



1993

The Culture of Battering and the Role of Mediation in Domestic Violence Cases

Karla Fischer

Neil Vidmar

Rene Ellis

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Karla Fischer, et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117 (1993)
<https://scholar.smu.edu/smulr/vol46/iss5/10>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PROCEDURAL JUSTICE IMPLICATIONS OF ADR IN SPECIALIZED CONTEXTS

THE CULTURE OF BATTERING AND THE ROLE OF MEDIATION IN DOMESTIC VIOLENCE CASES

*Karla Fischer**

*Neil Vidmar***

*Rene Ellis****

I. INTRODUCTION

He always found something wrong with what I did, even if I did what he asked. No matter what it was. It was never the way he wanted it. I was either too fat, didn't cook the food right . . . I think he wanted to hurt me. To hurt me in the sense . . . to make me feel like I was a nothing. And that I did something wrong, when I didn't do anything wrong. . . .

I can't talk to adults. I don't know how to talk to people because my opinion doesn't ever count. I feel like I never had an opinion on politics or on life. I don't know how to interact because he would [always] be going like this to me [mimicking abuser's gesture of drawing a line with his index finger] . . . that was his big signal to make me shut up, or he'd be kicking me under the table to shut my mouth.¹

THE relationship between a battered woman and her abuser frequently involves communication through subtle phrases and modes of interaction that have meanings and symbols idiosyncratically shared by the two parties—a “culture of battering.” This culture is a reflection and an integral part of the pattern of dominance and abuse that a battered woman experiences. Recognition of this cultural component of battering relationships has major implications for the policy debate on whether mediation is an appropriate mechanism for dealing with cases involving domestic violence, regardless of whether the specific issues to be mediated involve the

* Assistant Professor of Psychology: Social and Health Sciences and Assistant Professor of Law, Duke University.

** Professor of Social Science and Law, Duke Law School.

*** Executive Director, Private Adjudication Center, Duke Law School.

1. Karla Fischer, *The Psychological Impact and Meaning of Court Orders of Protection for Battered Women* (1992) (unpublished Ph.D. thesis, University of Illinois (Urbana-Champaign))(on file with author) (text of interview conducted with one of 83 battered women seeking court protection from their abusive partners).

abuse itself or ancillary matters related to divorce or separation (i.e. child custody and visitation, child support, or division of property). We argue here, as a central theme, that because mediation models work on ameliorating conflict, mediators assume that abuse in a relationship is a product of interpersonal conflict. This assumption is fundamentally inconsistent with the dynamics of the relationship and its cultural context of domination and control. Essentially, both the ideology and the practice of mediation are incompatible with a culture of battering.

In this article we first explore the culture of battering and its dynamics.² We specifically refute here theories that posit that battering results exclusively from conflict. In Section III we consider the widespread and expanding practice of referring "domestic relations" cases to mandatory or voluntary mediation and describe how mediation is practiced when spousal violence is identified in the couple. In Section IV we critique both the ideology and practice of mediation against the background of the culture of battering. We conclude by recommending that cases should be excluded from mediation where a culture of battering has been established.

II. THE CULTURE OF BATTERING

The example in the prologue to this article is far from atypical. Battered women's advocate Mary Pat Brygger, in testimony before Congress, illustrated her objection to mediation by describing a case in which a battered woman and her husband were ordered into mediation by a court to negotiate their divorce and child custody.³ Prior to the session, the husband threatened violence if his wife spoke against him and said that throughout the session he would scratch his nose as a signal to remind her of the potential consequences if she disobeyed his order.⁴ The first author of this article uncovered similar examples of symbolic communication and controlling, intimidating behavior in her study of battered women seeking court orders of protection.⁵ The third author, an experienced mediator, was involved in a session intended to resolve a dispute over property damage. In the midst of the session the man pushed a pen violently across the table towards the mediators, causing a stunning effect on his partner's composure and de-

2. Throughout this article we use the female pronoun when referring to victims and the male pronoun for batterers because most victims of domestic violence are women. See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528 n.1 (D. Conn. 1984) (women are victims in 29 of 30 spouse abuse cases); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983) (finding that 95% of victims are women).

We do not intend to represent the culture of battering as an exclusive type of abusive relationship. Abuse may arise out of genuine conflict in some relationships; abuse may be nearly random or constant in others. Ultimately whether the culture of battering is more prevalent than conflict in abusive relationships is an empirical question. Our criticism goes to the theory of conflict as the dominant explanation of battering. See *infra* notes 95-103 and accompanying text.

3. Nina Youngstrom, *Laws to Aid Battered Women Backfire*, APA MONITOR, Feb., 1992, at 45.

4. *Id.*

5. See Fischer, *supra* note 1 (narrative accounts from participants in this study).

meanor. Other narrative accounts provide ample illustration of the cultural features of abusive relationships.

Much of the research on domestic violence has tended to divide itself along disciplinary lines, with substantial bodies of literature in psychology, sociology, criminal justice, nursing, and other disciplines. It has also fragmented according to the subjects under study. The bulk of work has focused on battered women, typically those seeking assistance through formal help sources, or on abusive men, typically those ordered by the court to engage in counseling. The literature tends to center on the individual psychology of abused women or that of their abusers or on the various social and economic factors that constrain escape from abusive relationships. Very little research has attempted to study abusive couples or abusive families by conceptualizing the abuse as occurring within a broader relationship or family context.⁶

The concept of "culture" as applied to battering is our first attempt to describe this relationship context, as it helps us to move beyond the individuals and understand the important dynamics of abusive relationships. One definition of culture, "shared information or knowledge encoded in systems of symbols,"⁷ captures an element of the relationship context that exists even in normal, non-abusive relationships. Through daily interaction and shared history every couple develops idiosyncratic modes of communication, such as single word phrases, facial expressions, gestures, tones of voice, and private jokes, that may be mysterious or unnoticed to outsiders but which convey clear meaning to the couple themselves.⁸ Consequently, we use culture as the paradigm through which to view battering for two reasons. First, we emphasize that the appropriate level of analysis for understanding the problem of domestic violence is not that of individual decisions, motivations, or behaviors, but the dyadic interaction that transcends them—the relationship context. Second, culture is not only descriptively accurate but also is intended to convey an explicit rejection of pathological terminology such as "battered woman syndrome,"⁹ instead highlighting similarities of the dynamics between normal and abusive relationships.¹⁰

6. *But see* JEAN GILES-SIMS, *WIFE BATTERING: A SYSTEMS THEORY APPROACH* 2-3 (1983) ("[W]e [need to] study the behavior in the context in which it takes place, [so] we can discover general processes which relate context and behavior in battering relationships.") (emphasis omitted). Giles-Sims' notion of context, however, is limited to conflict. *Id.* at 21-25.

7. Roy G. D'Andrade, *Cultural Meaning Systems*, in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* 88 (Richard A. Shweder & Robert A. LeVine eds., 1984).

8. SHARON S. BREHM, *INTIMATE RELATIONSHIPS* 216 tbl. 8.2 (1992) (one of the functions of nonverbal communication is to provide information); *see also id.* at 219 (nonverbal sensitivity increases with the depth of or commitment to a relationship).

9. *See generally* LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984) [hereinafter WALKER (1984)]; LENORE WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER (1979)]. Our specific intent here is not to reject the value of the important descriptive research conducted by Dr. Walker; rather, it is to critique her analysis of the learned helplessness theory of battering. *See infra* notes 87-94 and accompanying text.

10. Liz Kelly has also recognized the relationship between normal and abusive relationships, albeit in a slightly different fashion. She has suggested that sexual violence (her term for all forms of abuse) is a continuum, where violence is "connected to more common, everyday aspects of male behavior. . . . 'Typical' and 'aberrant' male behaviour shade into one another." LIZ KELLY, *SURVIVING SEXUAL VIOLENCE* 75 (1988). The distinction is that Kelly empha-

In battering relationships these cultural components become an extension of the pattern of domination itself, whether it be a nose scratch signal devised specifically for a mediation session, a drawn line gesture used repeatedly over the course of the relationship, or perhaps a fleeting facial change.¹¹ A gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse. It is a threat that carries weight because similar threats with their corresponding consequences have been carried out before, perhaps many times.¹²

We focus on the communication variable as a way of emphasizing the subtlety of the dynamics of abusive relationships and the difficulty that outsiders, even those professionally trained and experienced in dealing with battering, may have in identifying what is taking place in a controlled setting, such as mediation. However, the shared knowledge represented by these private symbols arises out of deeper elements of the culture of battering. The process by which such information becomes shared knowledge to the couple is best explained by a description of the elements of the culture of battering. The first essential element of the culture is the abuse itself, including any or all of the multiple forms of abuse: emotional, physical, sexual, familial, and property. The second element is the relationship context in which the abuse is folded into a systematic pattern of control and domination by the abuser. Our emphasis on this cultural aspect of battering is intended to highlight what we believe is a fundamental misinterpretation of abusive relationships by many scholars and practitioners. Our view rejects the dominant explanation of battering as conflict; we suggest that in many relationships, conflict has little, if anything, to do with the causes of battering. Rather, when conflict is a triggering event it tends to be only an expression of an attempt to control. The third element involves the tendency, on both the part of the victim and the abuser, to hide, deny, or minimize the abuse and the total control that the abuser attempts to exert on the victim.

A. DEFINITIONS OF ABUSE

Researchers in the field of domestic violence have not agreed on a uniform definition of what constitutes violence or an abusive relationship. It is important to briefly consider this literature in order to, first, expand the definition of abuse beyond physical assault, and, second, to distinguish

sizes that there is a fine line between abusive and non-abusive behavior exhibited by any individual man; our point is that abusive relationships have the same features as normal relationships.

11. It is frequently reported that abusers' faces change in some observable way, signaling impending violence. *E.g.*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL 59 (1987) ("Women learned to identify this pattern and often to see changes in the man just before an attack."); FAITH McNULTY, THE BURNING BED 83-84 (1980) (Francine Hughes' story) ("I saw him at the door and the look on his face made my heart sink right down into my shoes. I knew I was in trouble. . . . Mickey's face took on what Francine had come to know as his 'crazy' look.").

12. See *infra* notes 70-72 and accompanying text (discussing the enforcement of rules through punishment).

relationships that are characterized by a culture of battering from those involving isolated acts of physical assault or other forms of abuse. Acts of assault and abuse occur in many domestic disputes and while they might incur criminal charges, relationships involving a culture of battering are of another order (they are qualitatively and perhaps quantitatively different as well).

Richard Gelles and Murray Straus, the authors of two national studies¹³ that assessed the prevalence of domestic violence, limited their definition to physical abuse: "specific, definable acts of omission and commission that are harmful to individuals in families."¹⁴ Gelles and Straus surveyed over 3,000 individuals in American homes, measuring the frequency and severity of physical violence such as slapping, hitting, pushing, beating, or using weapons.¹⁵

While the bulk of research on domestic violence has implicitly or explicitly followed the lead of Gelles and Straus by focusing on physical assaults, there is growing professional recognition that emotional and sexual forms of abuse should fall under the rubric of "domestic violence." The reasons for labeling these as domestic violence run along two lines: 1) emotional and sexual forms of abuse are commonplace in battered women's experiences, frequently accompanying the physical assaults—i.e. they are an integral part of being battered; and 2) emotional and sexual abuse are harmful to women.

As sociologist Liz Kelly has noted, the prevailing stereotype about domestic violence is that assaults are "physical, frequent, and life threatening."¹⁶ Yet, the reality of battered women's lives does not conform solely to this image. Advocates for battered women have long noted that financial abuse and property abuse are forms of emotional abuse inflicted upon women. Abusers frequently restrict women's access to money¹⁷ and destroy their personal property¹⁸ in an effort to gain control over them or keep them in a

13. See RICHARD GELLES & MURRAY STRAUS, *INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY* (1988) [hereinafter GELLES & STRAUS]; MURRAY STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1980).

14. GELLES & STRAUS, *supra* note 13, at 59.

15. *Id.* at 227.

16. KELLY, *supra* note 10, at 150.

17. DELL MARTIN, *BATTERED WIVES* 83-84 (1976) ("[V]iolent husbands generally handle all of the money; . . . in some cases the husband takes the car keys and money whenever he leaves the house."); MILDRED D. PAGELOW, *FAMILY VIOLENCE* 310 (1984) ("Husbands who beat their wives keep a tight rein on their wives' actions and money: the last thing in the world they want is for the women to leave them. One way to ensure that is to tightly control all the family finances. Even when a wife is gainfully employed, she may have little or nothing to say about how her contribution is spent, and, in some cases, abusive husbands accompany their wives on payday so the checks are turned over to them immediately."); WALKER (1979), *supra* note 9, at 131-32 (inadequate spending money for household and children); Fischer, *supra* note 1, at 62 tbl. 9 (61% of sample of 83 battered women who obtained court orders reported that their abusers had tried to control their money).

18. Fischer, *supra* note 1, at 62 (30% of sample reported that batterers had abused pets; 70% reported that batterers had destroyed property).

state of fear.¹⁹ Emotional and sexual abuse may be even more common.²⁰ Forms of emotional abuse include acts that do not constitute overt threats of injury or violence, such as constant humiliation, insults, degradation, and ridicule.²¹ Of course, explicit threats to harm or kill, including those attached to vivid descriptions of the method the abuser would use to carry it out, also have emotional consequences.²² The abuser may extend threats of harm to the victim's extended family²³ or her children²⁴:

*Molly stayed because Jim said he would kill her family if she left, and she believed him. In addition to his violence toward her, she was beginning to find out more about his violence toward others—men he worked with, men in bars. Jim warned that her parents' home would be the first place he would go if he came home and found her gone; he said he would see them die first and then kill her.*²⁵

19. See *infra* notes 73-78 and accompanying text (discussing how acts of emotional and property abuse induce fear).

20. GELLES & STRAUS, *supra* note 13, at 68 (suggesting "that one reason so little research on emotional abuse has been conducted is that so many of us are guilty of occasional or even frequent emotional attacks on loved ones that the behavior is too close and too common to allow for objective research").

21. See examples cited in Fischer, *supra* note 1, at 62 tbl. 9. The case of Judy Norman, a North Carolina woman who killed her husband in 1987, represents the extremes of emotional abuse: he forced her to prostitute herself to support the family and then ridiculed her as a whore to her family and friends. He called her a "dog," forced her to bark like a dog, eat pet food out of pet dishes, and lie on the concrete floor next to the bed, because "dogs" can't lie on beds. *State v. Norman*, 366 S.E.2d 586, 587-89 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989); 378 S.E.2d at 20 (Martin, J., dissenting).

22. BROWNE, *supra* note 11, at 66. A particularly compelling example of this is offered: *Chuck jumped up and began shouting, 'I've had enough of you. I've had enough of your shit!' He grabbed a rifle from behind the door and began firing down at her from the end of the table, his face distorted. Mary could feel the impact of the bullets and was terrified. She waited for blood to come, for the sensation of pain. Then Chuck started to laugh wildly, telling her he only had blanks in the gun and not to be such a fool. The children were sobbing, but he made them all finish their meals, even though one of them became sick.*

Id. at 67.

23. Batterers typically target their threats to individuals who might provide some tangible assistance to the women if they leave the relationship. See *id.* at 66.

24. These threats could include both threats of harm to the children and threats to take the children away. See *id.* at 66, 91 ("He warned her that she would 'lose' Kevin if she ever did anything else to disobey him."). Browne's sample also reported high rates of physical and sexual assaults against the children (over 51%), enhancing the perceived risk for disobedience. *Id.* at 70. The threats may turn to actual harm. See GILES-SIMS, *supra* note 6, at 92 (case study report):

[The child] was only about nine months old. She was in her high chair, and I was feeding her cereal. I had to go to the bathroom, something like that, and I asked him to finish feeding her. When I came out of the bathroom, he got mad at her for something, and he pushed the bowl of cereal right in her hair. I don't know why he got mad at her. I don't know what made him do that at that instant, but he did do that, unless he was trying to make me mad or something. . . . There were a few times that she was just walking and he picked her up and heaved her from one side of the room to another. To make me behave.

Id. (emphasis added).

25. BROWNE, *supra* note 11, at 57; see also WALKER (1979), *supra* note 9, at 148 (finding that "[t]hreats . . . to the battered women's families were standard routine"); Fischer, *supra* note 1, at 62 (36% of sample reported that abusers had threatened family and friends).

Researchers who have investigated the phenomenon²⁶ find that rates of battered women who have been sexually assaulted consistently fall in the thirty-three percent to sixty percent range.²⁷ Sexual abuse frequently involves acts that could also be classified as physical assaults, blurring the line between physical and sexual abuse, such as the insertion of objects into the woman's vagina, forced anal or oral sex, bondage, forced sex with others, and sex with animals.²⁸ Sexual violence sometimes marks the end of a physically abusive incident;²⁹ for others, the sexual violence begins the assault.³⁰ Some of the abuse involves the use of pornography, as batterers may force their partners to look at or watch pornographic materials³¹ and/or act out pictures or scenes from these materials.³²

Emotional, familial, and sexual abuse have also been recently labeled as domestic violence because these forms of assault harm³³ women, both psychologically and physically.³⁴ Some battered women have described psycho-

26. One possible explanation for why sexual abuse has been neglected might be because most state laws still retain the marital rape exemption in some form. Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma*, 1989 U. ILL. L. REV. 691, 694 n.28.

27. KELLY, *supra* note 10, at 130 (60% sexually assaulted); DIANA E. H. RUSSELL, RAPE IN MARRIAGE 60-68 (1982) (citing other studies); see Fischer, *supra* note 1, at 63 tbl. 9 (45% sexually abused); Cris M. Sullivan et al., *An Advocacy Intervention Program for Women with Abusive Partners: Initial Evaluation*, 20 AM. J. COMMUNITY PSYCHOL. 309, 314 (1992) (48% raped); see also sources cited in BROWNE, *supra* note 11, at 100 (33%-43% experience marital rape).

28. BROWNE, *supra* note 11, at 95-96; see also WALKER (1979), *supra* note 9, at 119-24 (case studies).

29. See, e.g., McNULTY, *supra* note 11, at 174.

30. See, e.g., KELLY, *supra* note 10, at 113 ("We got to the flat and he dragged me into the bedroom and . . . forced me into bed, made me have sex with him and he scratched all my back open. Then he got a tin of deodorant and sprayed it into every scratch . . . then he started laughing . . .").

31. Fischer's sample reported a 12% rate of this form of abuse. See Fischer, *supra* note 1, at 63 tbl. 9.

32. See, e.g., RUSSELL, *supra* note 27, at 84 (24% reported they had "been upset by anyone trying to get you to do what they'd seen in pornographic pictures, movies, or books"); Fischer, *supra* note 1, at 63 tbl. 9 (10% forced to act out pornography). Kelly, *supra* note 10, provides several narrative accounts of this particular form of abuse:

[A] lot of my relationship with him [was] some kind of sexual assault. He used to use pornography at the same time as having sex with me — it was as if I became one of those pictures . . . That's a much more subtle form of assault.

Id. at 108.

I felt more like an object than anything else, something to be experimented upon. When it was getting really bad he used to come home with all these various contraptions. It was almost like I wasn't involved. I was just a piece of apparatus in an experiment. Whatever happened in this magazine we used to have to do, it was like a manual. I'd think "Oh God, I better read it to see what I've got to do tonight."

Id. at 111.

