legislative scheme and the guiding principles central to effective mediation, the ideological and practical problems that arise are apparent once the nature of domestic violence is understood.

B. Domestic Violence and Its Effects

Although domestic violence against women is “as old as recorded history,” it took hundreds of years for it to be treated as a crime.³⁹ In ancient Roman times a man was allowed to kill his wife.⁴⁰ American courts in the 1800s allowed a man to beat his wife, and followed the “rule of thumb,” whereby a husband could beat his wife with any stick as long as it was no thicker than his own thumb.⁴¹ It was not until the latter half of the twentieth century that society awakened to the problem of domestic violence and responded with protective laws and programs.⁴² Yet, domestic abuse has not subsided, and as it is increasingly

36. See Cal. Fam. Code § 3181 (“(a) In a proceeding in which mediation is required . . . where there has been a history of domestic violence between the parties . . . at the request of the party alleging domestic violence . . . the mediator appointed pursuant to this chapter shall meet with the parties separately and at separate times.”).

37. *Id.* § 3182 (“(a) The mediator has authority to exclude counsel from participation in the mediation proceedings . . . if, in the mediator’s discretion, exclusion of counsel is appropriate or necessary. (b) The mediator has authority to exclude a domestic violence support person from a mediation proceeding . . .”).

38. *Id.* § 3161(a)–(c).

39. BERRY, *supra* note 5, at 15.

40. See *id.*

41. See *id.* at 16.

42. See *id.* at 19–27; McCUE, *supra* note 5, at 25–58.

studied and reported, statistics reveal its pervasiveness. A woman is beaten every 15 seconds in the United States.⁴³ For about one out of five abused women the violence is not an isolated incident, but a repeated occurrence.⁴⁴

Furthermore, statistics show that the violence increases when women leave their abusers. According to one study of domestic homicides, 75% of the victims had ended or stated an intention to end the relationship at the time of their death.⁴⁵ While these statistics expose the surface of domestic violence, the depth of its complexity and the scope of its impact are even more troubling.

Domestic violence is commonly defined as “the emotional, physical, psychological, or sexual abuse perpetrated against a person by that person’s spouse, former spouse, partner, former partner or by the other parent of a minor child.”⁴⁶ “Battering,” though used interchangeably with domestic violence, is more specifically understood as “power and control marked by violence and coercion.”⁴⁷ A “battered woman” is “a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself.”⁴⁸ Similarly, some scholars describe the patterns of an abusive relationship as a “culture of battering.”⁴⁹ The “culture of battering” includes three primary elements: the abuse itself (physical, emotional, sexual, etc.); the systematic pattern of domination and control the batterer exerts over his victim; and the coping strategies, including hiding, denying and minimizing the abuse, which a battered woman employs to reduce the psychological impact of the abuse.⁵⁰

In researching the detrimental physical and psychological effects on women in abusive relationships, psychologist Lenore Walker iden-

43. See Lori Heise, *The Global War Against Women*, WASH. POST, Apr. 9, 1989, at B1.

44. See MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 41–42 (1980).

45. See OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE, DATA SHEET, at http://www.opdv.state.ny.us/about_dv/dataweb2003.pdf (last accessed Aug. 9, 2003).

46. McCUE, *supra* note 5, at 2.

47. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 93 (1991).

48. *Id.*

49. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2141 (1993).

50. *Id.*

tified a "cycle of violence,"⁵¹ which describes three stages in an abusive relationship.⁵² The first stage is the "tension building stage," which includes verbal abuse, threats, and minor battering.⁵³ Women react compliantly and try to calm the batterer down during this stage, with the goal of anticipating his every need and wish in order to prevent the incidents from escalating.⁵⁴ Nevertheless, stage two, "the acute battering incident," is inevitable and is characterized by brief but uncontrollable battering.⁵⁵ The second phase is shorter than the first and third phases; usually it will last from two to twenty-four hours, but some women have reported it to last for a week or more.⁵⁶ This is followed by the third stage of "kindness and contrite loving behavior," where the abuser realizes he has gone too far and attempts to compensate by treating his victim kindly and lovingly.⁵⁷ Finally, the cycle comes full circle when there is a slow buildup of tension again as the batterer thinks his victim is getting too free, and he uses minor battering to bring her back under his control.⁵⁸

Extensive research on the negative effects created by this cycle of violence sheds light on to the psychological characteristics of battered women.⁵⁹ Victims of domestic violence are found to have poor self-images and feelings of worthlessness, powerlessness, and helplessness.⁶⁰ Battered women also commonly have strong feelings of fear, shame, and self-blame.⁶¹ This often prevents them from calling the police or from otherwise finding help.⁶² The National Coalition

51. It should be noted that the "cycle of violence" is compatible with the "culture of battering" discussion *supra* text accompanying notes 49–50. See Fischer et al. *supra* note 49, at 2141 (discussing how the gaps in time caused by the cyclical nature of battering allow women to contribute to the culture of battering by minimizing the violence).

52. See LENORE E. WALKER, *THE BATTERED WOMAN* 60 (1979). Although the dominant theory, Walker's description of three stages in the "cycle of violence" is not the exclusive pattern of abusive behavior found in battering relationships. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *HOFSTRA L. REV.* 1191, 1208–10 (1993) ("The violence may appear to come 'out of the blue,' with no tension-building phase, or there may be no contrition phase following the violence, only the transient absence of violence and abuse.").

53. WALKER, *supra* note 52, at 56–59.

54. See *id.* at 56.

55. *Id.* at 59.

56. See *id.* at 60.

57. *Id.* at 65.

58. See *id.* at 69.

59. See, e.g., Dutton, *supra* note 52, at 1215–27 (discussing the battered woman's psychological reactions to domestic violence).

60. See RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 131 (1988).

61. See *id.* at 131–32.

62. See *id.*

Against Domestic Violence estimates that up to 90% of battered women never report their abuse.⁶³ Often they minimize or deny their abuse altogether, failing to identify themselves as battered by citing a lack of physical abuse or examples of women who have been more severely abused.⁶⁴ In addition, battered women can be reluctant to show the extent of the problem.⁶⁵

Walker explains that battered women are characterized by "learned helplessness,"⁶⁶ suffering from extreme feelings of helplessness and powerlessness.⁶⁷ They feel unable to protect themselves, or to control or influence what will happen to them.⁶⁸ Walker describes that even after a period of such helplessness, a woman is often still paralyzed and unable to act on her own.⁶⁹ Another commentator confirms:

[R]epeated assault can unquestionably cause severe psychological distress or dysfunction; major depressive, sexual and dissociative disorders; cognitive changes in how one views oneself and understands the world [T]he individual's normal coping mechanisms are replaced by adaptive responses designed to manage the feeling that all avenues of escape are closed ("learned helplessness") and the unbearable anxiety that accompanies repeated violation of one's physical and psychological boundaries.⁷⁰

The particular psychological and physical disposition of women escaping from a battering relationship places them at a disadvantageous and dangerous seat at the mediation bargaining table. Given the context of domestic violence and the nature of mediation, California's mandatory mediation laws pose the following significant ideological and practical problems.

