

## Decriminalization of Violence in the Home: Mediation in Wife Battering Cases

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If a man assaulted a pregnant friend of yours on the street and beat her until he broke her jaw, punched her repeatedly in the stomach, broke two of her ribs . . . who would you call? A psychiatrist, or a cop?<sup>1</sup>

The common sense response to this question would be "A cop, of course." Most people would agree this violence is criminal behavior. Ironically, this behavior, when it occurs in a family setting, is considered "normal," "necessary" and "justifiable." Suddenly, the response to this violence is no longer "Throw that guy in jail." Instead, the response is "Mind your own business. This is a family matter."<sup>2</sup> Society conveniently denies that criminal behavior exists in the family setting. Years of tradition, social conditioning and economic selfishness buttress our refusal to address family violence through the criminal system.

Reports of violence within family units has been collected and recorded in broad-based data since the mid-1970s. According to current estimates, approximately two million women in the United States are battered annually.<sup>3</sup> Researchers have found that the risk of serious assault, physical injury, and murder is greatest in one's own home. Furthermore, the perpetrator of the crime is often a family member.<sup>4</sup>

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1. Louise Armstrong, *The Home Front: Notes from the Family War Zone 1* (1983).

2. Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 225 (1982). See also *infra* text accompanying notes 59-67.

3. Schechter, *supra* note 2, at 16.

4. Murray Straus, Richard Gelles & Suzanne Steinmetz, *Behind Closed Doors: Violence in the American Family* 4 (1980). One study showed that 40% of female homicide victims are killed by family members. Lisa Lerman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice Response* 1 (1981).

Despite overwhelming data about family violence, the criminal system has generally avoided the problem.<sup>5</sup> Rather than prosecute batterers, the criminal system diverts family disputes from the criminal system to informal mediation programs.<sup>6</sup> Recently, battered women's advocates have questioned the efficacy of mediation and the motives behind its use. In this article, I evaluate the use of mediation in wife<sup>7</sup> abuse cases.

To evaluate mediation programs, we must choose appropriate evaluative criteria. Evaluators often use criteria or standards found in other programs to judge mediation. The efficacy of mediation programs, for example, is often compared with the efficacy of other existing alternatives such as the criminal system. Such a comparison distorts the value of mediation programs. As a practical matter, the criminal system avoids wife abuse cases.<sup>8</sup> The very existence of diversion programs demonstrates that wife abuse cases are excluded from the criminal system. The same biases that engendered the diversion programs also affect those cases which go through the criminal system.<sup>9</sup> Compared to a system that simply ignores wife battering, mediation programs look better than they are.

To examine this distortion, I first focus my analysis on the perceived causes of battering. I then examine the goals and methods of mediation programs. I conclude that mediation is but another way that the criminal system avoids confronting the pervasive violence in the family institution. Mediation is not only ineffective in stopping battering, but also tends to aggravate the conditions that promote battering. Finally, I discuss suggestions for reform, based on the causes of battering, which would more effectively serve the needs of battered women.

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5. Throughout this article I refer to the criminal justice system as the criminal system. For an extensive review of the criminal system's response to battering, see generally, R. Emerson Dobash & Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* 207-22 (1979).

6. Lerman, *supra* note 4, at 66.

7. Throughout this paper, I will use the words "husband," "wife," and "spouse" to include not only those persons in a marital relationship but also those in other intimate relationships.

8. See generally Dobash & Dobash, *supra* note 5; Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 Harv. Women's L.J. 65-67 (1984).

9. Schechter, *supra* note 2, at 24-27, 54-55.

## I. Battering—An Analysis of the Causes

Various studies explore the reasons why husbands batter their wives.<sup>10</sup> I begin this evaluation with a representative survey of theories about the causes of battering. My goal in this analysis is not to explain battering in a single theory, but rather to separate the theories which have been widely discredited from those which have not. After making this separation, I examine the mediation approach to family violence. To the extent that mediation implicitly incorporates the discredited sexist theories in either its goals or implementation, mediation of family violence must also be discredited.

### A. Victim Blaming Theories

Masochist, provocation, and conflict theories are examples of victim blaming theories. These theories focus on the victim's behavior rather than on the behavior of the violent party. They also justify violence on the basis of the victim's own behavior.

Some theorists argue that domestic abuse victims are masochistic.<sup>11</sup> These theorists focus on the reasons that a wife stays with an abusive husband. They first note that the abusive husband has previously attacked the victim in over ninety percent of domestic violence cases.<sup>12</sup> Masochist theorists then draw the conclusion from this data that the abused woman must enjoy such beatings or else she would not put up with them.<sup>13</sup> The masochist theory claims that the wife who stays with an abusive husband has a masochistic need that her husband's aggression fulfills.<sup>14</sup> As one such theorist explains:

The essential ingredient seems to us to be the need both the husband and wife feel for periodic reversal of roles; she to be punished for her castrating activity, he to re-establish his masculine identity.<sup>15</sup>

The masochist theory, however, ignores the terror and eco-

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10. For an overview, see Straus, *supra* note 4.

11. See, e.g., John Snell, Richard Rosenwald & Ames Roby, *The Wife-Beater's Wife: A Study of Family Interaction*, Archives of General Psychiatry II (1964) [hereinafter cited as *The Wifebeater's Wife*].

12. Minnesota Department of Corrections, Minnesota Program for Battered Women, 1981 Update 41 (1981) (data on prior abuse).

13. For example, a counseling psychologist from Columbia, South Carolina was quoted as saying: "probably some wives want to be beaten. For some it may be the only attention they get." Roger Langley & Richard Levy, *Wifebeating: The Silent Crisis* 113 (1977).

14. *The Wifebeater's Wife*, *supra* note 11, at 109.

15. *Id.* quoted in Schechter, *supra* note 2 at 22; Anthony Storr, *Human Aggression* 95 (1974).

conomic coercion battered women face. The theory fails to consider the historical tradition that sanctions the husband's right to beat and reprimand his wife.<sup>16</sup> In addition, the theory takes no notice of the violent husband's superior economic and physical power.<sup>17</sup> Nor does the theory recognize the victim's fear of retaliation should she leave the batterer.<sup>18</sup>

Equally disturbing is that masochist theories justify beatings by blaming them on the woman's perceived threat to male sexuality and masculinity. If "castrating" behavior is a justification for violence, any woman can be beaten any time she challenges a man's superiority. Furthermore, the violent party determines what constitutes "castrating" behavior. The masochist theory scrutinizes the victim rather than the assailant, and blames the assailant's violent behavior on the victim's psychological need to be abused.

Even assuming that the victim does desire abuse, the violent partner still must make choices about his own behavior. The "woman as masochist" paradigm provides a convenient way for the assailant to transfer to the victim responsibility for his own behavior.<sup>19</sup> From this perspective, violence constitutes the normal and healthy state of affairs in the marital relationship. The victim wants to be abused and the assailant wants to reassert his masculinity. According to the masochist theory, violence makes for the happy ending—both get what they want.