33. As Liz Kelly wrote: "The Oxford English Dictionary defines violence as involving damage to the self. The damage may be physical, emotional, psychological and/or material. Violence can be of the body, of the mind or of trust. The exercise of violence involves the denial of the victims' will and autonomy." KELLY, *supra* note 10, at 39.

34. KELLY, *supra* note 10, at 41 (defining violence as "any physical, visual, verbal or sexual act that is experienced by the woman . . . at the time or later, as a threat, invasion or assault, that has the effect of hurting her or degrading her and/or takes away her ability to control intimate contact") (emphasis added).

logical degradation and humiliation as the most painful abuse they have experienced.³⁵ The impact of this kind of abuse can be long lasting and harmful to women's psychological health.³⁶ Emotional, familial, and sexual abuse may also affect women's physical health. Physical symptoms such as high blood pressure, ulcers, chronic back pain, chronic fatigue, and tension headaches may manifest as a result of physical abuse or as a result of the stress produced by the other forms of violence.³⁷ Research on the psychological impact of rape suggests that sexual abuse, particularly when the assailant is known to the woman, has deleterious mental health effects including depression, anxiety, suicidal ideation, and a loss of self esteem and self worth.³⁸

Several researchers have developed measures of emotional abuse that correspond to the physical abuse scale developed by Gelles and Straus.³⁹ For

35. WALKER (1979), *supra* note 9, at 172. To illustrate:

I've been verbally abused as well. It takes you a long time to . . . you may say you feel good and you may . . . but inside, you know what's been said to you and it hurts for a long time. You need to build up your self-image and make yourself feel like you're a useful person, that you're valuable, and that you're a good parent. You might think these things, and you may say them . . . I'm gonna prove it to myself.

Kathleen Ferraro & John Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 334 (1983) [hereinafter Ferraro & Johnson]. As one of the participants in Fischer's study summarized, "The bruises healed on my body, but they'll never go away on my heart." See Fischer, *supra* note 1.

36. Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107, 114 (1990) (72% of sample reported that emotional abuse had a more severe impact on them than physical abuse).

37. See Suzanne Kerouac et al., *Dimensions of Health in Violent Families*, 7 HEALTH CARE FOR WOMEN INT'L 413, 420-25 (1986); Rachel Rodriguez, *Perception of Health Needs by Battered Women*, 12 RESPONSE: TO THE VICTIMIZATION OF WOMEN AND CHILDREN 22, 22-23 (1989). Francine Hughes' story illustrates the physical and psychological changes that may result from ongoing assaults:

As the months of torture went on, Francine became aware of strange physical symptoms. She felt nausea. Sometimes she could eat nothing; at other times she was ravenously hungry and ate until she was sick. She felt starved for air, suffocated, unable to take a breath deep enough to satisfy her. Her pulse raced and she was dizzy even lying down. It occurred to her that she might have cancer. "I'd imagine I was going to die an awful death and think, 'Oh God, then the kids will have no one but Mickey!'"

There were psychological changes, too. Francine, who had always loved being with people, became afraid of them. She, who had once thought herself pretty, felt ugly, unattractive, stupid. She avoided speaking to neighbors on the street. In the supermarket if she saw someone she knew she looked the other way. She thought everyone in Dansville must despise her for living a degrading life. Vague fears came over her. It frightened her to go out of the house or to drive a car. She felt inadequate, helpless in every way. Rather than borrow Mickey's car, she asked him to drive her wherever she had to go. . . .

She had to fight suicidal impulses.

McNULTY, *supra* note 11, at 128.

38. See Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery*, in ACQUAINTANCE RAPE: THE HIDDEN PROBLEM 251 (Andrea Parrot & Laurie Bechhofer eds., 1991); Mary Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victims' Experience?*, 12 PSYCHOL. WOMEN Q. 1 (1988).

39. The Conflict Tactics Scale, developed originally by Straus, is the most commonly used measure in research on family violence. Various behaviors are organized on the scale which begins with non-violent actions such as discussing an issue calmly, and ends with violent ones,

example, Marshall includes behavior such as "shook a fist at you" and "made threatening gestures."⁴⁰ Follingstad and colleagues define six categories of emotional abuse, including ridicule, jealousy, and property abuse.⁴¹ Tolman developed an inventory that includes items such as "my partner tried to make me feel like I was crazy" and "my partner yelled and screamed at me."⁴² Finally, Sullivan's index contains items like "lied to you or deliberately misled you" and "ridiculed or criticized you in public."⁴³

Gelles and Straus' physical abuse measure has received heavy criticism that could also be applied to the emotional abuse scales described above.⁴⁴ Abstracted from their social reality, the reports of abuse that result from these quantitative scales lack a description of the relationship and family context in which the abusive behaviors are occurring.⁴⁵ For example, a woman involved in an emotional divorce might respond affirmatively to many of the scale items, such as denigration, outbursts of anger and perhaps even physical assault, but this would not necessarily capture the fear, domination, and control that characterizes culture of battering relationships.

Establishing that there has been abuse in a relationship is a necessary but insufficient condition to conclude that a culture of battering exists. For our

such as slapping, pushing, and using a knife or gun. The individual reporting the violence is asked to indicate how frequently this behavior occurs on a scale from "never" to "more than 4 times/week". Severity of violence is divided into minor violence, defined as pushing, kicking, throwing objects, shoving, or slapping, and severe violence, such as beating or threatening use or actual use of knives or guns. GELLES & STRAUS, *supra* note 13, at 250-51; *see infra* note 96 (instructions for the scale).

40. See Linda L. Marshall, *Development of the Severity of Violence Against Women Scales*, 7 J. FAM. VIOLENCE 103, 114 (1992).

41. See Follingstad, *supra* note 36, at 113.

42. See Richard M. Tolman, *The Development of a Measure of Psychological Maltreatment of Women by their Male Partners*, 4 VIOLENCE & VICTIMS 159, 162 (1989).

43. See Cris Sullivan et al., *Index of Psychological Abuse: Development of a Measure*, Paper Presented at the Annual Meeting of the American Psychological Association (Aug. 6, 1991).

44. According to Browne, *supra* note 11, at 69, the Conflict Tactics Scale fails to account for the physical injuries that result from specific acts of abuse. She argues that the context of abuse needs to be taken into account. Browne defines context of abuse as the "force with which an act is carried out, the number of repetitions of the act, and the clustering of different acts together." *Id.* (emphasis omitted). In a later paper, Browne expands this contextual argument to include the failure of the scale to measure other aspects of the violence, such as whether it occurred in the course of a conflict or whether it happened unexpectedly. Irene H. Frieze & Angela Browne, *Violence in Marriage*, in FAMILY VIOLENCE 163, 168-69 (Lloyd Ohlin & Michael Tonry eds., 1989) [hereinafter Frieze & Browne].

Liz Kelly labeled the scale a "poorly designed research instrument:"

The CTS fails to distinguish between offensive and defensive acts and contains no questions on either the frequency or consequences (injury) of violent acts. The scaling implicit in the CTS assumed that all acts within categories are the same, whether they are committed by a woman or a man and whether they are part of on-going abuse or a single event. The hierarchy of 'tactics' implies that pushing and throwing is by definition more serious than any amount of verbal or emotional abuse. The CTS, therefore, provided data on acts of violence abstracted from both the context in which they occurred and their consequences and meaning to the individuals involved.

KELLY, *supra* note 10, at 65-66.

45. See LEE ANN HOFF, *BATTERED WOMEN AS SURVIVORS* 9 (1990) (arguing that acts of violence stripped of context distort the severity and meaning of domestic violence).

purposes, the line between a relationship where there has been abuse and a relationship where there is a culture of battering is the important distinction to make. The other two elements that comprise relationship context, a pattern of domination and control and denial and minimization of the abuse, must also be present in the relationship for a culture of battering to be established.

B. THE SYSTEMATIC PATTERN OF CONTROL AND DOMINATION

1. *The Context of Rule-Making*

The abuser who signaled silence to his victim by gesturing with his index finger in our opening narrative⁴⁶ illustrates quite clearly the dynamic of control and domination⁴⁷ and the symbols that are used to enforce it. The culture of her relationship, like that of other domestic violence victims, consists of two roles within the family: that of rule-maker/rule-enforcer and the one(s) that must follow the rules. As explained by two women from Fischer's study:

He has this macho male ego thing like, I am King Kong and no one is going to [control me]. If you don't do this then I'm going to beat you type of attitude. I'm the ruler, you go by my rules, if you don't, you know, you have to pay the consequences. He has this attitude that I'm Mr. Macho and I'm going to show you my physical force through, you know, by beating you.

He was a dictator in this house and it seemed like the more our relationship progressed the worse that got. When he'd get upset, he'd go hitting the walls. He didn't really throw things a lot but every once in a while he'd throw or kick something, threw the cat. He knows that cat is kind of real special to me, and he'd get mad, pick him up and throw him outside and say, well, he can stay out for a while, I'm tired of him or something. It never really hurt the cat, but it was enough, I mean, it upset me that he even did it anyway.⁴⁸

a. The Ruler and the Ruled

Battered women have frequently reported that abusers are extremely controlling of the everyday activities of the family.⁴⁹ This domination can be all

46. See *supra* text accompanying note 1.

47. We are not the first to suggest that battering is a process of control and domination. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 70 (1991) (urging "cultural redefinition of battering as a process of power and control"). We are the first, we believe, to provide an empirical description of how this process might unfold in a battering relationship.

48. Fischer, *supra* note 1.

49. See, e.g., KELLY, *supra* note 10, at 131 ("[M]any abusive men felt they should control almost every aspect of household organization, from where the clock stood on the mantelpiece, to how often windows were cleaned, to how the table should be set."). In Fischer's study, the husband of the woman in our opening anecdote, see *supra* text accompanying note 1, poured over the TV Guide when it arrived in the mail each week, highlighted in yellow what the family was to watch, and highlighted in pink what the family was to tape on their VCR. This

encompassing: as one of the batterers from Angela Browne's study was fond of stating, "[y]ou're going to dance to *my* music . . . be the kind of wife I want you to be."⁵⁰ Charlotte Fedders' account⁵¹ of the escalating rules imposed by her husband over the course of their seventeen year, extremely violent marriage is particularly illuminating about the range of control that abusers can exert. Her husband insisted that no one (including guests and their toddler children) wear shoes in the house, that the furniture be in the same indentations in the carpet, that the vacuum marks in the carpet be parallel, and that any sand that spilled from the children's sandbox during their play be removed from the surrounding grass.⁵² Charlotte was not allowed to write checks from their joint checking account.⁵³ Any real or perceived infraction of these rules could result in her husband beating her, or at the very least, the expression of his irritation that was frequently a harbinger to a beating.⁵⁴

Typically, battered women talk to the men about the abuse, partly as an attempt to concretize the rules that are connected to the absence of abuse.⁵⁵ In turn, many abusers promise to stop the abuse.⁵⁶ One abuser in Browne's study formalized such discussions into a written document, where he set forth a list of conditions that his victim was to agree to in exchange for cessation of his violence. These conditions were: 1) the children were to keep their rooms clean without being told; 2) the children could not argue with each other; 3) he was to have absolute freedom to come and go as he wished, and could have a girlfriend if he wanted one; 4) she would perform oral sex on him anytime he requested; and 5) she would have anal sex with him.⁵⁷ He enforced this document shortly after she "agreed" to it and continued to sexually assault her until his death.⁵⁸ This abuser simply made

schedule could not be deviated from, even if he was not home in the evening. Fischer, *supra* note 1.

50. BROWNE, *supra* note 11, at 60.

51. CHARLOTTE FEDDERS & LAURA ELLIOT, SHATTERED DREAMS (1987) [hereinafter FEDDERS & ELLIOT].

52. *Id.* at 138-41.

53. *Id.* at 158-59.

54. *Id.* at 158-59, 207-08.

55. See Fischer, *supra* note 1, at 65, 66 tbl. 10.

56. Promises to end the violence might be part of the reconciliation, or "honeymoon" phase, of Lenore Walker's cycle theory of violence. It is well established that violence in a relationship escalates over time, increasing in frequency and severity. WALKER (1984), *supra* note 9, at 43-44, 130. Fischer, *supra* note 1, at 37 tbl. 5 (64% of sample reported that abuse at time of obtaining court protection order was becoming worse). This escalation is consistent with the cyclical nature of abuse, first recorded by Walker. WALKER (1979), *supra* note 9, at 55-70 (battering occurs in three cycles: 1) tension building phase, 2) acute battering incident, and 3) honeymoon stage (contrite & loving behavior)); see also KELLY, *supra* note 10, at 147 ("It was really cyclical actually, really incredible. And the odd thing was that in the good periods, I hardly remembered the bad times. It was almost as if I was leading two different lives . . . There were long gaps sometimes . . . If it had been continuous battering then I'd have just gone. There were always times of hope.").

It may be that the escalation is triggered by episodes of rebellion, as it was in Francine Hughes' case. See *infra* text accompanying notes 83-86.

57. BROWNE, *supra* note 11, at 99.

58. *Id.* at 100.

explicit the rules in the relationship and made it obvious that abuse was the punishment for violating the rules.

In many abusive relationships, however, the rules do not need to be verbally expressed to create a family atmosphere controlled by the batterer. Charlotte Fedders' story is a prototype of a battered woman who becomes very good at reading nonverbal messages from her abuser. She writes of how she restricted the play of her four young boys in order to avoid her husband's increasingly subtle signs of displeasure:

Eventually . . . we just stopped using the living room and the family room because little things out of place would make him angry. . . . If [the boys'] rooms were a mess, he'd complain to me, so I was reluctant to let them play there. So they pretty much played in the basement. . . . I'd let them play only in the backyard, not the front, because John was so proud and particular about it. He wanted it perfectly green, and orderly. . . . He didn't like my putting a swing set up for the kids in the backyard, so it had to go all the way in the back, where no one would see it.⁵⁹

The characteristics of the Fedders' marriage are consistent with accounts reported by other battered women indicating that the violence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point,⁶⁰ nor does the explosion always have to be physical. Violence need only symbolize the threat of future abuse in order to keep the victim in fear and control her behavior. For example, Marshall has called property abuse "symbolic violence."⁶¹ The following accounts from Fischer's study explain how this could be so:

When I came back to the apartment, he had smashed every single piece of furniture in the bedroom. On the wall there was the red dress that I had worn to my office Christmas party the week before. It was stuck to the wall with a butcher knife through the heart.

I saw him standing out in the street with an ax handle over his shoulder, yelling for me to come out, and luckily I was at a house with people and a telephone to get help. So he trashed my car. There was glass all

59. FEDDERS & ELLIOT, *supra* note 51, at 140-41.

60. As Walker stated:

Violence as a discipline does not cause a permanent change in the way someone will behave unless the victim believes that the possibility of violence is always present. However, batterers are very accomplished at getting their victims to believe that it is. A climate of fear is established which is maintained by the ever-present potential for extremely violent explosions.

WALKER (1979), *supra* note 9, at 148.

The narrative examples provided by Kelly confirm this:

I remember the tension of becoming aware that I had to notice what I was saying all the time, to make sure I didn't offend him. I had become afraid of him.

I didn't know when he was going to knock on the door, what he was going to be like, what mood he was going to be in, whether I was going to get hit . . . Was he going to scar me for life? Was he going to punch me in the head and knock me out and I'd die?

KELLY, *supra* note 10, at 127.

61. Marshall, *supra* note 40, at 107.

over the street from my car windows that he busted out. And he was walking . . . with the ax handle in his hand. . . . [When I saw the damage] I just fell on my car, I never cried so hard in my life. I could not believe it . . . there was glass clear over in this extra yard. And, it wasn't that it was a good car or anything. It was just the fact that it could have been my head.⁶²

In fact, physical abuse may only be utilized by abusers who are too unsophisticated to be able to control their victims with verbal or sexual violence.

b. The Internalization of Rules of Time: The Process of Self-Censorship

As time goes on in a battering relationship, as in the Fedders' case, specific rules and their attached consequences give way to a general climate of increasingly subtle control, where the batterer needs to do less and less to structure his family's behavior. Caught up in the day to day fight for survival, the victims may not even be aware of this censorship process:

I would do anything for him. I would cook, clean, you know, pick up his shit, whatever. He could have said, drop off the face of the earth, and, sure, I would have done it . . . I was so stressed out that I was scared from one day to the next of what was going to happen with him. When I first moved in things were pretty happy-go-lucky. In the second year I was starting to . . . I wouldn't go out, I'd make excuses to people. I got to understanding that he didn't want me telling a lot of people where I lived, who I was seeing . . . That started clicking in . . . I wouldn't let my family come over to the house because I didn't know what kind of a mood he was going to be in, if he would want company. I was living a lie for two and a half years.⁶³

I suppose you might be able to prevent [the abuse] by suppressing so much of yourself, learning to avoid the kind of behaviour that precipitates it. But then that in itself is a form of violence.⁶⁴

What fuels this self censorship process⁶⁵ is the responsibility the victim feels, both as a woman socialized into believing that making relationships work is her job, and the responsibility added by the abuser, who blames her for the "failure" of the relationship, as evidenced by the occurrence of abuse.⁶⁶ Women are taught in our society to care for others, to make decisions around what is best for other people, even if it denigrates their own

62. Fischer, *supra* note 1.

63. Fischer, *supra* note 1.

64. KELLY, *supra* note 10, at 180.

65. The idea that women censor their behavior in response to fear of violence from their partners is similar to empirical accounts that women's fear of sexual assaults by strangers leads to a behavioral change in response to these threats. See MARGARET I. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 90-117 (1989) (women's fear affects choices of day-to-day activities); KELLY, *supra* note 10, at 31 ("The threat and reality of sexual violence may result in women developing strategies for self-protection which result in apparently voluntary limitations of mobility, territory, and encounters.").

66. The complexity of self-blaming responses is discussed in Dale T. Miller & Carol A. Porter, *Self-Blame in Victims of Violence*, 39 J. SOC. ISSUES 139 (1983).

needs.⁶⁷ Batterers reinforce this societal message by consistently blaming women for everything that goes awry in their lives.⁶⁸ The end result is manifested in frantic attempts by the woman to be the perfect wife, mother, and homemaker.⁶⁹

67. BROWNE, *supra* note 11, at 78-79. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 154 (1991).

68. Francine Hughes' story contains a particularly potent example of this:
He became terribly agitated over small problems, and no matter how a crisis began, it always became Francine's fault.

"Like one day he couldn't find a particular paper he needed. He began emptying drawers and tearing up the place. He was cursing and saying, 'I can't find this goddamn thing I have to take to Social Security.' Then he said, 'You look for it! You're probably the one who lost it anyway.' I said, 'Mickey, I never saw it. What does it look like? Just tell me and I'll help you look.' I started hunting for it while Mickey paced the floor, drinking coffee and watching me. 'You better find it,' he said. 'You better find it fast.' My head began to pound. I was so scared if I didn't find it soon he'd begin to drink. Then he blamed the kids. He began to curse and rant about them getting into his things, and that was my fault, too. Before I found the paper in the pocket of his windbreaker where he'd left it, I was trembling all over, a nervous wreck."

MCNULTY, *supra* note 11, at 143.

One of the women from Angela Browne's study reported a similar irrational level of blame; in her case it was for the abuser's automobile accident, which occurred while she was not even in the car:

[He] wrecked the truck, injured himself, and was hospitalized for several weeks. After he returned home, he drank heavily and was abusive every day. He would hit Molly with his crutches, throw his food at the wall, and chew snuff and spit it in her face. He felt the accident had ruined his business and he blamed Molly for driving him to it. He kept her awake until early morning while he raged, and threw bottles of beer at her or poured hot coffee over her if she fell asleep.