63. See BERRY, *supra* note 5, at 6.

64. See Fischer et al., *supra* note 49, at 2140-41.

65. See Carol Nadelson & Maria Sauzier, *Intervention Programs for Individual Victims and Their Families*, in *VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVES* 153, 157 (Mary Lystad ed., 1986).

66. WALKER, *supra* note 52, at 174. *But see* Cahn, *supra* note 7, at 1049-53 (pointing out that the learned helplessness theory does not always conform to every battered woman's experience).

67. See WALKER, *supra* note 52, at 174; GELLES & STRAUS, *supra* note 60, at 131, 142-43.

68. See WALKER, *supra* note 52, at 174; GELLES & STRAUS, *supra* note 60, at 131, 142-43.

69. See WALKER, *supra* note 52, at 174.

70. Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 997 (1995).

II. Problems

A. Mandatory Mediation Involving Domestic Violence Undermines the Principles and Goals of Mediation

Effective mediation is premised upon voluntary participation, equal bargaining power, and confidentiality. However, these principles, along with the premise of mediation as a self-determining and empowering process, are undermined in the context of mandatory mediation involving domestic violence.

1. Voluntariness

The element of voluntariness, thought to be at the heart of mediation, is absent when parties are forced to mediate. The belief that, due to the voluntary nature of their participation, the parties are more likely to invest emotionally in the success of their personally formulated agreements is not applicable if the parties are forced to mediate.⁷¹ Furthermore, while proponents of mediation highlight its value as “emphasi[zing] individual freedom and minimum state coercion,”⁷² mandating mediation effectively negates individual freedom because it is by definition a forced measure the state imposes.

These problems take on more significance and have a much greater detrimental impact when the state is forcing a victim of domestic violence to mediate because it reinforces her lack of power and lack of control, which have already been beaten into her. By taking away any ability she might have to empower herself through the judicial process, the state has not only decreased her chances of success, but has also effectively replaced her husband as the unchallenged and all-controlling patriarch. The state prevents the battered woman from regaining a sense of power and self-determination, and instead, forces her into a process it labels “self-determining.” Thus, California harms the victim of domestic violence by reinforcing her disempowerment as it traps her into the contradictions of forced participation in mediation.

2. Equal Bargaining Power

More problematic, however, is the premise of effective mediation based upon parties with equal bargaining power fairly negotiating with each other. Commentators have recognized that as an alternative

71. See Folberg, *supra* note 21, at 18.

72. *Id.*

to the adversarial system, mediation "lacks the precise and perfected checks and balances that are the principal benefit of the adversary process," and thus, "mediation creates a constant risk of overreaching and dominance by the more knowledgeable, powerful or less emotional party."⁷³ This risk is at its greatest in situations with domestic violence victims because there is a small chance of fair negotiations given the profoundly unequal power equation, the victim's disadvantageous psychological characteristics, and the threat of the batterer's retaliation. The nature of the abusive relationship is characterized by the batterer's total control and position of power used to dominate the victim. So at the outset, mediation for abused spouses is operating in severe contravention of a crucial premise of mediation, because an abusive relationship is one in which the victim has been systematically stripped of power by the batterer.

California's legislation attempts to recognize and ameliorate the problem of power imbalances by announcing certain standards of mediation practice. The standards include, "[t]he conducting of negotiations in such a way as to equalize power relationships between the parties."⁷⁴ However, there are no guidelines as to how this can be accomplished. In addition, although a mediator might be successful in balancing out the slight power differences of a non-abusive couple, it is unlikely that after years of abuse and psychological damage, the mediator will be able to undo the lasting effects of the fundamental power imbalance that exists in a battering relationship.

For example, if the batterer bullies or intimidates the victim, it may coerce her into agreeing to terms she does not want. Even if there are no outright threats or noticeable intimidation on the part of the batterer that the neutral mediator may observe, the victim's emotional status and pattern of acquiescing to the abuser reinforce the likelihood that she will feel reluctant to state her needs or assert herself forcefully. Moreover, she may realistically fear some sort of retribution or retaliation.⁷⁵

Thus, although the mediator must be trained in issues of domestic violence according to California law,⁷⁶ there is still an enormous risk that negotiations will favor the abuser due to the victim's deep-seeded fears of his potential for revenge and her ingrained feelings of helplessness and powerlessness. As one account of battered women

73. *Id.* at 20-21.

74. CAL. FAM. CODE § 3162(b)(3) (West 1994 & Supp. 2002).

75. See discussion *infra* Part II.B.

76. See CAL. FAM. CODE §§ 1815-1816, 3164.

explains, "These women were a study in paralyzing terror . . . the waking lives of these women were characterized by overwhelming passivity and inability to act They had a pervasive sense of hopelessness and despair about themselves and their lives."⁷⁷ To expect battered women to walk right into mediation without fear, overcome all their existing psychological torment and assertively state their case, ignores the scope of damage domestic violence inflicts.

B. The Batterer's Psychological Advantage: The Victim's Fear and Denial Are Not Assuaged by Separate Meetings

A battered woman has significant fears, including the fear of revenge by her partner and the fear that he will take the children.⁷⁸ Taking into consideration her perspective of powerlessness and the reticent, accommodating stance she has adopted through the cycle of violence, coupled with her fears of retaliation and kidnapping, it is likely that mediation negotiations will indirectly coerce a battered woman into a less desirable agreement. Research has affirmed the power and advantage the batterer continues to exert during mediation. A study found that men won custody in 63% of "agreement" cases, and in many of those cases the father had forced the mother to agree by threatening her safety, reputation, or financial security.⁷⁹ As one researcher noted, "Clearly, men can continue to control and abuse 'their' women by gaining control of the children."⁸⁰

Although California refuses to exempt a victim of domestic violence from mediation, the legislation does seek to offset these problems by providing for separate meetings for the parties.⁸¹ According to the California Rules of Court, these separate sessions "must protect the confidentiality of each party's times of arrival, departure, and

77. Elaine Hilberman, *Overview: The "Wife-Beater's Wife" Reconsidered*, 137:11 AM. J. PSYCHOL. 1337, 1341-42 (1980).

78. See Amy Kohlberg, *Social and Legal Policy Implications of Domestic Violence*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 445, 465 (Howard Davidson et al. eds., 1982); cf. Mahoney, *supra* note 47, at 65-69 (defining "separation assault" as when the batterer "seeks to prevent her from leaving, retaliate for the separation, or force her to return It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship.").

79. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 233-34 (1985).

80. *Id.*

81. See Cal. Fam. Code § 3181.

meeting with Family Court Services.”⁸² Separate meetings may provide for the battered woman’s immediate safety and offset some pressure and coercion she might feel in the direct presence of the batterer, but the victim’s fears of retaliation and kidnapping, and her reluctance to assert her wishes cannot be expected to dissipate suddenly once she is out of the abuser’s presence. California’s belief that separate meetings can realistically alleviate the problems of accommodation, fear, coercion, and lack of power and control, is like trying to argue that a victim of domestic violence no longer fears her batterer when he leaves the house.