Closely aligned with the masochist theory are the "provocation" and "conflict" theories.<sup>20</sup> These views represent another branch of the victim blaming analysis. The provocation/conflict theories argue that battering correlates with increasing conflict.<sup>21</sup> One author argues that the husband is violent because he loses control when he can no longer resist his wife's

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16. U.S. Commission on Civil Rights, *Under the Rule of Thumb: Battered Women and the Administration of Justice* (Jan. 1982) [hereinafter cited as *Under the Rule of Thumb*].

17. For an historical overview of women's work and women's dismal economic position both in and outside family units, see Alice Kessler-Harris, *Women Have Always Worked* (1981).

18. One study showed that all battered women believed that their husbands could kill them. Lenore Walker, *The Battered Woman* XV (1979).

19. One author who studied the characteristics of assaulters found that assaulters share certain characteristics. One of these characteristics is the externalization of blame. Assaulters try to reduce their feelings of guilt by rationalizing their actions and blaming the victim. Barbara Star, *Characteristics of Family Violence*, in *The Many Faces of Family Violence* 18 (Jerry Flanzer ed. 1982); Dobash, *supra* note 5, at 118.

20. See generally *The Wifebeater's Wife*, *supra* note 11.

21. Straus, *supra* note 4, at 161.

provocative, antagonistic behavior.<sup>22</sup> This argument raises but leaves unanswered at least two questions: What constitutes provocative, antagonistic behavior? What causes the husband to respond to this behavior with violence? Consider whether refusal to perform housekeeping chores constitutes provocative behavior. American couples report that a disagreement related to housekeeping is one of the most frequent conflicts that precede a violent attack.<sup>23</sup> A disagreement over dirty dishes or a late dinner may precede assaultive behavior but it is probably inaccurate to characterize such squabbles as provoking or *causing* assaultive behavior which sends thousands of women to hospitals each year. Presumably, the batterer experiences conflict in the workplace, but does not respond to that conflict with violence. Only in the privacy of his home does the batterer feel free to act out his frustration in a violent way.

The provocation and conflict theories have disturbing implications. The theories label the wife "provocative" whenever she challenges her husband's absolute right to control her. Labeling the wife's behavior as provocative also justifies the husband's beating his wife back into submission. In addition to these disturbing implications, the provocation theory fails to explain why some women are battered in their sleep.<sup>24</sup> These theories share the weaknesses of the masochist theory. All victim blaming theories nourish the assailant's need to externalize blame and legitimize shifting to the battered woman the responsibility for the violent act.

### B. Psychological Theories

Some theorists explain battering as psychotic behavior. Such explanations have been contradicted by studies which show that most batterers do not have symptoms or problems normally exhibited by mentally ill people or those having personality disorders.<sup>25</sup> Nor does any evidence demonstrate that

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22. M. Faulk, *Men Who Assault Their Wives*, in *Battered Women: A Psychological Study of Domestic Violence* 121-24 (Maria Roy ed. 1977).

23. Straus, *supra* note 4, at 157. Straus also notes, however, that 34% of all American couples say they *always* disagree about housekeeping issues. *Id.*

24. Interviews with battered women in Minneapolis, Minnesota (June, 1982-August, 1983).

25. Straus, *supra* note 4, at 125. Armstrong denounces the use of "psychological autopsies on living victims." She argues that evidence shows that wife-batterers are normal. She notes that historically men have given themselves permission to be violent. The result of this tradition is that husbands are violent, not in spite of the fact that they know it is wrong, but rather, because they believe it is right or at least justifiable. Armstrong, *supra* note 1, at 6-7.

most victims are mentally or physically ill. Batterers and battered women comprise a diverse sociological group encompassing all economic backgrounds, ethnic groups and personality types.<sup>26</sup>

The catharsis theory is typical of some psychologists' attempts to label battering as a mental illness afflicting either the husband or the wife.<sup>27</sup> The catharsis theory implies that violent marital conflict is inevitable. Advocates of the theory hypothesize that people have an innate aggressive drive they must express. When non-violent avenues of expression do not exist, the person suffers from accumulated aggression which eventually erupts into violence.<sup>28</sup> Other theorists argue that battering results from poor impulse control. These theorists speculate that the husband is simply unable to control his violence.<sup>29</sup> According to these theorists, batterers should be taught to express their aggression verbally or to strike an inanimate object.<sup>30</sup>

The "poor impulse control" and catharsis theories contain, at least, two flaws. First, there is little, if any, scientific evidence to support either the theories or the treatment.<sup>31</sup> To the contrary, evidence shows that when a man ventilates his anger through verbal abuse or by striking an object, he is more likely to continue his violent behavior.<sup>32</sup> Thus, the suggested therapy does not reduce the violent drive. Second, neither theory explains why some husbands are "sophisticated" batterers. "Sophisticated" batterers consciously hit their wives only where others will not readily notice the bruises or scars.<sup>33</sup> If a husband actually "loses control" when he strikes his wife, as the theories suggest, he would probably not be able to limit his violence. He certainly would not consider hiding the evidence of his violence. Additionally, many husbands have greater physical strength and use weapons more frequently than their wives. If husbands actually lose control when they strike their wives,

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26. Straus, *supra* note 4, at 31.

27. *Id.* at 167.

28. *Id.* Following the reasoning of this theory, one might either predict a similar percentage of male and female batterers, or a higher percentage of female batterers because men have greater access than women to outlets for aggression such as soldiering and competitive sports. Neither prediction, however, is valid.

29. Star, *supra* note 19, at 16; Straus, *supra* note 4, at 167.

30. See, e.g., Straus, *supra* note 4, at 167.

31. *Id.* at 168.

32. *Id.*

33. Interview with Cheryl Howard, Representative of Domestic Abuse Project, in Minneapolis, Minnesota (October 10, 1983).

more husbands would kill their wives than actually do.<sup>34</sup>

These theories fail to consider the context in which husbands batter their wives. When husbands strike wives, they conform to a behavioral rule or norm.<sup>35</sup> The norm is that it is acceptable to hit wives, but that it is unacceptable to kill them.<sup>36</sup> Batterers know that certain violence may result in serious reprisals and that other violence will go unchecked. Their knowledge may also explain why batterers choose to beat their wives and not others, such as their bosses, with whom they experience conflict.

One author who studied the characteristics of batterers noted that they share a tendency to shift anger.<sup>37</sup> Batterers shift anger from those over whom they have no control to those whom they can dominate.<sup>38</sup> This evidence supports the notion that batterers do not suffer from poor impulse control, but rather make conscious choices based upon an evaluation of probable consequences. The underlying hypotheses of the catharsis and "poor impulse control" theories are both unsupported by evidence and insufficient to explain many battering situations.

### C. Socio-Economic Theories

Socio-economic theories which attempt to explain battering rely on certain sociological factors. The most frequently cited factor is the generational aspect of family violence.<sup>39</sup> Theorists have determined that children who grow up in a violent setting have a strong tendency to be violent themselves when they grow older. Extrapolating from such data, some theorists claim violent childhood experiences cause battering.<sup>40</sup> I call this hypothesis the generational theory of battering.