BROWNE, *supra* note 11, at 91.

69. The women from Liz Kelly's study provided several illustrations of this:

The best way to avoid it was to show as little reaction as possible . . . Even though I didn't feel I loved him at the time, I hated him (anger), I was saying that I loved him. I had to be the absolute perfect housewife . . . I wouldn't dare argue with him or challenge him — for fear of my life actually.

You kept the house tidy, you got the children out of the way, you got meals ready when he walked in . . . all sorts of pandering about, women's skills you know. I got quite skilled over the years, I never knew when it was going to happen, it was just avoidance.

I just tried to be self-effacing in every sense— you know, if I made myself invisible he won't see me to hit me.

I would just be quite passive, try not to provoke him verbally or physically. I would just do anything he wanted me to do, try and be calm and pleasant just to try and avoid it or if there was a warning I would flee the house.

KELLY, *supra* note 10, at 180. Similarly, one of the women in Giles-Sims' study reported that:

[I felt] very confused. When it really first started happening, I didn't know what was going on. I couldn't figure it out. I stayed with him quite a while when he was doing this, because I like figured out well, maybe he'll come home this time, and I'll do something different. Maybe that might please him and he'll stay off my back. I would always try to do things that . . . that wouldn't make him angry. He was never satisfied. He'd get mad for some stupid reason and take it out on me.

GILES-SIMS, *supra* note 6, at 70. As summarized by Heather McGregor in *Conceptualizing*

c. The Enforcement of Rules by Punishment

The rules that battered women try desperately to follow become established in a pattern of domination and control by the enforcement mechanism used by the batterer. Batterers may either simply respond with abuse when a rule is broken,⁷⁰ or they may make it clear that the abuse is punishment for violations:

He felt I was a child. He'd say, "I'm going to teach you a lesson; raise you right." He'd make himself angry, lecturing me. I was always caught off guard by his attacks. They seemed to be mainly dependent on his mood, rather than on things going on around him. He would slap me, hit with his fists, twist my arms behind my back, call me names, and say awful things about—and to—my mother. And then he'd tell me it was for my own good. If I tried to say anything, he'd call that "talking back" and I'd get hit. But if I kept quiet, he'd say I was ignoring him. No matter what I did, it just got worse and worse, once it got started.⁷¹

He said, "Well, I'm going to take you out to . . . 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 kind of, like, deserted road. He stopped and I got out of the Jeep, and he got out of the Jeep, and 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.⁷²

d. Cementing the Connection Through Fear, Emotional Abuse, and Social Isolation

At the core of these types of systematic control and domination is the fear that battered women have about future violence. This fear can be a result of

Male Violence Against Female Partners: Political Implications of Therapeutic Responses, 11 AUSTL. & N.Z. J. FAM. THERAPY 65, 67 (1990):

[Women] will try to cook better meals, stay awake for him no matter what time he gets home, have sex with him whenever he wants, have the children in bed before he gets home, have the house immaculate, lose weight, get a job, give up a job, give up friendships, keep thoughts and opinions private, sever relations with their family of origin, move house, move town, suggest counseling.

70. McGregor, *supra* note 69, at 67.

71. BROWNE, *supra* note 11, at 60.

72. GILES-SIMS, *supra* note 6, at 75-76.

past beatings or threats of physical⁷³ or sexual abuse.⁷⁴ The fear may also be triggered by any verbal or nonverbal symbol associated with the onset of an abusive incident.⁷⁵ In some cases, threats of harm against the victim's extended family⁷⁶ or against her children may be as effective in controlling her behavior as physical violence itself:

[The child] was only about nine months old. She was in her high chair, and I was feeding her cereal. I had to go to the bathroom, something like that, and I asked him to finish feeding her. When I came out of the bathroom he got mad at her for something, and he pushed the bowl of cereal right in her hair. I don't know why he got mad at her. I don't know what made him do that at that instant, but he did do that, unless he was trying to make me mad or something. . . . There were a few times that she was just walking and he picked her up and heaved her from one side of the room to another. To make me behave.⁷⁷

Control is also maintained, and fear is intensified, through the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse; financial abuse; and social isolation. It is undoubtedly easier to control someone if they think less of themselves. It is difficult for victims to leave their abusers when they do not have access to money. Similarly, limiting victims' interactions with other people enhances the batterers' domination over the family by both cutting off potential sources of support and by making the boundary between the family culture of battering and the outside world more defined.⁷⁸

73. "What he did wasn't exactly battering but it was *the threat*. I remember one night I spent the whole night in a state of terror, nothing less than terror, *all night*. . . . And that was worse to me than getting whacked. That waiting without confrontation is just so frightening." KELLY, *supra* note 10, at 143.

I just couldn't take all this . . . me feeling so numb inside and this feeling of panic. And this feeling of being caged—all at the same time. Panicked and caged, and not being able to go anywhere and do anything. It was like he was an animal trainer, coming and beating on the bars of the cage with a stick—only he was outside the bars so he couldn't get hurt.

GILES-SIMS, *supra* note 6, at 114.

74. Another example is provided by Kelly:

His fantasy was . . . for me to be in a gang bang, against my will, so he could be in another room — not actually watching — but in another room knowing I was there with a load of men, screaming and shouting for help. My fear was that it would happen. He often used to say to me, "Wouldn't it be nice if you went out one night and got raped and came home and told me about it!"

KELLY, *supra* note 10, at 114.

75. Kathleen K. Wayland & John E. Lockman, *Gender Differences in the Affective Response to Marital Aggression*, J. FAM. VIOLENCE (forthcoming) (finding that fear was strongly correlated with psychological abuse) [hereinafter Wayland & Lockman].

76. See *supra* note 23 and accompanying text.

77. GILES-SIMS, *supra* note 6, at 92 (emphasis added); see *supra* note 24-25 and accompanying text.

78. See KELLY, *supra* note 10, at 132 (batterers deliberately isolate their victims). Sometimes the batterers' denial of social interaction to the victim is part of the rule-making context, where victims must secure approval before they visit any of their friends:

I was not allowed to have friends. Not allowed to go anywhere with [the child] Jesse by myself. This is why it was so bad, 'cause he told me he didn't trust me, therefore I couldn't go places with Jesse by myself, or I couldn't go to the store with Jesse, or I couldn't spend time with Jesse, or I couldn't go out and have any

2. Rebellion and Resistance

The pattern of rule-making and rule-enforcing, nested within the control and domination exerted by the batterer over his family, is frequently interspersed with episodes of rebellion by the victims.⁷⁹ Expanding on Hannah Arendt's argument that force is only used when power is threatened, Liz Kelly suggested that the victim's resistance strategies forces the abuser to make his coercive power explicit.⁸⁰ Any threat, however small, to the abuser's authority within the family is likely to be met with violence: "I think because I was sticking up for myself the hidings got harder. I think that's what it was, he wanted to show that he was still my *governor*."⁸¹ These resistance incidents are not initiated with ignorance on the part of victims, as they are very much aware that any type of challenge to the batterer is likely to result in further, perhaps escalating, violence.⁸²

Rebellion can take one of several different forms. The first form is a deliberate but not active verbal confrontation. To illustrate from the story of Francine Hughes, she described an incident when she violated the implicit rule that she was not to leave the apartment while her husband was gone:

One day, on a furtive outing, Francine dropped into a drugstore and bought some nail polish. When Mickey came home he instantly noticed her painted nails. He asked how she had gotten the polish. She told him she had gone for a walk. Mickey said he didn't think she needed to go for walks. Francine began to pour out her unhappiness—how she hated the idleness, the loneliness, the gloomy high-ceilinged apartment. Mickey was unsympathetic. Francine protested she had the right to go for a walk

kind of relationship with any girls, or I couldn't do anything. Not unless he gave me permission, and so forth and so on.

GILES-SIMS, *supra* note 6, at 76-77.

79. Liz Kelly has compellingly argued that researchers have ignored the study of how battered women (and other victims of male violence) resist abuse: "[M]ost research on sexual violence has neglected, or indeed at times misread, the acts of resistance and challenge that women . . . take which display strength and determination. Much feminist theory has . . . paid insufficient attention to analyzing and documenting women's persistent and consistent resistance to it." KELLY, *supra* note 10, at 185. This passive victim imagery is based on the untested assumptions of learned helplessness theory and does not in fact conform to battered women's experiences. See *infra* notes 87-94 and accompanying text (critiquing learned helplessness theory). Fischer also reported that, in her sample, many battered women said that although the abuser controlled the family's daily activities or finances, they would refuse to allow him to dominate decisions about the children; the women were willing to risk challenging him for the best interests of their children. Fischer, *supra* note 1, at 64.

80. KELLY, *supra* note 10, at 22.

81. *Id.* at 178. The battered woman's rebellion of speaking out may also extend to protect her children:

I did start . . . trying to do something about the way he was reacting with [the child]. I think that afterwards was when he started hitting me. He didn't hit me before that. When I started standing up for my children, when I thought he was abusing [her], he started hitting me.

GILES-SIMS, *supra* note 6, at 93.

82. KELLY, *supra* note 10, at 179. It is well established that violence in a relationship escalates over time, increasing in frequency and severity. See *supra* note 56. It may be that the escalation is triggered by episodes of rebellion, as it was in Francine Hughes' case. See *infra* text accompanying notes 83-86.

*if she chose. The scene ended in a beating.*⁸³

What is important to extract from this narrative is not only that the abuse resulted from Francine's rebellion, but also the subtle way in which she chose to resist. She spoke to her husband about her needs. When he was unresponsive to that language, she switched to something more directly confrontative—her rights as an individual—and she was beaten for this. Francine's abuser was threatened because she was focused on her needs and rights, rather than his. The abuser's place as the authoritarian in his family is challenged if his victim thinks about herself instead of concentrating exclusively on him.⁸⁴

In addition to indirect methods of rebellion, Francine's story includes several episodes where she directly confronted her batterer by simply refusing to do what he ordered her to do. Her husband did not hesitate to abuse her when she declined to fetch a drink for a friend during a party at their home, an obvious and public challenge to his authority in the household.⁸⁵ The most poignant instance of Francine's resistance is when she declined to back down when her batterer dictated that she could not visit her mother:

Francine saw a chance to visit her mother; [her friends] would give her a ride both ways.

Mickey objected. "There's no sense in it. You don't need to go. What do you want to go up to Jackson for?"

"I haven't seen Mom in a long time," Francine said, "I'd just like to see her, that's all. I've got nothing to do here."

Mickey scowled. "You don't need to go to Jackson to look for something to do, and you don't need to see your mom."

Suddenly Francine rebelled. "I just couldn't stand Mickey's eternal domination one more minute. I picked up my coat and started for the door. I said, "I want to see Mom and I'm going, no matter what you say.

83. McNULTY, *supra* note 11, at 64-65.

84. See, e.g., James Ptacek, *Why Do Men Batter Their Wives?*, in *FAMILY ABUSE AND ITS CONSEQUENCES: NEW DIRECTIONS IN RESEARCH*, 133, 145-49 (G. Hotaling et al. eds., 1988) (batterers own descriptions of the causes of their abuse suggest strong themes of male entitlement, including the "right" to the priority of his needs over her needs); see also sources cited *id.* at 149.

85. McNULTY, *supra* note 11, at 73. As Francine described:

Mickey enjoyed weekend parties with friends, drinking beer and listening to music. One Saturday a group gathered in the Hughes apartment. . . .

"Mickey told me to fetch somebody a beer. I'd been getting beers and emptying ashtrays all day. I blurted out my feelings, I said, 'Get it yourself. I'm sick of all this! I'm going to bed!' Mickey's hand shot out and he slapped me with full force across the face. Everybody shut up while I sat there, my face stinging. I wanted to die of humiliation. I got up and ran into the bedroom, trying not to cry till I got there.

Id. It is significant that this instance of abuse was committed in public. The abuser's power over his victim is enhanced by having witnesses to enforcement of his rules and making the consequences of rebellion even more serious. See Ferraro & Johnson, *supra* note 35, at 332. The impact of public abuse on the victim is quite profound:

[W]e went Christmas shopping and he slapped me in the store because of some stupid joke I made. People saw it, I know, I felt so stupid, like, they must all think what a jerk I am, what a sick couple, and I thought, 'God, I must be crazy to let him do this.'

Id.

I don't care!" That did it! Mickey pulled back his fist and floored me Then Mickey beat the living hell out of me. He stayed home from work and we fought all afternoon."

This was the worst beating Francine had yet. Her face and body were covered with bruises.⁸⁶

The noteworthy elements of this piece of Francine's story are the abuse that was a response to her direct verbal confrontation with her abuser as well as the surrounding contextual factors. As with the previous example, her batterer denigrated her needs by forcing his definition of what her needs were through violence. Francine was inevitably abused when she attempted to express her needs for the structure of their relationship. This particular episode of rebellion was threatening to Francine's abuser not only because it was direct, but also because Francine was attempting to break her imposed social isolation by visiting her mother. This challenge to his singular hold over her was probably among the most threatening forms of rebellion. Consequently, it is not surprising that it was met with escalated and serious violence.

These stories of rebellion and resistance do not map onto the passive victim image fostered by the dominant theory of battered women's experiences, learned helplessness. Although it is beyond the scope of this article to engage in a full critique of this theory, we wish to point out the inconsistencies between the narrative accounts we have described and the tenets of the theory.

Learned helplessness theory was developed through experiments conducted with dogs, who were trapped in cages and administered variable but random shocks from which they could not escape.⁸⁷ Over time, the dogs stopped all attempts to leave their cages and would remain submissive and passive during the "punishment" even when the door was left open.⁸⁸ Lenore Walker presents a straightforward application to battered women, arguing that repeated batterings are analogous to shocks, which decrease the victim's ability to respond and, eventually, make her completely passive.⁸⁹ The basic implication of Walker's theory is that while battered women may employ various strategies to attempt to stop the violence early in the relationship, including leaving the abuser, these attempts decline gradually towards total passivity.

Other researchers have investigated what Walker failed to study: battered women's behavioral responses⁹⁰ to the abuse. Fischer specifically asked the

86. McNULTY, *supra* note 11, at 65-66.

87. See WALKER (1979), *supra* note 9, at 45-46. Learned helplessness research has also been conducted with human subjects, comparing depressed and non-depressed people, resulting in a reformation of the theory. See WALKER (1984), *supra* note 9, at 86.

88. See WALKER (1979), *supra* note 9, at 46.

89. *Id.* at 49. For a thorough critique of the battered woman syndrome, see David Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 19 (1986).

90. Walker, in her later study (1984), asked about women's emotional responses (fear, anxiety, depression, anger, disgust, and hostility) over time. WALKER (1979), *supra* note 9, at 87. She found that for the emotions most closely linked with helplessness (fear, anxiety, de-

battered women in her study who had obtained court protective orders about the methods they had employed in attempting to stop the violence. Of the thirty-one strategies described, the women in her sample had tried an average of thirteen different strategies, including talking to the abuser about the abuse, consulting family and friends, calling the police, leaving him, and seeking counseling or legal advice.⁹¹ Fischer concluded that the number and variety of strategies tried suggests that battered women continue over time to increase their helpseeking rather than to decrease it and become passive.⁹² Like the narratives of rebellion described earlier, these attempts at helpseeking are woven into the pattern of domination and control that the batterer exerts over the woman.⁹³

It is important to distinguish episodes of rebellion and resistance (of which helpseeking is one example), which depart from the victim's usual active attempts to follow the rules, from the *consequences* of those episodes. The fact that battered women seek help for the abuse, a process that increases over time, and periodically rebel against their abusers' rule structures does not mean that they escape punishment for doing so. That battered women continue to resist the domination and control asserted against them even in the face of brutality is further evidence of their resilience and courage. As

pression) resigned acceptance did not increase linearly over time, as the theory would predict. *Id.* at 89. See also *id.* at 88 fig. 2. Nevertheless, she concludes, with no attendant explanation, that these results "are compatible with learned helplessness theory." *Id.* at 89. Independent of these results on emotional responses to abuse over time, the learned helplessness theory more centrally functions as a predictor of how battered women will behave, such as whether she will call the police, tell her friends or family, seek counseling, or leave the relationship. Walker did not ask the women in her study about any of these things. Focusing solely on how women feel as a test of the theory leaves out a large part of battered women's experiences.

91. Fischer, *supra* note 1, at 65-68.

92. *Id.* at 102. See also *id.* at 109 (finding that study participants, as a whole, had never been passive). Fischer's data is consistent with prior work in this area, which has examined the temporal sequence of battered women's behavioral responses. Lee Bowker, studying women who had "beaten wife beating," asked women to describe the attempts they had made to stop the abuse in their own words, then coded these responses into three different categories (personal strategies, informal helpseeking, and formal helpseeking). LEE H. BOWKER, BEATING WIFE BEATING 36 (1983). The question was asked about five specific instances of abuse (the first, second, third, "worst," and last). *Id.* Generally, the number of women attempting any given strategy increases over time, not decreases. See *id.* at 64 tbl. 4-1 (personal strategies), 75 tbl. 5-1 (informal help sources), 87 tbl. 6-1 (formal help sources). As Bowker concluded: "It is clear from these data that many battered wives actively fight to remove violence from their lives. The efforts to end the abuse . . . were completely at variance with the image of the battered woman as passively accepting her fate." *Id.* at 104. This criticism is echoed by Kelly, *supra* note 10, at 181 ("The fact that, for many women, their resistance increased before they finally left, seriously questions the suggestion that women become progressively more passive and accepting. . . . [T]he theory of 'learned helplessness' . . . does not reflect the experience of the women interviewed in this project.") Even Walker reported that helpseeking is enhanced over time: "As the violence escalated, so did the probability that the battered women would seek help." WALKER (1984), *supra* note 9, at 26. She neglected, however, to discuss the implications this has for learned helplessness theory. See also EDWARD W. GONDOLF, BATTERED WOMEN AS SURVIVORS 27-39 (1988) ("causal model of helpseeking showed an increased helpseeking in response to more dangerous abuse").

93. Note that the sources of help that battered women call on for help are largely rated as unsuccessful in ending the violence. See, e.g., GONDOLF, *supra* note 92, at 22 (arguing that it is the helpers that battered women contact, not the women themselves, who suffer from learned helplessness); Fischer, *supra* note 1, at 65, 68.

illustrated by the narratives above, they risk further and heightened violence each and every time they resist.⁹⁴ Resistance breaks the most fundamental rule in the relationship: do not rebel against any of the rules.

