

NOTES

Domestic Violence in the Armed Forces: Using Restorative Mediation as a Method to Resolve Disputes Between Service Members and Their Significant Others

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I. INTRODUCTION

The armed forces have a problem that is not dissipating and may be growing.¹ Service members are committing an alarming number of violent crimes including domestic violence.² Every couple of years the media publishes a story highlighting the problem,³ and Congress or the armed forces respond by unveiling new reforms.⁴ However, these reforms have

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¹ See Fox Butterfield, *Wife Killings at Fort Reflect Growing Problem in Military*, N.Y. TIMES, July 29, 2002, at A9.

² See, e.g., T. Trent Gegax & John Barry, *Death in the Ranks at Fort Bragg*, NEWSWEEK, Aug. 5, 2002, at 30, 30 (indicating that service members “commit thousands of domestic assaults each year”); Peter Maass, *A Bulletproof Mind*, N.Y. TIMES, Nov. 10, 2002, § 6 (Magazine), at 52 (asserting that “[f]atal spouse abuse . . . plagues the military even in peace time”).

³ See generally Mark Thompson, *The Living Room War*, TIME, May 23, 1994, at 48, 48 (recounting the murders of family members by their service member spouses taking place in California, Hawaii, North Carolina, Washington, and Germany); *Threats and Responses: Coping with Stress; Mental Health Workers Must Go to Combat Units; Report Says*, N.Y. TIMES, Nov. 9, 2002, at A13 (noting a case in which a wife murdered her husband, a Special Forces officer); Nanette Varian, *Did the Military Let This Woman Die?*, GLAMOUR, Oct. 2002, at 288, 288 (focusing on the murder of a woman by her estranged husband, a Fort Bragg soldier, and questioning whether the death could have been prevented); *60 Minutes: The War at Home* (CBS television broadcast, Jan. 17, 1999) [hereinafter *60 Minutes*] (reporting the deaths of three women at the hands of their service member husbands or boyfriends at Fort Campbell); *Oprah: Murders at Fort Bragg* (CBS television broadcast, Sept. 25, 2002) [hereinafter *Oprah: Murders*] (discussing the murders of five women at the hands of their husbands, Fort Bragg soldiers, over a span of seven months and asking whether there was a reason for this clustering).

⁴ See Peter J. Mercier, *Introduction: Violence in the Military Family*, in BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY 3, 9 (Peter J. Mercier &

failed to sufficiently address the reasons why service members resort to domestic violence more often than their civilian counterparts.

Many theories have been put forth as to why domestic violence occurs more frequently in military relationships than in civilian relationships. One theory has focused on the anti-malaria drug Lariam and its possible side effects.⁵ Other media articles and stories that have addressed the problem focus on the failure of the armed forces to discipline service members who commit domestic violence.⁶ Implementing a restorative mediation program⁷ and mandating that families enter mediation one week after the service member returns from deployment, the time period before the statistics show the severe cases of domestic violence typically occur,⁸ will ensure that domestic violence issues do not impair mediation. This Note will focus on using restorative mediation to diffuse the disputes that lead to violence, thereby preventing the escalation of the disputes toward domestic violence and preserving relationships.

Part II of this Note will demonstrate that the demographics of the armed forces, the training service members receive, and the deployments service members undergo, all place service members at a statistically higher risk for committing a domestic violence offense.⁹ Part III discusses why the armed forces should provide a restorative mediation program for service members to resolve their family disputes and conflicts, and Part IV sets forth the framework in which mediation should be provided to the armed service members. In Part V, this Note will address potential criticisms of an Armed Forces Restorative Mediation Program.

Judith D. Mercier eds., 2000) ("Under government mandates, the military has established policies and agencies to address family violence.").

⁵ See, e.g., *National Briefing Washington: Medicine Cleared in Killing*, N.Y. TIMES, Oct. 31, 2002, at A24 (indicating that psychotic side effects from the Lariam drug have been discounted as the cause of the murders at Fort Bragg).

⁶ See, e.g., *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001) This case involved a service member who was court martialed on a charge of attempted premeditated murder arising "from a long period of marital discord and mutual accusations of infidelity that culminated when [the service member] shot his sleeping wife in the back with a .380 caliber handgun" while their child was in the next room. The crime occurred "within a few hours after the no-contact order from [the service member's] commander expired." *Id.* at 227; see also Gegax & Barry, *supra* note 2, at 30 (stating that "few [service members] are ever prosecuted in civilian courts" for the thousands of acts of domestic abuse they commit every year); *60 Minutes*, *supra* note 3 (finding that fewer than 5% of violent and abusive service members are disciplined for their acts of domestic abuse).

⁷ See discussion *infra* Part IV.A.

⁸ See *infra* text accompanying note 48.

⁹ See discussion *infra* Part II.A-C.

The armed forces cannot afford for its service members to conclude, after weighing the costs and benefits of their positions as armed service members, that their service is detrimentally affecting their relationships. If service members make this determination, they may decide that they must seek a discharge from the armed forces in order to salvage those relationships.¹⁰ The armed forces also cannot afford to lose service members to the criminal justice systems of the states, where they must answer charges relating to domestic violence.¹¹ Reports of service members' arrests for murder and the reports of high divorce rates for service members cannot be strong recruitment tools.¹² The armed forces will find it necessary to correct this problem in order to ensure that prospective enlistees do not refuse to enlist because they view military service and marriage/family as mutually exclusive. A restorative mediation program provided by the armed forces can allow service members to resolve their disputes with their significant others and family—guided by a mediator with specialized training in military operations and in recognizing domestic violence issues—while maintaining those relationships.

II. THE PROBLEM OF DOMESTIC VIOLENCE IN THE ARMED FORCES

The statistics show that domestic violence occurs more often in the relationships of armed service members than in the relationships of their civilian counterparts.¹³ “[A] series of studies ha[s] shown that the rate of domestic violence in the military [is] two to five times higher than in the civilian population.”¹⁴ Another article states that “more than 50,000 members of the military had hit or otherwise hurt their spouse between 1991 and

¹⁰ See Don R. Catherall, *Family as a Group Treatment for PTSD*, in *GROUP TREATMENTS FOR POST-TRAUMATIC STRESS DISORDER* 15 (Bruce H. Young & Dudley D. Blake eds., 1999) (noting that “what affects one member of the group affects all members of the group”).

¹¹ See Varian, *supra* note 3, at 290 (discussing the military’s discharge of one service member when the local criminal court system charged him with kidnapping and rape and set bail at \$200,000).

¹² The Air Force has recognized the fact that service member suicides will become public knowledge and may influence the public perception of the armed forces. See Charles P. McDowell, *Suicide Among Active Duty Members 1980–1989*, in *MILITARY-CIVILIAN TEAMWORK IN SUICIDE PREVENTION* 3-4, 3-13 (Meyer Moldeven ed., 1994) (“As word of a suicide spreads it can have a profound impact on the perception of the quality of life within the military community.”).

¹³ See Butterfield, *supra* note 1, at A9 (indicating that “the rate of incidents of domestic violence in the military rose . . . [while] domestic violence rates were declining among the overall population”).

¹⁴ *Id.*

1995.”¹⁵ These facts may not be entirely surprising since service members often possess the factors that make them statistically more likely to commit domestic abuse:

Most military families, at one time or another, experience family separations, serious financial pressures, isolation from family and peer support systems, and frequent moves. Moreover, the demographic makeup (young adults, with low status, who are on the lower end of the socioeconomic scale) of military families closely parallels that of violent families in the general population; thus, military families may be particularly vulnerable to incidences of domestic violence . . .¹⁶

The actual incidents of domestic violence committed by armed service members are probably much higher than reports indicate because the statistics do not take into account violence against a non-spouse or former spouse.¹⁷ Military statistics do not include reports of domestic abuse among couples that are dating, had been dating, or are living together outside of marriage.¹⁸

A restorative mediation program provided by the armed forces can take into account these relationships. The Air Force currently has a mediation program to resolve disputes between the Air Force and civilians.¹⁹ This program can and should extend to cover disputes between Air Force members and their civilian significant others. The actual nature of a service member's relationship with his civilian roommate, partner, girlfriend, fiancée, or wife should not be relevant to the armed forces. The focus of an armed forces restorative mediation program should merely be whether the service member has a dispute in a personal relationship that could escalate to

¹⁵ Mark Thompson, *A Farewell to Arms: How the Military Plans to Enforce a Law Denying Guns to Abusive Spouses*, TIME, Oct. 6, 1997, at 46, 46.

¹⁶ See Mercier, *supra* note 4, at 5.

¹⁷ See Butterfield, *supra* note 1, at A9 (noting that the actual incidences of domestic violence in the military could be much higher than reported because only violence between husband and wife is considered).

