Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap

Carol J. King
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CAROL J. KING*

INTRODUCTION

Without question, public funding for court services rarely meets all the needs of the justice system.1 Case filings have increased dramatically in many courts in the past ten to twenty years.2 In some courts, particularly in state courts, increases in the criminal docket have forced significant delays in processing civil cases.3 The perception that there are undue delays has gen-

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1 See James W. Meeker & John Dombrink, Access to the Civil Courts for Those of Low and Moderate Means, 66 S. CAL. L. REV. 2217, 2218 (1993) (noting that access to the courts is limited, due to high costs of litigation); Jack M. Sabatino, ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution, 47 EMORY L.J. 1289, 1291 (1998) (suggesting that parties are increasingly "unable or unwilling to bear the excesses of our elaborate civil justice system").

2 See KARL D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT 1 (1990) (noting that Florida's courts have become overburdened and providing a graph showing the rise of circuit civil filings by year; also noting that Americans are becoming more litigious); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 37-40 (1983); Marc Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3, 3 (1986); John Flynn Rooney, Federal Judges Launch New Salvo at Crime Bill, CHI. DAILY L. BULL., Mar. 14, 1994, available in LEXIS, Allnews Library, Child Filing; Is U.S. Justice System in a State of Crisis?, NAT'L L.J., Aug. 2, 1993, at 23.

erated pressure to take cases out of the trial system. Many courts have instituted alternative dispute resolution methods such as mediation, court-annexed arbitration, early neutral evaluation, and summary jury trials in order to speed up case resolution.\(^4\) The desire for expanded court-related services comes at a time of strong public resistance to increased taxes and public spending. This has created tension for court reformers due to the fact that expanded services require additional funds. Some programs have been designed to resolve this tension by shifting costs of new services to users of the courts. These programs, however, create new problems concerning equal and fair access to both the courts and to the alternative methods the courts wish to promote.

The speed of case processing and docket control are not the only motivations behind the growing impetus to divert cases from the litigation track to alternative dispute resolution. The quality, not just the quantity, of justice delivered by trial alternatives is also important to policy makers. There is some evidence that the quality delivered by alternative conflict resolution programs has been more than satisfactory. Mainly, research studies show that participant satisfaction with alternatives is usually high,\(^5\) and that parties generally perceive the process and outcomes as fair.\(^6\)


\(^6\) See McEwen & Maiman, supra note 5, at 238 (noting parties' overall satisfaction and perception of fairness in mediation process); Jeanne M. Brett et al., The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Ma-
In the family law area, especially in cases involving children, many judges, advocates, and commentators share concerns that the adversarial system can be counterproductive, frustrating rather than advancing the real needs of the parties. The adversarial system works by emphasizing the differences between the litigants, and by advancing each litigant's wishes by attacking the merits of the other's position. In order to work as designed, divorce litigation actually polarizes the divorcing couple. After trial the adversaries need to rebuild their relationship so as to remain partners and parents to their children. This goal is unlikely to be achieved in a system that operates on the general assumption that the trial court judgment actually ends the case, and also ends the relationship between the disputants, when in fact it does neither.

In light of studies indicating that high levels of interparental hostility are associated with poorer emotional adjustment of the children of divorce, policy makers have encouraged parents to
try mediation to resolve conflicts over children, especially in cases involving custody and visitation.9 Because mediation facilitates open communication, it has the potential to help parties resolve underlying issues and deal with emotions that arise in litigation and negotiations.10 The hope held by proponents of child-custody mediation is that parents will learn to cooperate with each other, resulting in decreased hostility, thereby improving the psychological adjustment of children post-divorce.11

Custody law is both ambiguous and fact specific. The court is directed to place the child with the parent who will best serve the child's needs under the prevalent “best interest” standard.12 In reality, determining placement is rarely an easy decision.13 The judge may seek the expertise of a psychologist or psychiatrist to aid in forming the judge's decision, but different profes-

(1987) (finding that preschoolers exposed to anger showed evidence of sadness, aggressiveness, and anger); Robert E. Emery, Interparental Conflict and the Children of Discord and Divorce, 92 PSYCHOL. BULL. 310, 310 (1982) (citing relevant cases that stand behind “[t]he idea that marital turmoil is the cause of a variety of behavior problems in children is widely held”) (footnote omitted) [hereinafter Interparental Conflict]; John Guidubaldi et al., The Role of Selected Family Environment Factors in Children's Post-Divorce Adjustment, 35 FAM. REL. 141, 142-50 (1986) (describing longitudinal study of post-divorce adjustment in children).