3. *The Pretext of Conflict or Disputes*

Our argument that abuse occurs within a relationship context of control and domination is an explicit rejection of the popular belief that abuse is simply a logical extension of a heated argument or disagreement. Richard Gelles and Murray Straus, authors of the major assessment tool in the field, the Conflict Tactics Scale (CTS), clearly identify conflict as *the* cause of family violence.⁹⁵ In their perspective, all violence flows from conflict, captured particularly well in the instructions for the CTS:

No matter how well a couple gets along, there are times when they disagree . . . or just have spats or fights because they're in a bad mood or tired or for some other reason. They also use many different ways of trying to settle their differences. I'm going to read some things that you and your partner might do when you have an argument. I would like you to tell me how many times . . . in the past 12 months you . . .⁹⁶

The CTS has been criticized for precisely the reason that Gelles and Straus designed it: that it seeks only to identify violence that occurs in the context of conflict, leaving out violence that occurs "out of the blue," although actually as a result of a broken rule, or other context.⁹⁷ Battered women's narratives of the context of the abuse suggests quite the opposite of conflict. Women are typically beaten in a variety of situations that could hardly be classified as conflict: while sleeping,⁹⁸ while using the toilet,⁹⁹ and while in another room that the batterer suddenly entered to begin his beating.¹⁰⁰ The usual scenario women describe is that at one moment all is calm and in the next, there is a major, seemingly untriggered explosion:

I remember walking in, got undressed, and put my robe on, and I was going to get a glass of milk. At one moment we were laying together and kissing and everything seemed fine. And, it was like a second later, he was saying that I stayed out too late, and asked who was there and stuff, and then just . . . everything blew up. I know he threw me off the bed. And he told me he was going to beat me to death. And, then he said, "I'm going to set the trailer on fire with you and your daughter in it." And then he goes, "well first, bitch, you are going to get me a glass of ice

94. See *supra* notes 79-94 and accompanying text.

95. GELLES & STRAUS, *supra* note 13, at 78-84. In particular, they note: "Faced with conflict, one can fight or flee. Because of the nature of family relations, it is not easy to choose the flight option when conflict erupts. Fighting, then, becomes a main option for resolving intimate conflict." *Id.* at 83.

96. *Id.* at 227. The scale has 19 items, which range from "[d]iscussed an issue calmly" to "threw . . . something" (all considered nonviolent); "[p]ushed, grabbed, or shoved . . ." to "[u]sed a knife or fired a gun" (all considered violent). *Id.*

97. E.g., FRIEZE & BROWNE, *supra* note 44, at 168-69.

98. BROWNE, *supra* note 11, at 59.

99. WALKER (1979), *supra* note 9, at 89.

100. *Id.* at 157.

water."¹⁰¹

In addition to the information about context, batterers' behavior during abusive incidents does not support an image that these are men out of control with anger. Women have reported deliberate, calculating behavior, ranging from searching for and destroying a treasured object of hers to striking her in areas of her body that do not show bruises (e.g. her scalp) or in areas where she would be embarrassed to show others her bruises.¹⁰²

Anger and conflict may be frequently confused with violence because both can be a proxy for abuse. The abuser may in fact be angry when he beats his victim or a conflict over what she has served for dinner may have developed before the incident of violence. But this simple coexistence in time does not mean that the anger or conflict has caused the violence. Lurking underneath the surface anger or conflict is the batterer's need to express his power over his victim. Even if the anger is controlled and all sources of conflict are removed from the relationship, violence still occurs. After all, batterers are usually involved in other social relationships, at work or elsewhere, where they become angry or have conflicts with others that they do not abuse.¹⁰³ Their ability to cope with anger in some situations but not at home suggests that conflict and anger are not at the root of domestic violence. Perhaps the best evidence, however, that abuse is not about anger or conflict is that violence continues to occur, frequently escalating, after women leave their abusers.

4. Separation Abuse: Heightened Risk for Abuse Following Separation

The most dangerous time for a battered woman is when she separates from her partner.¹⁰⁴ Many attacks are precipitated in retaliation for her

101. Fischer, *supra* note 1. Similarly:

I was sitting over there and for no reason he came up and just knocked me over in the chair. I went down. Me and the chair went down, and he started knocking me all over the kitchen, and down the hall here, and pushed me and I scraped my arm, and he pushed me into that thing right there, and I scraped my arm real bad. I asked him if I could wash my arm off 'cause it was bleeding a little bit and he said, "No." Then I went into the bedroom, and he started knocking me around the bedroom. I was up against the door, and he slapped my face, and I hit my head on the door sill, and a big bump came up. I said, "Can I go wash my face?" and he said, "No." It scared me because a big bump just immediately arose, and that scared me. Then he knocked me down and kicked me a couple of times, and finally he just walked out. I had bruises all over me, on my face and on my arms, on my legs, and . . . I couldn't go right to work.

GILES-SIMS, *supra* note 6, at 1.

102. BROWNE, *supra* note 11, at 61.

103. McGregor, *supra* note 69, at 67.

104. Joan Pennington, *Family Law Developments*, 25 CLEARINGHOUSE REV. 1159, 1159 (1992) (citing U.S. Department of Justice statistics); see also CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 150-52 (1989); ANN JONES, WOMEN WHO KILL 299 (1980); Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counselors,"* 10 INT'L J. L. & PSYCHIATRY 403, 408 (1987). Martha Mahoney has named abuse occurring during separation as "separation assault," emphasizing the need to recognize this form of abuse within battered women's experiences as part of the batterer's struggle to control and dominate. Mahoney, *supra* note 47, at 6-7.

leaving, some as part of an escalation of violence following separation.¹⁰⁵ Separation tends to increase, not decrease the violence,¹⁰⁶ and many of the women who are murdered by their partners are killed after separation.¹⁰⁷ As Martha Mahoney has argued, women who leave their partners may commit the ultimate act of rebellion, which triggers the fatal control/domination response from the abuser, the final episode of violence.¹⁰⁸ As separation abuse illustrates, the victim's attempt to end the relationship does not ensure that the control and domination will end; indeed, it may escalate.

C. HIDING, DENYING, AND MINIMIZING THE ABUSE

This third element of the culture of battering involves the shame and embarrassment battered women feel, particularly when their injuries are visible to others. It is typical for women to remain inside their homes until their bruises and other injuries fade away:

After a beating Francine instinctively tried to hide the fact. She wore sunglasses and makeup to cover a black eye or stayed out of sight while a split lip healed, and in fact, no one seemed to notice. Friends and neighbors, Mickey's brothers and their wives, studiously ignored any marks on her. Francine felt as though she had an unmentionable affliction from, which everyone turned away.¹⁰⁹

105. Mahoney, *supra* note 47, at 66. Assaults can occur at three stages: 1) when the abuser is suspicious of her leaving, 2) when the woman announces her separation, and 3) after separation. *Id.* at 65. For example:

I said I couldn't live like that anymore and would leave if he didn't stop. He kept saying I couldn't leave because we didn't have enough money to support two households. . . .

Suddenly he lost his temper . . . He stormed upstairs . . . He came down the stairs shouting and I saw that he really did have the shotgun. I knew it was fully loaded

I turned around and ran out the front door screaming. . . .

Id. at 66.

We had been separated nine months. I came home late one night with a date. . . .

He knocked. . . I told him to go home. He wouldn't leave. He rang the bell for fifteen minutes without stopping. . . .

He started pounding on the door. He broke it in and started a fight with [my date]. . . .

[I]t took two hours to try to get him to leave. He ran around with a butcher knife. . . .

Id. at 66-67.

106. See Ellis, *supra* note 104, at 408 (citing several studies supporting this conclusion).

107. Mahoney, *supra* note 47, at 72.

108. See *id.* at 71.

109. McNULTY, *supra* note 11, at 74. Others may overtly deny the victim's experience of violence:

My mother-in-law knew what was going on, but she wouldn't admit it . . . I said, 'Mom, what do you think these bruises are?' and she said 'Well, some people just bruise easy. I do it all the time, bumping into things.'

Ferraro & Johnson, *supra* note 35, at 333.

No, nobody in the building heard anything. They're afraid to. They didn't hear him break down the door, or even ring the doorbell for fifteen minutes in the middle of the night. 'None of them heard anything!'

Mahoney, *supra* note 47, at 67.

As these experiences indicate, denial occurs on a societal as well as individual level. See *id.* at 9. Undoubtedly this social denial facilitates effective denial and minimization by battered

Something triggered him and he stood up and threw that two liter Pepsi and hit me right in the eye and my glasses went flying. I had a real nice black eye. And, immediately when it hit me, I mean, he came over and said, Baby I didn't mean to hit you. I was, you know, trying to throw it, but miss you. . . . He calmed right down, he was real upset about it . . . and so loving . . . I just thought, well, it was one of those once in a lifetime things. He couldn't believe he even did it. . . . And, the next day, the only thing that was said was, you tell people you fell and hit your eye, that you got drunk and you fell on the chair or something. Well, for two days, I didn't go out of the house because I didn't really want to try to explain.¹¹⁰

Even when it becomes impossible to hide the abuse from others, battered women may engage in extreme forms of denial or minimize the seriousness of the abuse or the abuser's intent to harm. Often they rationalize the abuse as "an accident" or result of excessive drinking.¹¹¹ For example, one of the women in Walker's earlier study, a physician who had been dating her boyfriend for about four months, was severely beaten by him when he threw her down on the kitchen floor and stomped on her. She bled internally, had to have emergency surgery to remove one of her kidneys, and barely survived. As the victim explained:

I love him and he loves me. I can't give him up, can I? At my age? Looking the way I do? Who else would want me? . . .

I'm really not sure how the whole incident happened. Perhaps it was my fault. [He] says he really didn't throw me against the stove. He just pushed at me and I fell and hit the stove. I really believe him. He couldn't have wanted to hurt me as badly as I was hurt. It really must have been an accident.¹¹²

There are many ways that battered women minimize the violence. The coping strategy of minimization, like denial, allows women to escape temporarily from the pain and trauma of the violence.¹¹³ Women may not identify themselves as battered, citing a lack of physical abuse¹¹⁴ or examples of wo-

women themselves. Fischer reported that most women in her study had experienced one or multiple forms of "negative consequences" as a result of disclosing the abuse to others, including being blamed for the abuse, dismissed as a liar, told what to do, or informed that abuse is normal. Fischer, *supra* note 1, at 87.

110. See Fischer, *supra* note 1.

111. Nearly all (87%) of the women in Fischer's study reported that the abuser's alcohol and/or drug problem was the cause of the abuse. Fischer, *supra* note 1, at 64.

112. WALKER (1979), *supra* note 9, at 92-93. Ferraro and Johnson would label this as a denial of "emotional options," where battered women experience feelings of fear of losing the one sure relationship they have and that they cannot risk losing that: "He's all I've got. My dad's gone, and my mother disowned me when I married him. And he's really special. He understands me, and I understand him. Nobody could take his place." Ferraro & Johnson, *supra* note 35, at 330.

113. KELLY, *supra* note 10, at 193. After a battering incident, the family may simply pick up where it left off, as if nothing had happened: "[R]outines quickly return to normal. Meals are served, jobs and schools are attended, and daily chores completed. Even with lingering pain, bruises, and cuts, the normality of everyday life overrides the strange, confusing memory of the attack." Ferraro & Johnson, *supra* note 35, at 329.

114. Fischer notes that reports of physical abuse vary depending on whether an open-ended

men who have been more severely abused.¹¹⁵ Minimizing the abuse also may involve attending to the positive aspects of the relationship, reducing the impact of the abuse on the victims' lives.¹¹⁶ As Liz Kelly wrote, minimization is fostered by the cyclical nature of domestic violence: "Where there were long gaps between violent episodes, women tended to minimize the violence by choosing [to] focus on the time when it was not occurring and by hoping that it would not occur in the future."¹¹⁷

D. SUMMARY

The culture of battering refers to the relationship context of an abusive relationship. The first of the three elements of the culture of battering is the abuse, which includes at least one of the following types: physical, emotional, sexual, familial, and property. Professionals have increasingly recognized non-physical forms of abuse as harmful to domestic violence victims. The second element is the systematic pattern of domination and control that the batterer exerts over his victim. This pattern may be initiated by the batterer's gradual imposition of a series of rules that his victim must follow or be punished for violating. Over time, victims may censor their own behavior in anticipation of yet-unexpressed rules. The abuser's rein on the members of the household is enhanced by the use of emotional abuse and financial and social isolation, all of which help keep the victim in fear of impending abuse. Victims may engage in episodes of rebellion or resistance to the rules, which are nearly always met with more serious violence. Even separating from the abuser, an act of rebellion by itself, does not secure the end of the abuse; rather, it frequently escalates it. The third element, hiding, denying, and minimizing the abuse, refers to typical coping strategies that battered women use to reduce the psychological impact of the abuse. Each of these elements to some degree must be present in order for a culture of battering to be established.

III. THE WIDESPREAD USE OF MEDIATION FOR "DOMESTIC DISPUTES"

The use of mediation to resolve what are often generically labeled "domes-

question ("Have you been physically abused?") is asked or whether specific questions about physically abusive acts (e.g. "Have you been slapped?") are asked. This may be a reflection that some of the lower forms of physical abuse are not considered abuse by some women. Fischer, *supra* note 1, at 59 n.16. The same is true for sexual abuse. *Id.*; see also KELLY, *supra* note 10, at 145-46.

115. Fischer, *supra* note 1, at 92. Ferraro and Johnson reported the following case illustration:

First of all, the first beatings—you can't believe it yourself. I'd go to bed, and I'd cry, and I just couldn't believe this was happening. And I'd wake up the next morning thinking that couldn't of happened, or maybe it was my fault. It's so unbelievable that this person that you're married to and you love would do that to you, but yet you can't leave either because, ya'know, for the other 29 days of the month that person loves you and is with you.

Ferraro & Johnson, *supra* note 35, at 334.

116. KELLY, *supra* note 10, at 146.

117. *Id.* at 147.

tic relations issues" is widespread and growing. Many states have enacted statutes providing for mediation in divorce, child custody, and disputes involving division of property.¹¹⁸ In some instances mediation is mandatory.¹¹⁹ In others judges have discretion to assign these civil cases to mediation on an almost wholesale basis.¹²⁰ Prosecutors have discretion to direct criminal cases involving domestic assault to mediation as part of diversion programs.¹²¹ Mediators and mediation service providers are expanding at a tremendous rate and have organized themselves into professional organizations that argue for even more expansive use of mediation.¹²² The providers argue that mediation is a viable, superior remedy for domestic disputes, even as a potential remedy for cases in which the central issue is criminal assault.

We take the position that both the theory and practice of mediation pose serious problems for its use as a resolution device when a relationship involves a culture of battering. In this section we review a number of statutes that foster mediation and discuss problems associated with them. We also consider literature that advocates broadening the uses of mediation, particularly that which suggests mediation is appropriate as a resolution device when the central issue is domestic assault. This provides a backdrop for Section IV where we detail the incompatibility of mediation ideology and practice for domestic violence cases.

A. SELECTED STATUTES AND DISCRETIONARY GUIDELINES

The statistics indicate that a high percentage of women involved in divorce proceedings are likely to be battered, including those in mediation programs. Many battered women are divorced or separated,¹²³ confirming studies that suggest that "the most dangerous time for a woman is when she divorces or separates from her spouse."¹²⁴ From the perspective of the culture of battering, separation from the abuser may actually enhance the likelihood and seriousness of the violence because abuse is one of the few tools the abuser has left to attempt to dominate and control his victim.¹²⁵ Estimates of the number of battered women who enter divorce mediation programs

118. See *infra* note 128.

119. See *infra* notes 175-211 and accompanying text.

120. See *infra* notes 132-74 and accompanying text.

121. See, e.g., LINDA A. FOLEY, *A PSYCHOLOGICAL VIEW OF THE LEGAL SYSTEM* 166 (1993).

122. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441, 445 (1992).

123. Statistics from the United States Department of Justice, released in January 1991, indicate that violent crime declined twenty percent between 1973 and 1987, but violent crimes against women did not decrease at all during that period. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *FEMALE VICTIMS OF VIOLENT CRIMES* 14 (1991). In addition, 75% of women reporting battering were divorced or separated. *Id.* at 5.

124. Pennington, *supra* note 104, at 1159.

125. See *supra* notes 104-08 and accompanying text (separation abuse); see also Fischer, *supra* note 1, at 109 (noting same for orders of protection).

range from a conservative ten percent¹²⁶ to fifty percent.¹²⁷

Despite the substantial probability that many divorcing women will be battered, the use of mediation continues to expand. Many states have enacted statutes encouraging mediation of domestic relations cases, including divorce and child custody.¹²⁸ Some states require mediation.¹²⁹ Although some states exempt battered women from mandatory mediation,¹³⁰ alarmingly few provide special rules for domestic violence, and none provide a mechanism to screen for those cases. Many ignore even the possibility of domestic violence among divorcing couples and none consider patterns of domination and control. Some states do not establish minimum credentials for mediators while others have model provisions for mediator qualifications. Likewise, some states give the mediator a great deal of authority, but fail to establish even minimum qualifications for mediators. Others specifically limit the authority of the mediator. Most statutes provide broad discretion for the appointment of the mediator. Likewise, some statutes are quite broad about the subject matter of mediation, while others are quite limited. The statutes often do not provide or recommend representation for

126. David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 *MEDIATION Q.* 331, 345 (1990). Chandler believes that the prevalence of battering in divorce mediation cases has been exaggerated. *Id.* at 331. His own study revealed that 23% of couples had a history of violence, *id.* at 339, but he determined that only in 10% was the violence "serious." *Id.* at 345.

127. Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 *MEDIATION Q.* 377, 377 (1990) [hereinafter Erickson & McKnight].

128. See ALASKA STAT. § 25.24.060 (Supp. 1992); COLO. REV. STAT. § 14-10-129.5 (1987); FLA. STAT. ANN. § 61.183 (West Supp. 1993); ILL. ANN. STAT. ch. 40, paras. 602.1, 607.1(c)(4) (Smith-Hurd Supp. 1992); IOWA CODE ANN. § 598.41 (West Supp. 1992); KAN. STAT. ANN. §§ 23-601 to -607 (1988); LA. REV. STAT. ANN. §§ 9:351-:356 (West 1991); MINN. STAT. ANN. § 518.619 (West Supp. 1993); N.H. REV. STAT. ANN. § 328-C (Supp. 1989); N.M. STAT. ANN. § 40-12-5 (Michie 1989); R.I. GEN. LAWS § 15-5-29 (1988); TEX. CIV. PRAC. & REM. CODE ANN. §§ 152.001-004 (Vernon Supp. 1993); WASH. REV. CODE ANN. § 26.09.015 (West Supp. 1993); WIS. STAT. ANN. § 767.11(3) (West Supp. 1992).

Other states authorize conciliation in domestic relations cases. See ARIZ. REV. STAT. ANN. §§ 25-381.01-.24 (1991); IND. CODE ANN. § 31-1-11.5-19 (Burns 1992); IOWA CODE ANN. § 598.161 (West 1981); KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984); MONT. CODE ANN. §§ 40-3-101 to -127 (1991); NEB. REV. STAT. §§ 42-808 to -823 (1988); OHIO REV. CODE ANN. §§ 3117.01-.08, 3105.091 (Anderson 1989); UTAH CODE ANN. § 30-3-16.2 (1976).

Some states authorize arbitration in domestic relations issues. See CAL. CIV. CODE § 4800.9 (West Supp. 1993); WASH. REV. CODE ANN. §§ 7.06.010-.910 (West 1987) (all civil actions in Superior Court, except appeals from Municipal or District Courts for \$15,000 or less or up to \$35,000 if two-thirds of Superior Court approves; a majority approval required for child support issues).

At least one state provides for voluntary participation in mediation only. See MICH. COMP. LAWS ANN. § 552.513 (West 1988).

129. See CAL. CIV. CODE § 4607(a) (West Supp. 1993); DEL. FAM. CT. C.R. (16)(a)(1); ME. REV. STAT. ANN. tit. 19, § 752(4) (West Supp. 1992); N.C. GEN. STAT. § 50-13.1 (1989); OR. REV. STAT. § 107.765 (1990); UTAH CODE ANN. § 30-3-21 (Supp. 1992).