Even though separate meetings may alleviate the direct threat to safety, they fail to eliminate the psychological weapons that advantage the batterer in a negotiation process. As one researcher stresses, “It’s vital to understand that battering is *not* a series of isolated blow-ups. It is a *process of deliberate intimidation intended to coerce the victim to do the will of the victimizer*.”⁸³ Moreover, Lenore Walker’s research emphasizes the pervasive nature of both physical and psychological coercion, which cannot be separated, and notes that battered women often found the psychological abuse more harmful than the physical.⁸⁴ Walker adds that threats of violence to the battered women’s families are commonplace, and states, “The woman really believed that her batterer would commit such violence.”⁸⁵ In addition, research has found that after they escape, battered women experience a host of psychological problems ranging from anxiety, shame, and despair, to flashbacks and suicidal ideation.⁸⁶ Moreover, “[t]hese aftershocks are the symptoms of post-traumatic stress disorder, a psychological syndrome seen also in survivors of rape and incest and in veterans of wartime combat.”⁸⁷ However, “the diagnosis of post-traumatic stress disorder, as it is now defined, doesn’t begin to cover the problems of battered women.”⁸⁸

Thus, it is a misguided notion to assume that a batterer’s psychological control over a victim simply disappears when he does. Whether she is in the presence of him directly or not, all her psychological stresses, fears, and patterns of accommodating behavior naturally per-

82. CAL. R. CT. 5.215(d)(6); *see also* CAL. FAM. CODE § 3170(b) (West Supp. 2002) (requiring the Judicial Council to adopt guidelines for Family Court Services to follow in domestic violence cases).

83. ANN JONES, NEXT TIME, SHE’LL BE DEAD: BATTERING & HOW TO STOP IT 88 (1994).

84. *See* WALKER, *supra* note 52, at xiv.

85. *Id.* at 148.

86. *See* JONES, *supra* note 83, at 87.

87. *Id.*

88. *Id.* at 88.

sist. Although separate meetings are a minor benefit, they do not significantly alter her disadvantaged position as a battered woman. She may not be looking at her batterer in the face or hearing his voice, but as the mediator communicates the batterer's demands to her in a separate room, nothing stops her from picturing his face and remembering his oft-repeated threats, which have been burned oppressively into her psyche.

Furthermore, there is a significant risk of the victim's denial that she is abused. The separate meetings may not take place immediately, or at all, if the battered woman never alleges domestic violence. Section 3181 of California's mandatory mediation provisions provides that if there is a history of domestic violence between the parties or if a party alleges domestic violence on the intake form, the mediator shall meet with parties separately if the party alleging violence so requests.⁸⁹ In addition, California Rules of Court provide that each court should screen for a history of domestic violence in accordance with the Family Court Services program.⁹⁰ However, this "screening" can be satisfied simply by using the intake form.⁹¹ Furthermore, it is not mandatory that the intake form or other court file be reviewed before the start of mediation.⁹²

Once a battered woman is given the intake form, questionnaire, or other source of screening device, there is a high risk that she will not allege domestic violence. Many women minimize their experiences of domestic violence, and do not consider themselves victims of abuse.⁹³ Therefore they will not readily identify themselves as victims of domestic violence.⁹⁴

Another serious problem is that a woman may fear retaliation by the abuser, especially given the fact that the act of leaving an abusive relationship is often followed by an increase in violence.⁹⁵ One study found that 45% of murders of women were caused by the man's reaction to an estrangement.⁹⁶ Even assuming that separate meetings were a satisfactory means of ensuring the battered woman's chances of a

89. See CAL. FAM. CODE § 3181 (West 1994).

90. See CAL. R. CT. 5.215(f)(1).

91. *Id.* R. 5.215(f)(2).

92. See *id.* R. 5.215(e)(3).

93. See generally Fischer et al., *supra* note 49, at 2139-41 (discussing victim's minimization and denial of abuse).

94. See *id.*

95. See McCUE, *supra* note 5, at 115; Mahoney, *supra* note 47, at 64-65.

96. See DONALD G. DUTTON, THE BATTERER: A PSYCHOLOGICAL PROFILE 15 (1995). Researchers drew from police records and coroners' reports and examined 551 recorded murders of females in the Province of Ontario from 1974 to 1990. See *id.* at 187 n.7.

fair outcome, there must be comprehensive measures in place to guarantee that the separate meetings will take place before mediation begins.

A victim of domestic violence is burdened with realistic fears of revenge, retaliation, and kidnapping, which she carries with her long after she has been physically separated from her abuser. In addition, a victim's reluctance to identify herself as a battered woman, coupled with the inadequacy of California's screening procedures and separate meetings, allows a batterer to retain a psychological advantage over the victim in making an "agreement" with her. This advantage unfairly favors the batterer's success in mediation because he will negotiate with an enormous amount of psychological control as his invisible bargaining chip.

C. The Problem of Confidentiality and Mediator Recommendations

If the parties fail to come to a resolution in mediation, a judge will hear their case and decide the outcome. During California's early mediation programs in the 1970s, there emerged two different practices and philosophies of the courts: the "confidential" model and the "recommending" or "evaluative" model.⁹⁷ The confidential model prohibits the mediator from making any recommendation to the court as to the preferred outcome of any unresolved issues.⁹⁸ Rather, the mediator must only submit to the court a list of the remaining issues to be addressed.⁹⁹ In contrast, under the recommending model, mediators may be asked by the court to make recommendations on the unresolved issues.¹⁰⁰ In jurisdictions that use the recommending model, the mediator has a duty to tell the parties prior to mediation that the mediator may occupy the role of both mediator and evaluator.¹⁰¹ Today, California gives local courts the discretion to use either of these models—the applicable statute specifically authorizes mediators to submit recommendations to the court as to the custody of or visitation with the child, if local court rules so provide.¹⁰²

Two problems arise in the recommending model from allowing a mediator to switch from a position of confidential neutrality to that of

97. Ricci, *supra* note 16, at 4, 21.

98. *See id.* at 23.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See* CAL. FAM. CODE § 3183(a) (West 1994 & Supp. 2002).

an evaluative-recommender. First, it undermines the parties' critical trust and confidence in the so-called "neutrality" of the mediator.¹⁰³ Second, it allows the batterer further opportunity to manipulate the mediator to ultimately gain an advantageous outcome. As one mediation expert noted, "Using the informal, consensual process of mediation, with no evidentiary or procedural rules, as the basis for an imposed decision . . . create[s] a considerable risk that the more clever or sophisticated participant may distort or manipulate the mediation in order to influence the mediator's opinion."¹⁰⁴ These problems are especially worrisome in the context of domestic violence because of the relationship and characteristics of the batterer and the abused.