Children experience different degrees of violence. Some children, for example, experience physical acts such as spanking. These children learn that those who love them are the ones that hit them. They also learn that violence can and should be used to ensure conformity with behavioral norms. They learn that violence is acceptable when other forms of per-

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34. Straus, *supra* note 4, at 45-46.

35. *Id.*

36. *Id.*

37. Star, *supra* note 19, at 18.

38. *Id.*

39. See, e.g., Jerry Flanzer, *Alcohol and Family Violence*, in *The Many Faces of Family Violence* 41 (Jerry Flanzer ed. 1982).

40. Straus, *supra* note 4, at 98-101.

suasion do not work. In short, children learn to internalize and believe in the moral rightness of violence.<sup>41</sup>

In another way, children learn similar lessons when they witness their father's violence toward their mother. Children receive clear messages about the roles of husbands and wives. Male children may identify with the aggressor and become violent.<sup>42</sup> They may learn that violence is a handy control device. Female children may react by withdrawing.<sup>43</sup> Children do not view violence just as untouched bystanders. These experiences in the home teach children about the male dominated structure that institutionalizes violence.<sup>44</sup>

The generational theory of family violence has also been criticized. Experts caution against separating the generational aspect of family violence from the societal traditions that condone abuse. They note that brothers from the same family will often react to intra-familial violence differently. Some may abuse and others may be repelled by violence.<sup>45</sup>

Another possible explanation exists for the generational aspect of wife abuse. What theorists assume to be a causal relation may merely reflect the high incidence of both violent childhood experiences and wife abuse.<sup>46</sup> Both kinds of abuse are so pervasive that a substantial overlap of victims may be inevitable. The generational aspect of family violence may be a significant factor causing battering, but it is only a part of the social structure that condones the abuse of women and children.

Theorists also cite many other socio-economic factors as contributing to family violence. Among such factors are minority race, low family income, blue-collar employment, urban residence and unemployment.<sup>47</sup> Data demonstrating that poor people and people of color do a greater proportion of the battering are biased. One bias, for example, results from the fact that poor people and people of color are reported, caught and prosecuted more often than white, upper-class offenders.<sup>48</sup>

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41. *Id.* at 102-04, 121, 124-25.

42. Langley & Levy, *supra* note 13, at 112.

43. Richard Gelles, *Abused Wives: Why Do They Stay?*, 38 J. of Marr. & Fam. 659-668 (1976).

44. Schechter, *supra* note 2, at 215.

45. *See, e.g. id.* at 213.

46. *See* Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 Law & Inequality 609 (1984); *The Proceedings of the International Tribunal on Crimes Against Women* (Diana Russell & Nicole Van de Ven eds. 1984).

47. Straus, *supra* note 4, at 131-51.

48. Mandatory arrest policies in domestic abuse cases may counter some of

Even if it were demonstrably true that men of color were the perpetrators of a disproportionate amount of violence against women, the impact of racism on these men must be acknowledged. Some women of color have explained the violence of men of color as a reaction to the vicious racism of white society.<sup>49</sup> They argue that the systematic, institutionalized degradation and dehumanization of men of color leads them to an overwhelming sense of powerlessness. Men of color express this powerlessness through violence towards those who are even more powerless, namely, women of color and their children.<sup>50</sup>

This sociological explanation of battering may be accurate. However, we must recognize that the explanation provides no method to eliminate the violence. In fact, this explanation is used to support a non-interventionist approach.<sup>51</sup> Such an approach implies that since white society abuses men of color, these men gain the right to abuse women with impunity. It is disturbing that men of color may seek to remedy their oppression by aligning themselves with their oppressors, thereby increasing the burden on women of color. Although an appreciation of possible differences between why men of color batter and why white men batter is necessary to understand woman abuse, this understanding should never condone or justify that abuse. The conclusion that non-intervention is appropriate because of discrimination against men of color tacitly condones abuse of women.

Social scientists' studies are likewise inconclusive about the relationships between crime (*e.g.* family violence) and unemployment. One criminologist, for example, concludes that current research shows little relationship between economic factors and crime.<sup>52</sup> Although some evidence may suggest that

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this bias. In Duluth, Minnesota where a mandatory arrest policy in domestic abuse cases was recently implemented, more whites and middle-class offenders are being arrested than ever before. *Minneapolis Star and Tribune*, Feb. 29, 1984 at B1, col. 1.

49. Interviews with battered women in Minneapolis, Minnesota (June, 1982-August, 1983).

50. Telephone interview with Penny Scheffler, Coordinator of Family Violence Division of Indian Works, Minneapolis, Minnesota (Sept. 19, 1984). Scheffler notes that the racism of white society is one of many reasons why men of color batter. She also notes, however, that this explanation should not absolve men of color of responsibility for battering.

51. See *infra* notes 137-43 and accompanying text.

52. James Wilson, *The Debate Over Deterrence: Thinking About Crime*, Atlantic Monthly, Sept. 1983, at 72-81. Wilson presents a symbiotic theory of criminality and unemployment. He argues that three relationships between

socio-economic factors have a peripheral impact on battering,<sup>53</sup> it is premature and inaccurate to conclude that such factors *cause* battering.

*D. The Institutionalized Practice of Violence Against Women*

Battered women's advocates have rejected victim blaming, psychological and socio-economic theories. These advocates argue that dysfunctional relationships or psychological disabilities do not cause battering. They recognize battering as a behavior that has been historically accepted. Susan Schechter suggests that a holistic view of our social structure is the key to understanding an individual man's violence against a particular woman. Instead of focusing on why individuals batter, we should focus on why *men batter women*.<sup>54</sup> We need to distinguish between the question of why men are violent and the question of why men are violent towards women.<sup>55</sup>

Schechter argues that economic domination perpetuates violence in the family.<sup>56</sup> In our society, the economic status of women is maintained at a level well below that of men. Women's subordinate economic status partially results from women's maintenance of the family and the home. Industrialized society does not recognize the economic value of this work. Women's economically unrewarded work in the home results in women's economic dependence on men. Both women and men are acutely aware of women's economic dependence. When the husband's monetary support exceeds his wife's wages, her work around the house is a fit subject for his inspection. If housework is not done to the husband's satisfaction, it is proper, and perhaps even his duty as head of the household, to chastise and discipline her.<sup>57</sup> Women's economic dependence perpetuates the powerlessness of women to leave violent relationships.<sup>58</sup>

Wives' solitary confinement in the home also reinforces

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unemployment and criminality exist simultaneously: (1) unemployment leads to crime; (2) crime leads to unemployment; and (3) social disintegration or personal inadequacy leads to both crime and unemployment.

53. See generally, *id. passim*.

54. Schechter, *supra* note 2 at 210.

55. *Id.* at 211.

56. *Id.* at 225.

57. Kathryn Conroy, *Long Term Treatment Issues with Battered Women*, in *The Many Faces of Family Violence* 25 (Jerry Flanzer ed. 1982). See also *supra* note 23 and accompanying text.