130. See COLO. REV. STAT. § 13-22-311(1) (1987); FLA. STAT. ANN. § 44.102(b) (West Supp. 1993); ILL. ANN. STAT. ch. 40, para. 607.1(c)(4) (Smith-Hurd Supp. 1992); ME. REV. STAT. ANN. tit. 19, § 768(5) (West Supp. 1992); MD. R. S73A(b)(2); MASS. GEN. L. ch. 209A, § 3 (Law, Co-op. Supp. 1992); MINN. STAT. ANN. § 518.619 (West Supp. 1993); N.H. REV. STAT. ANN. § 458:15-a (1992); N.C. GEN. STAT. § 50-13.1(c) (Supp. 1992); N.D. CENT. CODE § 14-09.1-02 (1991); OR. REV. STAT. § 107.179 (1990); WASH. REV. CODE ANN. § 26.09.191 (West Supp. 1993); WIS. STAT. ANN. § 767.11(5), (10) (West Supp. 1992).

the parties, and some give the mediator the authority to exclude legal counsel from the process.¹³¹

Below we highlight some of the statutes governing the mediation of domestic cases to illustrate the widespread use of mediation, the inconsistent implementation of programs from state to state, the absence of screening mechanisms for cases involving battering, the lack of consistent credentialing for mediators, and the obvious ignorance of the risks in mediating "disputes" that arise out of a culture of battering.

1. *The Discretion of the Court - Permitting the Judge to Order Mediation*

Many states give courts broad discretion to order mediation in domestic cases.¹³² In Alaska, the court may order mediation for child custody, divorce, and annulment cases.¹³³ The statute permits the judge to appoint the mediator, although the parties may challenge peremptorily one mediator.¹³⁴ There does not appear to be anything in the statute outlining qualifications for mediators or guidelines for appointment. The statute provides for the presence of counsel in divorce mediation,¹³⁵ but does not provide for the presence of counsel during custody mediation.¹³⁶ There is nothing in the Alaska statute that specifically deals with issues of domestic violence, although in divorce mediation the parties may withdraw after participation in the first mediation conference.¹³⁷

Some statutes authorize court-ordered mediation, but provide exceptions for abuse cases.¹³⁸ The difficulty in most of these cases is that no real mechanism exists for identifying the abuse. For example, Minnesota provides that a domestic relations matter may be set for mediation prior to, concurrent with, or subsequent to the setting of the matter for hearing.¹³⁹ Interest-

131. See CAL. CIV. CODE § 4607(d) (West Supp. 1993); KAN. STAT. ANN. § 23-603(b) (1988); WIS. STAT. ANN. § 767.11(3) (West Supp. 1990). The general trend in the statutes to fail to recognize the likelihood that many couples entering mediation will have a history of violence is reflected in the American Bar Association standards for family dispute mediators. The ABA House of Delegates adopted the "Standards of Practice for Lawyer Mediators in Family Disputes" on August 8, 1984. Forum, National Institute for Dispute Resolution, Dec. 1984, at 5-9. Nothing concerning spousal violence or abuse is highlighted in these standards.

132. An Iowa court may require custody mediation where the parties do not agree to joint custody. IOWA CODE ANN. § 598.41 (West Supp. 1992). In addition, the child may be required to participate. *Id.*

In Louisiana, the parties may be required to mediate their differences in a custody or visitation proceeding. LA. REV. STAT. ANN. §§ 9:351-:356 (West 1991).

See also ALASKA STAT. ANN. § 25.24.060 (Supp. 1992); COLO. REV. STAT. § 14-10-129.5 (1987); FLA. STAT. ANN. § 61.183 (West Supp. 1993); ILL. ANN. STAT. ch. 40, paras. 602.1, 607.1(c)(4) (Smith-Hurd Supp. 1992); KAN. STAT. ANN. §§ 23-601 to -607 (1988); MINN. STAT. ANN. § 518.619 (West Supp. 1993); N.H. REV. STAT. ANN. § 328-C (Supp. 1989); N.M. STAT. ANN. § 40-12-5 (Michie 1989); R.I. GEN. LAWS § 15-5-29 (1988); TEX. CIV. PRAC. & REM. CODE ANN. §§ 152.001-.004 (Vernon Supp. 1993); WASH. REV. CODE ANN. § 26.09.015 (West Supp. 1993); WIS. STAT. ANN. § 767.11(3) (West Supp. 1992).

133. ALASKA STAT. §§ 25.20.080, .24.060 (1991 & Supp. 1992).

134. *Id.* § 25.24.060(b) (Supp. 1992).

135. *Id.* § 25.24.060(c) (Supp. 1992).

136. *Id.* § 25.20.080(b) (1991).

137. *Id.* § 25.24.060(d) (Supp. 1992).

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

139. MINN. STAT. ANN. § 518.619 (West Supp. 1992).

ingly, the mediator is directed to "use best efforts to effect a settlement . . . but shall have no coercive authority."¹⁴⁰ The statute provides an exception to required mediation if the court determines that there is probable cause that one of the parties, or a child of a party, "has been physically or sexually abused by the other party."¹⁴¹ The statute also specifies mediator qualifications, including a minimum of forty hours of mediation training.¹⁴² The mediation agreement, if any, may not be presented to the court without the consent of the parties and their counsel.¹⁴³ If the parties have not reached an agreement as a result of mediation, the mediator may recommend to the court that an investigation be conducted to assist the parties to resolve the "controversy," and in some limited cases the mediator may conduct the investigation.¹⁴⁴

North Dakota simply says that "the court may order mediation at the parties' own expense."¹⁴⁵ Like Minnesota, it also states that the court may refrain from ordering mediation if the custody, support, or visitation issue involves or may involve physical or sexual abuse of any party or the child of any party to the proceeding.¹⁴⁶ The statute does not suggest any mechanism for identifying the abuse. The North Dakota court is directed to appoint a mediator from a list of qualified mediators approved by the court,¹⁴⁷ and the supreme court is charged with establishing minimum qualifications.¹⁴⁸ The mediator is specifically prohibited from excluding counsel from the mediation.¹⁴⁹

At least one state permits the court to consider abuse issues and order mediation anyway if the court finds it appropriate. An Ohio court is directed to consider the existence of abuse and thereafter may still order mediation, but "only if the court determines that it is in the best interests of the parties . . . and makes specific written findings of fact."¹⁵⁰ The mediator is required to file a report with the court that may contain a mediated agreement, but the court is not bound by the report.¹⁵¹

Other statutes are more specific about what might be mediated and provide exclusions for domestic violence cases according to the particular issues involved in the case. For example, Illinois provides for an exclusion for mediation in domestic violence cases enforcing visitation orders,¹⁵² but not when mediating joint custody.¹⁵³ In cases in which joint custody is requested in Illinois, the parties are first required to submit a Joint Parenting

140. *Id.* § 518.619(1).

141. *Id.* § 518.619(2).

142. *Id.* § 518.619(4).

143. *Id.* § 518.619(7).

144. *Id.* § 518.619(6).

145. N.D. CENT. CODE § 14-09.1-02 (1991).

146. *Id.*

147. *Id.* § 14-09.1-03.

148. *Id.* § 14-09.1-04.

149. *Id.* § 14-09.1-05.

150. OHIO REV. CODE ANN. § 3109.052(A) (Anderson Supp. 1992).

151. *Id.* § 3109.052(B).

152. ILL. ANN. STAT. ch. 40, para. 607.1 (Smith-Hurd Supp. 1992).

153. *Id.* para. 602.1.

Agreement.¹⁵⁴ Once the agreement is submitted, any changes, disputes, or breaches regarding the agreement may be mediated.¹⁵⁵ The court may also order mediation to determine if joint custody is appropriate.¹⁵⁶ Likewise, in enforcing visitation orders, the court may order counseling or mediation, except in cases where there is evidence of domestic violence.¹⁵⁷

In contrast, a number of statutes provide significant detail about the procedure or qualifications of mediators, and then ignore any possible issues of domestic abuse. For example, the Kansas statute governing family law issues¹⁵⁸ provides that the "court may order mediation of any contested issue of child custody or visitation at any time, upon the motion of a party or on the court's own motion."¹⁵⁹ The statute contains a provision outlining the appointment and qualifications of the mediator and requires the court to consider the following: whether an agreement exists for a specific mediator; conflict and bias issues; the mediator's knowledge of the Kansas judicial system and domestic relations cases; the mediator's knowledge of sources for referral; the mediator's knowledge of child development issues, children's clinical issues, effects of divorce on children, and psychology of families; and the mediator's training and experience.¹⁶⁰ Michigan is more specific about the requirements of mediators: they must have a "license or a limited license to engage in the practice of psychology . . . or a master's degree in counseling, social work, or marriage and family counseling."¹⁶¹

For the states that focus on who the mediator is, many states require mediators to attend training sessions. Michigan's statute provides for a training program with not less than forty hours of classroom instruction and 250 hours of practical experience.¹⁶² Wisconsin makes mediation available and requires that mediators have twenty-five hours of training or not less than three years experience in the field of dispute resolution.¹⁶³ Interestingly, the mediator is charged with the responsibility of determining the appropriateness of mediation.¹⁶⁴ If the mediator finds that it is not appropriate, he or she will notify the court, and the court will waive mediation if the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties.¹⁶⁵ Undue hardship can be established if the mediator finds interspousal battery or domestic abuse.¹⁶⁶ Whether or not counsel is permitted to be present at a mediation

154. *Id.* para. 602.1(b).

155. *Id.*

156. *Id.*

157. *Id.* para. 607.1(c)(4).

158. KAN. STAT. ANN. §§ 23-601 to -607 (1988).

159. *Id.* § 23-602(a).

160. *Id.* § 23-602(b).

161. MICH. COMP. LAWS ANN. § 552.513 (West 1988).

162. *Id.* Minnesota requires 40 hours of training. MINN. STAT. ANN. § 518.619(4) (West Supp. 1992).

163. WIS. STAT. ANN. § 767.11(4) (West Supp. 1992).

164. *Id.* § 767.11(6).

165. *Id.* §§ 767.11(6),(8).

166. *Id.* § 767.11(8)(b); *see also id.* §§ 940.19 (defining interspousal battery), 813.12(1)(a) (defining domestic abuse).

session is within the discretion of the mediator.¹⁶⁷

The Kansas statute is illustrative of unusual attention paid to the process of mediation. The statute includes a list under "Duties of Mediator" that outlines mediator responsibility, including the requirement that the mediator advise each of the parties to obtain independent legal advice;¹⁶⁸ however, it allows only the parties to attend the mediation session.¹⁶⁹ Unlike statutes in many other states, the information obtained during the mediation process is not privileged.¹⁷⁰ The mediator is obligated to inform the parties that the mediation process is not privileged and may be subject to disclosure.¹⁷¹ The mediator is required to advise each party, in writing, to obtain legal assistance in drafting any agreement and reviewing any agreement drafted by the other party.¹⁷² It does not speak to issues of domestic violence, but it does provide that either party may terminate the session any time after the second session.¹⁷³ The mediator may also terminate the session when he or she believes that continuation would "harm" one or more parties or the children, or when meaningful participation is lacking.¹⁷⁴ There are no stated guidelines for defining "harm."

2. *Mandatory Mediation*

In California, mediation of custody disputes is mandatory, and there is no provision for exclusion where domestic violence is present.¹⁷⁵ The court appoints the mediator, who may be a member of the "professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court."¹⁷⁶ In addition, the appointed mediator has the authority to exclude counsel from the mediation hearings.¹⁷⁷ The statute also provides that the agreement should be limited to specific custody issues¹⁷⁸ and provides for conducting "negotiations in such a way as to equalize power relationships between the parties."¹⁷⁹ There are no suggested guidelines or reference to some resource for recommendations on how to engage in effective methods of power balancing. The mediator is directed to make "best efforts to effect a settlement."¹⁸⁰ The mediator may interview the child or children in-

167. *Id.* § 767.11(10).

168. KAN. STAT. ANN. § 23-603(a)(5) (1988).

169. *Id.* § 23-603(a)(6).

170. *Id.* § 23-603(a)(9).

171. *Id.*

172. *Id.* § 23-603(c).

173. *Id.* § 23-604(a).

174. *Id.* § 23-604(b).

175. CAL. CIV. CODE § 4607 (West Supp. 1993).

176. *Id.* § 4607(b). Mediators are also required to meet the minimum requirements of a counselor of conciliation as provided in section 1745 of the California Code of Civil Procedure.
Id.

177. *Id.* § 4607(d).

178. *Id.* § 4607(e).

179. *Id.* § 4607.1(c).

180. *Id.* § 4607(a).

volved¹⁸¹ and also has the authority to meet with the parties separately when a request for separate mediation is made or where there has been a history of domestic violence.¹⁸² Thus, the statute does not exclude domestic violence cases from mediation but provides for separate mediation.

The California statute has an interesting provision for a "support person" that may accompany a party to the mediation, but the statute also provides that the mediator may exclude the support person if the "support person participates in the mediation session, acts as an advocate, or the presence of a particular support person is disruptive or disrupts the process of mediation."¹⁸³ One of the problems with the authority given to the California mediator is that it exists hand in hand with the court's broad discretion to appoint a mediator who only meets certain minimum qualifications and who may exclude either party's attorney and "support person."¹⁸⁴

North Carolina has a mandatory mediation statute,¹⁸⁵ but gives the court the authority to waive mediation in cases involving domestic violence.¹⁸⁶ North Carolina requires that child custody matters shall be set for mediation either before or concurrent with the hearing where there is a program established.¹⁸⁷ The statute provides an exception where, for good cause, the court can waive mediation.¹⁸⁸ Good cause may include, among other reasons listed, allegations of abuse and neglect of a minor child, alcoholism, drug abuse, undue hardship, voluntary participation in mediation, and spouse abuse.¹⁸⁹ Additionally, either party may move to have the mediator dismissed due to bias, undue familiarity with one of the parties, or other prejudicial ground.¹⁹⁰ One of the stated goals of the statute is "[t]o provide a structured, confidential, nonadversarial setting that will . . . minimize the stress and anxiety to which the parties, and especially the child, are subjected."¹⁹¹

Not only does Oregon have a mandatory mediation statute,¹⁹² it also has a mandatory arbitration statute in "domestic relations" cases where the only issue is the division or disposition of property.¹⁹³ It does provide the court with the authority to exempt certain cases for good cause.¹⁹⁴ The statute also provides for mandatory mediation in joint custody proceedings "within a mediation program established by the court or as conducted by any mediator approved by the court."¹⁹⁵ Upon a party's motion, the court may waive

181. *Id.* § 4607(d).

182. *Id.* §§ 4607(d), 4607.2(a).

183. CAL. CIV. CODE § 4351.6(c) (West Supp. 1993).

184. *Id.* §§ 4351.5, .6.

185. N.C. GEN. STAT. § 7A-37 (1989).

186. *Id.* § 50-13.1(c) (Supp. 1992).

187. *Id.* § 50-13.1(b) (Supp. 1992).

188. *Id.* § 50-12.1(c) (Supp. 1992).

189. *Id.*

190. *Id.* § 50-13.1(d) (Supp. 1992).

191. *Id.* § 50-13.1(b)(4) (Supp. 1992).

192. OR. REV. STAT. § 36.405 (Supp. 1992).

193. *Id.* §§ 34.405(1)(b), 107.765 (1990 & Supp. 1992).

194. *Id.* § 36.405(2) (Supp. 1992).

195. *Id.* § 107.179(1) (1990).

mediation if participation will lead to emotional distress.¹⁹⁶ The statute does not specifically speak to abuse, but does have some other protection. Although the statute gives the court the authority to establish mediation procedures in other cases, any mediation of property division or child/spousal support issues requires the written approval of the parties and their counsel.¹⁹⁷ Additionally, the mediator may not make any substantive recommendations to the court without approval of the parties.¹⁹⁸ The statute provides for minimum educational and experience qualifications as well as gives the court the discretion to employ or contract for mediators directly or through public or private agencies.¹⁹⁹ The mediation proceedings are private and confidential.²⁰⁰

The Utah statute establishes a mandatory mediation program,²⁰¹ but provides an exception for cases that would cause undue hardship to or threaten the mental or physical health or safety of either of the parties, or the child or children of the parties, or cases in which a party has engaged or been victimized in interspousal domestic violence.²⁰²

In at least one state, mediation is encouraged as a matter of public policy. Maine's statute has a formal finding that mediated resolutions of disputes between parents is in the best interest of minor children.²⁰³ Thus, the statute provides that when there are minor children in a custody action, mediation is mandatory.²⁰⁴ The statute provides that the court may waive the mediation requirement for extraordinary cause supported by affidavit.²⁰⁵ Once involved in the mediation session, the court must determine that the parties made a good faith effort to mediate.²⁰⁶ If the court does not find good faith, it may order the parties to mediation, may dismiss the action, may assess attorney's fees and costs, or may impose any other sanction that is "appropriate."²⁰⁷ In addition, the child custody statute states that the mediator should consider the "existence of a history of domestic abuse between the parents"²⁰⁸ when mediating child custody issues.²⁰⁹ The statute also provides that the court shall not consider abandonment of the residence as a factor in determining parental rights when the parent who left was "physically harmed or seriously threatened with physical harm . . . and that harm or threat of harm was causally related to the abandonment."²¹⁰ However, one chapter in its domestic relations statute precludes protection order cases

196. *Id.* § 107.179(3) (1990).

197. *Id.* § 107.765(1) (1990).

198. *Id.* § 107.765(2) (1990).

199. *Id.* § 107.775 (1990).

200. *Id.* § 107.600 (1990).

201. UTAH CODE ANN. § 30-3-21 (Supp. 1992).

202. *Id.* § 30-3-22.

203. ME. REV. STAT. ANN. tit. 19, §§ 214, 581, 752 (West Supp. 1992).

204. *Id.* §§ 214(4), 581(4), 752(4).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* §§ 214(5)(K-1), 581(5)(K-1), 752(5)(K-1).

209. *Id.*

210. *Id.* §§ 214(8), 581(8), 752(8).

from being mediated.²¹¹

B. MEDIATION IN SPOUSAL ABUSE CASES

There are two types of legal cases where mediation with batterers and their victims is likely to occur: 1) criminal assault/battery cases; and 2) divorce and child custody. While the type of case will determine the exact form that the agreement will take, both criminal and divorce mediation sessions with abusive couples will not differ markedly from mediation with general populations. Whether the context is criminal or civil, mediation that has the elimination of violence against the victim as its goal will result in a settlement of some variation like: "Mr. Abuser agrees not to hit Ms. Victim and Ms. Victim agrees to talk to Mr. Abuser about any subject provided that he has not been drinking."²¹² Our purpose in this section is limited: we wish to simply provide a descriptive summary of how mediation with domestic violence is carried out. We follow this with our critical evaluation of the weaknesses of these mediation programs.

1. Mediation in Criminal Assault/Battery Cases

In addition to the many jurisdictions where mediation is used for divorce and child custody, every year thousands of cases in which the specific issue is criminal assault are referred annually to mediation centers.²¹³ The referrals are made by judges, district attorneys, and court clerks. In many instances public mediation centers send their personnel to the court to screen for such cases and court personnel then give their imprimatur to attempts to contact the parties for mediation.

The utilization of mediation for criminal assault/battery against spouses has been encouraged and supported by articles in scholarly journals that provide a rationale for mediation as an alternative to the court systems. A leading article by Bethel and Singer, for example, labeled mediation as an important new remedy for domestic violence cases.²¹⁴ They described a model program of community mediation that included domestic violence cases within its claimed scope of expertise. This center, called the "Citizens' Complaint Center", operates in the District of Columbia and is separate

211. *Id.* § 768(5).

212. Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 23 n.15 (1982) (example of criminal case mediation agreement where husband agrees "that I will not physically harm in any way my wife" and wife agrees "that I will talk and communicate with [my husband] on any subject provided [he] has not been drinking when he approaches me") [hereinafter Bethel & Singer].

213. See U. S. DEPT. OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 22, 27 (1980) [hereinafter *Final Evaluation Report*]. See generally Chandler, *supra* note 126; Desmond Ellis & Noreen Stuckless, *Preseparation Abuse, Marital Conflict Mediation, and Postseparation Abuse*, 9 MEDIATION Q. 205 (1992) [hereinafter Ellis & Stuckless]; Anne E. Menard & Anthony J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 MEDIATION Q. 293 (1990) [hereinafter Menard & Salius]; Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39 (1990).

214. Bethel & Singer, *supra* note 212, at 15.

from the prosecutor's office.²¹⁵ Like all disputes that the center handles, mediation in domestic violence cases occurs only if both parties agree.²¹⁶ The mediation occurs in a single hearing set for a specific time and date, and typically two mediators are assigned to each case.²¹⁷ Bethel and Singer identified mediation as faster, cheaper, and empowering of both parties because it requires direct involvement of both in the resolution process.²¹⁸ They also pointed out that it lessens the demand on the resources of the legal system because it does not require the time of judges, prosecutors, and defense attorneys.²¹⁹

With a slightly different spin, Corcoran and Melamed²²⁰ have similarly urged consideration of mediation on the grounds that it is less remote and impersonal than the court system that has traditionally been unresponsive to battered women.²²¹ Battered women are not protected, they claim, by restraining orders, by the police, who frequently fail to arrest the abuser, by prosecutors, who infrequently prosecute domestic cases, or by judges and juries, who refuse to convict or sentence to jail the rare abuser who enters the system.²²² Criminal prosecution only attempts to control domestic violence (and does so inadequately), without addressing the societal causes of battering.²²³ In these authors' view, what is needed is more attention to compassionate approaches to dealing with domestic violence, approaches that incorporate support and treatment for both victims and offenders.²²⁴ By addressing the violence directly, including its causes and methods of rehabilitation, the "couple may actually experience relief and support in knowing that others have shared their experiences . . ." ²²⁵ Like Bethel and Singer, they argue that mediation offers "the prospect of empowerment to the victim, rehabilitation of the batterer, and, as a model of constructive conflict resolution, an opportunity to end the cycle of violence."²²⁶ Media-

215. *Id.* at 25. Even though the center is technically separate, a complaint might lead to the initiation of criminal charges or a protection order. *Id.* The center specifically contemplated that much of its caseload would be intrafamily cases, in part because the three law enforcement agencies who organized the center are mandated by the D.C. Code to cooperate in the disposition of intrafamily offenses. *Id.* at 25 n.18.

216. *Id.* at 26.

217. *Id.*

218. *Id.* at 25.

219. *Id.* at 15.

220. Kathleen O. Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303, 311 (1990) [hereinafter Corcoran & Melamed].

221. *Id.* at 307-08.

222. *Id.*

223. *Id.* at 309.

224. *Id.* at 310.

225. *Id.* at 311.

226. *Id.* But see Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317, 326-27 (1990). Hart notes:

[M]ediation offers false promises to battered women—promises of cooperation, honest communication, safety, amicable postdivorce collaboration in parenting, improved communication, and fairness. No mediator, no matter how skillful or sensitive to domestic violence, can transform the belief systems and conduct of batterers in the mediation arena and ensure that these promises are realized.

Id.

tion can be effective in the cessation of further violence, they suggest, because the process models other approaches to resolving conflicts that are nonabusive.²²⁷ Mediation may have immediate practical effects as well, including the ability to structure a prompt protective agreement involving the appropriate criminal justice mechanisms²²⁸ or an agreement that the abuser will seek counseling.²²⁹

Corcoran and Melamed propose several modifications to the mediation process to address concerns raised primarily by victim advocates about mediation of domestic violence cases. First, they suggest that mediation include victim advocates or the victim's attorney: individuals who balance negotiating power. The presence of non-neutral individuals may eliminate covert intimidation so that the rights of the victim can be better protected.²³⁰ Second, they suggest the use of private caucusing with the parties to encourage disclosure about intimidation or abuse and check on the victim's safety.²³¹ Third, they suggest the use of prerequisites to mediation, such as counseling or protective orders to encourage victims and abusers to obtain outside help.²³² Fourth, they suggest that mediators take affirmative steps, through the use of questionnaire or interview screening, to determine whether there has been abuse in the relationship.²³³

To support the position that mediation can have a positive effect for battered women and their abusers, Corcoran and Melamed cite the study conducted by Bethel and Singer comparing the outcome of mediation cases involving domestic violence with cases that did not involve domestic violence.²³⁴ Bethel and Singer had mediation staff contact participants by telephone approximately two months after mediation was attempted.²³⁵ Statistically, in comparing mediated domestic violence cases with non-violent cases, the authors found no significant differences between the samples in terms of the parties' satisfaction with the mediation process, their satisfaction with the agreement, and satisfaction with the extent to which the agreement was reported to have been adhered to.²³⁶ Based on data that they do

227. Corcoran & Melamed, *supra* note 220, at 311. Bethel & Singer, *supra* note 212, suggest that the use of the "ground rules" of mediation can change the parties' method of interacting. As an example, the mediator will insist that each party listen to the other without interrupting: "courteousness may not previously have been the parties' strong point; the mediation process is an exemplary one in that couples are shown at least a glimpse of a more respectful way to interact." *Id.* at 368. But this presumes that changing various communication strategies, should those even generalize to use outside the context of mediation, is the reason for the abuse. This does not conform with accounts given by battered women when describing their relationships. Often women point to at least some violence emerging "out of the blue" or as a result of manufactured "arguments." See *supra* notes 97-103 and accompanying text.

228. Corcoran & Melamed, *supra* note 220, at 311.

229. *Id.*

230. *Id.* at 312.

231. *Id.*

232. *Id.* at 312, 314.

233. *Id.* at 313.

234. *Id.* at 311.

235. Bethel & Singer, *supra* note 212, at 26.

236. *Id.* at 27. The authors did not, however, present the raw data comparing the domestic

not provide for the reader, Bethel and Singer concluded that domestic violence cases are "not less suitable for mediation than other interpersonal disputes."²³⁷ While Bethel and Singer conceded that, perhaps, mediation should not be used for the most serious cases of spousal violence, they also set forth the caveat that more research might prove mediation's usefulness in those instances.²³⁸

Despite Bethel and Singer's claim that mediation may protect battered women from further violence, other empirical work indicates that this may not be true. For example, Desmond Ellis found that battered women were more likely to be abused after separation if they went through mediation rather than adjudication with lawyers.²³⁹ He reported that attorneys were more likely than mediators to use particular strategies to "challenge" the batterer. For instance, lawyers might seek to increase the adverse consequences of violence by enlisting the help of law enforcement through orders of protection or police involvement.²⁴⁰

Ellis' empirical study is cited by advocates for battered women who have repeatedly emphasized that victims should never have to negotiate for their physical safety. The advocates argue that safety is a basic right and under no circumstances should a woman ever have to bargain it away.²⁴¹ Forcing victims to negotiate with their abusers in this fashion both compromises the message that domestic violence is a crime²⁴² and enhances the power imbalance between the parties.²⁴³ Some assert that mediation should be used in conjunction with other intervention efforts and that "it is never appropriate to mediate about stopping the violence."²⁴⁴ However, even for some who advocate the more limited use, the "empowerment" of the victims of spousal abuse is commonly pointed to as one of the positive outcomes of mediation.²⁴⁵

violence from the other cases, so an independent statistical evaluation of this claim is not possible.

237. *Id.* at 27.

238. *Id.* at 16:

The following discussion will assume that some cases are suitable for mediation while others are not. It is nonetheless important to note that there are no data to support this assumption. It is a normative judgment, based upon considerations of equity, our current knowledge of the mediation process, and common perceptions of the function of our criminal law. More experience with mediation programs may produce evidence that this judgment is too conservative.

239. Ellis, *supra* note 104, at 408-10.

240. *Id.*

241. Hart, *supra* note 226, at 326-27.

242. See, e.g., Menard & Salius, *supra* note 213, at 298.

243. Hart, *supra* note 226, at 320-22.

244. Yellott, *supra* note 213, at 43; 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, 100 (1984).

245. Yellot, *supra* note 213, at 45. The argument that mediation is empowering for battered women is not substantially different from the more general argument that mediation is empowering for all women. A number of scholars and practitioners have severely criticized this claim, suggesting that it may have just the opposite effect by causing women to compromise financial and child custody issues and, perhaps, even harm whatever vestiges of self esteem they have salvaged or are trying to develop. Bryan, *supra* note 122, at 445, 446-81; Grillo, *supra* note 67, at 1610. We note this literature and draw insights from it but do not

2. Divorce Mediation

The rationales offered for the use of mediation in divorce cases where there has been violence in the relationship are not substantially different than those cited for the criminal cases. Erickson and McKnight, for example, representing themselves as experienced mediators with domestic violence divorce cases,²⁴⁶ offer the claim that mediation not only reduces the likelihood of future abuse, but also “encourages cooperative interaction,” and may “reduce hostility and establish clear boundaries for the couple.”²⁴⁷ To accomplish these goals, mediation with abusive couples must be done by trained and experienced mediators who employ a variation of the standard mediation process.²⁴⁸

Although Erickson and McKnight do not mention the qualifications needed for mediators, they propose several adaptations to the mediation process to accommodate domestic violence cases. Grounding their trio of special rules in establishing safety for the victim, they suggest that the mediator first attempt to uncover the history of abuse in the couple.²⁴⁹ The first rule for mediators is to take the abuse seriously as an “issue” rather than as true fact,²⁵⁰ and immediately begin to focus on protection, boundaries, communication procedures, and safety.²⁵¹ The second rule mediators are encouraged to follow is to make a strong statement that there is never an excuse for abuse. Accomplishing this requires mediators to avoid certain topics of discussion, including inquiring how the “incident” of abuse came about, or who was at fault.²⁵² The third rule is a list of specific steps to be taken with the couple including 1) providing the victim with information about protection orders; 2) discussing additional precautions, such as calling the police; 3) establishing clear boundaries about the exchange of children and contact between the parties; 4) encouraging the victim to seek sensitive counsel; 5) asking each party to bring their attorneys to mediation sessions; and 6) considering whether a battered woman’s advocate might be useful to the victim during mediation.²⁵³

Like those who advocate mediation in the criminal context, Erickson and McKnight find certain categories of domestic violence cases inappropriate for mediation. Most of their exclusion criteria involve the behavior of the abuser, such as the husband “who totally discounts everything his wife says

plan to address the general issues in this article. We have a narrow focus, namely to examine the compatibility of mediation ideology and practice with our understanding of the culture of battering as developed in Section II.

246. Erickson & McKnight, *supra* note 127, at 378.

247. *Id.*

248. *Id.*

249. *Id.* at 382.

250. *Id.* This does not mean that the mediator should violate the fundamental principle of neutrality by “judging” whether or not the abuse is true. They advocate that the mediator bypass the issue of whether the abuse actually occurred as the victim claims, and proceed to implement protections not because he/she believes the victim, but because the victim has raised the issue. *Id.* at 383-85.

251. *Id.* at 383.

252. *Id.* at 382.

253. *Id.* at 383-84.

and does and refuses to acknowledge her worth,"²⁵⁴ the husband who is currently abusing his victim, and the husband who is carrying a weapon or using drugs and alcohol.²⁵⁵ Couples should also be prevented from engaging in mediation when they meet and attempt to resolve issues outside of the formal sessions, or if either party violates the rules of mediation and refuses to conform.²⁵⁶ Through excluding these inappropriate cases of domestic violence and following the special procedures for appropriate cases, Erickson and McKnight believe that mediation will "work" with spousal abuse couples.²⁵⁷

3. *Screening for Domestic Violence in Mediation*

The screening issue in mediation of domestic violence cases involves two separate determinations. First, unlike criminal cases where abuse has already been tagged as the problem, divorce mediators must have some mechanism that identifies the history of violence in the couple's relationship. Moreover, these mediators must then be able to refer to specific criteria to determine whether or not the case is an appropriate one for mediation.²⁵⁸ Second, mediators need to be able to screen for violence that is presently occurring, particularly if it is a result of the agreement developing through mediation. The first screening issue is applicable only in divorce mediation cases, while the second issue is relevant for mediation occurring both in criminal and civil contexts with abusive couples.

Those who have written about screening mechanisms for uncovering histories of abuse in couples engaging in mediation differ both in the type of questions asked and how those questions are asked. Erickson and McKnight give couples a questionnaire that has a single item that identifies abuse: "Was abuse present in the marriage relationship?"²⁵⁹ The follow-up item asks couples to check off the type(s) of abuse present: 1) physical; 2) emotional; 3) chemical; or 4) other.²⁶⁰ The screening program in Hawaii described by David Chandler also uses a single question, asked by a interviewer: "Would you tell me if you have been physically abused by your husband during your relationship?"²⁶¹ The Hawaiian program expands the domain of abuse history by further inquiring when the abuse last occurred, whether the woman fears future assaults, and whether she feels that the abuse has limited her ability to communicate "on an equal basis" with her spouse.²⁶² Only women responding affirmatively to the physical abuse ques-

254. *Id.* at 387.

255. *Id.* at 386-87.

256. *Id.*

257. *Id.* at 388.

258. It is worth noting here that the screening issue is equally relevant if one takes the position that battered women should be exempted from divorce mediation, because they first need to be identified before they can be excluded.

259. Erickson & McKnight, *supra* note 127, at 381.

260. *Id.*

261. Chandler, *supra* note 126, at 336.

262. *Id.*

tion are asked the last three questions.²⁶³

Linda Girdner provides the most comprehensive assessment of abuse history in a semi-structured interview format that she calls the Conflict Assessment Protocol.²⁶⁴ First, the Conflict Assessment Protocol probes for the couple's decision-making patterns, resolution of conflicts in the relationship, and expressions of anger.²⁶⁵ The purpose of this section of the protocol is for mediators to be "attuned to the issue of control."²⁶⁶ The second section of the interview proceeds through a series of questions designed to elicit acknowledgment of specific abusive behaviors.²⁶⁷ Based on the Conflict Tactics Scale used in domestic violence research,²⁶⁸ the questions about abuse tap into emotional, sexual, and physical domains.²⁶⁹ The interview closes with specific questions about control, jealousy, child abuse, and substance use.²⁷⁰ Each of these questions is asked of each spouse in an individual session, but phrased in terms of whether either partner has abused the other.²⁷¹

Only the screening procedure described by David Chandler contains a "when" question that would allow a mediator to know if the abuse is occurring presently, or whether it is merely part of the couple's history.²⁷² Unfortunately, this lack of attention to inquiring about present abuse may reflect the stereotype that abuse is no longer an issue once the couple seeks to terminate their relationship. As we documented earlier, separation abuse is common and frequently life-endangering.²⁷³

In short, even the model mediation programs appear to have weak or inadequate screening mechanisms to identify cases involving culture of battering relationships. We strongly suspect that even rudimentary screening is absent in most other settings, particularly when the issue involves divorce, child custody, or division of property.

C. SUMMARY

Mediation has become legislators', judges', and prosecutors' preferred mode of resolution of "domestic issues" cases. While one can infer that a primary motivation in sending these cases to mediation is that it helps clear court dockets of troublesome cases, it is also true that a number of theorists have justified mediation by arguing that it is a superior method for resolving domestic issues disputes—including, in some instances, serious cases of domestic violence. However, even when professionals agree that mediation

263. *Id.*

264. Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 *MEDIATION Q.* 365, 366-72 (1990).

265. *Id.* at 368.

266. *Id.* at 369.

267. *Id.* at 369-71.

268. *See supra* notes 95-103 and accompanying text (description and critique of Conflict Tactics Scale).

269. Girdner, *supra* note 264, at 369.

270. *Id.* at 369-70.

271. *Id.* at 371.

272. Chandler, *supra* note 126, at 336.

273. *See supra* notes 104-08 and accompanying text.

should not proceed when there is a history of spousal abuse, our review suggests that current mechanisms to screen for abuse are inadequate. We now turn to the issue of the adequacy—or rather inadequacy—of mediation to provide justice to battered women.

IV. THE INCOMPATIBILITY OF MEDIATION IDEOLOGY AND PRACTICE WITH THE CULTURE OF BATTERING

A. THE INCOMPATIBILITY OF MEDIATION IDEOLOGY WITH THE CULTURE OF BATTERING

Consider the widely quoted definition of mediation set forth by Folberg and Taylor:

Mediation is an alternative to violence, self-help, or litigation It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process.²⁷⁴

The definition itself reflects what Laura Nader has labeled the “harmony ideology” underlying mediation as it is currently practiced in the alternative dispute resolution (ADR) movement.²⁷⁵ In contrast to the adversary system which is based on the notion of justice and on the understanding of power differentials, the harmony model values consensus settlement and management of disputes through “healing” processes that “minimize power differentials of class, race, economics, and gender; it articulates the notion that disputes are generated in relationships by the failure of individuals to act as they should.”²⁷⁶ Nader’s critique addresses the social and legal systems as a whole. She argues that the ADR movement has become increasingly coercive and “values means over ends, harmony over justice, and efficiency over due process.”²⁷⁷

Nader’s critique is shared by others who have analyzed the implicit and explicit assumptions underlying mediation theory.²⁷⁸ The objections to it are brought into sharpest focus when mediation assumptions are contrasted with our analysis of the culture of battering. This may be illustrated by considering the leading Bethel and Singer article in which the authors ar-

274. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1984).

275. Laura Nader, *The ADR Explosion — The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. ACCESS TO JUST. 269 (1988).

276. *Id.* at 469.

277. *Id.*

278. Bryan *supra* note 122; Grillo, *supra* note 67; Hart, *supra* note 226; Lerman, *supra* note 244. See generally RICHARD L. ABEL, *THE POLITICS OF INFORMAL JUSTICE, VOL. 1: THE AMERICAN EXPERIENCE* (1982); Neil Vidmar, *Procedural Justice and Alternative Dispute Resolution*, 3 PSYCHOL. SCI. 224 (1992); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observation About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89 (1991).

gued that mediation is an appropriate remedy for domestic disputes involving violence.²⁷⁹

Bethel and Singer acknowledge that mediation may not be appropriate in instances where there is "serious repeated physical abuse" or where the complainant is "too fearful" of the respondent, but they also argue that these disqualifications may be too conservative since there are no data to show that mediation would be ineffective in such cases.²⁸⁰ Below we consider eight purported advantages of the mediation forum and weigh them against our insights about the culture of battering.