¹⁸ See Sherry R. Wetsch, *Alternative Dispute Resolution—An Introduction for Legal Assistance Attorneys*, ARMY LAW., June 2000, at 8, 11–12; Lauren Taylor, *The Home Front: The Defense Department Takes Aim at Domestic Violence*, GOV'T EXECUTIVE, Mar. 2002, at 50, 52.

¹⁹ See David Castellon, *Mediation Program Aims to Settle Air Force Battles*, A.F. TIMES, June 17, 2002, at 19, 19. Should the Armed Forces choose not to extend its internal mediation programs, private mediation may be sought through sources such as state and local bar associations. Also, despite the proscribed confidentiality rule for mediation, parties in homosexual relationships may be hesitant to utilize the services of an armed forces restorative mediation program and may prefer a private mediation environment.

domestic violence and result in the injury, death, or criminal conviction of a service member. If so, the disputing parties should enter the restorative mediation program.

A. *Consequences of Training*

Not surprisingly, training soldiers to kill the enemy and to always be on guard for potential threats may have desensitized armed service members.²⁰ Service members are trained to be physical, not verbal, and this training is incompatible with the necessity for good communication skills in any relationship.²¹

The combat branches of the armed forces are necessarily trained to be violent because of the life and death battles fought when at war or practiced during training.²² Frequently, the question has been asked whether it is “possible to be an efficient killer one day and a good citizen the next.”²³

One of the most important functions of . . . homecoming rituals is to remind returning warriors that they are no longer at war and must begin to readjust to life at home. The warrior must leave behind the mental state that was used for survival, grieve whatever losses have been suffered, or to readjust to the life they once knew. Even the manners of the field and of shipboard life must be left behind²⁴

However, the military has failed to institute some method to transition the soldiers from the violence of deployment to the non-violent, day-to-day activities at home.²⁵ It is clear that there is a need for some form of transition for the service members to take them from the battlefield to the home.

²⁰ See Maass, *supra* note 2, at 52 (“The Special Forces are well trained, but that does not mean they will come back alive or sound Their bodies are not bulletproof, nor are their minds.”); Thompson, *supra* note 3, at 50 (A “family violence expert” asserts that “[i]f you’re in an occupation whose business is killing, it legitimizes violence.”).

²¹ See David H. Marshall & Marilyn D. McShane, *First to Fight: Domestic Violence and the Subculture of the Marine Corps*, in BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY 15, 20 (Peter J. Mercier & Judith D. Mercier eds., 2000) (noting that the military model of problem solving in which service members are required to follow orders is effective for deployment, but is not an asset to a service member’s social skills).

²² See *id.* at 18 (“The primary goal of the Marine Corps leadership is to instill in all Marines that they are warriors first . . .”).

²³ Maass, *supra* note 2, at 52.

²⁴ EMOTIONAL AFTERMATH OF THE PERSIAN GULF WAR: VETERANS, FAMILIES, COMMUNITIES, AND NATIONS 378 (Robert J. Ursano & Ann E. Norwood eds., 1996).

²⁵ See, e.g., Taylor, *supra* note 18, at 52 (citing one view that service members “may have trouble dropping the ‘might makes right’ attitude when they get home”).

B. *Consequence of the Armed Forces Demographic Composition*

The very factors that make a person statistically more likely to commit domestic abuse are present in abundance in the enlisted members of the armed forces:

[F]amilies living at lower socioeconomic levels experience higher levels of domestic violence A low family income . . . characterizes wife abuse. More than one-third, 37 percent, of the lowest pay grades . . . are composed of soldiers 30-years-old and younger who are married

[M]ilitary families are at a particularly high risk for family violence as a result of additional demographic variables and family stressors (e.g., dissatisfaction with one's employment status, responsibility for raising a family) which are habitually associated with wife abuse in the general population Moreover, military members may experience other tensions, such as long deployments and family separations, as well as the stress associated with financial and work-related pressures

[Service members] have limited control in work settings and are generally subjected to orders from other higher-ranking service members . . . [T]hey are continually subjected to conditions they may find undesirable yet are incapable of changing²⁶

In addition to the socioeconomic factors, age is a significant factor placing service members at a higher risk for domestic violence. "Eighty-five percent of active-duty service members are men ages 18 to 35—the group at the highest risk of committing crimes, including physical violence."²⁷

Because the armed forces are recruiting service members that have just reached the age of adulthood, the armed forces have a duty not only to mold the service member into a good "warrior," but also into a good human being. This proposition that the armed forces should participate in the social development of the service members has been discussed for members of the Marine Corps: "The Marine Corps needs to intervene with young couples who, fortunately, may not have established long-term patterns of chronic and escalating abuse."²⁸ In addition to training the soldiers to handle weapons

²⁶ Mercier, *supra* note 4, at 4–5; see also *Department of Defense Symposium on Domestic Violence Prevention Research* 12 (2002), at http://www.mfrc-dodqol.org/domestic_violence/pdfs/Combined_Report.pdf (last visited Aug. 31, 2003) [hereinafter *DoD Symposium*] ("[T]he large majority of persons employed by the Armed Forces are in the age ranges most likely to be characterized by aggressive behavior.").

²⁷ Taylor, *supra* note 18, at 52; see also Marshall & McShane, *supra* note 21, at 25 (noting that there are some theories proposing that the Marine Corps "tends to recruit and enlist individuals that have a predisposition for violence").

²⁸ Marshall & McShane, *supra* note 21, at 26–27.

and to deal with the harsh environments where they are likely to be deployed, the armed forces need to train the soldiers to avoid attempting to use military problem solving strategies at home and to better incorporate their military and non-military personas. The training could “focus on helping young soldiers cope with the demands and stress of daily life” and “focus on building a young person’s confidence to handle the challenges of military life, marriage, and parenthood, helping to build coping strategies that teach the potential aggressor to choose more appropriate responses.”²⁹ These new techniques can then be implemented as a service member attempts to reassume his role in the relationship and the responsibilities he had prior to the deployment.³⁰ A mandatory restorative mediation program implemented by the defense department can teach the service member problem solving skills that will assist him in his social environment.³¹

C. Consequence of Service Member Deployment

Service members often leave their families for extended periods of time to perform certain Department of Defense operations.³² “Military life with its overseas assignments and prolonged periods at sea has traditionally placed considerable strain on marital and other social relationships.”³³ It is not a new phenomenon that these deployments bring an end to many relationships.³⁴ The lengthy absences leave the persons remaining behind

²⁹ See *DoD Symposium*, *supra* note 26, at 15.

³⁰ See *id.* at 13. Some researchers have found that the rate of domestic violence diminishes when court monitoring is implemented by itself. *Id.*

³¹ See *id.* (suggesting that the Armed Forces can “tailor[] the nature and intensity of [domestic violence] prevention efforts to the appropriate class of potential aggressors”).

³² Deployments consist of the time that “[a]ctive-duty military personnel, regardless of branch, . . . experience separations from their families as a result of overseas assignments, temporary duty assignments, or isolated duty tours.” See, e.g., Peter J. Mercier, *Domestic Violence in the Navy: Exploring the Relationship Between Severity of Abuse and Duty Assignment*, in *BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY* 45, 45 (Peter J. Mercier & Judith D. Mercier eds., 2000) (noting that the Navy battleship is often deployed for two to six weeks to prepare the ship for the six to eight-month mission deployment); see also Gegax & Barry, *supra* note 2, at 31 (“Special forces soldiers are away from home as much as 10 months a year.”).

³³ Yoshito Kawahara & Lawrence A. Palinkas, *Suicides in Active-Duty Enlisted Navy Personnel*, in 21 *SUICIDE & LIFE-THREATENING BEHAV.* (1991), reprinted in *MILITARY-CIVILIAN TEAMWORK IN SUICIDE PREVENTION* 2-81, 2-90 (Meyer Moldeven ed., 1994); see also *Threats and Responses*, *supra* note 3, at A13 (citing an Army report finding that the Fort Bragg murders “were probably attributable to existing marital strife that had been made worse by frequent separations as the soldiers trained and fought”).

³⁴ See, e.g., JOHN COSTELLO, *LOVE, SEX, AND WAR: CHANGING VALUES, 1939-45* 275 (1985) (noting American judges’ reluctance to grant divorces to wives while their

lonely and seeking companionship that is inconsistent with their relationship with the deployed service members.³⁵ The party left behind may become involved with a non-service member boyfriend or girlfriend and may decide to end the relationship with the service member.³⁶ The deployed service member is powerless to stop this behavior³⁷ and often wonders how his significant other could leave him while he is overseas performing an important service for his country.³⁸

Also during these absences, the significant others and families left behind are forced to assume all the tasks the service member used to perform.³⁹

Soldiers who go to war generally leave behind them a vacuum—in their families, communities, and work—that is filled by the people who stay at home. When they return, they often find that their wives have taken upon themselves both parental roles, [and] that their children have assumed more responsibilities⁴⁰

husbands were overseas fighting in World War II). “After V-J Day this restraint was removed and the number of divorce petitions shot up.” *Id.*; see also EMOTIONAL AFTERMATH, *supra* note 24, at 379 (noting that “[f]ears of having been replaced in the heart of loved ones or having been betrayed sometimes become realities”).