9 See Silberman & Schepard, supra note 7, at 399-400.

10 See Kenneth R. Davis, A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power, 26 FORDHAM URB. L.J. 167, 208 (1999) (noting that arbitration “reconciles autonomy and cooperation” as the parties have a “common desire for swift and affordable justice”); Folberg, supra note 5, at 418-21 (noting that mediation provides benefits not present in the adversarial process); Ellen A. Waldman, The Evaluative-Facilitative Debate in Mediation: Applying the Laws of Therapeutic Jurisprudence, 82 MARQ. L. REV. 155, 160-63 (1998) (discussing how the mediation process provides a “less traumatic means of resolving conflict” than the adversary system)

11 See, e.g., CAL. FAM. CODE § 3161 (Deering 1994) (declaring that mediation is intended inter alia “[t]o reduce acrimony that may exist between the parties”); N.C. GEN. STAT. § 50-13.1 (1995) (stating that the purposes of mediation are to reduce acrimony, facilitate agreements and cooperative resolution of issues, and reduce re-litigation); WASH. REV. CODE ANN. § 26.09.015(1) (West 1998) (indicating that mediation is intended to reduce acrimony and to develop an agreement whereby both parents maintain contact with the child); Jones v. Bowman, 479 So. 2d 772 (Fla. Dist. Ct. App. 1985) (Glickstein and Barkett, JJ., concurring specially) (noting that the adversary system is inappropriate and inadequate for cases involving children).


13 See id. The best interest standard has been criticized as almost no standard at all, or one that encourages divisiveness and litigation, and permits the expression of adjudication bias. See, e.g., Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 229 (1975) (noting that what is best for a child is “usually indeterminate and speculative”).
tionals looking at the same set of facts frequently arrive at different conclusions, leading to the classic "battle of the experts.\textsuperscript{14} While passions run high in many domestic relations cases, emotions are particularly intense in disputes over children. Thus, diverting child-related disputes to mediation could also serve the court's interest of avoiding the trackless swamp of the contested custody case.

Obviously, expanded court services require additional funding. Given the widespread public resistance to the suggestion of spending tax dollars to improve the system, courts have been forced to come up with creative ways of encouraging litigants to try alternative methods of dispute resolution, without creating additional costs for the courts.\textsuperscript{15} Further, despite the generally favorable reaction disputants have to family mediation, and the perceived advantages to children, voluntary use of mediation is low.\textsuperscript{16} Courts have, therefore, employed varying levels of encouragement or coercion in an attempt to divert parties from the trial courts into mediation.\textsuperscript{17}


\textsuperscript{15} See Steve Lash, "Creativity" Before Lawsuits—Reno Calls on Litigants, Courts to Mediate, HOUS. CHRON., May 1, 1998, at 4 (reporting Attorney General Janet Reno's call to resolve conflicts via negotiation rather than litigation), available in 1998 WL 3574922; Robert S. Greenbaum, We Are Going in the Right Direction; Everyone is Learning, METROPOLITAN CORP. COUNS., Aug. 1998, at 14 (noting courts' findings that arbitration agreements are enforceable and their awards are final), available in LEXIS, Allnews Library, Metcc File.

\textsuperscript{16} See Pearson & Thoennes, supra note 5, at 13 (reporting that one-third of the couples refused an offer of free custody and visitation mediation services); John P. McCory, Introduction to Symposium, A Study of Barriers to the Use of Alternative Methods of Dispute Resolution: Vermont Law School Dispute Resolution Project, i (1984) (noting that individuals are "skeptical regarding the fairness and practicality . . . of ADR processes"); Wayne D. Brazil, Institutionalizing Court ADR Programs, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 52, 122–24 (Appendix C) (1991) (discussing reasons why "volunteer" ADR programs will not attract many cases, including: the inability of parties to agree on getting a case into the program; attorney/party ignorance; attorney/party inertia; attorneys who seek trials; fear of the unknown; and fear of loss of fees by the attorney); David E. Matz, Why Disputes Don't Go to Mediation, 17 MEDIATION Q. 3, 3 (1987); Sally E. Merry & Susan S. Silbey, What Do Plaintiffs Want? Reexamining the Concept of Dispute, 9 JUST. SYS. J. 151, 151–52 (1984) (finding it puzzling that the rate of voluntary ADR usage is low despite satisfaction with the process); Craig A. McEwen & Thomas W. Milburn, Explaining a Paradox of Mediation, 9 NEGOTIATION J. 23, 23 (1993).