A battered woman is in a unique position of disadvantage under the recommending model because of the particular psychological dynamic between her and her abuser. The abuser has a Dr. Jekyll and Mr. Hyde personality where he comes across as charming and kind to outsiders, but is actually extremely manipulative.¹⁰⁵ One commentator explains, "Batterers are extraordinarily talented in sucking in therapists [and] the community Their whole M.O. is manipulation. They are notorious liars; they'll say whatever makes them look good. Even if the woman gets a restraining order . . . these guys will call or send flowers."¹⁰⁶ Considering batterers' adeptness and skill at deceiving everyone, including trained therapists, it is not far-fetched to imagine that an evaluative mediator might construe the abuser in a favorable light, as highly positive and cooperative. Moreover, "[b]atterers tend to deny their violence even to themselves, and go to great lengths to conceal the violence from others if confronted."¹⁰⁷ At the same time, there is a risk the mediator will look unfavorably on any reluctance to compromise on the part of the battered woman. "[T]he abuser's willingness to share the children, which assures his ongoing access to his partner and allows him to continue to manipu-

103. See generally Folberg, *supra* note 28 (discussing the importance of confidentiality in mediation).

104. *Id.* at 333.

105. See BERRY, *supra* note 5, at 38; McCUE, *supra* note 5, at 108.

106. Interview by Hara Estroff Marano with Sara Buel, Assistant District Attorney, Norfolk County, Va., in *Why They Stay: A Saga of Spouse Abuse*, PSYCHOL. TODAY, May/June 1996, at 57, 74.

107. Lerman, *supra* note 25, at 432; see also Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 57-59 (1984) (describing a case where the husband would not admit to any abuse, despite having beaten his wife for over twenty-five years, including once pushing her through a plate glass window).

late and intimidate her, will . . . make him appear the more attractive candidate for custody."¹⁰⁸

A related problem with the recommending model stems from the decision in *McLaughlin v. Superior Court*.¹⁰⁹ In *McLaughlin*, the petitioner challenged the respondent court's mediation policy that allowed mediators to make a recommendation to the court but prohibited their cross-examination by the parties.¹¹⁰ The court held in *McLaughlin* that the policy was unconstitutional as a violation of due process, and directed that the respondent court only receive a recommendation from the mediator if the parties are guaranteed the rights to have the mediator testify and to cross-examine him or her concerning the recommendation.¹¹¹ Thus, under the recommending model, where the judge will rely on the mediator's recommendations in making a decision, a batterer can call the mediator to testify in the hearing. This extinguishes the confidentiality of the victim because any private information that the victim shared with the mediator in the supposedly confidential setting of her separate meetings is now at risk of being revealed in court.¹¹² Conversely, if the batterer does not choose to have the mediator testify, the victim can either accept the recommendation of the mediator unchallenged, or call the mediator to testify and be cross-examined, again undermining her confidentiality.

The implications of *McLaughlin* are dangerous in the context of domestic violence because it exacerbates the problem of confidentiality and creates a dilemma for battered women. It creates an inconsistency in legislation because according to section 3177, mediation proceedings are to be confidential.¹¹³ Confidentiality is a central principle underlying the success of mediation. For battered women, the erosion of confidentiality can be even more troublesome because it means that whatever information about the batterer she has chosen to disclose to the mediator is now discoverable by her abuser. One researcher explained, "It is well documented that thousands of battered

108. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 277 (1999).

109. 189 Cal. Rptr. 479 (Ct. App. 1983).

110. *See id.* at 481.

111. *See id.* at 486-87. The parties may waive those rights. *See id.*

112. *See* CAL. FAM. CODE §§ 3177, 3181 (West 1994).

113. *See* CAL. FAM. CODE § 3177 ("Mediation proceedings . . . shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code.").

women tolerate beatings for years because they are threatened with worse beatings if they talk about their problems or seek help.”¹¹⁴ The absence of confidentiality gives the abused woman incentive not to disclose unfavorable or incriminating facts about her abuser. In a negotiation context with mediator recommendations, it is especially important that a victim speak freely about the abuse since she is the only one advocating on her own behalf to a mediator who can shape the outcome. The dilemma *McLaughlin* creates is that it traps a battered woman into a no-win situation.¹¹⁵ She can either confide to the mediator about the abuse and threats and risk the batterer discovering that she has tattled, or she can remain silent and risk that the mediator’s favorable impression of the batterer stands unchallenged. Thus, when a court chooses to allow the mediator to make recommendations, it creates a host of problems that have a great potential to work to the disadvantage of domestic violence victims.

D. Mandatory Mediation Undermines the Best Interests of the Child

Under California’s mandatory mediation legislation for custody and visitation, the designated purpose and goal of mediation is to provide for the “best interest” of the child.¹¹⁶ In determining the “best interest” of the child, the applicable test relies on the assessment of various factors, including “[t]he health, safety, and welfare of the child,” and “[a]ny history of abuse by one parent . . . against . . . [t]he other parent.”¹¹⁷ Nevertheless, this goal of mediation is thwarted in the context of mandatory mediation involving domestic violence. By forcing victims of domestic violence into mandatory mediation, the child’s best interest is not adequately protected because the mediation process is non-accusatory and forward-looking, and is disadvantageous to the battered woman, shifting the scales in favor of custody for the batterer. Mediation allows a batterer who has not been held accounta-

114. Lerman, *supra* note 25, at 432.

115. See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 279 (1984).

116. CAL FAM. CODE § 3161 (West 1994 & Supp. 2002). Section 3161 provides:

The purposes of a mediation proceeding is as follows:

- (a) To reduce acrimony that may exist between the parties.
- (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child, consistent with Sections 3011 and 3020.
- (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.

117. *Id.* § 3011(a)-(b).

ble for his behavior and who may not even be identified as an abuser to simply sit down and freely negotiate with his victim for control of the children. Giving a batterer such power is like giving a pyromaniac a box of matches. Unfortunately, the children are the ones who get burned if the batterer has unrestrained power to dictate their future. The children are at the mercy of whatever the batterer decides will help perpetuate his control. As he achieves the custody arrangement that will best suit his abusive needs, there is no attorney, no judge, and no therapist to intervene and demand what is best for the children. It is in this sense that mandatory mediation is fundamentally contradictory and detrimentally inconsistent with legislation aiming to protect the child.

Research illuminates the connection between domestic violence and the resulting dangers to children that has only recently been uncovered, and the depth of its impact seems to know no limits.¹¹⁸ Between 50 and 70% of men who abuse their female partners also abuse their children, and when there are four or more kids, over 90% of men who abuse their partners also abuse their children.¹¹⁹ Additionally, 25 to 33% of men who batter their wives also sexually abuse their children.¹²⁰ Given the nature of mediation as disadvantageous for battered women, by allowing the batterer to enter mediation with a clean slate and bargain for his rights to his children, the result contravenes legislation purporting to protect the child. The danger is especially high as shown by the observation that “husbands who batter their wives are twice as likely to seek custody as non-abusive husbands, in part because many batterers see it as a way to perpetuate control over their ex-wives.”¹²¹ Such “tangential spouse abuse” is illustrated by the batterer’s interest in custody as an extension of his control.¹²² Abusers frequently “use children as pawns in the power play against the mother. Batterers use child visitation to gain access to the mother to

118. See generally Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1342–47 (2001) (noting the historical inattention paid to children exposed to domestic violence and discussing the behavioral, emotional, cognitive, physical, and social effects of domestic violence on children).