1. IDEOLOGY OF MEDIATION: Abuse arises out of conflict.
- CULTURE OF BATTERING: Conflict is only the pretext for abuse.

In Bethel and Singer's words, "[m]ediation . . . should be considered a crisis-intervention technique. Regardless of the number or seriousness of prior conflicts, some recent event has precipitated mediation."²⁸¹ This statement reflects mediation ideology that presumes that disputes develop out of conflict. In the context of assault and battery criminal cases, the assumption is that the abuse is a product of conflict. As we have illustrated, however, culture of battering relationships are not about conflict but rather about domination and control. To the extent that conflict is present it is only a symptom. The conflict is manufactured by the abuser in the relationship.²⁸² To structure mediation sessions as if the cause of abuse is conflict is to artificially frame the problem of battering. This is reflected in the typical mediated agreement, where the abuser promises not to batter if his partner will, in turn, cease objectionable behavior such as going out in the evening.²⁸³ Or the trade-off for ceased abuse may be less directly victim-blaming, like her promise to have contact or discussions with the abuser.²⁸⁴ The serious danger with this approach is that the actual process as well as the formal written document that emerges from mediation will mimic the rule-oriented dynamics of the abusive relationship. Mediation may legitimize the abuser's practice of identifying as the cause of the abuse the victim's behaviors, including acts of rebellion, that are temporally proximate to physical assaults or other abusive incidents.²⁸⁵ This potentially increases the risk that victims will experience abuse after mediation.

A related danger that flows from mediation's focus on abuse as the prod-

279. Bethel & Singer, *supra* note 212.

280. *Id.* at 16.

281. *Id.* at 17.

282. See *supra* notes 95-103 and accompanying text.

283. See generally William L. F. Felstiner & Lynne A. Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 LAW & HUM. BEHAV. 223 (1978) [hereinafter Felstiner & Williams].

284. See *supra* note 212 and accompanying text (example of agreement from Bethel & Singer's center). This type of agreement allows the abuser to dominate and control the victim through words. Even if those words are not abusive, she is required to "listen" to him. The victim should always control whether or not she has contact with the abuser.

285. See *supra* notes 79-86 and accompanying text.

uct of conflict is the risk to justice for battered women. As Barbara Hart pointed out, safety, a right that exists prior to any mediation session, should be non-negotiable.²⁸⁶ No one should have to give anything up in exchange for the cessation of abuse against her. Any agreement that is structured in the format of "Mr. Abuser agrees to stop the abuse and Ms. Victim agrees to —" is conceptually wrong. The point is that anything that goes into that blank is a violation of her rights. She should never be forced to engage in, abstain from, or surrender anything to stop the abuse. This dictum should apply even if what is given up seems trivial or reasonable to the outside observer, such as "stay home one night per week" (an example suggested by Felstiner and colleagues)²⁸⁷ or "talk with him about any issue" (an example reported by Bethel and Singer).²⁸⁸ Minimal justice standards would label this practice as grossly unfair to battered women attempting to end abusive relationships. They should never leave mediation with agreements that have bargained away their safety rights and/or made these rights conditional on some necessary performance of their own. Such a "contract" perpetuates the conditions they had to suffer during their marriage.

Closely connected to the problem with the format of agreements like "Mr. Abuser agrees to stop the abuse and Ms. Victim agrees to talk with him about any issue" is the troubling content of that provision that emerged out of mediation. This type of agreement allows the abuser to dominate and control the victim through words. Even if those words are not abusive, she is required to "listen" to him. Whether or not she has contact with the abuser should always be a choice under the control of the victim, not the abuser. An agreement of this type forces the victim to give up a right just as basic as the right to be free of abuse—the right to have control over when and about what she will converse with another person. This agreement would allow the abuser to interrogate the victim about her social activities and private life in much the same way that he might have during the time they lived together. Restricting her ability to break away from contact with the abuser that she determines is unpleasant, harassing, or abusive is not an appropriate use of mediation.

For divorce cases where child custody or property settlements are disputed, these conflicts may be equally likely to be manufactured by the batterer, as he may raise the issues as a pretext for regaining power in the relationship and exerting his usual system of control and domination. Martha Mahoney warned of this possibility: "[T]he custody action is *part of* an ongoing attempt, through physical violence and legal manipulation, to force the woman to make concessions or return to the violent partner."²⁸⁹ Because batterers use threats against the children - especially to take them away from their mothers - and abuse the children to control the woman, it is plausible to view custody "disputes" as suspicious in cases where a culture of

286. Hart, *supra* note 226, at 325.

287. See Felstiner & Williams, *supra* note 283.

288. See Bethel & Singer, *supra* note 212.

289. Mahoney, *supra* note 47, at 78.

battering has been established.²⁹⁰ Similar dynamics may operate in property settlements. Batterers use family financial resources to control their victims both physically and psychologically.²⁹¹ Mediation sessions may simply become another forum for this coercion. Whether the issue is property or children, the mediation model of ameliorating conflict presumes, and therefore imposes, a conflict structure on a situation where these issues may not be truly disputed. The danger for battered women who have recently extracted themselves from a culture of battering is that the batterers' domination and control tactics will flourish in the mediation environment and not be recognized as such.

2. IDEOLOGY OF MEDIATION: Focus on future, not past behavior.
 CULTURE OF BATTERING: Ignoring past behavior denies victims' experiences of violence.

According to Bethel and Singer, "[u]nlike legal remedies, mediation is prospectively rather than retrospectively centered and is not concerned with determining rights and wrongs" but is focused on "future conduct."²⁹² This component of the mediation ideology is partially responsible for the policy of many mediation centers to exclude attorneys from the mediation session even though the victim's attorney may be the primary source of support and protection for the victim's rights.²⁹³

Yet, the culture of battering is ineluctably tied to an escalating history of domination and control. The batterer and the victim cannot, and should not, be separated from their history. The specific failure to consider right and wrong allows an assumption that the victim may be responsible for her plight. The mediation process then treats the victim as though she shares responsibility, in essence subtly classifying her as a perpetrator. In short, the mediation model is not geared to either recognize or deal with the underlying cause of battering.

Consider Bethel and Singer's response to the argument for setting history aside: "[m]ediation is not therapy. Mediation's goal is to help effect behavioral change, because it is specific behavior, assaultive behavior or threatening behavior, that one or both parties cannot tolerate. Attitudinal change . . . is not the paramount goal of mediation." [F]undamental personality or attitudinal change is not required to prevent many forms of domestic violence.²⁹⁴ They go on to state that the process of mediation "requires the parties to focus on crucial rather than peripheral issues, and it allows little room for excuses."²⁹⁵

290. See *supra* notes 24-25 and accompanying text (batterers use threats against the children or abuse children to control victim).

291. See *supra* notes 17-19 and accompanying text.

292. Bethel & Singer, *supra* note 212, at 17.

293. See, e.g., Lerman, *supra* note 244, at 59 (inadequate agreement reached at hearing in which lay mediators refused wife's request to have her attorney present).

294. Bethel & Singer, *supra* note 212, at 17, 18.

295. *Id.*

Two interrelated problems are inherent in this aspect of mediation ideology. First, the assumption that attitude change is not a goal of mediation shifts the process away from the root cause of abuse. Second, it assumes the problem is a specific conflict or set of conflicts and that peripheral incidents are of no consequence. Yet, the peripheral matters are reflective of the total relationship between the two parties. Regardless of whether some form of therapy can ultimately transform the parties and their relationship, concluding that the history, attitudes, and behaviors associated with the relationship as peripheral simply because they are not explicitly associated with the original dispute is to ignore the realities of victims' experiences. Being battered involves more than the specific acts of violence committed by the abuser; it means living in a relationship with a partner who systematically dominates and controls your activities, your relationships with other people, your beliefs and values, and your body. Labeling this experience as "peripheral" delegitimizes the victim's right to bring the abuse up as an issue in mediation even though it may be extremely relevant to how custody and visitation should be arranged, or how property should be divided.

3. IDEOLOGY OF MEDIATION: Each party participates equally in the search for a mutual agreement.
- CULTURE OF BATTERING: Equal participation is impossible.

Another of Bethel and Singer's ideological statements addresses the process of mediation: "The parties are treated as responsible adults and in turn are expected to participate actively in the search for a mutually acceptable agreement."²⁹⁶

This expectation that the parties should participate actively in the mediation session is also problematic. Mediation theorists consistently evoke the theme that participation is a self empowering process.²⁹⁷ They assert that helping to shape the outcome that is the subject matter of the forum compels even a weak party to find new strength. However, to participate and become self empowered the weaker party must be able to articulate needs and desires. This may be extremely difficult for a victim of spousal abuse because she may not even understand her position, may have been consistently silenced by her partner, and may fear the consequences of speaking out. Further, the task of negotiating an agreement runs a grave risk of simply mimicking the battering culture. The mediation session may in fact be a safe as well as powerful setting for the abuser to intimidate and control his victim through hidden symbols of impending violence. Even his mere presence may be intimidating, particularly if she is attempting to escape from the relationship; contact with the abuser is often the last thing that victims want.

This issue for battered women is consistent with the general problems that

296. *Id.*

297. DIANE NEUMAN, HOW MEDIATION CAN EFFECTIVELY ADDRESS THE MALE-FEMALE POWER IMBALANCE IN DIVORCE 238 (1992); Bethel & Singer, *supra* note 212, at 18; Corcoran & Melamed, *supra* note 220, at 310; Yellot, *supra* note 213, at 45.

women may have when they are involved in domestic issues mediation. Trina Grillo has argued that mediation's emphasis on joint needs may push the woman away from an attempt to define herself as a person with needs and rights that are independent of the spousal relationship.²⁹⁸ The mediation process may evoke feelings of guilt and socialized tendencies to subordinate self needs to relationships with others and acquiesce in the face of social pressure. Clearly, abused women may often experience certain characteristics in the extreme, such as feelings of dependency, uncertainty about self worth, and self-censoring tendencies to deny their own needs. Thus, the mediation process, with its emphasis on compromise and healing relationships may actually serve to undo the abused woman's initial steps to find empowerment as an individual person.

Finally, the emphasis of mediation ideology on joint participation may make the mediator insensitive to the needs of an abused woman or even cause the mediator to view the woman as uncooperative. Our own experiences with some mediators are quite consistent with the following observation by Grillo:

When I have suggested to mediators that even being forced to sit across the table and negotiate, unassisted, with a spouse might be traumatic, their reaction has been almost uniformly dismissive. Some mediators have denied that this could possibly be the case. Even mediators who acknowledge the possibility of trauma have said, in effect, "So what?" A few hours of discomfort seems not so much to ask in return for a system that, to their mind, serves the courts and the children much better than the alternative [of legal action].²⁹⁹

Bethel and Singer further state that "[m]ediation relies on a rough parity in bargaining power between the parties to be successful. If one side dominates the other there is much less chance that any agreement will be truly voluntary or that it will accurately reflect the parties' needs."³⁰⁰ Indeed! And by its very nature the culture of a battering makes the couple unequal in subtle and pervasive ways.

4. IDEOLOGY OF MEDIATION: Avoid blame and findings of fact.
 CULTURE OF BATTERING: Avoidance of abuse issues perpetuates status quo of victim responsibility and abuser domination.

"Mediation is an informal, participatory method of conflict resolution. The mediator . . . has no higher authority to invoke, and rebuffs requests to make findings of fact or decisions about blameworthiness."³⁰¹ If followed, this tenet of mediation ideology eschews any actions by mediators relating to the parties as anything but equals and prevents mediators from looking for

298. Grillo, *supra* note 67, at 1607-08.

299. *Id.* at 1606-07.

300. Bethel & Singer, *supra* note 212, at 19.

301. *Id.* at 18.

elements in the relationship that might indicate a culture of battering. The tenet forces the mediator to treat spousal abuse and domination neutrally. Because batterers place the responsibility and blame for the assaults on the victim, frequently tying the abuse to her inability to live up to his rules, the status quo of the relationship is left in place when his belief system is left unchallenged. By ignoring the context of the abuse under the guise of avoiding blame, the mediator leaves behind any opportunity to learn about how the abuser might attempt to control and dominate the victim during mediation sessions.

5. **IDEOLOGY OF MEDIATION:** Private caucuses will encourage the victim to speak her needs.
- CULTURE OF BATTERING:** Private caucuses will not assist victims who are afraid of the consequences of speaking their needs.

“The process is participatory, but the nature of the participation is controlled by the mediator”³⁰² Bethel and Singer recognize that the mediator may communicate individually, through caucuses with the parties, to develop the agreement. It is assumed that getting the victim alone will allow her to state her true feelings, wants, and needs. This assumption naively ignores the fear and psychological control that develops in culture of battering relationships and extends beyond the immediate physical presence of the abuser. If the relationship has been one where the victim has been punished for having or speaking her needs,³⁰³ she may be justifiably afraid of the consequences of doing so, even if she is unable to articulate this fear. Spending five minutes alone with the victim, as Erickson and McKnight urge,³⁰⁴ will not substantially reduce the reality of this fear or enhance her trust of the mediators. In fact, it is absurd to believe that a five minute caucus can uncover and rectify the effects of being silenced through months or years of abuse - presuming, of course, that the mediator earns the trust of the victim who truly wishes to disclose her history and experiences.

6. **IDEOLOGY OF MEDIATION:** Batterers need to be coerced into mediation.
- CULTURE OF BATTERING:** Batterers may coerce victims into mediation.

As explained by Erickson and McKnight, “[m]ediation is to some extent a voluntary process, but one party may participate only because it is the least objectionable of several alternatives. The prospect of court action, or further police involvement, or retaliation from the other party, may have substantial

302. *Id.*

303. See *supra* notes 79-86 and accompanying text. See also Hart, *supra* note 226, at 319-22 (anecdotes from interviews with women dissatisfied with mediation).

304. Erickson & McKnight, *supra* note 127, at 381.

coercive effect."³⁰⁵ This assertion seems to focus on the inducements to bring the batterer to the mediation forum.³⁰⁶ It ignores the possibility that the batterer may prefer mediation because it places him in a situation where he can continue to dominate. Moreover, it clearly glosses over the pressures that may force the reluctant victim into mediation. Some women may go to mediation only because it is cheaper, or it is their only recourse because a judge or other authority has ordered it, or they cannot receive legal support unless they submit to mediation first.³⁰⁷

7. IDEOLOGY OF MEDIATION: The novelty of a written agreement detailing the rules of the relationship will end the violence.
- CULTURE OF BATTERING: Rules in a battering relationship may justify the batterer's further abuse.

The culmination of the mediation ideology is usually a written agreement specifying the rules and obligations of the parties' relationship. Each of several examples provided by Bethel and Singer articulates rules.³⁰⁸ Yet, as our analysis of culture of battering relationships clearly illustrates, the relationship is already filled with rules imposed on the victim by the batterer. It is the violation of these rules that leads to the violence and abuse. Because the agreements place obligations on the victim as well as the batterer, any minor infraction of these rules by the victim may provide the batterer with an excuse to abandon his obligations. Moreover, he now has a written text to help justify his outrage.³⁰⁹

8. IDEOLOGY OF MEDIATION: The process of mediation can protect battered women from future violence.
- CULTURE OF BATTERING: Battered women will not disclose abuse to mediators, during or after sessions.

If Bethel and Singer's conclusion from their study of violent and nonviolent mediated cases is to be believed, mediation prevents further violence against victims.³¹⁰ Aside from the need to replicate this sort of research finding before the strength of that conclusion can be assessed, several aspects of the culture of battering dynamics raise questions about the disclosure of abuse to mediators and the prevention of further abuse.

The notion that the process of mediation will "heal" the relationship is

305. Bethel & Singer, *supra* note 212, at 19.

306. See Hart, *supra* note 226; Lerman, *supra* note 244, at 67-71.

307. See, e.g., Ellis & Stuckless, *supra* note 213.

308. Bethel & Singer, *supra* note 212, at 22-24.

309. See *supra* note 57-58 (abuser from Angela Browne's study who created written agreement involving his cessation of violence in return for her freedom to refuse to have sex with him but used agreement as an excuse to rape her repeatedly).

310. See *supra* notes 214-19 and accompanying text.

anchored in the abuse-is-conflict framework. Changing the couple's communication strategies to include non-abusive ones will only be effective outside mediation if those "strategies" are the cause of the abuse. Because much of the violence in battering relationships occurs "out of the blue" or at the end of manufactured arguments, the healing power of the mediation session is likely to be limited.

This ideological statement that mediation will end the violence also has an underlying assumption that mediators will somehow know if the victim is currently being abused. The culture of battering involves an element of hiding, denying, and minimizing the abuse. Much abuse is itself hidden, leaving no visible marks: sexual assaults, emotional abuse and threats, familial abuse. Even physical abuse may not leave marks if the batterer chooses to hit where the bruises on the victim's body will not be revealed to others. The parties may cancel mediation sessions until the bruises fade away (in the event that mediation lasts for more than one session) in much the same way that battered women stay home from work or school until their injuries heal.³¹¹ If mediators send the message that abuse is irrelevant or peripheral, this may intensify the victim's feelings of shame, and she may be even less likely to disclose the abuse.

As a final thought on the ideology of mediation with violent couples, in cases where the couple is separated (all divorce cases and probably the majority of criminal cases), the risk for serious violence is heightened. The abuser's ability to dominate and control his partner through abuse becomes more limited as his access to her decreases. Consequently, his motivation for obtaining access to her through any means possible, including formal interaction with the legal system through court-mandated mediation sessions, is quite high. Sadly, scheduled court proceedings can lead to an opportunity to kill, as they were in one recent death for a battered woman: Shirley Lowery was killed by her estranged husband as she arrived in a Wisconsin courthouse lobby to wait for the hearing for her second order of protection.³¹² Mediators must never forget that separation is the most dangerous time for a battered woman, and avoid allowing the contact that the sessions require to become the abuser's safe opportunity to strike out with violence against his partner.

B. THE INCOMPATIBILITY OF MEDIATION PRACTICE WITH THE CULTURE OF BATTERING

Many advocates of mediation concede that mediation may not be appropriate in more serious spousal abuse cases but that such cases can be screened out ahead of time. Well-trained mediators, it is argued, will identify these cases during mediation and take appropriate action. Advocates also argue that in cases with less serious spousal abuse, mediators can correct the imbalance of power and put the victim on a level playing field. For

311. See *supra* notes 109-10 and accompanying text.

312. Don Terry, *Killing of Woman Waiting for Justice Sounds Alert on Domestic Violence*, N.Y. TIMES, Mar. 17, 1992, at A1.

example, Neuman asserts that “[d]ivorce mediators recognize the degree of power held by their clients, assess the effect of the imbalance of power upon the negotiations, and employ techniques to intervene in the balance of power to provide a forum in which to have fair negotiations.”³¹³ These assertions conflict with the systemic and organizational realities of mediation in practice and with the actual implementation of the ideology that guides most mediators.

1. PRACTICE OF MEDIATION: Mediation is freely chosen by both parties.
- CULTURE OF BATTERING: Mediation involves economic coercion for battered women.

Cases get to mediation through different routes. Through the exercise of discretion allowed in statutes, judges, prosecutors, and court clerks routinely divert both cases in which spousal abuse is the main issue³¹⁴ as well as the many other divorce, child custody, and other domestic cases where a culture of battering may be present but in which abuse is not the legal issue before the court.³¹⁵ Many cases, including those involving criminal assault charges, end up in mediation as a direct result of the “recruiting” activities of dispute resolution centers. Most centers have a working relationship with court officials in which dispute center personnel peruse court filings to find “appropriate” cases for mediation and recommend to the judge or district attorney that an attempt should be made to divert these cases out of the court system into mediation. The dispute center and the court have a symbiotic relationship. Diverting cases to mediation removes them from crowded court dockets; the dispute resolution center, usually dependent on yearly grants and other soft sources of funds, get cases that help to justify its existence and continued funding.³¹⁶ There is, of course, nothing inappropriate about the motivation of either the court or the dispute resolution center. The difficulty, however, is that screening for culture of battering cases is, at best, likely to be perfunctory. Such cases cannot usually be ascertained from court files, and mediation center personnel who conduct the screenings are typically not trained to identify the elements involved in these relationships. Moreover, mediation center personnel have a strong motivation to find as many cases as the dispute center can handle.