58. Schechter, *supra* note 2, at 224-25.

their husbands' power over them.<sup>59</sup> The seclusion of women in the family, combined with their historically inferior economic position, allows society to ignore violence against women within the family structure:

Because of the privatized family, and women's secondary status within it, violence is viewed as an individual act. Women suffer in shameful silence, convinced that no one else is experiencing the horror and that no one else wants to know about it. As a result, male domination is restored in the family and in the community. Privatization is dangerous because it allows violence to accelerate while everyone says, 'Mind your own business. This is a family problem.'<sup>60</sup>

The closed family structure resists external influence. Without external influence, violence continues to flourish unchecked.<sup>61</sup> Studies show that abuse is most likely to escalate when the victim can be coerced into silence.<sup>62</sup> The notion that "a man's home is his castle" facilitates and legitimizes violence against women. While the husband is protected from outside interference in his fortress, the wife is given an indeterminate sentence to a private torture chamber.

Another important aspect of our social structure that perpetuates battering is the belief that a man's wife is his property. This idea is embedded in the legal and moral traditions of our society. Historically, the legal system regarded a husband and wife as one person. That person was the man. The husband had every right to control his wife physically to keep her behavior in line.<sup>63</sup> Today, battering remains an effective tool for the controlling husband. Even if the wife is not beaten repeatedly, a single violent act can teach her a profound lesson. Battering powerfully demonstrates who is in control of the rela-

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59. Compare Miriam Hirsch, *Women and Violence* 174 (1981) (negative sanctions of social control correlate with observability).

60. Schechter, *supra* note 2, at 225.

61. Mark Krain, *A Sociological Perspective on the Control of Violence in Families*, in *The Many Faces of Family Violence* 67 (Jerry Flanzer ed. 1982).

62. [A]ll behavior is at least subject to evaluation by self and observers, in terms of roles and standards existing in culture and society, which rate the acceptability of that behavior. . . . [B]ehavior is least likely to be controlled when the behaving person is the only one who is aware of the behavior and the only one who decides upon acceptability. . . . [The violent behavior is] least likely to be controlled when the victim can be compelled not to disclose the occurrence of violence.

*Id.* at 69.

63. See Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1509-11 (1983). See generally, Under the Rule of Thumb, *supra* note 16; Lerman, *supra* note 4, at 15-16; R. Emerson Dobash & Russell Dobash, *Violence Against Wives* 60-61 (1979).

tionship, and the consequences of challenging that control.<sup>64</sup>

The notion of control has another important dimension. It demonstrates that violence can be purposeful conduct—a result of weighing alternatives, benefits, and perceived consequences. Some scholars argue that violence is a tool that the husband uses to get his own way in the relationship.<sup>65</sup> The husband discovers that a single act of violence can have a lasting effect. The wife learns to placate the husband in order not to “provoke” him. The husband benefits because he does not have to negotiate everyday household activities. In this way battering is a “rational” choice.

This scenario profoundly affects the wife. She eventually learns that she cannot identify the particular events which will provoke her husband’s violence. She eventually realizes that she cannot in any way control her husband’s violence.<sup>66</sup> One researcher studied the effects of this realization and concluded that the victim suffers from “learned helplessness.”<sup>67</sup> Once the victim learns that she cannot control the infliction of pain through her voluntary acts, she becomes completely passive. Eventually, the victim accepts passivity as her reality. The victim’s perception becomes so distorted that she does not recognize opportunities to escape when they arise.<sup>68</sup>

A discussion about the institutionalized causes of battering is not complete without recognizing the connection between the objectification of women in the media and the social institutionalization of violence against women.<sup>69</sup> Commercial advertising often portrays women as worthless and ignorant.<sup>70</sup> In addition, pornography is a potent contributor to the social view that violence against women is erotic and acceptable.<sup>71</sup> Pornography’s message to the male viewers is that men’s use

64. Hirsch, *supra* note 59, at 174.

65. *Id.*; Dobash, *supra* note 5, at 127-133.

66. The wife’s experience perhaps explains scholars’ inability to identify specific causes of an individual woman’s abuse.

67. Walker, *supra* note 18, at 45-51.

68. *Id.*

69. Many battered women shelter advocates believe that pornography contributes to battering because their intake interviews reveal pornography is a predominant hobby of batterers which has both taught men how to batter and legitimized battery as sexual. Region XI Battered Women’s Consortium, *Pornography—A Battered Women’s Issue* (Feb./March 1984) at 10. See Dolf Zillman & Jennings Bryant, *Pornography, Sexual Callousness and the Trivialization of Rape*, 32 *J. of Com.* 10 (1981).

70. Department of Women’s Studies, University of Minnesota, *Images of Women in Media and Pornography* (1982) (unpublished manuscript).

71. Neil Malamuth & Edward Donnerstein, *The Effects of Aggressive—Pornographic Mass Media Stimuli*, 15 *Adv. Exp. Soc. Psych.* 103, 115 (1982).

of violence against women is appropriate behavior. Pornography also portrays the submission of women to such force as correspondingly appropriate behavior.<sup>72</sup>

The causes of battering are complex. Simplistic views of battering such as those offered by the provocation, masochist and catharsis theories are inadequate. These theories are preserved because they serve a societal function; they shield some people from the truth that they cannot always stop others from being violent. When people accept this truth, they realize they do not have control over their own lives.<sup>73</sup> The fear of being hurt, engendered by this realization, compels people to distance themselves from abuse victims.<sup>74</sup> The provocation, masochist, and catharsis theories allow people to reason that if they do not act foolishly and if they stay away from lunatics, they will protect themselves from becoming victims.

We must resist the self-serving temptation to explain family violence as something peculiar to a particular victim or relationship. In reality, our social system first renders a woman powerless and then uses that powerlessness as an excuse to avoid protecting her. The lack of protection is based on the rationale that the woman deserves or wants to be abused because she will not leave her abuser. We must look beyond this victim-oriented analysis to an understanding that violence against women is institutionalized.

We must recognize that the family exists in a system that institutionalizes the economic and sexual exploitation of women. A husband may beat his wife because he feels it is his inalienable right to do so, or a husband may beat his wife because he has learned to feel violence as erotic. Spousal violence will not end until society stops protecting men who beat up women. Any solution to the problem of family violence must first address these institutionalized causes of battering.

## II. Mediation—A Description

The word "mediation" is often a source of confusion. Different types of actions and programs are labeled "mediation." The spectrum ranges from a police officer's informal attempt to reconcile parties on their doorstep to a formal procedure in

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72. See Margaret Baldwin, *The Sexuality of Inequality: The Minneapolis Pornography Ordinance*, 2 *Law & Inequality* 629 (1984).

73. Schechter, *supra* note 2, at 19-20.

74. *Id.*

which parties draw up a contract.<sup>75</sup> In this article, I limit my analysis to the more formal approach.<sup>76</sup> I define mediation as meetings between a mediator and the parties involved, in which the parties identify problems in their relationship and reach an agreement on how to solve those problems.