³⁵ See COSTELLO, *supra* note 34, at 271–72 (explaining that even if the spouses did not intend to be unfaithful, the spouses found companionship, then friendship, and, at times, love in the arms of others).

³⁶ See, e.g., *id.* (discussing a statement by one British wife that companionship for the significant other left behind was vital and, therefore, extramarital affairs soon became socially acceptable); Gegax & Barry, *supra* note 2, at 31 (citing a statement by the wife of a service member that women are “out on the town running around” once their husbands are deployed).

³⁷ See Butterfield, *supra* note 1, at A9 (noting that some service members during their deployments “still worried about what their wives were doing, either failing to pay bills or having extramarital affairs”).

³⁸ See, e.g., *Apocalypse Now* (Paramount Pictures 1979). In the movie, Chef, a member of a team escorting a soldier on a secret mission, discusses his relationship troubles stating “Eva’s not sure she can have a relationship with me Here I am, 13,000 . . . miles away, trying to keep a relationship with my ass.” *Id.*

³⁹ See EMOTIONAL AFTERMATH, *supra* note 24, at 172 (“Responsibilities and decisions related to managing the household that normally are shared must now reside with the husband or wife remaining at home.”); Florence W. Kaslow, *Thematic and Universal Considerations*, in *THE MILITARY FAMILY IN PEACE AND WAR* 255 (Florence W. Kaslow ed., 1993) (“[T]he individuals in the part of the family unit that remained together usually have coalesced into a new pattern of interrelating and taken on the tasks and some of the role of the missing member.”).

⁴⁰ ZAHAVA SOLOMON, *COMBAT STRESS REACTION: THE ENDURING TOLL OF WAR* 107–08 (1993).

The change in structure of the family is necessary for the family survival, but often this added responsibility also builds independence in those left behind.⁴¹ This independence and change in family structure is often unsettling for the returning service members,⁴² and the redistribution of those duties is often difficult for the families or significant others who have come to enjoy this independence.⁴³

Disputes often develop when a service member attempts to reassume his role in the relationship and the responsibilities he had prior to the deployment.⁴⁴ For example, “[I]rritation and disappointment often follow[]

⁴¹ See, e.g., COSTELLO, *supra* note 34, at 274 (referring to a woman’s achievement of financial means as the catalyst for the woman leaving her husband and family “without even the formality of a divorce”); Christian Davenport, *Soldiers Returning Home to Mingled Joy, Jitters*, WASH. POST, Sept. 26, 2002, at A01 (detailing the concerns expressed by the wives of service members adjusting to the return of the service member from deployment).

⁴² See Rachel Henry & Rene J. Robichaux, *Understanding Life in the Army: Military Life from a Service Member and Family Member Perspective*, in SOCIAL WORK PRACTICE IN THE MILITARY 217, 228 (James G. Daley ed., 1999) (noting that “the service member begins to feel like superfluous, excess baggage”); David J. Westhuis, *Working with Military Families During Deployments*, in SOCIAL WORK PRACTICE IN THE MILITARY 275, 287 (James G. Daley ed., 1999) (discussing the possibility that a service member may feel that he no longer is an integral part of the family since the family was able to manage in his absence); *Coming Home* (MGM/United Artists 1997). This film offers a poignant example of how a service member’s deployment can detrimentally affect his marriage. Bob, a male service member, returns from deployment in the Vietnam War to find that his wife Sally is “full of surprises” in that Sally has changed her hair style, bought a new car, moved their home to the beach, and had an extramarital affair. Sally says she has wanted to talk to him since he returned home, but that he seemed so distant and she was afraid to approach him. When discussing her affair, Bob will not accept Sally’s attempt to rationalize it stating “[e]verybody needs somebody for Christ’s sake.” *Id.*

Sally and Bob then discuss the possibility of saving their marriage:

Sally: Well what are you saying? That you’re not even going to make the effort?

Bob: What I’m saying is! . . . I don’t belong in this house and they’re saying that I do not belong over there!

Sally: I can’t talk to you when you’re shouting at me.

Bob: I wanna be your husband, I just don’t deserve to be your husband.

Id.

⁴³ E. Heath Graves & Laura J. Moriarty, *Partner Violence in the Air Force: Estimating Incidence Rates*, in BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY 30, 31–32 (Peter J. Mercier & Judith D. Mercier eds., 2000).

⁴⁴ See EMOTIONAL AFTERMATH, *supra* note 24, at 173 (The couple’s reunion after the period of deployment “is characterized by intermittent discomfort as the relationship is renegotiated and roles are redefined.”); SOLOMON, *supra* note 40, at 109 (indicating that the family members may resist when the service member seeks to reassume the role

the return of the spouse, and flawed communications ma[k]e it difficult for couples to share their individual experiences Conflict areas for couples include[] . . . the wife's unwillingness to relinquish the independent role she had assumed during the separation."⁴⁵ If these disputes are not resolved, the conflict can lead to violent reactions, including domestic abuse.⁴⁶

The statistics seem to show a critical period in which intervention is necessary.⁴⁷ In the case of the Navy, eighty-four percent of the battering incidents occurred between eight and thirty days after sailors returned home from deployments and the severity of the battering increased as the length of the sailors' deployments increased.⁴⁸ These statistics suggest that family mediation for service members and their spouses or significant others will be most effective if scheduled for the week following the service member's return from deployment.

III. RESTORATIVE MEDIATION AS A METHOD OF RESOLVING DISPUTES WITHOUT VIOLENCE

The armed forces continue to unveil new programs to combat the high rates of domestic abuse perpetrated by or on service members.⁴⁹ In 1981, the Department of Defense implemented programs to address the problem of domestic violence.⁵⁰ The Air Force has implemented the Family Advocacy Program that "identif[ies], report[s], assess[es], and treat[s] families with exceptional medical or educational needs, children who are at risk for injury, and families that are experiencing maltreatment."⁵¹ The Army has developed the Community Services Program that "identifies, reports, treats, prevents,

he held prior to deployment, or the family members may urge the service member to reassume his role as "breadwinner" before the service member is ready).

⁴⁵ Westhuis, *supra* note 42, at 276; *see also* Kaslow, *supra* note 39, at 255 ("The spouse . . . frequently has become more independent and self-sufficient and may not want to resume being relegated to second-in-command status.").

⁴⁶ *See* Henry & Robichaux, *supra* note 42, at 228–29 (recounting that "conflict associated with loyalty issues, financial overspending, and the transition from single to couple status" often serves as the catalyst for domestic violence and is often present when the service member returns from deployment).

⁴⁷ *See* Mercier, *supra* note 32, at 55–57 (referring to the critical period as a "window of opportunity").

⁴⁸ *Id.* at 54.

⁴⁹ Mercier, *supra* note 4, at 9 (referring to the programs that have been established "[u]nder government mandates" to combat domestic violence and indicating that the solution has not been discovered).

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 7.

and follows the progress of abuse incidents.”⁵² The Navy has formulated the Family Advocacy Program, which “addresses the prevention, identification, intervention, treatment, followup, and reporting of child and spouse maltreatment.”⁵³ In each of these programs, the primary focus is on treating and providing help for the families that are experiencing or have experienced domestic violence. Additionally, the programs provide educational services on “good parenting and family communication.”⁵⁴

Most of the services provided by the armed forces’ family advocacy programs apply only after the abuse has occurred.⁵⁵ After the abuse occurs, the spouse may choose to report the abuse by: (1) calling the local police department, (2) talking with the service member’s commander, who will ordinarily impose discipline on the service member, or (3) calling the family advocacy program for the particular service branch where social workers or other health professionals will typically investigate the abuse and determine whether the claim can be substantiated.⁵⁶ None of these methods empower the abused spouses or give them the skills needed to solve their own problems. This is a void in the programs provided by the armed forces—one that restorative mediation can fill.

A. *The Inability of Military Social Work and Therapy to Solve the Problem*

A program can only be beneficial to service members when the program is actually implemented and when individuals seek it out. The mental health programs provided by the armed forces are not any different in this way. The effectiveness of the mental health programs are limited because the chain-of-command does not take therapy and social work seriously, and because service members and their families fear the possible repercussions that may flow from seeking out therapy or social work.⁵⁷ Both factors prevent the

⁵² *Id.* at 8.