119. See BERRY, *supra* note 5, at 8.

120. See *id.*

121. Catherine Elton, *Why Courts Award Batterers Custody*, in BATTERED WOMEN 87, 88 (Louise Gerdes ed., 1999).

122. Stark, *supra* note 70, at 1017 (explaining that the term “tangential spouse abuse” describes the extension of coercive tactics to the children as part of an ongoing battering relationship).

terrorize her; they fight for custody to retaliate against the woman."¹²³ Rather than holding batterers accountable for their actions or taking into serious consideration the likelihood of continuing danger, mandatory mediation favors the batterer to emerge successful and therefore jeopardizes the children's best interest.

Not only are the best interests of the child directly contradicted, but the long term welfare of children and society is also thwarted. One study found that 81% of abusive husbands and 33% of abused wives came from violent family backgrounds.¹²⁴ In addition, "boys exposed to fathers who batter their mothers are 700 times more likely to use violence in their own lives."¹²⁵ If a boy is abused himself, he is 1000 times more likely to use violence than a boy who did not experience abuse.¹²⁶ Mandatory mediation poses the grave risk of perpetuating this cycle of violence by its potential to allow these patterns to continue unrestrained and unaccounted for. It gives the batterer the upper hand in negotiating for custody, and does not impose any kind of court-ordered treatment for the batterer.

Lenore Walker notes that "children who live in a battering relationship experience the most insidious form of child abuse. Whether or not they are physically abused by either parent is less important than the psychological scars they bear from watching their fathers beat their mothers."¹²⁷ Another commentator notes, "Children who witness domestic violence demonstrate the same symptoms as physically or sexually abused children."¹²⁸ Therefore, even if the abuser never lays a hand on his own children, the best interests of the children are nevertheless thwarted because a parent's battering has and will continue to have an enormous detrimental impact on the children.

123. BERRY, *supra* note 5, at 153.

124. See Suzanne K. Steinmetz, *The Violent Family*, in *VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVES* 51, 62 (Mary Lystad ed., 1986).

125. Lenore Walker, *The Battered Woman Syndrome Defense*, in *BATTERED WOMEN* 82, 86 (Louise Gerdes ed., 1999).

126. See *id.*

127. WALKER, *supra* note 52, at 149.

128. Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112 (1995); see also Lynne R. Kurtz, Comment, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1350-52 (1997) (discussing other research and studies that have focused on the effects of domestic violence on women and children).

E. Stifling the Screams of Progress: The Privatization of Domestic Violence Through Mediation

Allowing victims of domestic violence to pursue adjudication rather than mediation is essential. On a practical level, battered women are in a disadvantaged position from the moment the State forces them to sit down at the bargaining table and negotiate with their abusers. Research has found that battered women are more likely to be abused after mediation than after a formal trial.¹²⁹ In addition, studies have shown that the money saved by choosing mediation may be illusory.¹³⁰

On an ideological level, battered women individually and as a group are ultimately disadvantaged by mandatory mediation because it stifles the progress of domestic violence issues and does nothing to empower or vindicate the victims in the long term. In mediation, "the emphasis is not on who is right or who is wrong."¹³¹ "Mediation is more concerned with how the parties will resolve the conflict and create a plan than with personal histories."¹³² Mediation does not care about attaching blame; it just looks to future solutions. Thus, mediation not only assures that the abuser's actions will go unpunished and unaccounted for, it also perpetuates the privatization of a problem that has traditionally been kept out of the public consciousness.¹³³ Fittingly, proponents of mediation note that mediation is not "strictly governed by precedent nor concerned with the precedent [it] may set for others," and "private matters may be discussed without becoming part of a public record."¹³⁴

The danger of taking a serious social problem like domestic violence out of public discourse and hiding it in the corners of mediation rooms is that it minimizes the importance of the problem and operates as a setback to the movements of the 1970s that brought the pri-

129. See Fischer et al., *supra* note 49, at 2153; Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 252 (stating that more than 40% of men studied resumed their abusive behavior within four and a half months of completing mediation).

130. See Imbrogno, *supra* note 6, at 867 (noting also that "[t]he potential long-term financial losses confronting women who [mediate] can greatly outweigh short-term savings in legal fees and court costs").

131. Folberg, *supra* note 21, at 16.

132. FOLBERG & TAYLOR, *supra* note 115, at 8.

133. See generally Imbrogno, *supra* note 6 (contrasting the battered women's movement that brought public awareness to domestic violence with the subsequent reprivatization through mediation).

134. Folberg, *supra* note 21, at 16.

vate family problem of abuse into public scrutiny.¹³⁵ One critic cautions that "the privatization of domestic violence through mediation can . . . diminish[] the judicial development and vindication of legal rights for disadvantaged groups such as battered women."¹³⁶ A mandatory mediation policy, with no exemptions for battered women, gives the State imprimatur to treat domestic violence as a peripheral issue that is not important enough to justify spending precious court time or money in remedying. One commentator remarked:

When public matters are funneled into [mediation], the American people lose, among other things, the opportunity to vindicate and develop the legal rights of the oppressed. But most importantly, it is American society itself that must bear the burden of knowing that it and its institutions are turning their backs on those segments of the population most in need of protection.¹³⁷

While not everyone will want to pursue litigation or even be able to afford it, to take away that option is disempowering to victims and stifling to the progress of the battered women's movement. Victims should be encouraged to bring issues of domestic violence out into the public forum if that is their choice. When the patriarchal State forces the privatization of domestic violence through mandatory mediation, it takes away the progress and power that is gained through public scrutiny and discourse.

III. Solutions

A. Restoring Power Through Optional Exemption

California has a responsibility to reform its mandatory mediation in cases of domestic violence in order to protect individual victims, and to fulfill the socially responsible mission of visibly empowering the collective plight of battered women. The fundamental change that California should make in reformulating its legislation is to provide for optional exemptions to mandatory mediation, allowing victims to decide for themselves if they want to mediate or formally adjudicate. This will enable battered women to avoid the potential dangers and unfairness inherent in mediation, as well as empower victims with the decision to control their destiny either through a public forum or

135. See generally Imbrogno, *supra* note 6 (discussing the dangers of reprivatization of domestic violence through mediation).

136. Imbrogno, *supra* note 6, at 872; see also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) ("Imagine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated.").

137. Imbrogno, *supra* note 6, at 879.

through a private one. These modifications will still allow the State to fulfill its cost-effective goals by continuing mediation in cases where victims choose to settle privately.