Minneapolis, Minnesota has a formal mediation program called the Citizens Dispute Settlement Program (CDSP). CDSP operates out of the Minneapolis City Attorney's office, and is typical of other mediation programs across the country. In theory, the program exists as an alternative dispute resolution procedure for parties who do not want to go through the criminal system.<sup>77</sup> In practice, the City Attorney's office sends all victims of domestic abuse who attempt to prosecute their husbands to CDSP.<sup>78</sup> CDSP then investigates which cases should be mediated.

To determine whether a case is suitable for mediation CDSP requires two factors. First, *there must be a criminal offense that could be prosecuted*. Second, the abuser must not be violating a restraining order.<sup>79</sup> The CDSP also considers other factors to evaluate the possible success of mediation. Among these factors are the seriousness of the offense, a history of battering, and the abuser's chemical dependency.<sup>80</sup> If the couple's problems are not suited to mediation, the couple is sent to the prosecutor's office.<sup>81</sup>

If the couple is accepted for mediation, CDSP arranges a meeting with a mediator. CDSP hires non-professional

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75. Informal procedures are an alternative to mediation or full-scale prosecution. These procedures can include the police referring the victim to a shelter, informing the victim of her legal remedies, referring her to other resources, or instructing the prosecutor to send a warning letter to the abuser. Lisa Lerman reports that these informal measures are useful only where a pattern of violence has not been solidified in a relationship. Lerman, *supra* note 4, at 64-65.

76. For an analysis of police officers' informal attempts to mediate between batterers and victims, see Maria Pastoor, *Police Training and the Effectiveness of Minnesota "Domestic Abuse" Laws*, 2 Law & Inequality 557 (1984).

77. Literature of the Minneapolis CDSP distributed by Minneapolis City Attorney's office on file at the Law & Inequality Journal.

78. I observed this practice continually during my tenure as a legal intern at the Minneapolis City Attorney's Office during 1982 and 1983.

79. Interview with Judith Jackson, Director of CDSP, in Minneapolis, Minnesota (Oct. 4, 1983).

80. CDSP does not uniformly apply the factors listed. Generally, abuse cases resulting in serious injury are not mediated. CDSP did, however, mediate (unsuccessfully) a dispute involving a man who had broken his wife's leg. Howard interview, *supra* note 33.

81. Jackson interview, *supra* note 79.

mediators through the Minneapolis Urban Coalition.<sup>82</sup> Mediators are hired on the basis of their listening and problem-solving skills.<sup>83</sup> The Coalition trains mediators at a one-day workshop and instructs them to take a peace-maker approach and to remain neutral. Compromise is the focus of the meeting with the involved parties. During the meeting, the mediator encourages the parties to identify the problem areas in their relationship that have triggered the battering.<sup>84</sup> The couple then enters into a written agreement. This process is limited to one hour. Mediators have no authority to impose anything on the parties, and compliance is voluntary.<sup>85</sup>

CDSP contacts the parties three times during the six months following mediation. The director of CDSP concedes that when CDSP contacts victims, they do not appear to be honest about whether the abuse is continuing.<sup>86</sup> If either party breaks the agreement, CDSP does nothing unless the victim returns to the prosecutor's office.<sup>87</sup> When victims return, the Minneapolis City Attorney decides whether to file criminal charges. The Minneapolis City Attorney rarely prosecutes an abuser when mediation has failed.<sup>88</sup> If the prosecutor does intervene, charges are filed only for the abuse that broke the agreement. No charges are filed for the abuse that originally brought the woman into the legal system.<sup>89</sup>

### III. Mediation—An Evaluation

The Minnesota Department of Corrections estimates that 35,000 Minnesota wives are beaten by their husbands each year.<sup>90</sup> In over ninety percent of these cases, the husband had

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82. *Id.* The Urban Coalition is a research and advocacy organization that works on behalf of poor and non-white people. In mediation cases the coalition's primary concern is keeping men of color out of the criminal system. Women are reportedly not part of the coalition's constituency. Telephone interview with Urban Coalition representative Lou-Ann Nyberg, in Minneapolis, Minnesota (Oct. 7, 1983).

83. Nyberg interview, *supra* note 82.

84. *Id.*

85. *Id.*

86. Jackson interview, *supra* note 79.

87. Howard interview, *supra* note 33.

88. *Id.*

89. *Id.*

90. Minnesota Department of Corrections, Minnesota Programs for Battered Women, 1981 Update 39 (1981). See also Minneapolis Star and Tribune, Aug. 28, 1983, at A6, col. 1; Minnesota Department of Corrections, Minnesota Programs for Battered Women, 1983 Update (1983).

previously abused the wife.<sup>91</sup> Ninety-three percent of the assaults included sexual abuse, as well as threats, choking, or the use of guns and knives.<sup>92</sup> In spite of this evidence, prosecutors have consistently preferred to divert domestic abuse cases so that they are free to pursue "real" criminals.<sup>93</sup> This preference both illustrates and perpetuates the attitude that wife battering cases are unimportant and should not be dealt with as criminal matters. Wife abuse is avoided at every stage within the criminal system, from prosecution and arrest to the judge's sentencing.<sup>94</sup> When the system does respond to wife abuse cases, it is heavily weighted in favor of the batterer.<sup>95</sup>

Because of the criminal system's dismal failure to address wife battery, alternative programs receive praise. No evaluation of mediation programs has yet thoroughly examined the goals and methods of such programs in light of the causes of battering. Viewed from such a perspective, mediation programs take on a new and disturbing character.

In theory, mediation programs incorporate the very myths and biases that have rendered the criminal system ineffective in battering cases. In other words, mediation programs perpetuate the problems and biases of the criminal system. In mediation, the bias takes on a new and beguiling disguise that frustrates attempts to eliminate the institutionalized causes of battering. The disguise is the benign language of "keeping the family together" and "problem solving."

In practice, mediation programs provide a dumping ground for unwanted criminal cases. The programs serve to pacify feminists who demand that society eliminate the inequities in the criminal system. Like a pacifier, mediation programs provide no real nourishment for those who hunger for equality before the law. In the final analysis, mediation programs provide a new excuse to avoid the social and fiscal costs of eliminating violence against women.

#### A. Mediation's Ideology

Mediation is designed to create an agreement or contract between the parties that will lead to the cessation of the behav-

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91. Minnesota Department of Corrections, Minnesota Programs for Battered Women, 1981 Update 39 (1981).

92. *Id.*

93. Lerman, *supra* note 4, at 1.

94. See also, Langley & Levy, *supra* note 13, at 126-85.

95. See generally Lerman, *supra* note 4.

ior that brought them into the program.<sup>96</sup> Program literature for CDSP states that the mediation sessions are designed to find solutions to problems and to reduce or resolve conflicts existing in the parties' relationship. The literature recommends that parties "think about what they want from the other party to the dispute and what they are willing to give in return."<sup>97</sup>

This stated purpose of mediation assumes that the parties' relationship is the problem, that both parties are somewhat at fault, and that compromise is an appropriate solution. These assumptions match the discredited theories about the causes of battering. The problem-solving and compromise approach, for example, incorporate assumptions from the victim blaming theories. This approach assumes that the victim has done something to provoke the beatings. It assumes that stress or conflict within the marital relationship caused the problems.<sup>98</sup> Assumptions underlying the practice of mediation do not address the conditions that institutionalize abuse, such as a woman's isolation in the family, her economic dependence on her husband, and the social system that reinforces the husband's belief that he has a right to beat his wife.