⁵³ *Id.*

⁵⁴ *Id.* at 7–9.

⁵⁵ See, e.g., *id.* at 5 (including “crisis intervention, emergency shelter, and counseling”); Thompson, *supra* note 3, at 49 (noting that the head of the Army’s program to combat domestic violence was now looking at methods of prevention and that the Army was “being very reactionary”).

⁵⁶ Laura J. Moriarty & E. Heath Graves, *Victim Reports of Partner Violence in the Air Force: Strategies for Increased Reporting*, in *BATTLE CRIES ON THE HOME FRONT: VIOLENCE IN THE MILITARY FAMILY* 157, 157–58 (Peter J. Mercier & Judith D. Mercier eds., 2000).

⁵⁷ See discussion *infra* Part III.A.3.

mental health programs from accomplishing the purposes for which they were created.

1. *The Failure of the Chain-of-Command to Recognize the Importance of the Service Member's Family and the First Signs of Domestic Violence*

In the armed forces, a commander will be in charge of a certain number of service members assigned to him.⁵⁸ The commanders are required to ensure the quality of life of those service members and their families.⁵⁹ The commanders are also responsible for training the service members to be able to accomplish any future mission.⁶⁰ When the two responsibilities conflict, however, the responsibility to train will supercede the responsibility for the quality of life of the service member and his family.⁶¹

"[I]t is left up to the unit commander to punish [a service member for the commission of a domestic assault] as he/she sees fit. However, often there is very little, if anything, done. The Marine may receive formal counseling, but most often there is no further disciplinary action taken."⁶² There are many reports indicating that the service members' commanders either deny or respond callously to reports that a service member has been violent⁶³ or that a service member is having family problems.⁶⁴ Even though counseling is

⁵⁸ See Taylor, *supra* note 18, at 54.

⁵⁹ *Id.*

⁶⁰ See, e.g., 60 Minutes, *supra* note 3 (indicating that commanders would likely focus on the armed forces' interest in "the readiness of the troops" and order a soldier to go to training).

⁶¹ See, e.g., Gegax & Barry, *supra* note 2, at 31. Referring to the tendency of commanders to discourage victims of domestic from reporting the abuse, an investigator of domestic abuse committed by service members notes that "[f]or the commanders, unit readiness is all. Which means they will do anything rather than lose a soldier." *Id.*

⁶² Marshall & McShane, *supra* note 21, at 22.

⁶³ See, e.g., 60 Minutes, *supra* note 3 (noting the people in command bend over backward to defend service members by refusing take the recommendations of social workers who investigate domestic abuse and quoting a typical response of "if she said that to me, I'd probably hit her too").

⁶⁴ There is an often-quoted statement from the chain-of-command that the service does not want to hear about family problems that the service member brought upon himself. See, e.g., Mercier, *supra* note 4, at 6 ("[I]f the [Navy] . . . had wanted [a sailor] to have a wife, they would have issued [him] one."); ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES 65 (1987) (citing an "[o]ld military saying" that "[i]f the army wanted you to have a wife, they would have issued you one").

available to members of the military, such programs are often viewed as secondary to the military's primary interest in training the soldier.⁶⁵

Further, as relates to the quality of life, the military method of problem solving is often at odds with the problem solving skills a service member needs to use in family situations.

The chain-of-command control model vests authority in rank and rewards officers on their ability to take and follow commands and to seek approval from supervisors rather than to solve problems at their own level of operation. While most critics do not dispute the success of the military model in accomplishing tasks, they view it as a serious impediment to effective personnel communications and employee development."⁶⁶

Because the military goals supercede the quality of life goals, the service member has to learn to shut off his military persona at home, or at least to be able to transition between the two personas when necessary.

2. The Failure of Military Programs to Filter Down to the Service Members and Their Families

Delores Johnson, the Director of Family Programs for the United States Army, recounts the programs that are implemented when service members are scheduled to return home:

When soldiers are ready to come back, there [are] . . . reunion materials available to them. We do have de-stressing sessions with soldiers as they return back and we also have de-stressing sessions with families If [you are] saying that there should be some holdover area where soldiers could stay, well, that's a different issue and the Army is going to have to take a look at that

We do do many programs that get the soldier to talk about what has changed. What are you going back to? How have I changed?

After Desert Storm, we did it a number of ways. We had a chaplain that was on the airplane with the soldiers as they came back and they talked about the kinds of things they should expect that may have changed while they were gone. There were many soldiers that had new babies when they

⁶⁵ See, e.g., Mercier, *supra* note 4, at 6 (listing articles that have reported on the military's tendency to place the mission first and the family second); Taylor, *supra* note 18, at 56 (stating that commanders will offer a variety of excuses as to why it is more important for a service member to attend military training rather than counseling programs).

⁶⁶ Marshall & McShane, *supra* note 21, at 20.

were away. Their spouses may work The whole dynamic could have changed and people need to talk about On the home front we have the spouses talk about what should I expect coming into this. I've changed and . . . how is he going to react to that and how are my children going to react to this person, some of them may have forgotten.⁶⁷

However, Desert Storm veterans dispute the claimed availability and implementation of these programs stating that on their return home, there was a welcoming party, they were given a beer, and then they were sent home.⁶⁸

3. Actual or Perceived Stigma of Utilizing Mental Health Programs

“Soldiers frequently view the mental health mission with a mixture of suspicion, stigma, and fear of career damage.”⁶⁹ A service member’s communications with a therapist or counselor may be transmitted to a service member’s superiors because the military does not provide that communications with counselors or therapists are privileged.⁷⁰ “Anyone in the member’s chain-of-command with a ‘need-to-know’ would have access to those records.”⁷¹ In contrast, such mental health communications are privileged for civilians.⁷²

⁶⁷ *Oprah: After the Show* (Oxygen television broadcast, Sept. 25, 2002).

⁶⁸ *Id.* In addition to failing to cause the filtering down of these programs to returning service members, the armed forces also have failed to inform service members, their family, and their commanders of laws in place to assist the victims of domestic violence by service members. See Taylor, *supra* note 18, at 51 (explaining that “most people, including the commanders who must enforce [the Lautenberg Amendment, the enlistment bar, and the laws providing compensation for abuse victims] are unaware of their existence”); see *infra* note 91 and accompanying text.

⁶⁹ Spencer J. Campbell & Charles C. Engel, Jr., *Combat Psychiatry the “First Team” Way: First Calvary Division Mental Health Operations during the Persian Gulf War*, in *THE GULF WAR AND MENTAL HEALTH: A COMPREHENSIVE GUIDE* 80 (James A. Martin et al. eds., 1996); see also Gegax & Barry, *supra* note 2, at 31 (indicating that service members will not seek out marriage counseling because of a fear that utilizing such services “will make them look weak or hurt their chances for promotion”).

⁷⁰ See Major Barbara J. Zanotti & Captain Rick A. Becker, *Marching to the Beat of a Different Drummer: Is Military Law and Mental Health Out-of-Step after Jaffe v. Redmond?*, 41 A.F. L. REV. 1, 9 (1997).

⁷¹ See *id.*

⁷² See, e.g., Taylor, *supra* note 18, at 54 (noting that civilians will report abuse to attorneys, therapists, or pastors because they know those communications will remain confidential). Service members will seek out mental health care through private programs because the service member will obtain the same benefits of confidentiality that civilians

Reporting the atypical behavior of a service member to his commander may result in the service member being reduced in rank, thereby reducing his pay, which further increases the economic stresses on a family with children to raise and feed.⁷³ This will often hurt the victim reporting the abuse as well because the service member is often the only breadwinner in the family.⁷⁴ In weighing the decision to report, the victim additionally now has to weigh the family finances.⁷⁵

Certain treatment programs are only available if a service member is found to be disabled, a label that would be detrimental to his career.⁷⁶ "This seems to create a paradox: help is readily available, but you must always be in control and demonstrate a top-notch image."⁷⁷ For example, the emotional stability of Air Force members is examined before deployment and throughout training.⁷⁸ If the results of those examinations show emotional problems, the Air Force member will be discharged.⁷⁹ Delores Johnson, the Director of Family Programs for the United States Army, indicates that help is available, but admits that a stigma still attaches when a service member seeks out mental health or social services.⁸⁰ These stigmas provide tremendous disincentives to a soldier who has recognized that he needs help

are provided. See Carla A. Monroe-Posey, *TRICARE and Its Impact on Military Social Work Practice*, in *SOCIAL WORK PRACTICE IN THE MILITARY* 67, 86 (James G. Daley ed., 1999).

⁷³ See Moriarty & Graves, *Victim Reports*, *supra* note 56, at 157-58 (noting that these are "typical sanctions in the military justice system"); *DoD Symposium*, *supra* note 26, at 5-6.