1. The Choice to Mediate

It is vital that California allow a victim of domestic violence the option to adjudicate instead of mediate. To give choices to battered women is empowering, while to deny choices is to strip victims of true self-determination and vindication of their legal rights. The state should not restrict the use of the public forum because it is an important avenue to foster awareness and social change. While not every battered woman will choose litigation, the choice should be the victim's to make. Battered women have been silenced long enough, and the state should not force them to remain hidden and fend for themselves in mediation.

In implementing a self-determining policy, California should model itself after Hawaii's mediation statute.¹³⁸ Like California, Hawaii maintains a mandatory mediation policy, but unlike California, Hawaii allows an exemption for spousal abuse.¹³⁹ Moreover, the statute provides that in the case of domestic violence, mediation shall not proceed unless "authorized by the victim of the alleged family violence."¹⁴⁰ While this provision does not safeguard against the concerns of possible coercion by the batterer or the victim's psychological state of denial, it does fill an essential need for autonomy and empowerment for the battered woman. At a minimum, California should emulate Hawaii's legislation in this regard, and also seek measures to address potential safety issues.¹⁴¹

2. Providing a Broad-Based Exemption Policy

In providing exemptions for mandatory mediation, California should reformulate its legislation to mirror North Carolina's ap-

138. See HAW. REV. STAT. § 580-41.5(a)-(b)(1) (Supp. 2001).

139. See *id.*

140. *Id.*

141. Although Hawaii's approach provides for full empowerment to a battered woman by allowing her equal access to either forum, there is a risk in giving unfettered discretion to a victim who is suffering from a severe degree of emotional paralysis or has been threatened by her spouse. The best way to address this potential risk, while still offering the choice of two avenues, is to formally address her decision in pre-mediation therapeutic intervention. See discussion *infra* Part III.D. This will allow a trained therapist to evaluate the emotional state of the victim, assess the existence and extent of external pressures forcing her to choose mediation, and provide corresponding treatment and advice.

proach, which provides for a waiver of mediation on a showing of good cause.¹⁴² North Carolina's waiver requirement is most favorable to victims of domestic violence because it allows good cause to be shown by "allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems."¹⁴³

By allowing exemptions based upon a broad variety of showings, North Carolina's legislation eliminates the dangers inherent in forced mediation and gives a battered woman many opportunities to avoid a process that may not be in her best interests. One significant aspect of North Carolina's legislation is that in providing for exemptions, it takes into account the frequent connection between domestic violence and a broad range of other behaviors. For example, a woman can avoid mediation on a mere allegation of alcoholism.¹⁴⁴ This is important because of the strong connection between alcohol and spousal abuse. A significant predictor of domestic violence is alcohol,¹⁴⁵ and one study found that as many as 93% of men committing violence on their wives were alcoholics.¹⁴⁶ A battered woman in North Carolina who does not want to mediate and does not want to allege any violence has the choice of alleging alcoholism to be exempted.

North Carolina's policy also allows a victim to be exempt from mediation upon allegations of drug abuse.¹⁴⁷ Like alcoholism, there is a demonstrated connection between drug abuse and domestic violence. One study found that 64% of all reported child abuse and neglect cases in New York City were associated with drug or alcohol abuse.¹⁴⁸ Again, North Carolina's legislation favors victims because it recognizes these connections, and gives battered women a better chance to escape mediation. If she denies or minimizes her abuse, or is afraid to come forward with direct allegations, either to protect herself or her children, she has the alternative to make true allegations of drug or alcohol abuse under the North Carolina legislation.

142. See N.C. GEN. STAT. § 50-13.1(c) (2001).

143. *Id.*

144. *See id.*

145. See LIFERING, UNHOOKED SCIENCE READINGS: DOMESTIC VIOLENCE & ALCOHOL AND OTHER DRUGS, at <http://www.unhooked.com/sep/alcodome.htm> (last accessed Aug. 9, 2003).

146. See Jerry P. Flanzer, *Alcohol Abuse Causes Domestic Violence*, in DOMESTIC VIOLENCE: OPPOSING VIEWPOINTS 54, 60 (Tamara L. Roleff ed., 2000).

147. See N.C. GEN. STAT. § 50-13.1(c).

148. See LIFERING, *supra* note 145.

B. Eliminating Mediator Discretion and the Recommendation Model

1. Abrogating Mediator Discretion to Exclude Support Person

Another necessary modification to California's legislation is to eliminate the total discretion afforded to the mediator. Under section 3182, the mediator has unchallengeable authority to exclude counsel as well as a "domestic violence support person" from a mediation proceeding.¹⁴⁹ It is plausible that part of the reason a battered woman is even willing to mediate is because she knows she is not alone and has the support of an advocate or a friend, and the State should not allow mediators to take away that source of strength and security from her. This importance has been highlighted:

Those who work with battered women have discovered that if the victim has someone with her for moral support during any proceeding, she gains courage to confront the situation and ask for what she wants. The presence of others may interfere somewhat with the process of mediation, but without such assistance, the resulting agreement may not reflect her concerns.¹⁵⁰

Therefore, instead of having complete mediator discretion, California should follow Hawaii's mediation policy, which provides that the victim can bring a support person whose presence cannot be challenged by anyone.¹⁵¹ This will help to empower the battered woman, give her a steady sense of control and confidence in the process, and foster a balanced bargaining table for negotiations.

2. Eliminating the Recommendation Model and the Related *McLaughlin* Dilemma

Another critical legislative change needed is to prohibit the use of a recommendation model altogether in cases involving domestic violence. This will solve the *McLaughlin* predicament by making complete confidentiality a staple of the mediation process. Legislation purporting to safeguard the confidentiality of the proceedings¹⁵² is undermined when, as in the *McLaughlin* case, the mediator is allowed to give recommendations to the court and is subject to cross-examination.¹⁵³ California should strive to uphold the principles of confidentiality in mediation and the neutrality of the mediator by mandating the

149. CAL. FAM. CODE § 3182 (West 1994).

150. Lerman, *supra* note 25, at 434.

151. See HAW. REV. STAT. § 580-41.5 (d)(3) (Supp. 2001).

152. See CAL. FAM. CODE § 3177 ("Mediation proceedings . . . shall be held in private and shall be confidential."); see also discussion *supra* Part II.C.

153. See 189 Cal. Rptr. 479, 486-87 (Ct. App. 1983).

confidential model and preventing the mediator from making any recommendations to the court.¹⁵⁴ This will also alleviate the problems of the victim's nondisclosure of abuse, the batterer's manipulation, and the potential for an unfair outcome because the victim will be less fearful of discussing her abuse during mediation, and the batterer's cooperativeness and the victim's uncooperativeness at the mediation will not transfer to and adversely affect the victim in court proceedings.

C. Comprehensive Pre-Mediation Screening Procedures to Identify Domestic Violence

California needs to establish comprehensive procedures to guarantee that victims of domestic violence are immediately identified before the start of mediation. Among the states employing mediation, there has been a lack of sufficient attention given to this part of the process.¹⁵⁵ A recent study found that not all states even screen for domestic violence, and among the ones that do, typically by written or oral questions, the average number of questions related to domestic violence is only 3.5.¹⁵⁶ If California continues to promote mediation, the implementation of adequate screening is especially crucial so that victims are not lost in the system. Once identified, victims can be properly channeled to therapeutic intervention where they can safely consider whether mediation is in their best interest.