\textsuperscript{17} See LINDA R. SINGER, SETTLING DISPUTES: CONFLICT RESOLUTION IN
In the family law context, courts have developed several approaches to institutionalizing mediation. For example, some courts have established and funded court-annexed mediation programs which are staffed by court employees and provide mediation services to at least some divorcing couples at no charge. Usually, these programs focus on disputes involving children, leaving financial issues for resolution through the more traditional means of attorney negotiation, direct party negotiation, or adjudication. In addition, court-annexed mediation programs often include parties to post-divorce conflicts over the children, such as disputes over modification of pre-existing custody or visitation orders.

Other courts, which lack funds to establish family mediation programs, attempt to educate parties about mediation. For instance, one court forwards parties brochures describing mediation. Others ask parties to watch videotapes describing mediation, perhaps including scenes from a scripted mediation simulation. Still others hire court employees to educate parents about mediation and to screen cases to see if mediation might be productive or contraindicated. If mediation is recom-
mended, the parties are referred to private mediators. Often these mediators can be added to court-maintained lists of "approved" service providers by meeting criteria designed to assure minimum competence. If parties desire mediation after receiving education or assessment, they are expected to pay the mediator's fee. It should be noted that litigants are not required to mediate.

Finally, some courts order parties to attend mediation with a private mediator and order the parties to pay the mediator's fees. The court may set fee maximums. Usually, some provision is made to offer free mediation to the very poor. Otherwise, the duty of fee payment is assigned to the parties, often with a provision for court allocation of the costs when the parties cannot agree. This approach seems to be growing in popularity.

Programs mandating or encouraging divorcing parties to mediate and pay for the service raise significant legal and policy questions concerning access to justice. Mandatory referral schemes, in which divorcing parties are ordered to attend mediation and pay the costs, are certainly effective in increasing the use of mediation while holding down court expenditures. If mediation is not voluntary, and parties are required to attend and are obligated to pay the mediator, constitutional due process and...
equal protection issues may be implicated. Further, as a practical matter, parties may be denied access to adjudication of their cases because they lack the funds to pay for the prerequisite mediation. Particularly in divorce cases, when partners are setting up two households on the same income that formerly supported only one, money is tight. Divorcing parties who are mandated to use and pay for mediation services may be unduly pressured to settle on unacceptable terms because they cannot afford to pay lawyers' fees for trial or further negotiation, in addition to the fees they have been forced to spend for mediation.

Voluntary programs raise issues concerning access to justice that are, in many respects, the flip side of the problems attendant to the mandatory use and payment schemes. While some parties may essentially feel coerced to hire and pay a private mediator due to fear of alienating the referring court or judge, other couples may wish to try mediation but are unable to afford the service. Because a mediator cannot guarantee that parties will reach an agreement, there is a risk that the money spent on mediation will be wasted. Even if an agreement is reached, the parties will likely still need to hire lawyers to review the proposed agreement, draft the legal documents, and procure the divorce decree. If lawyers attend the mediation sessions, the overall cost of mediating might increase accordingly.30 The potential financial burden may simply appear too great for the parties to risk trying mediation. In this time of financially strained courts, private alternatives may become the choice of the wealthy, leaving poor and middle-class couples to operate in an inadequate, under-funded, second-class public justice system.31 Rather than posing the problem of access to trial created

30 See Craig A. McEwen et al., Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation, 79 MINN. L. REV. 1317, 1388–90 (1995). The authors make a strong argument for lawyer attendance at mediation sessions as a way to safeguard fairness. See id. at 1391. If lawyers attend, costs are more likely to be contained when the mediations are free or provided for a nominal fee. Lawyer attendance may increase case-processing efficiency by eliminating the need for outside legal consultation. A lawyer presented with a thorough, well-drafted memorandum seldom needs to spend significant time reviewing the process and content of the mediated discussions.

31 See ROGERS & MCEWEN, supra note 4, § 5:03, at 11; Daniel G. Brown, Divorce and Family Mediation: History, Review, Future Directions, 20 CONCILIATIONCTS. REV. 1, 22, 26 (1982) (discussing the issue of private versus tax-supported mediation and noting that private mediation is expensive); Richard Chernick et. al., Private Judging: Privatizing Civil Justice, 3 Alternative Disp. Resol. Rep. (BNA) 397 (1989);
by mandatory schemes, the voluntary programs pose a problem of fair and equal access to mediation services.

In recent years, our society has produced a "widening gap between the rich [and] the poor."32 The justice system should aspire to reduce, rather than exacerbate, the disparity between the ability of the rich and poor to access desirable dispute resolution services, whether the services consist of traditional adjudication or innovative alternatives.