⁷⁴ See, e.g., Thompson, *supra* note 3, at 49 (indicating that the deployment of the "breadwinner" causes additional problems for the family of the service member).

⁷⁵ See Eric Schmitt, *Military Struggling to Stem an Increase in Family Violence*, N.Y. TIMES, May 23, 1994, A1 ("[S]pouses in the military are often reluctant to report abuse, fearing . . . that revealing abuse could imperil the service member's career and the family's finances.").

⁷⁶ See Julian D. Ford & Judith Stewart, *Group Psychotherapy for War-Related PTSD with Military Veterans*, in *GROUP TREATMENTS FOR POST-TRAUMATIC STRESS DISORDER* 95 (Bruce H. Young & Dudley D. Blake eds., 1999); see also Mary Laedtke, *Occupational Therapy and the Treatment of Combat Distress*, in *THE GULF WAR AND MENTAL HEALTH: A COMPREHENSIVE GUIDE* 151 (James A. Martin et al. eds., 1996) ("The term *therapy* construes ill health.").

⁷⁷ James G. Daley, *Understanding the Military as an Ethnic Identity*, in *SOCIAL WORK PRACTICE IN THE MILITARY* 291, 294 (James G. Daley ed., 1999).

⁷⁸ McDowell, *supra* note 12, at 3-12. However, the Air Force has asserted that it is trying to overcome the stigma that attaches to therapy by "discourag[ing personnel] from interpreting the need for assistance as a sign of weakness." *DoD Symposium*, *supra* note 26, at 8.

⁷⁹ See McDowell, *supra* note 12, at 3-12.

⁸⁰ See Oprah: Murders, *supra* note 3.

to resolve a particular conflict but knows that asking for help may bring an end to his career. “[W]hat goes on within the walls of a man’s home, if it becomes known elsewhere, reflects on his qualities as a soldier and may affect the man’s chances for promotion.”⁸¹ The stigma attaches because of the perception in the armed forces that a service member is always in control. By seeking out social services, the service member has admitted an inability to control one aspect of his life.⁸²

B. Mediation as a Beneficial Alternative to Therapy or Social Work for the Armed Forces

In any mediation program, the program can only help if people are aware of its availability.⁸³ Procedures are in place to increase the public awareness of family mediation through word of mouth, increased participation in mediation programs, and public education by mediation organizations.⁸⁴ As public awareness of family mediation increases, the program will become less experimental⁸⁵ and more conventional, thereby reducing the stigma that attaches to therapy methods.

The successful implementation of a restorative mediation program will depend on a commitment by the government to extend mediation programs to cover domestic disputes. The Air Force acknowledges that having “an award-winning alternative dispute resolution (ADR) program . . . takes strong commitment from senior managers, sufficient financial and people resources, and a wide variety of communication tools including websites and

⁸¹ SHUPE ET AL., *supra* note 64, at 68.

⁸² James G. Daley, *Understanding Life in the Air Force*, in SOCIAL WORK PRACTICE IN THE MILITARY 245, 250 (James G. Daley ed., 1999) (explaining that a service member is given a “reasonable time” to resolve the problems he is having at home “and then the member begins to lose status and viability to remain in the Air Force”).

⁸³ See, e.g., Susan Knighton Cavanaugh, *An Award-Winning ADR Program*, THE PUB. MANAGER, June 27, 2000, at 27, 27. The Air Force has provided a website and workshops to educate service members on the subject of alternative dispute resolution. *Id.* at 28. The effects of this mediation education will probably have a positive spillover effect on any restorative mediation program implemented.

⁸⁴ See HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 443 (1995).

⁸⁵ See, e.g., CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 6 (2001) (noting that court workers in the 1960s were the first mediators “experimenting with informal procedures in dispute resolution”); IRVING & BENJAMIN, *supra* note 84, at 443 (discussing the transition of family mediation “from the fringe into the mainstream”).

awareness briefings, and extensive ADR training.”⁸⁶ The fact that an alternative dispute resolution section has been established within the Judge Advocate General’s department⁸⁷ shows that the United States Government does recognize the benefits of alternative dispute resolution.

A restorative mediation program will not be a fundamental change in the operation of conflict resolution programs provided by the military. For example, the Air Force currently provides for mediation in Air Force contract disputes and workplace disputes.⁸⁸ Thus, a restorative mediation program would be a natural extension of mediation programs already in place.

In addition, there are reports that mediation programs are providing “long-term cost savings” for the Air Force.⁸⁹ Since “[t]he United States military is a \$355-billion-a-year outfit,”⁹⁰ the savings from the mediation programs may be tremendous. The savings from the various armed forces mediation programs can be used to fund the Armed Forces Restorative Mediation Program that this Note proposes.

There is an additional incentive for the Government to develop the program. The armed forces need service members who are not distracted by conflicts at home, and service members who are not being criminally charged for domestic violence.⁹¹ “[T]he servicemember family’s satisfaction with military life contribute[s] heavily to the member’s decision to make the military a career versus returning to civilian life.”⁹² The Armed Forces

⁸⁶ Cavanaugh, *supra* note 83, at 27 (indicating that the Air Force’s “successful ADR program serves as a model for other federal agencies”).

⁸⁷ *Id.* at 28.

⁸⁸ Castellon, *supra* note 19, at 19.

⁸⁹ See Cavanaugh, *supra* note 83, at 27; Castellon, *supra* note 19, at 19.

⁹⁰ Maass, *supra* note 2, at 52.

⁹¹ See, e.g., Thompson, *supra* note 15, at 46 (explaining that the armed forces is required to confiscate the weapons of service members who have been convicted of domestic violence and this requirement may result in a discharge from the armed forces for service members whose position requires them to carry weapons); Taylor, *supra* note 18, at 52 (discussing the Lautenberg Amendment that requires commanders to confiscate the weapons of service members who have been convicted of misdemeanor domestic violence charges and the Department of Defense policy barring prospective enlistees convicted of domestic violence after 1996 from volunteering). However, these laws have exceptions that may make them ineffectual in that under the Lautenberg Amendment, “[m]ajor military weapons systems and those that need a crew to operate are exempt” and military recruiters have discretion as to whether to enforce the enlistment bar. *Id.*

⁹² EMOTIONAL AFTERMATH, *supra* note 24, at 167.

spends a great deal of money training soldiers.⁹³ Therefore, it should be clear that money should be provided to make sure the service member has a stable home life because a stable home life leads to better results in training.⁹⁴

1. *Encouraging and Empowering the Parties to Formulate Solutions*

Mediation differs from family therapy and social work in the nature of the third-party involvement. "Family therapy is in its nature manipulative Where family therapy approaches are adopted in mediation practice, there is a danger that covert attempts to manipulate the perceptions and preferences of the parties will occur."⁹⁵ In addition, in social

⁹³ See McDowell, *supra* note 12, at 3-13 (noting that in the case of the suicides of Air Force members, the cost "includes the money already invested in the victim, the direct cost of death benefits following the suicide, the loss of anticipated services, and the cost of replacing the victim). These costs are also applicable when a service member is charged with domestic violence in a military or civilian court. In both cases, the investment in training the soldier is lost, the skills the service member was expected to provide are lost, and the armed forces must now recruit and train another service member as a replacement. See also JOANNE C. MARSHALL-MIES ET AL., UNITED STATES ARMY RESEARCH INSTITUTE FOR THE BEHAVIORAL AND SOCIAL SCIENCES, DIFFERENCES IN JOB SATISFACTION OF SOLDIERS IN DUAL MILITARY AND TRADITIONAL MARRIAGES viii (2000) (explaining that "[t]he Army is concerned with attracting and retaining capable female officers and enlisted personnel").

⁹⁴ See Mercier, *supra* note 32, at 57 ("[P]roblems on the 'home front' could lead to problems and various distractions at work, proving disastrous to an operational ship if the sailor works in a critical area."); Mercier, *supra* note 4, at 5 ("[F]amily abuse not only poses a serious threat to family life but also compromises preparedness by reducing the readiness and performance of individual military members."); SHUPE ET AL., *supra* note 64, at 69 (reporting that the military has recognized the direct correlation between a stable home environment and the soldier's performance on deployment); Schmitt, *supra* note 75, at A1 ("[S]tresses at home tend to spill over to the battlefield, hurting military readiness, recruiting and retention."); Taylor, *supra* note 18, at 51 ("[D]omestic violence interferes with readiness, retention and morale in the ranks, whether the service members involved are abusers or victims."). At times, service members have taken their own life at the same time that they took the life of their significant others. See Varian, *supra* note 3, at 288 (noting that two of the Fort Bragg soldiers took their own lives after murdering their wives). In the context of service member suicides, the Air Force notes that the entire military environment is affected and disrupted by a service member's suicide. See McDowell, *supra* note 12, at 3-13. However, even if the service member does not take his own life, the mere fact that the service member has been accused or convicted of murdering his significant other must also affect the friends and co-workers of the service member in much the same way as suicide.