The problem-solving approach also assumes that helping the couple remain together and work out their problems is in the best interest of the woman. Staying together, however, may not be in the best interest of the woman. One study, for example, shows that the frequency of contact between the batterer and the victim was the foremost indicator of the frequency of violence.<sup>99</sup> This study also found that thirty-six percent of the victims who had participated in mediation reported increased concern about their safety; forty-one percent reported increased fear of revenge.<sup>100</sup> Keeping the husband and wife together may perpetuate the violence. To the extent that the primary *effect* of mediation is to keep the violent family together,<sup>101</sup> mediation perpetuates violence.

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96. Jackson interview, *supra* note 79.

97. CDSP literature, *supra* note 77.

98. Lerman, *supra* note 8, at 86-87.

99. Barbara Smith, *Non-Stranger Violence: The Criminal Court's Response* 76 (1983).

100. *Id.* at 71.

101. The director of CDSP denies that the *goal* of mediation is to keep the family together. Jackson interview, *supra* note 79. The Urban Coalition, however, agrees that improving the couple's relationship is the primary goal. Nyberg interview, *supra* note 82. Other mediation facilities across the country more unabashedly proclaim that they do everything possible to keep families together. See Under the Rule of Thumb, *supra* note 16, at 64.

What constitutes the "best interest" of the battered woman needs re-evaluation. If an ongoing marriage and attendant economic dependence of the wife on her husband is in the best interest of the woman, then mediation is effective. But if eliminating the wife's fear of revenge and providing her with safety is in her best interest, then mediation is inappropriate. The problem-solving approach of mediation incorporates an assumption regarding women's best interests which ignores the physical danger women face.

### B. Mediation's Methodology

Mediation may be inappropriate for any family law dispute,<sup>102</sup> but it is, at best, counterproductive in battering situations. Effective mediation depends on equal bargaining power between the parties, confidentiality of the negotiation, and neutrality of the mediator. Furthermore, the issues of mediation must be amenable to compromise.<sup>103</sup> Mediation methods in battering cases fail to conform to these requirements.

In a typical battering relationship, the woman does not have equal bargaining power. She has less economic resources than the batterer. Furthermore, mediation requires the woman to be her own advocate. After being physically beaten, she may not be emotionally able to advocate effectively for herself.<sup>104</sup> A battered woman needs the built-in protections of the legal system. She needs a lawyer or an experienced advocate to evaluate the ramifications of any proposed solutions and to compensate for her unequal bargaining position and her probable lack of advocacy experience.<sup>105</sup> Mediation does not offer a battered woman these protections.

Mediation programs do not always guarantee the confidentiality of mediation negotiations. The mediator may be called as a witness in a subsequent divorce or child custody proceeding to testify regarding the conversation between the parties during the session.<sup>106</sup> If the parties know that admissions of wrongdoing made in a mediation session could be used against

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102. Cf. Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 *Law & Inequality* 21 (1984).

103. Unpublished policy paper by the National Center of Women and Family Law, available from the Center, 799 Broadway, Room 402, New York, N.Y. 10003 [hereinafter cited as NCWFL].

104. *Id.*

105. *Id.*

106. *Id.* *But see*, Minn. Stat. § 518.167 subd. 1-4 (1982) (amended 1984 Minn. Sess. Law Serv. 635 (West)) (Provides that in contested custody proceedings, a court ordered investigation regarding custodial arrangements for a child may

them, it is unlikely that they will freely and honestly discuss their problems. Honest exchange, however, is the necessary starting point for mediation. Lack of confidentiality inhibits the effectiveness of mediation.

Another problem with mediation is that mediators are often biased.<sup>107</sup> Some mediators believe that the woman deserved or provoked the attack. Others think that women who work outside the home are inadequate wives, or erroneously assume that the housework is shared equally when the woman is working.<sup>108</sup> In addition, some mediators pursue a goal other than stopping the abuse. The Minneapolis mediation program, for example, focuses on keeping men of color out of the criminal system.<sup>109</sup> Thus, the woman may face both her husband's abuse *and* the mediator's bias.

Methods used to mediate disputes assume that violence is amenable to compromise. Negotiation means a trade-off. The woman bargains away her personal safety, and possibly her life, in exchange for economic security.<sup>110</sup> In the trade-off, the wife also gains by fulfilling her expected role of promoting familial tranquility. In effect, the process of mediation asks a woman to agree to make dinner ten minutes earlier in exchange for not being punched or beaten. To prevent such "trade-offs," wife abuse cases should not be mediated. There should be no "compromise" with respect to violence.

Organizations familiar with mediation methods argue that mediation should not be used for parties in a continuing violent relationship.<sup>111</sup> Mediation methods are dangerous because they fail to deter future life-threatening abuse. Not only do mediation methods fail to give swift and sure punishment to abusers they also fail to communicate to the abuser that his conduct is wrong. Instead, mediation allows the abuser to blame his violent behavior on small things that the woman has done to *provoke* him. These methods support the notion that the violence is a result of some defect in the parties' relationship rather than a defect in the assailant's ability to express his hostility, frustration, or sexuality in a non-violent way. These methods

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not obtain information from a mediator unless both parties have agreed in writing to the disclosure).

107. NCWFL, *supra* note 103.

108. *Id.*

109. *See infra* notes 128-36 and accompanying text; *see supra* note 82.

110. NCWFL, *supra* note 103, at 2.

111. *Id.*

do not counter the assailant's training that women are appropriate objects for violence or that beating women is not a crime.

The privatization aspect of mediation programs also concerns battered women's advocates. As discussed earlier, the isolation of the battered wife reinforces the husband's power because it insulates him from the threat of reprisal and simultaneously distorts the wife's perception of reality.<sup>112</sup> The private nature of mediation compounds this problem rather than alleviates it. The only people involved in the mediation are the couple and the non-professional mediator.<sup>113</sup> The mediator has no authority to impose anything on the couple. Thus, the power differential between husband and wife remains undisturbed. The batterer remains insulated from the evaluation or disapproval of others. Moreover, unlike a public trial, the closed session leaves a mediator's biases undetected and unchecked. As a result, mediation has little impact upon the batterer's perception of the acceptability of his behavior.<sup>114</sup> The impact upon the wife is more devastating. She learns that turning to the law for help is futile.

### C. Mediation and Administration

Administrative problems also cause mediation programs to be ineffective. Mediation programs often lack funding, expertise and personnel. For example, CDSP's staff consists of the program director and one clerical worker. Occasionally, the program employs two student interns. The CDSP program director personally handles an estimated 250 cases per month.<sup>115</sup> The director is also required to follow up each case. Under these conditions, the mediation program cannot give each case the attention it deserves.