The argument often made by these centers is that mediation is faster and cheaper than litigation.³¹⁷ To the extent that this claim is true, it may also be the central concern of a victim who agrees to the mediation forum over

313. Neuman, *supra* note 297, at 237.

314. See, e.g., Morton Bard, Ph.D. & Hamet Connolly, Ph.D., *The Police and Family Violence: Policy and Practice*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 304, 307 (1978); *Final Evaluation Report*, *supra* note 213, at 82-83 (judges conceded that cases of “excessive violence” were not appropriate for mediation but expressed considerable disagreement on the definition and treatment of such cases); Lerman, *supra* note 244, at 67-71.

315. See, e.g., Erickson & McKnight, *supra* note 127; Hart, *supra* note 226.

316. See, e.g., Lerman, *supra* note 244, at 68.

317. Bethel & Singer, *supra* note 212, at 16; Bryan, *supra* note 122, at 441 n.1.

the court process, thus making the voluntariness of her participation akin to a contract of adhesion. Indeed, it appears that in some jurisdictions women are informed that if they do not consent to mediation they will not be eligible for legal aid.³¹⁸ The reality is that a mediated settlement is all the legal aid they will receive. In some parts of the country, divorce mediation is free.³¹⁹ Battered women are particularly vulnerable to the pressures of legal aid or the prospect of free legal assistance because the abuser frequently controls the family finances.³²⁰ In the face of these types of economic incentives to "voluntarily" engage in mediation, the argument that mediation does not involve coercion³²¹ rings hollow.

2. **PRACTICE OF MEDIATION:** Mediators are trained to deal with domestic violence when the issue arises.
- CULTURE OF BATTERING:** Mediators are trained to conceptualize violence as a tactic of conflict rather than control.

A body of literature is developing that shows that in practice mediators have great difficulty in coping with intimations of violence when it arises in mediation sessions and, as critics of mediation ideology have feared, either ignore it or construe it in a way that harms the victim.

Lisa Lerman, for example, relates the case study of Mrs. Carson who was a reluctant participant in mediation and instead wanted an order of protection against her husband.³²² Two volunteer mediators in a community mediation center refused to allow an attorney to observe the mediation session.³²³ The agreement that resulted from the session specified when her husband could visit the children and when he could telephone her.³²⁴ The agreement said nothing about the violence. During the mediation session the husband would not admit to any abuse even though he had beaten her over a period of twenty-five years, including pushing her through a plate glass window.³²⁵ As a result of a prior beating, Mrs. Carson suffered blood clots that required anti-coagulant medication to treat; consequently, a subsequent beating could end in death.³²⁶ In a private caucus session the mediators shifted attention away from the abuse and went so far as to tell Mrs. Carson that she should listen to her husband.³²⁷ She subsequently obtained an order of protection but that did not prevent her husband from

318. See, e.g., Hart, *supra* note 226, at 321.

319. See Chandler, *supra* note 126, at 335.

320. See *supra* note 17 and accompanying text.

321. See generally Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

322. Lerman, *supra* note 244, at 57-61.

323. *Id.* at 59.

324. *Id.*

325. *Id.* at 58-59.

326. *Id.* at 58.

327. *Id.* at 59.

beating her again some months later.³²⁸ The fact that the order of protection did not further protect Mrs. Carson in no way exonerates the abysmal failure of the mediation sessions that refused to even address the violence.³²⁹

The typicality of Lerman's example has been documented by others.³³⁰ Cobb and Rifkin ascribe at least part of the problem to the conflict between the mediators' conceptions of neutrality and their attempts to balance impartiality while remaining equidistant from both parties.³³¹ Mediators are not equipped to deal with violence or the threat of violence because it is antithetical to the ideology of mediation. Thus, in discourse with the parties they may marginalize and reinterpret violence to fit with their notions that disputes are a result of conflict, that the history of relationships is unimportant, and the empowering process of participation and agreement leaves room for discussion.

3. PRACTICE OF MEDIATION: Mediators can employ power-balancing strategies to equalize negotiating power.
- CULTURE OF BATTERING: No technique can compensate for the impact of the battering experience.

Even in the rare instance that mediators recognize the seriousness of abuse in a battering relationship and attempt to balance the power between the parties,³³² this compensation is inadequate. As others have argued, even the notion that power which has been grossly imbalanced over the course of an entire multi-year relationship can be shifted within a two hour mediation session minimizes the seriousness of the impact of the abuse on battered women.³³³ Balancing the power means that the weaker party can arrive at the point where she is free to express her needs to the other. As we suggested above, fear of the consequences may prevent the battered woman from doing so because voicing her needs is tantamount to "rebellion" in the eyes of the abuser, who has consistently punished her for self-assertion.³³⁴ Nor should it necessarily be the goal of mediators to assist battered women in "moving beyond" their fear. Rooted in prior experience, their fear is not irrational. Mediation cannot promise to protect battered women from the abuse that might result from expressing their needs, which does not facilitate the creation of a safe environment where they can actually do so.

328. *Id.* at 59-60.

329. In fact, it is plausible that the refusal of the mediators, as representatives of the legal system, to make the abuser accountable for his violence encouraged Mr. Carson to ignore the dictates of another component of the legal system.

330. *See, e.g.*, Grillo, *supra* note 67, at 1584-85; Hart, *supra* note 226, at 321-22; *see also* Sara Janet Cobb & Rifkin, *Practice and Paradox; Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991) [hereinafter Cobb & Rifkin]; Ellis & Stuckless, *supra* note 213, at 221-22; Yellot, *supra* note 213, at 45 (author still advocates mediation in some cases).

331. Cobb & Rifkin, *supra* note 330, at 43-44.

332. *See, e.g.*, Girdner, *supra* note 264, at 372-75.

333. *E.g.*, Hart, *supra* note 226, at 318.

334. *See supra* notes 79-86 and accompanying text.

Even assuming for the moment that battered women are able to voice their needs in a mediation session, they have to be able to identify and then label those needs as a prerequisite. From the culture of battering perspective, there are two forces that prevent women from being able to express themselves. First, battered women have been socialized over the course of their abusive relationship to pay attention to the abuser's needs and to denigrate their own. Earlier we referred to this as "self-censorship," where the victim's denial of her own needs and the primacy of the batterer's is gradually shaped less by external punishment and more by internal processes.³³⁵ Because self-censorship is internalized, physical separation from the batterer may not change her instincts to focus on the abuser's needs in the mediation session and not her own. Second, the oppression a battered woman experiences during the abusive relationship may impede either her ability to even *know* what her needs are, or her ability to speak about her needs in ways that can be understood by others. This is captured concretely by the battered women in our opening anecdote: "[I feel that] my opinion doesn't ever count."³³⁶ Despite the best efforts of the most sensitive and nurturing mediators, a setting that does not validate her experiences of violence can never make a battered woman feel as if she counts.

Finally, the deployment of power-balancing strategies by mediators may be trumped by the hidden symbols of dominance and control shared only by the couple. Whether these symbols of impending violence are a figuratively drawn line, a nose-scratch, or a fleeting facial change, mediators cannot be aware and cannot be trained to recognize these idiosyncratic gestures. Although some mediators may be able to identify these tactics if they have an overt impact on the victim's behavior,³³⁷ the victim may have been trained or warned not to flinch, or she may not be consciously aware of the connection between his behavioral change and the meaning of that change for her.

4. PRACTICE OF MEDIATION: Mediators can screen effectively for domestic violence.

CULTURE OF BATTERING: None of the currently used screening protocols adequately assess abuse or the other elements of the culture.

The screening protocols used for domestic violence cases fall short on two dimensions: 1) their failure to ask about all forms of abuse rather than just physical; and 2) their failure to recognize the cultural components of battering instead of nesting questions about abuse within a conflict perspective.

The screening device used in the Hawaiian program described by Chandler,³³⁸ a single physical abuse question, is flawed because of its exclusivity

335. See *supra* notes 63-69 and accompanying text.

336. Fischer, *supra* note 1.

337. Girdner, *supra* note 264, at 368-69; Erickson & McKnight, *supra* note 127, at 380.

338. See *supra* note 261-63 and accompanying text.

of the physical abuse domain. The device attempts to get at the impact of this abuse, which overlaps some with control and domination, by asking about whether she is afraid of her husband or whether the abuse had an impact on her ability to negotiate effectively. The problem with asking women for their estimation about whether the abuse has affected them is that battered women may deny and minimize the impact of the abuse just as they do the abuse itself.³³⁹ The Hawaiian protocol would be more effective (but still inadequate) if the first question asked was whether or not women feel they can negotiate on an equal basis with their spouses, and if it was followed by the fear and abuse questions as probes for whether their perceived lesser negotiating status is connected to their fear of their partner or past abuse. The question of whether she "has ever been physically abused" could probably be reworded more sensitively to normalize the impact of the battering experience. For example: "Many women who feel that they can't negotiate on an equal basis with their husbands have been abused or injured in some way by him; can you tell me if you have had any of the following experiences?"

Girdner's Conflict Assessment Protocol includes content that is directed to the control and domination elements of the culture of battering, but the questions about control are framed by others requesting information about conflict resolution tactics. Girdner's protocol also conceptualizes abuse as more than physical assaults; it has the advantage of assessing emotional and sexual abuse (although it does leave out familial abuse). These questions unfortunately follow those about conflict, so the risk is that only abuse that occurs in this context will be identified.³⁴⁰

An effective screening device would build on the content, but not the framework, of both Girdner and Chandler. Each of the elements of the culture of battering should be addressed independently of the others. Abuse could be assessed with some combination of emotional, physical, and sexual abuse scales used in research.³⁴¹ Many of the questions Girdner asks about control would be useful in assessing the extent of domination and rule-making in the relationship.³⁴² Particular attention would need to be paid to aspects of rebellion (e.g. "Have you ever felt that if you did something that you knew your partner didn't want you to do, that you would have to pay the consequences for it?") and self censorship (e.g. "Do you ever decide not to do or say certain things, even small things, because you know it will make your husband angry?"). Wayland and Lochman's ten item fear scale, developed for research with abusive couples, provides a good model for identifying the level of fear in the relationship (e.g. "I find myself walking on eggshells around my partner.").³⁴³ The third element of the culture of bat-

339. See *supra* notes 109-17 and accompanying text.

340. See *supra* notes 272-73 and accompanying text.

341. See Fischer, *supra* note 1, at 62 tbl. 9 (example of abuse scale).

342. Girdner, *supra* note 264, at 368-69. Mahoney suggested a more global question to assess domination: "have you ever experienced inappropriate control attempts by [your] partner[?]" Mahoney, *supra* note 47, at 69.

343. Wayland & Lockman, *supra* note 75. Other examples include: "I keep things from

tering (denial, minimization, hiding) could involve questions such as whether she has ever felt that she couldn't tell others how her partner was treating her, or whether she stayed away from other people during certain "bad" periods in the relationship. Regardless of the particular content of questions asked in a screening protocol, answers that indicate that a culture of battering may be present should be carefully explored with follow-up questions.

C. SUMMARY

Both the ideology and the practice of mediation are incompatible with the culture of battering, suggesting that mediation should not be used where a culture of battering has been established. The ideology of mediation artificially forces a conflict resolution paradigm on the problem of abuse where there may be not genuine conflict, just control and domination. Mediation's focus on future rather than past behavior and tendency to avoid blame denies the victim's experiences of violence and delegitimizes her right to talk about it. While the ideology of mediation promises equal participation, the reality of a culture of battering precludes victims from being able to voice their needs. The ideology of mediation also falsely holds that the batterers need to be coerced into mediation, that the rules provided in a written agreement will fundamentally change the battering relationship, and that mediation can protect battered women from further abuse. None of these claims holds up under close scrutiny when viewed through the lens of a culture of battering.

The practice of mediation is incompatible with the culture of battering because it economically and psychologically coerces battered women into participating and ignores violence as a tool of coercion and control. Standard techniques used to balance power during the negotiation sessions will not be effective where a culture of battering has been established. Mediators are similarly ill-equipped to properly screen for a culture of battering.

V. CONCLUSION

Mediation has been marketed to courts and policy makers on the grounds that it is better, fairer, and cheaper. Ideally, it transforms and empowers the parties, and, at the same time, reduces the load on court dockets. It has been widely adopted as a panacea for the inadequacies and troubles of our contemporary legal system. Within this atmosphere, so-called "domestic relations" cases are particularly subject to pressures to mediate.

Other scholars and practitioners have raised serious questions about whether mediation may have the opposite result from the results that advocates claim for it. They assert that it jeopardizes the rights of women and others who are lacking in traditional power. We join these critics of the mass movement toward mediation by arguing that many cases of serious

my partner in the interests of keeping the peace;" "I find it hard to relax and be myself around my mate;" and "I feel relieved when my mate comes home or wakes up in a good mood." *Id.*

spousal abuse are thrown into mediation and that the ideology and practice of mediation are generally incompatible with the goal of protecting the rights and safety of battered women.

Reconceptualizing spousal abuse in terms of a culture of battering is consistent with knowledge of spousal abuse and shifts the focus from individual actions of the two involved parties to the dynamics of their relationship. The notion of a culture of battering captures the pattern of domination and control in spousal abuse which includes: the elements of rule making; internalization of the rules by the victim; the process of self-censorship; the enforcement of rules by punishment or threat of punishment; and the abusers' responses to victims' rebellion or resistance. It consequently rejects conflict as the cause of spouse abuse. It raises the strong possibility that such a culture may be present in "domestic relations" cases where the legal matter is not spousal assault but rather divorce, child custody, or division of property. Finally, it exposes as myth the claim that spousal abuse can be easily identified by lay or professional mediators just asking a few questions of the victim.

Viewed from a culture of battering perspective, mediation ideology and practice is incompatible with the rights and safety of victims of spouse abuse. A central tenet of mediation theorists and practitioners is that domestic violence arises out of conflict rather than the pattern of domination and control over the victim that is at its core. By focusing on future behavior, mediation ignores the relational history that is part and parcel of the abuse. Mediation is billed as an empowering, transforming process for the parties in which each participates equally. The mediator is charged with rectifying power imbalances, but, within a culture of battering, correction of power imbalances is unlikely if not impossible. Emerging research also shows that because of mediators' orientation and training, they do not know how to respond to the signs of violence or threats of violence; thus, they transform them into procedural issues with the consequences that victims' rights are delegitimized. Finally, mediators' proclivities to develop written contracts specifying rules of future behavior may force the victim into unwanted contact with her abuser and set the stage for further violence for any perceived infraction of the rules.

The problems of mediation are compounded by statutes and programs that give mediators power to exclude advocates and legal counsel from the mediation sessions. This practice may enhance the power of both the batterer and the mediator to the detriment of the victim. Ironically, the process of mediation sometimes functions to cut victims off from sources of moral and other support just as their abusers isolate them. Additionally, as evidenced by mediation statutes and descriptions of mediation programs, there is often no provision for screening culture of battering cases out of the mediation process. Statutes and programs that do provide for exemptions fail to establish criteria for exclusion and some permit the mediator to do the screening. Finally, most mediators do not have the qualifications and training to cope with culture of battering cases, are unable to identify abuse when

it is present, and, as mentioned above, ignore or minimize it when victims attempt to bring it to their attention.

We conclude, therefore, that mediation should not be used in cases where a culture of battering exists. While an extremely well-trained mediator might successfully use mediation in some atypical cases, viewed from a system level perspective the odds are much greater that many more victims will have their rights jeopardized. Our recommendation is relatively easy to implement with respect to cases where the legal issue is the violence itself: whether civil or criminal, these cases should not be subject to mediation.³⁴⁴ It is more difficult to implement for cases in which the legal issue is divorce, child custody, or property settlement. How does one screen for culture of battering cases in order to eliminate them from mandatory mediation?

We have a few suggestions,³⁴⁵ but no easy answer to this question. Our goal for this article is to call attention to the problems of mediation in cases of domestic violence. We are not prepared at this point to propose extensive remedies. Nevertheless, we offer several observations bearing on the issue of mediation in domestic relations cases.

Working on an assumption that the trend toward mediation of "domestic relations" cases will remain in place, we have several recommendations. Mediation in these cases should never be mandatory. Specific exclusions should be built into statutes and local court rules for cases involving abuse. Specific exclusions should apply not only to criminal assault cases but also to protective orders, divorce, child custody, and domestic property disputes. Rules allowing mediators to exclude legal counsel or victim advocates from mediation sessions should be abolished. The screening mechanisms by which cases are recommended for mediation should not be carried out by representatives of mediation interests. Rather, the screening should be done by independent persons who have the skills and sensitivity to identify and assist cases of spousal abuse—such as advocates from battered women's shelters. Further, the screening mechanisms for spousal abuse should specifically recognize emotional, sexual, familial, and other forms of abuse that we have identified as the first element of the culture of battering. Finally, better training and credentialing of mediators is needed so that they are capable of recognizing and coping with the issues of domestic violence when it is signaled in mediation sessions. Mediators should be trained to terminate mediation when such signs are present and to recommend remedies that will protect the rights and safety of victims.

At the same time that we offer the above recommendations, we observe that our analyses of the culture of battering in relation to mediation ideology and practice raise a warning flag about the trend toward mediation as a panacea for the current ills of the legal system. Of course, mediation is a useful device for the resolution of some conflicts that find their way into the legal system. Specifically, it may be very useful for many "domestic relations"

344. See, e.g., ME. REV. STAT. ANN. tit. 19, § 768(5) (West Supp. 1992) (precluding mediation of protection order cases).

345. See *supra* note 342 and accompanying text.

cases. The difficulty is its wholesale adoption and application on a generic basis. Advocates for mediation frequently have more zeal for the process than the evidence or common sense warrants. And their assertions are not always given proper scrutiny. Consider, for example, the argument of some mediation advocates that the current adversary legal system is inadequate for dealing with domestic violence cases. We do not quarrel with this view: current law and practices frequently do not protect domestic violence victims' rights and safety.³⁴⁶ Our dissent is with those who conclude that the only solution is mediation. The problems with the adversary system should be addressed directly by statutory or local change rather than being side-stepped by advocacy for alternative programs such as mediation. Justice for battered women in the courtroom should include better access to the legal system and increased legal resources, including an expansion of pro bono programs and legal aid.³⁴⁷

The arguments of mediation advocates have been appealing to judges and policy makers for two reasons. Some advocates have made unsubstantiated claims about the merits of mediation without any empirical basis for doing so.³⁴⁸ This article begins to unravel those claims. The second reason is that mediation promises to be cheaper to the courts and will remove cases that bother judges and prosecutors. We pose the question here of whether irksomeness and cost savings are adequate reasons for jeopardizing the health and sometimes the lives of victims. We further question whether improving the present legal system with better mechanisms, such as broader relief in orders of protection, more responsive police action, and increased funding for domestic violence shelters, might not be as cost-efficient from a societal perspective in the long run.

As our culture of battering analysis clearly shows, harmony ideology and the well-meaning but blissfully ignorant practice of mediation are too great a risk to achieving justice for battered women in the legal system. Refocusing legal policy away from mediation and towards strategies that truly promote victim empowerment would assist in returning to domestic violence victims what is rightfully theirs: control over their activities, their bodies, and their ability to "count" in the world.

346. See generally Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163 (1993) (discussing limitations of order of protection laws).

347. See *id.* at 182-85.

348. Rosenberg, *supra* note 321.