⁹⁵ MARIAN ROBERTS, MEDIATION IN FAMILY DISPUTES: PRINCIPLES OF PRACTICE 124 (2nd ed. 1997) (citation omitted). The parties are sometimes too angry or emotional to be able to look at the situation objectively and define the issue in dispute. See *id.* In those

work, the social worker has final authority over what solutions will be implemented.⁹⁶

By contrast, mediation requires that the parties cooperate to formulate a solution.⁹⁷ “The mediator is subject to their authority, not vice versa.”⁹⁸ The relationship between the parties can be improved by assisting the parties in finding a mutually agreeable resolution through cooperation rather than by attributing fault.⁹⁹

2. Confidentiality Facilitates Open Communication

The private and confidential nature of the mediation allows the parties to engage in free and open communication.¹⁰⁰ The Air Force Mediation Program provides that the mediation process is confidential in the context of employment disputes.¹⁰¹ It is necessary that this confidentiality also apply to

cases, the mediator utilizing family therapy techniques will use “private and subjective interpretations to define issues in his/her terms.” *Id.* The parties are no longer in control of the process and instead proceed to find a solution to the issue the mediator believes is central to the dispute in their relationship. *See id.* Further, family therapy assumes there is a “psychiatric dysfunction in the family that requires treatment” whereas mediation presumes the parties are “competent both to define the issues for themselves and to come to their own decisions.” *Id.* at 14.

⁹⁶ *See id.* at 11.

⁹⁷ *See id.* at 7.

⁹⁸ *Id.* at 11.

⁹⁹ Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 50–51 (1995).

¹⁰⁰ Wetsch, *supra* note 18, at 11 (advising that parties should “incorporate a confidentiality provision into the agreement to mediate, as well as into any settlement agreement” if the substantive law of the parties’ jurisdiction does not provide that mediation communications are confidential).

¹⁰¹ *See* Cavanaugh, *supra* note 83, at 28. The United Kingdom has the Army Welfare Service which “provides a comprehensive and confidential welfare support service to the Chain of Command, all military personnel . . . , both married and single, families and dependents.” ARMY WELFARE SERVICE, SERVICE COMMUNITY OFFICIAL GUIDE 110 (2002), at http://www.army.mod.uk/linked_files/ag/soldierwelfare/supportagencies/aws/pdf/Aldershot%20section%203%202002.pdf (last visited Aug. 31, 2003). This program also applies to the problems a service member has in his personal life. *Id.* at 111. Typically, a service member has to grant permission before information will be released to third parties. *Id.* at 110. However, confidentiality will be broken “to prevent: the risk of self harm, a danger to others, a serious crime, civil or military, a breach of security or the effectiveness of a soldier being compromised in the course of their duty.” *Id.* If the United States Air Force can provide for confidentiality in employment and contract disputes and the United Kingdom can provide for confidentiality in its Army Welfare Services, the Department of Defense can provide for confidentiality in a restorative mediation program.

restorative mediation programs available to service members and their significant others.¹⁰²

3. *Flexible Structure to Accommodate the Needs of the Parties*

The mediator's role is to facilitate the parties' search for common ground and reconciliation or settlement.¹⁰³ If the level of anger or perceived betrayal is high, the mediator may meet with the parties separately in "private caucuses" or conferences and may convey to the other party the information discussed only when one expressly permits.¹⁰⁴ This method allows the process to continue even though the parties cannot discuss their problems face-to-face.¹⁰⁵

In addition, relevant to the issue of service members returning from deployment, one of the advantages of mediation is that it can occur early and diffuse the conflict.¹⁰⁶ "Mediation occurring soon after, or even before, a dispute manifests . . . can contain conflict or limit its damaging effects. The dispute will not yet have had time to develop a past, with its own history and associated pattern of behavior."¹⁰⁷ This flexibility accommodates the interests of the service member in getting to an amicable solution early and accommodates the interests of the armed forces in having a productive military.

IV. FRAMEWORK IN WHICH MEDIATION SHOULD BE PROVIDED

Family law issues differ from many other fields of law in that the feelings of the parties have to be acknowledged and addressed in order to allow the parties to continue to relate without residual blame.¹⁰⁸ Often in

¹⁰² See *DoD Symposium*, *supra* note 26, at 5. Some researchers have found that "the lack of confidentiality in the collection of [domestic violence] data in the military might result in the underreporting of spouse maltreatment incidents . . ." *Id.*

¹⁰³ See ROBERTS, *supra* note 95, at 15. "The mediator's first responsibility is to protect the right of the parties to be the architects of their own agreement." *Id.* at 104.

¹⁰⁴ Wetsch, *supra* note 18, at 12.

¹⁰⁵ See *id.* at 11-12.

¹⁰⁶ DANIEL DANA, *CONFLICT RESOLUTION: MEDIATION TOOLS FOR EVERYDAY WORKLIFE* 114 (2001) (advocating "preventative mediation" as a method of directing interpersonal relationships "that prevents conflicts from becoming so serious" that the parties are required to focus all of their attention solely on finding a resolution to those conflicts).

¹⁰⁷ ROBERTS, *supra* note 95, at 131 (citation omitted).

¹⁰⁸ See *id.* at 13 (explaining that "the facts of the past cannot be negotiated over, they can only be adjudicated over" and so, the mediator must guide the process away from the differing perspectives of the events that led up to the disputes).

family disputes, the viewpoints of both parties are valid and the dispute cannot be broken down into a situation in which one party is wrong and the other party is right.¹⁰⁹

It is important that the mediation allows the parties to resolve their disputes in such a way that the marriage or relationship can be saved.¹¹⁰ Through this process, the parties will develop clear solutions to their disputes and knowledge of how to resolve future disputes in the same manner.¹¹¹ The parties can cooperate and collaborate to resolve their dispute without anger and blame so that the parties will be able to continue to work together in the future.¹¹² Since the intent of mediation between service members and their significant others is to save relationships, the ideal process by which to conduct the mediation is through restorative mediation.

However, if the parties determine that the relationship needs to end, the dynamic nature of a mediation session offers a tremendous advantage over counseling.¹¹³ The goal of mediation can easily be altered from salvaging the relationship to mediating an amicable separation agreement. The parties can work together to reach a divorce, custody, and property settlement by using the problem solving strategies learned in their mediation sessions.¹¹⁴ In any event, whether the relationship is salvaged or ended, the parties are in a non-emotionally charged environment, in a structured session, with a neutral facilitator rather than in an emotionally charged home environment where anything can happen.

¹⁰⁹ See JENNIFER E. BEER, *THE MEDIATOR'S HANDBOOK* 118 (1997) (noting that mediation cannot be used to determine “the truth of what happened” or “fault and punishment”); ROBERTS, *supra* note 95, at 116 (finding that “the parties’ versions of the past are bound to differ” and “the validity of . . . perceptions should be affirmed, and the parties encouraged . . . to consider the present and future implications of their dispute”).

¹¹⁰ See HOWARD H. IRVING & MICHAEL BENJAMIN, *THERAPEUTIC FAMILY MEDIATION: HELPING FAMILIES RESOLVE CONFLICT* 76 (2002) (“[F]amily mediation affords couples an opportunity to slow down and think carefully about what they really want to happen in their relationship.”).

¹¹¹ See, e.g., KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 187 (2001) (“It is possible for us to fight in ways that encourage resolution, learning, collaboration, and transformation.”).

¹¹² See Gerencser, *supra* note 99, at 50–51.

¹¹³ See LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* 33 (2001). The flexibility of dispute resolution “has the advantage of allowing the parties some say over what processes will suit them, [and] of allowing the adaptability where the nature of the dispute and disputants require it . . .” *Id.*

¹¹⁴ Gerencser, *supra* note 99, at 47 (noting that “if the parties can reach agreement on equal terms and neither party controls the other, family mediation, including matters such as child custody, visitation, and support, may be appropriate”).