To achieve a more complete system, California should first change its legislation to require that cases only proceed if there has been a properly reviewed intake form as part of an adequate screening procedure. Further, California should require courts to adopt a screening procedure that consists of more than just a short intake form or other basic questionnaire. "[S]imply asking whether a party has abused, or been abused, is not likely to elicit an accurate response. Screening tools administered in a perfunctory manner may fail to uncover abuse."¹⁵⁷ Comparing the options of background checks, clinical observations, written questionnaires, and in-person interviews, the in-person separate interview is considered most effective because

154. See discussion *supra* Part II.C.

155. See generally Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253 (2001) (discussing pre-mediation measures utilized by states).

156. See *id.* at 253.

157. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 62 (1995).

it enables a hesitant victim to more easily reveal abuse, even if indirectly by her nonverbal cues.¹⁵⁸

Given the propensity for a battered woman to minimize or altogether deny her abuse, it is necessary that trained personnel conduct these interviews with proper attention to the subtleties and implications of the victim's responses. "Secrecy and distortions shroud the complex dynamics of domestic violence. Therefore, a screener should not minimize any disclosure, even an isolated incident, of abusive behavior."¹⁵⁹ While the questions should include explicit inquiries about specific instances of physical, psychological, sexual, and other abuse, the interviewer should also look for behavioral and nonverbal cues of violence and victimization.¹⁶⁰ This will ensure that the victims do not slip through the cracks, and it places the burden to take account for domestic violence on the State rather than the victims, who may be stifled in their ability to come forward.

Another objective of the screening process is to identify the victims who are most vulnerable to the dangers of mediation. Although not an easy task, screeners should try to distinguish at-risk victims among the spectrum defined by the particular relationship and the extent and severity of the abuse. For instance, victims whose experiences most closely identify with the "culture of battering," the "cycle of violence," and the resulting psychological stresses and external pressures, are most at risk.¹⁶¹ One type of comprehensive screening procedure that takes into account all of the aforementioned considerations is the "Conflict Assessment Protocol."¹⁶² This approach is designed to identify spousal abuse and assess the appropriateness of mediation through a lengthy initial interview and follow-up questions.¹⁶³ The structure of the inquiry includes both specific questions regarding abuse, as well as open-ended, non-violence-oriented questions used to assess decision-making routines and other control issues between the couple.¹⁶⁴ California should adopt a modified version of this scheme, and, in accordance with the spectrum of at-risk candidates, divide the couples into two categories: those likely to benefit

158. See Zylstra, *supra* note 155, at 271.

159. Gerencser, *supra* note 157, at 60.

160. See Zylstra, *supra* note 155, at 271.

161. See discussion *supra* Part I.B.

162. Zylstra, *supra* note 155, at 272.

163. See *id.*

164. See *id.*

from standard mediation and those likely to be harmed by mediation.¹⁶⁵

Under the Conflict Assessment Protocol, the first category includes the cases with no control or abuse indicators, minimal emotional abuse such as name-calling or put-downs unassociated with a pattern of control, and cases with one or two isolated incidents of physical confrontation that do not create a controlling pattern.¹⁶⁶ These are the cases that are likely to benefit from mediation.¹⁶⁷ The second category includes cases that are recommended to be excluded from mediation. These cases include those where: 1) one or both parties are unable to negotiate, and there are indicators of potential serious injury or death to one party, 2) the abuser continues to have a need to control the abused spouse, 3) the abuser accepts no responsibility for the violence, and 4) the abuser has recently or plans to obtain a weapon or has been convicted of a violent crime, or the abuser has suicidal or violent fantasies.¹⁶⁸ Additionally, a case should be excluded from mediation when the victim does not want the batterer to know she has disclosed the abuse.¹⁶⁹ In adopting these screening procedures, California will be implementing the safeguards necessary to provide a safe and equitable mediation process for battered women and their children.

D. Pre-Mediation Therapeutic Intervention

One mediator described a couple in a typical divorce mediation that involved no violence: "They are beyond logic, caught in an emotional trap. The mediator must free them, encourage them to begin thinking like adults again. But they have to see it for themselves. You can't force them to be rational."¹⁷⁰ The mediator's task may be difficult in a violence-free relationship, but the burden of the mediator is significantly more daunting in a mediation involving domestic violence because of the complexities and intense psychological dynamics found in an abusive relationship. To respond, California should implement a mandatory form of therapeutic intervention for both the batterer and the victim to occur before and concurrent with any medi-

165. *Cf. id.* at 274 (adding the possibility of a third category).

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. ROBERT COULSON, FAMILY MEDIATION: MANAGING CONFLICT, RESOLVING DISPUTES 67 (2d ed. 1996).

ation.¹⁷¹ This measure would be an extension of existing orientation and parent education programs that occur prior to mediation in many California mediation programs and aim to prepare the parties for negotiation.¹⁷² In the short-term, the therapy will help facilitate a more fair mediation process for the battered woman and help ensure the future safety of the children. It will be beneficial in the long-term as a socially responsible program that addresses the problems of domestic violence at the outset of dispute resolution rather than stuffing these issues away in the corners of mediation rooms.

1. Treatment for the Victim

Once a comprehensive intake process determines that there may be issues of abuse present in the relationship, each party should be immediately referred to a trained therapist who has experience in domestic violence. For the victim, the therapist's purpose should be two-fold. In order to help decide whether mediation is in the victim's best interest, the first objective of the therapist should be to evaluate and assess the level of abuse, the victim's current psychological state, and the existence and likelihood of retaliation or threats from the batterer. The second duty should be to address and help overcome the particular emotional problems and cognitive processes that prevent the battered woman from bargaining and asserting herself on an equal playing field in mediation.

Domestic violence expert Lenore Walker described how the process of victimization is perpetuated to the point of psychological paralysis, and stressed that "battered women need to be taught to change their failure expectancy to reverse a negative cognitive set. They need to understand what success is, to raise their motivation and aspiration

171. This would be an extension of the court's current *discretionary* power to order counseling under CAL. FAM. CODE § 3190 (West 1994 & Supp. 2002):

(a) The court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling . . .

if the court finds both of the following:

(1) The dispute between the parents, between the parent or parents and the child . . . poses a substantial danger to the best interest of the child.

(2) The counseling is in the best interest of the child.

The underlying premise of *mandatory* therapeutic intervention is that whenever there is a significant history of domestic violence, it is always in the child's best interest for the court to require the abuser and victim to attend therapy.