Similarly, the Urban Coalition currently provides CDSP with four mediators.<sup>116</sup> Four mediators cannot carefully handle the tremendous caseload of CDSP. Mediators' minimal training further jeopardizes the program's effectiveness. In other programs across the country, mediators generally receive a maximum training of forty classroom hours.<sup>117</sup> In Minneapolis,

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112. See *supra* notes 58-62, 66-68 and accompanying text.

113. See *supra* notes 82-85 and accompanying text.

114. See *supra* notes 61-65 and accompanying text.

115. Jackson interview, *supra* note 79.

116. Nyberg interview, *supra* note 82.

117. *Id.* Even a forty hour workshop may not be sufficient, especially if the training fails to stress that the objective of mediation must be to stop abuse.

the training consists of a one-day workshop.<sup>118</sup> The physical safety of battered wives is too important to leave to unskilled mediators. Even if mediation were an appropriate method of handling domestic violence, the lack of funding and skilled personnel seriously undermines the effectiveness of these programs.

#### D. Who Benefits From Mediation

Underlying the benign language of problem-solving and compromise are several hidden societal interests. A cursory look at these interests exposes the paternalistic bias against women inherent in the mediation system. The fact that this bias mirrors the societal view of women cannot save mediation; repetition of injustice does not legitimize it.

Mediation advocates argue that a major benefit of mediation is that it recognizes the wife's economic dependence on the husband.<sup>119</sup> Some mediation advocates argue that the wife is better off if she stays with her husband because he will support her.<sup>120</sup> The wife acts in her own economic interest if she remains with her husband. Other mediation advocates argue that the wife should stay with her husband so that she will not go on welfare and be a burden to the state.<sup>121</sup>

These economic concerns must be considered in light of the causes of battering. As previously discussed, the wife's economic dependence on the husband is a major contributing cause of battering.<sup>122</sup> The husband knows that his wife does not have the economic means to survive without him. The wife's continued economic dependence on the husband only serves to reinforce this destructive cycle of violence. The fact that advocates of mediation recognize and promote the wife's economic dependence on her husband oppresses rather than benefits the battered wife.

Society also has a hidden interest in using the wife as a "buffer" between the husband's violence and the rest of society. Prosecutors and judges may refuse to act in domestic violence cases because the husband is not a threat to anyone but his wife.<sup>123</sup> This reasoning parallels the reasoning underlying

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118. *Id.*

119. Jackson interview, *supra* note 79.

120. *Id.*

121. Interviews with prosecutors in Minneapolis, Minnesota (June, 1982-August, 1983).

122. See *supra* notes 56-58 and accompanying text.

123. See Armstrong, *supra* note 1, at 5.

the catharsis theory. Both this reasoning and the theory assume that aggression expressed through violence is inevitable.<sup>124</sup> Both assume husbands require an outlet for their aggression, and that wives can provide an outlet for husbands. The battered wife serves two needs. First, she fulfills her wifely duty of easing her husband's frustrations. Second, the wife provides a major benefit to the rest of society. The husband will not be violent toward other members of society when he satisfies his need to be violent in the privacy of his home.<sup>125</sup>

The catharsis theory is entirely unsupported by scientific data and has been discredited by recent studies.<sup>126</sup> Even if the catharsis theory were correct, prosecutors and judges should not justify *their* failure to protect wives and *their* refusal to punish husbands for abusive behavior simply because violence is inevitable. As one author states:

[I]f it is acceptable to us that [the wife] is there to domesticate [the husband's] violence, if in doing so she is a soldier enlisted for society's protection—then it seems unkind in the extreme to disown her, wounded.<sup>127</sup>

To assume wives should be sacrificial lambs for society is to degrade and dehumanize women. Mediation programs operate on these assumptions. They protect husbands from sanctions and fail to protect wives. By serving as a means to decriminalize battery, mediation programs incorporate the dehumanizing assumption that wives exist to domesticate their husband's violence.

### E. Protecting Men of Color

To the extent that battering affects women of color the problem becomes more complex. Some women of color may be reluctant to report incidents of battering because of discrimination against men of color in the criminal system. Women of color face the dual problems of racism and sexism. When women of color speak out against the injustices that men of color perpetrate upon them, they run the risk of dividing the movement to eliminate racism.<sup>128</sup> But in remaining silent about

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124. See *supra* notes 27-38 and accompanying text.

125. Armstrong, *supra* note 1, at 5-6.

126. See *supra* notes 31-32 and accompanying text.

127. Armstrong, *supra* note 1, at 6.

128. A complete examination of race/class interaction is beyond the scope of this article. For a discussion of the dual problems, see Angela Davis, *Race, Class, and Sex* (1982); *The Men Are All Black, The Women Are All White, But Some of Us Are Brave* (Gloria Hull and Barbara Smith eds. 1983); Scheffler interview, *supra* note 50. Scheffler explains that some women of color believe

such abuse, women of color subordinate their own special cause to the cause that they share with men of color. Some women of color die for the sake of such chivalry.<sup>129</sup> This dilemma is compounded by the protectionist approach taken by some mediation programs.

Protecting the interests of men of color is a somewhat unknown although expressed function of mediation. Both representatives of CDSP and Urban Coalition agree that a primary concern of mediation is to keep men of color out of the criminal system.<sup>130</sup> Their concern is twofold. First, they assume that men of color with unemployment problems will encounter increased unemployability if they are subjected to criminal charges. Second, these representatives claim that relations between police and men of color would further disintegrate if police made more arrests in domestic cases.<sup>131</sup> These are legitimate and pressing concerns. The question is whether these interests should be the primary focus in a program meant to protect battered women.

Those who advocate for mediation to protect men of color from the criminal system overlook some important factors. The

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that because their culture has been repeatedly attacked, they must view themselves as part of a whole and that individual interests are, by necessity, subordinate to the rights of the whole. She argues that for society to respond effectively to battering in communities of color, society must work with women as part of a whole community.

129. See *supra* note 4 and accompanying text.

130. Nyberg interview, *supra* note 82.

I don't agree with mandatory arrest because victims can use it for their own advantage. Just because the woman tells the officer he did it, they are going to get the guy. She can use it when she is mad at her boyfriend. Minority men are overrepresented in the criminal justice system. We do not want that person to get a criminal record.

Jackson interview, *supra* note 79. Other mediation programs make similar efforts to keep men of color out of the criminal justice system. See Under the Rule of Thumb, *supra* note 16, at 64. Evidence contradicts Jackson's view that wives are liars and manipulators out for vengeance. People have used similar arguments to avoid prosecution of rape and sexual harassment. This myth continues despite the overwhelming evidence to the contrary. See generally, Russell & Van de Ven, *supra* note 416; Diana Russell, *Rape in Marriage* (1982); Catharine MacKinnon, *Sexual Harassment of Working Women* (1979); Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975). Women have silently endured batterings to protect their husband's careers, they have been victimized in the workplace without complaint to protect their own jobs, and they have silently endured brutal rapes to avoid social stigma and their own crucifixion at trial. Only one out of five abused women seek assistance. Minn. Dep't of Corrections: Program for Battered Women, Data Summary Report (1982). The belief that wives will use the criminal system to their advantage only demonstrates the severity of the bias against women.