A. *Defining Restorative Mediation*

Restorative mediation, applying principles of restorative justice, has recently been added to the list of methods of mediation.¹¹⁵ The characteristics of restorative mediation are:

First, the parties are able to acknowledge that a dispute exists and are able to share how they experienced the dispute with each other. Second, the parties are able to talk about how to make things as right as possible between themselves. Third, the parties talk about the future to prevent the dispute from occurring again and to rebuild trust.¹¹⁶

This process is particularly appropriate where there is a dispute in a marriage or other romantic relationship where there are important incentives to save the relationship.¹¹⁷

Armed service members returning from deployment may see their loved ones' new-found independence and ability to flourish as signs that they were not needed and may feel wronged by love ones who no longer know how to relate to them.¹¹⁸ The loved ones left behind may have residual fears that the service member abandoned them and that they have taken second priority to the military.¹¹⁹ Both sides will feel hurt or wronged by the other and will have lost faith in the other. Restorative mediation can assist the parties to recognize the perceived hurt of his or her significant other and restore the relationship by rebuilding the parties' trust in each other.¹²⁰ Restorative

¹¹⁵ Douglas E. Noll, *Restorative Mediation*, at <http://www.mediate.com/articles/noll6.cfm> (last visited Aug. 31, 2003) (listing restorative mediation in addition to the other methods of mediation such as evaluative, facilitative, and transformative).

¹¹⁶ *Id.*

¹¹⁷ See Dean E. Peachy, *Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire*, in *RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION* 551, 552 (Heinz Messmer & Hans-Uwe Otto eds., 1992) ("Although the term 'restorative justice' is typically used in relation to crime, its concepts are also directly relevant to the harms suffered in the course of everyday life and routine conflict, and where the event is not classified as a crime."). Forgiveness is an effective tool of restorative justice and would be appropriate for disputes between service members and their spouses. *Id.* at 553-56.

¹¹⁸ See *supra* note 67 and accompanying text.

¹¹⁹ See, e.g., Kaslow, *supra* note 39, at 252 ("Some family members speculate as to why they have to bear the burden alone and whether the trooper really made every conceivable effort to get leave.").

¹²⁰ See Douglas E. Noll, *Restorative Mediation*, at <http://www.mediate.com/articles/noll6.cfm> (last visited Aug. 31, 2003) (listing restorative mediation's ability to give recognition to the hurt and wrongs perceived by the other person and to find a way to resolve the dispute, reconcile the parties, and rebuild the trust).

mediation also may help to alleviate the stress that service members face upon reuniting with their families by showing them how to resolve disputes through communication. Using these methods at home will hopefully prevent some future disputes.¹²¹ Therefore, this process should be available to service members and their significant others where disputes result when the service member returns from deployment and finds that his spouse has become independent and has changed in other ways.

B. *The Process of Restorative Mediation*

“Mediation is by definition and practice a voluntary process.”¹²² This view has changed somewhat though as some courts are ordering mandatory mediation; however, the mandate only requires that the parties enter the mediation process.¹²³ This section of the Note provides a possible framework for a restorative mediation program that the armed forces can implement and mandate that service members enter upon their return from deployment.

1. *Initial Screening*

The mediator will first bring the parties together to explain the restorative mediation process to the parties and how the restorative mediation process differs from therapy.¹²⁴ However, the mediator may choose to keep the parties separate during this process if there is some indication of severe domestic abuse or of a power imbalance between the parties.¹²⁵ The mediator should begin to build a relationship of trust with the parties.¹²⁶ The mediator

¹²¹ See Susan Kurtz et al., HEALTH & SOC. WORK, May 2002, at 155, 155.

¹²² *Id.* at 158.

¹²³ See Gerencser, *supra* note 99, at 54 (explaining that the parties are able to disband the process prior to any collaborative agreement); Castellon, *supra* note 19, at 19 (noting that if the parties utilizing the Air Force’s mediation program are not satisfied with the process, “they can always go back to the complaint process or to court”).

¹²⁴ MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION 11 (2001) (“Clearly explaining how the mediation process works and what [the parties] might expect to experience will help put the involved parties at ease.”); ROBERTS, *supra* note 95, at 14 (“[T]he basic assumption of family therapy is of psychiatric dysfunction in the family that requires treatment.”).

¹²⁵ See Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, MEDIATION Q., Summer 1990, at 365, 373–74.

¹²⁶ BOULLE & NESIC, *supra* note 113, at 158–60 (noting that the parties must trust the mediator in order for mediation to be successful); UMBREIT, *supra* note 124, at 11 (“The first and most important task . . . is establishing trust and rapport with the involved parties. The development of trust and rapport enhances any dialogue process but is particularly beneficial in intense interpersonal conflicts.”).

should explain to the parties that mediation is confidential¹²⁷ and that the mediator is impartial.¹²⁸ The parties are more likely to talk without reservation if assured that the information disclosed in mediation will not be disclosed outside of the mediation process.¹²⁹

Once these preliminary matters are addressed, the parties can then convey the problems they are having at home. The mediator will utilize this information to help the parties determine their central dispute and express the dispute as an issue that mediation can resolve.¹³⁰ Mediation is particularly able to resolve disputes that center on the parties' home lives in that mediation allows the parties to find solutions to disputes with complicated factual backgrounds in which legal determinations are not necessary.¹³¹

After the parties are fully aware of the restorative mediation process and the issue for mediation is preliminarily enunciated, the mediator and the parties determine whether they should continue the restorative mediation process.¹³² The parties with disputes that can be mediated will often want to continue the mediation process.¹³³

¹²⁷ See UMBREIT, *supra* note 124, at 41. A mediation agreement may be signed to ensure the confidentiality of the process. See *supra* note 134 and accompanying text.

¹²⁸ See, e.g., BOULLE & NESIC, *supra* note 113, at 18. The absence of impartiality "would fundamentally undermine the nature of the process. It is inconceivable that the parties could waive the requirement that the mediator act fairly." *Id.*; see also Richard Hill, *Non-adversarial Mediation*, DISP. RESOL. J., July-Sept. 1995, at 43, 44 (noting that impartiality is a trait that is found in the very best "non-adversarial" mediators).

¹²⁹ See Wetsch, *supra* note 18, at 11.

¹³⁰ See Kurtz et al., *supra* note 121, at 156-57 (stating that the mediator needs to assist the parties in recognizing their "common ground" and to phrase their dispute in unbiased and non-accusatorial terms).

¹³¹ See Hill, *supra* note 128, at 44 (indicating that where legal determinations are required, the parties should look to litigation or arbitration to resolve those disputes). Mediation can resolve disputes centering around "[h]ow people treat each other, [c]ommunicating about problems, and [f]ollowing through on promises and responsibilities." BEER, *supra* note 109, at 118. These issues face many couples, including the service members returning from deployment and their significant others. See *supra* Part II.C.

¹³² See, e.g., FORREST S. MOSTEN, *THE COMPLETE GUIDE TO MEDIATION: THE CUTTING-EDGE APPROACH TO FAMILY LAW PRACTICE* 32 (1997) (noting that after the mediator conveys information about the mediation process and answers any questions, if the parties "are ready to commence the process," they will sign an agreement to mediate).

¹³³ See, e.g., Gerencser, *supra* note 99, at 62 (citing the results of a survey in which each person, after the assessment phase, communicated a interest in continuing the mediation process).

If the parties decide to continue, the parties need to enter into a mediation agreement. The mediation agreement will set forth the basic rules to govern the entire restorative mediation process.¹³⁴

2. Working Toward Agreement

The mediator has to allow the parties to offer possible solutions to their problems.¹³⁵ “[M]ediation is about getting the parties to talk to one another again.”¹³⁶ The mediator and the parties will then discuss the potential positive and negative aspects of each proffered solution.¹³⁷ This process cannot degenerate into personal attacks;¹³⁸ however, the parties do not have to be in harmony or agreement.¹³⁹ Both sides need to discuss the ideas put forth by the other party in addition to the ones he or she offers.¹⁴⁰ The mediator is responsible for ensuring that the issues being mediated remain clear and for showing the parties where they are in agreement.¹⁴¹

Sometimes, the parties are too emotional to be able to collaborate to find a solution. The mediator may bring the session to a close if the mediator is concerned that the parties are not cooperating or collaborating and are instead taking advantage of the process.¹⁴² The mediator may also bring the session to a close if the mediation is not progressing because a party is continuing to blame the other side instead of working toward a solution.¹⁴³ However, in mediation, the process does not have to come to a close simply because the parties cannot work together.¹⁴⁴ In these instances, because of the dynamic

¹³⁴ See Kurtz et al., *supra* note 121, at 156 (“Ground rules for the mediation session such as courtesy, respect, and active participation are established. Commitment to working in good faith toward a resolution is established as an expectation.”).

¹³⁵ See ROBERTS, *supra* note 95, at 6.

¹³⁶ See *id.*

¹³⁷ See Kurtz et al., *supra* note 121, at 157.

¹³⁸ See, e.g., IRVING & BENJAMIN, *supra* note 110, at 53 (noting that when one party “makes disparaging remarks” about the other, the mediation process is disrupted).

¹³⁹ See ROBERTS, *supra* note 95, at 7.