172. See Ricci, *supra* note 16, at 16–17. However, these programs are not uniform. See *id.* at 46 n.13 (stating that 87% of California mediation programs reported that parent education programs are provided to mediation clients through the court or an outside agency contracted with the court).

levels, [and] be able to initiate new and more effective responses, so they can learn to control their own lives.”¹⁷³ Given the particular psychological disadvantages of a battered woman and the problematic nature of mediation, it is vital that an empowering therapeutic process occur before and concurrent with any mediation to ensure that a battered woman is participating in a fair process that equalizes power imbalances. California must at least give her these tools to succeed at the bargaining table.

A cost-effective way for California to implement these measures is to use a combination of individual and group therapy. Walker has documented the effectiveness of group therapy.¹⁷⁴ “Women describe having derived a sense of strength from all of the other group members that is more difficult to provide on an individual basis.”¹⁷⁵ She further reports that in one group setting, battered women are taught to use the criminal justice system “to help [them] overcome the immobilization that their terror brings. As women witness other women successfully making changes, they themselves are more likely to change.”¹⁷⁶ Such an approach will accomplish the dual purpose of empowering women during the negotiation and enabling them to hold their batterers accountable in a socially visible way.

2. Treatment for the Batterer¹⁷⁷

The primary objective of therapy for the batterer is to help ensure the safety of the victim and the children throughout the mediation process. The secondary objective is to facilitate such safety and promote the best interest of the children in the long term. These goals are important to promote a fair mediation process, are consistent with California’s legislation purporting to protect the best interest of the child, and hold the batterer accountable for his behavior. As one commentator stated regarding the best interest of the child:

While batterers do need to be held accountable for their criminal behavior in order to address the trauma experienced by children, batterers also need to be educated concerning how their children are impacted by their violent behavior.

173. WALKER, *supra* note 52, at 53–54.

174. *See id.* at 240–44.

175. *Id.* at 240.

176. *Id.* at 241.

177. In Louisiana, if a parent has a history of family violence, *supervised* visitation is allowed *only* if the parent has participated in and completed a treatment program, and there are stricter standards for unsupervised visitation. *See* LA. REV. STAT. ANN. § 9:364 (West 1991). Louisiana’s statute is a significant development among states in addressing the effects of domestic violence on children.

Domestic violence is a behavior pattern that is justified in the batterer's mind by a system of beliefs [T]his sort of education is extremely important to a child's welfare.¹⁷⁸

Given these objectives, the treatment should focus primarily on two tasks. First, treatment should use a comprehensive approach to help the batterer change his abusive behavior and learn to negotiate and compromise fairly.¹⁷⁹ Second, it should continually assess the potential likelihood of danger that the batterer may retaliate, kidnap, or otherwise jeopardize the safety of the woman and children. The importance of keeping tabs on the batterer's violent potential cannot be understated. "The most dangerous time for a battered woman is when she separates from her partner. Many attacks are precipitated in retaliation for her leaving, some as part of an escalation of violence following separation."¹⁸⁰ One study found that of all women killed by their husbands, 47% of them were killed within two months of separating, and 91% were killed within a year of separating.¹⁸¹ Moreover, every hour 40.4 children are abducted in this country—mostly by fathers or their agents—and more than half of these abductions occur in the context of domestic violence.¹⁸² Needless to say, "[c]ustodial interference is one of the few battering tactics available to an abuser after separation; thus, it is not surprising that it is used extensively."¹⁸³

The most helpful and cost-effective treatment for batterers comes from group therapy.¹⁸⁴ According to research, 70% of men sent to

178. Kent, *supra* note 118, at 1356–57.

179. In discussing the scope of treatment needed to break batterers' thinking patterns and behaviors, one commentator noted:

Court-ordered treatment programs for batterers seek to do all of the following: increase the batterer's responsibility for his abusive behavior; help the batterer develop behavioral alternatives to battering; increase the batterer's constructive expression of emotions, listening skills, and anger control; decrease isolation and develop personal support systems; decrease dependency on and control of the relationship; and increase the batterer's understanding of the family and social facilitators of domestic violence.

Kent, *supra* note 118, at 1360; *see also* Leslie D. Johnson, Comment, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 *LAW & PSYCHOL. REV.* 271, 277–80 (1998) (discussing batterers' programs).

180. Fischer et al., *supra* note 49, at 2138–39.

181. *See* SAFE HORIZON, DOMESTIC VIOLENCE FACTS: THE CYCLE OF VIOLENCE, at <http://www.dvshelertour.org/fact.html#cycle> (last accessed Aug. 9, 2003).

182. *See* BARBARA J. HART, MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, CHILDREN OF DOMESTIC VIOLENCE: RISKS AND REMEDIES, at <http://www.mincava.umn.edu/hart/risks&r.htm> (last accessed Aug. 9, 2003).

183. *Id.*

184. *See generally* Hara Estroff Marano, *From Battered Woman to Advocate*, in *BATTERED WOMEN* 121, 128 (Louise Gerdes ed., 1999) (adding that mandatory group treatment programs for batterers should last at least one year).

such batterers programs did not physically abuse their partners during a twelve-month follow up period, and the men who were mandated to attend the programs were less likely to become abusive than the men who came voluntarily.¹⁸⁵ In group therapy, “[t]he emphasis is on trying to get batterers to accept responsibility for the violence without blaming their partners and changing the attitudes of batterers so that they no longer see violence as an acceptable response in any situation.”¹⁸⁶ Furthermore, in a group setting the therapy focuses on discussing ways in which “batterers wield power and control, through emotional as well as physical abuse,” and “allows batterers to confront one another regarding their tendency to minimize, deny and distort their abuse.”¹⁸⁷ The group therapy also teaches anger management and communication skills.¹⁸⁸ This kind of program can help establish an intimidation- and violence-free mediation process, and can help ensure that in both the short and long term, the best interests of victims and their children are promoted.

Conclusion

California’s mandatory mediation legislation currently fails to recognize and address the complexity of domestic violence and the dangerous implications that arise in the context of mediation in a battering relationship. In failing to understand the scope of the issues, California takes a pervasive and multi-dimensional problem out of public discourse and scrutiny, creating a dangerous setback in the plight of victims of domestic violence. It also disempowers and jeopardizes the welfare of individual victims and their children by forcing them to participate in a negotiation process that is structured to favor a batterer. California needs to fundamentally restructure its mediation laws, with the first and most important step to join other states in allowing optional exemptions for victims of domestic violence. It is also essential to reform the mediation process by eliminating mediator discretion and recommendations to assure confidentiality. Furthermore, California should develop comprehensive pre-mediation screening procedures and implement a form of therapeutic intervention for

185. See Craig Chalquist, *Therapy Programs for Batterers Are Effective at Reducing Domestic Violence*, in DOMESTIC VIOLENCE: OPPOSING VIEWPOINTS 142, 145 (Tamara L. Roleff ed., 2000).

186. JOHN M. GOTTMAN & NEIL S. JACOBSON, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 232 (Simon & Schuster 1998).

187. *Id.*

188. See DUTTON, *supra* note 96, at 179.

both batterers and victims. With an explicit recognition and understanding of the scope and dimensions of domestic violence, California can successfully promote the rights of all battered women, and use legislation as a tool to ultimately restore power to victims.