131. Jackson interview, *supra* note 79; Nyberg interview, *supra* note 82.

difference between police investigation of domestic violence and police investigation of many other crimes is one overlooked factor. When an arrest takes place outside the home, there is always the risk that the police initiated the contact as a result of prejudice. In contrast, domestic abuse arrests typically occur within the couple's own home. Police usually do not initiate the contact with the man arrested in domestic abuse cases. It is only when the wife, or a neighbor who hears her screams, calls the police, that the husband is subjected to any risk of arrest or prosecution.<sup>132</sup>

Another overlooked factor is the relative inequality between men and women of color. In domestic abuse cases, the man of color initially has a significant degree of control over his entrance into the criminal system. If he stops beating his wife, he will not be in contact with the criminal system. Once the man of color enters the criminal system, he will most likely be subjected to the racial abuses that characterize our criminal system. The batterer, however, always has some initial control over his victimization through his voluntary conduct. The battered wife, however, is often not powerful enough to stop her husband's abuse.<sup>133</sup> Since the batterer, not the victim, has control over the abuse, the emphasis in mediation on protecting the batterer from the criminal justice system rather than protecting the victim from the batterer is misplaced.

Comparing domestic abuse to other crimes reveals other overlooked factors in evaluating mediation programs. The concern for protecting men of color from the criminal system does not manifest itself in the decriminalization of acts outside the family context. No one would suggest that if a man of color robs a bank, the protection of his career should be the primary focus of the criminal system's response. Nor would anyone suggest that the offender enter into an unenforceable contract providing that if society makes given concessions, the offender will not rob banks any more. That our system advocates this approach only when women are the victims of crime exposes the depth of misogyny in our culture.

Some advocates of mediation argue that family violence deserves different treatment from other criminal behavior because of its interpersonal nature. Battered women's advocates

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132. A mandatory arrest project in Duluth, Minnesota resulted in more arrests of whites and middle-class offenders, but did not result in more arrests of men of color. See *supra* note 48.

133. See, e.g., *supra* notes 66-68 and accompanying text.

and counselors of batterers, however, agree that battering is not the result of a dysfunctional relationship.<sup>134</sup> Since the causes of battering are not linked to problems in a particular relationship, it is irrational that the criminal system's solution to battering is linked to the particular interpersonal nature of a husband-wife relationship.

A program that represents itself to society and victims as a program to stop battering and simultaneously makes the welfare of the husband/batterer the program's primary concern is at best misleading. Securing the wife's safety and protecting the batterer's career are often conflicting goals. Unless this conflict is discussed with the victim, she will have misconceptions about mediation. Some victims believe that their safety is the primary goal of the program.<sup>135</sup> Victims sometimes erroneously assume that the mediator will take their side against the victims' husbands. As one woman of color who unsuccessfully participated in mediation remarked: "That whole system was set up to protect him [the batterer]. I feel badly about the way minority men are treated, but that doesn't mean that I deserve to be the scapegoat."<sup>136</sup> If mediators revealed to the victims the true focus of the program, many would probably not agree to participate.

Eliminating racism in the criminal system is important. Absolving men of color from responsibility for criminal acts against women, however, is an inappropriate means to achieve that end. The solution lies in reforming the criminal system and holding it accountable for racial abuse, not in decriminalizing violent acts. The sexism that prompts some people to sacrifice the physical well-being and the lives of women of color in order to end racism is as repugnant as the racism itself.

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134. Andrew McCormick, one of the developers of "Emerge," a model domestic abuse program in Boston, stated: "Our basic premise is that the cause of abuse is the fact that men dominate women both in personal relationships and in social institutions. . . . [O]ver the centuries [this] has given men permission to beat their wives." McCormick also criticizes male socialization which teaches men to dominate and fails to provide men with non-violent ways of handling emotions and conflict. He believes that "real prevention [of domestic abuse] lies in changing social norms that give men permission to be abusive and controlling." Zak Mettger, Response to Fam. Violence, Dec. 1982, at 1-2 (quoting Andrew McCormick).

135. Howard interview, *supra* note 33.

136. Interview with battered woman in Minneapolis, Minnesota (Nov. 10, 1983).

#### IV. Alternatives to Mediation

Mediation may actually perpetuate battering by protecting the batterer from criminal sanctions. This protection reinforces the husband's belief in his right to beat his wife, it absolves him of blame for his actions, and insulates him from social stigma. Mediation allows the husband to negotiate a change in his wife's behavior and fails to send a message to the batterer that he is responsible for his conduct and that his conduct is wrong.

Mediation programs derived from victim blaming theories incorporate serious flaws of the criminal system. Mediation does not address the actual causes of battering. Mediation simply adopts a "stay together and compromise" attitude which reinforces the husband/wife power differential and the husband's belief in his right to beat his wife.

Wife battering is criminal behavior. The fact that it occurs in a family setting does not change its criminal character. A criminal court is the proper forum for dealing with wife battering. Despite the problems that plague the criminal system, the solution to battering is not to decriminalize it. Instead, reforms must be made in both the social structure that institutionalizes violence against women and the criminal system that refuses to punish this violence.

Many possible reforms would make the criminal system more effective. Police officers must be educated about the causes of battering. They must be trained and required to make arrests when they have probable cause to believe that a husband has assaulted his wife. Prosecutors can require the police rather than the victim to file the complaint against the batterer. At the minimum, prosecutors should encourage victims to press charges. In addition, prosecutors should use the same criteria for charging domestic assaults as they use for other assaults. Where prosecutors have discriminatory charging practices, they should not be immune from legal action. Furthermore, prosecutors should routinely issue contempt citations for assaulters who violate protection orders.<sup>137</sup> Like the police and prosecutors, judges need to be educated about battering. Judges should impose sentences in domestic abuse

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137. Battered women often feel that their orders for protection are useless because they are not enforced. Interviews with battered women in Minneapolis, Minnesota (June, 1982-August, 1983). In my experience at the Minneapolis City Attorney's office, contempt citations were never issued for violation of protection orders.

cases that reflect the seriousness of the crime. Finally, police, prosecutors and judges should cooperate with battered women's advocates and batterer treatment programs.<sup>138</sup>

A societal recognition of all women and men of color as valuable members of society must accompany these reforms. As a society, we must give up the economic and psychological benefits we receive from subordinating whole classes of people. Only when sexism and racism cease to dominate social policy can reforms be truly effective. Until then, we must work to eliminate obstacles to reform. Mediation and its method of sheltering and nurturing sexism is one of those obstacles. Discontinuing mediation of wife battering cases will eliminate one discriminatory practice and make possible other substantive societal reforms to achieve equality for all people under the law.

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138. For a discussion of these reforms, see generally Lerman, *supra* note 4, at 13-32; Schechter, *supra* note 2, at 157-84; Pastoor, *supra* note 76, at 603-07.