¹⁴⁰ See, e.g., IRVING & BENJAMIN, THERAPEUTIC FAMILY MEDIATION, *supra* note 110, at 53 (indicating that the parties can terminate the mediation by failing to reach an agreement on any issue).

¹⁴¹ See ROBERTS, *supra* note 95, at 6.

¹⁴² Gerencser, *supra* note 99, at 67.

¹⁴³ See *id.* (“If the mediator determines that the mediation is progressing inappropriately, the mediator should declare an impasse.”).

¹⁴⁴ See, e.g., BECK & SALES, *supra* note 85, at 15 (discussing the use of “shuttle mediation” where the parties meet with the mediator on separate occasions or in separate locations); IRVING & BENJAMIN, *supra* note 110, at 53 (offering a private “caucus” as an alternative when the parties are unable to mediate together productively).

nature of mediation, the mediator may provide for separate meetings with each party. In this way, the mediator acts as a go-between transmitting the issues and the proposed solutions from one party to the other.

3. *Solution*

If the parties are able to come to a mutually agreeable solution,¹⁴⁵ they will then develop a method for implementing the solution.¹⁴⁶ The mediator may assure the parties that she will be available if there are difficulties in implementing the solution. The solution is not always formed during the mediation process. "Even if mediation fails to secure either an agreement or an improvement in communication, the parties will have lost nothing by resorting to it."¹⁴⁷ The mediation process may simply set the stage for the parties to find a solution outside of mediation.¹⁴⁸

4. *Determining the Parties' Satisfaction with the Mediation Process*

After the solution is agreed upon, the mediator will make an appointment with the parties for a post-mediation follow-up session.¹⁴⁹ The follow-up session may take place a few days after the mediation session in order to see whether the solution has worked or if changes are necessary.¹⁵⁰ The mediator will make follow-up phone calls or home visits at three and six months after the mediated solution was accepted. If the parties are reporting that the mediated solution is working, the mediator may compliment the parties on their success, advise the parties that mediation is available if needed in the future, and consider the dispute resolved.

¹⁴⁵ See, e.g., Wetsch, *supra* note 18, at 11–12 (noting that parties may find a solution during a mediation session, but mediators will suggest attendance at another session for parties that have not resolved their disputes).

¹⁴⁶ See Kurtz et al., *supra* note 121, at 157 (adding that the agreement should be in writing because the agreement serves as a continual reminder to the parties that they committed to this solution).

¹⁴⁷ ROBERTS, *supra* note 95, at 128.

¹⁴⁸ See Wetsch, *supra* note 18, at 12.

¹⁴⁹ See Kurtz et al., *supra* note 121, at 157 (explaining that use of surveys and check-ups can provide important information to determine whether the solution is working or if modification is needed).

¹⁵⁰ See *id.*; UMBREIT, *supra* note 124, at 33. "[A] follow up session several months [after the conflict has been resolved] to assess how the agreement is holding up or to resolve any new issues that may have emerged can be important in the overall process of healing and closure." *Id.* at 16.

V. ADDRESSING POTENTIAL CRITICISMS OF AN ARMED FORCES RESTORATIVE MEDIATION PROGRAM

Often the criticisms of mediation take the form of questions as to whether mediation has any real teeth. In family law, these questions are entirely relevant since families rarely choose to air their “dirty laundry” in front of a stranger.¹⁵¹ Also in families, conflicts and disputes will sometimes escalate to mental, physical, or verbal abuse.¹⁵² The question in this case is whether the parties can cooperate and collaborate to a mutually agreeable solution when abuse is present.¹⁵³

This is where the mediator’s experience is critically important. The mediator has to develop a relationship with the parties so that the parties no longer think of the mediator as an outsider but rather as a facilitator, there to assist both sides. The mediator also has to emphasize the confidential nature of mediation, so that both sides feel comfortable about openly communicating. Finally, the mediator needs to be able to distinguish the cases that are appropriate for mediation from the cases that are not. The mediator’s role as a facilitator is critically important.

A. *The Service Members Will Avail Themselves of this Program*

Some may claim that the process is voluntary, and, therefore, that there are no assurances that parties will avail themselves of this service. Family mediation can be private and mandatory.¹⁵⁴ These requirements refer only to the process rather than the result.¹⁵⁵

In the case of providing a restorative mediation program, the armed services can easily make it mandatory that service members returning from deployment enter a restorative mediation program,¹⁵⁶ especially when the

¹⁵¹ See, e.g., MOSTEN, *supra* note 132, at 32 (“People view family problems as far less appropriate for public display Many [divorcing couples] even stay in arid, unhappy, or abusive marriages out of fear that family problems will become public gossip.”).

¹⁵² Gerencser, *supra* note 99, at 51, 54 (“[A]buse is not unusual in relationships.”).

¹⁵³ Cf. Kurtz et al., *supra* note 121, at 155 (“[D]omestic violence programs are currently using mediation techniques to help reduce conflict between individuals, families, and service systems.”).

¹⁵⁴ Gerencser, *supra* note 99, at 51, 54.

¹⁵⁵ See UMBREIT, *supra* note 124, at 27 (“It must be made clear [by the mediator] that even when under pressure from the court system to participate, offenders may decline.”)

¹⁵⁶ This is even more true now that “[t]he military has mandated counseling for returning troops since the Persian Gulf War.” Davenport, *supra* note 41, at A01. However, mandating counseling for the service member does not assist service members

service members were sent home early to work on their marital problems.¹⁵⁷ In these cases, the armed forces are already aware that the service member's family is experiencing some conflict and can set up a restorative mediation session for the service member and his spouse to attend.

B. Restorative Mediation as an Option in Cases in Which There Has Been Some Domestic Violence

Mediators need to be trained to recognize the signs of domestic abuse so that they may screen out those cases as inappropriate for mediation.¹⁵⁸ Parties cannot mediate a dispute where the subject of the dispute is domestic violence.¹⁵⁹ However, not every occurrence of domestic abuse will render mediation inapplicable.¹⁶⁰ Where the spousal relationship has been marked by extreme instances of domestic violence and where one party has been victimized by the other, mediation will probably not be successful.¹⁶¹ However, as long as the parties have equal power and can come to an equitable solution, family mediation may be the appropriate method of resolving the dispute.¹⁶² Implementing a restorative mediation program and mandating that families enter mediation following the first full week after the service member returns from deployment, before the statistics show the

and their significant others in resolving disputes. Therefore, a restorative mediation program probably should be made mandatory because, in spite of this mandatory counseling, in the five murders at Fort Bragg during the summer of 2001, "the five couples . . . all had troubled marriages, but . . . none had sought help at any level." *Threats and Responses*, *supra* note 3, at A13.

¹⁵⁷ See Butterfield, *supra* note 1, at A9 (stating that one Fort Bragg soldier who murdered his wife had returned from Afghanistan on leave to "deal with personal problems"); Kathy Steele & Sherri Ackerman, *Off-Base Domestic Cases Not Clear-Cut*, TAMPA TRIB., Jan. 16, 2003, at 1 (noting that two of the Fort Bragg soldiers accused of murdering their wives "had been granted early returns from Afghanistan to deal with marital troubles").

¹⁵⁸ See, e.g., Gerencser, *supra* note 99, at 60–61 (indicating that self-advocacy and empowerment may not be attainable when there is abuse in the relationship and that a mediator must follow up on any report of abuse by either party); Wetsch, *supra* note 18, at 9 (noting that some cases of domestic abuse may be too severe for family mediation to be a possible dispute resolution alternative for the parties).

¹⁵⁹ See Gerencser, *supra* note 99, at 47 ("Abusers must know that domestic abuse is criminal, with no potential for any conciliatory process.").

¹⁶⁰ See *id.* (asserting that many relationships and most divorcing couples will have experienced domestic abuse prior to the end of the relationship and if there are minor or isolated incidences of abuse that do not implicate control issues, mediation is still possible).

¹⁶¹ See Wetsch, *supra* note 18, at 9.

¹⁶² See Gerencser, *supra* note 99, at 59.

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severe cases of domestic violence typically occur,¹⁶³ will ensure that domestic violence issues do not impair mediation.

VI. CONCLUSION

Restorative mediation has proven helpful in resolving disputes among married couples so that the marriages may be salvaged. The social work and family therapy currently provided by the armed forces is not preventing domestic violence.¹⁶⁴ Unlike current programs, particularly because of its confidentiality, restorative mediation will not have the detrimental effect on service member's rank. Also, the parties can seek mediation when the problem first materializes and can create their own solutions to deal with these problems. This creates the possibility that the relationship can be saved, and the parties can learn how to cope with future difficulties. Indeed, through mediation, couples can learn how to relate to each other as equals and how to constructively resolve marital difficulties.

¹⁶³ See *supra* text accompanying note 48.

¹⁶⁴ See discussion *supra* Part III.A.