This Article argues that, while expanded use of family mediation may advance goals of both the justice system and the disputants, requiring party-paid divorce mediation presents jurisprudential as well as policy problems concerning fair access to justice which outweigh the benefits. In order to achieve the goal of increased use of family mediation, programs should be structured in a manner that does not require parties to pay more than a nominal fee.

Part I of this Article explains why it is imperative to address the issue of whether parties should be required to attend and pay for mediation. Part II examines the history and current practices of divorce mediation. Part III details the legal and policy issues surrounding both mandatory and voluntary court-referred mediation, weighing both the benefits and burdens of family mediation.

In Part IV, this Article presents the results of a new empirical research study of three Ohio court systems that use three different approaches to mediation. In one court system, court employees mediated custody disputes free of charge. In the second court, a court employee educated parties to custody cases about mediation and referred them to private providers. The third

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32 See Nation Still Divided Racially, Economically, Study Finds, PROVIDENCE SUN., Mar. 1, 1998, at A3; see also Raymond W. Baker & Jennifer Nordin, A 150-to-1 Ratio Is Far Too Lopsided for Comfort, INT'L HERALD TRIB., Feb. 5, 1999, at 6 (noting the ratio comparing the top gross national products of the countries with the highest and lowest per capita income is currently 150-to-1, as compared to 60-to-1 in 1993), available in 1999 WL 109489; John L. Allen Jr., A Vision for the Americas: Familiar Themes, New Details, NAT'L CATH. REP., Feb. 5, 1999, at 6 (identifying Pope John Paul II's concern about the widening gap between the rich and poor as a result of globalization), available in 1999 WL 8553678.
court took no official action to encourage parties to use mediation, relying only on voluntary use by the disputants. The study results show that the problems of equal access to mediation based on relative income cannot be lightly dismissed. In addition, the research indicates that economic status is not the only potential source of unwarranted exclusion from mediation. Many policy makers exclude cases of reported domestic violence from divorce mediation. The new research questions the need for these well-intended exemption provisions. The study also sheds light on the role of attorneys in fostering the use of mediation by divorcing couples. The study’s results, comparing litigants’ reports of process and outcome satisfaction with mediated and attorney-negotiated settlements, support expanded access to mediation. The findings also raise attorneys’ professional responsibility concerns.

In Part V, this Article sets forth a policy discussion that suggests ways of attaining the benefits of divorce mediation without unduly burdening access, to either mediation, or more traditional avenues of justice. Ultimately, I conclude that, rather than choosing the easy option of forcing parties to attend and pay private mediators as a prerequisite to having their cases heard in court, the courts should seek funding for court-annexed programs. Courts should wait to introduce innovations until sufficient funds are available to provide easily affordable mediation services to all who want or are required to use them.

I. THE IMPORTANCE OF THE ISSUES RAISED BY MANDATORY PARTY-PAID DIVORCE MEDIATION

The issues raised by mandatory divorce or family mediation under schemes requiring parties to pay a private mediator are part of a larger question. Does requiring parties to engage in formal settlement efforts as a precondition to litigation unduly burden access to the courts for all types of cases? Particularly during the last twenty years, parties to many types of general civil actions have been ordered to attend and pay for mediation.

See Gruber, supra note 20, at 19. Divorce mediation generally refers to assisted negotiations attendant to a filing for divorce by one member of a married couple. Mediation, however, can also be used in disputes arising after the divorce is final, or between couples who never married. See id.; SINGER, supra note 17, at 32–34.
or other processes designed to attain settlement.\(^{34}\)

As used here, the term "mediation" generally refers to a process in which a third-party facilitator with no stake in the outcome of the case guides settlement negotiations among parties to a case. The mediated discussions are confidential. The mediator has no ability to render a binding decision, rather the parties must agree to a mutually satisfactory, consensual outcome.\(^{35}\)

Referrals to mediation are made via a number of procedural routes. Federal and state statutes, rules of procedure, and local court rules can be used to set up mechanisms for directing cases to alternative dispute resolution. For example, the 1990 Civil Justice Reform Act directs the federal district courts to consider referring appropriate cases to alternative dispute resolution programs.\(^{36}\) The Act does not provide for free mediation services, nor does it bar the courts from encouraging referral to private mediators to be paid by the parties.

Rule 16 of the Federal Rules of Civil Procedure\(^{37}\) permits the trial judge to order parties to attend pretrial conferences geared to generating settlements.\(^{38}\) If a case does not settle at a pretrial conference, the court can encourage the parties to enter mediation with a private provider in order to further movement towards settlement.

State statutes order mediation in a wide variety of substantive areas. These statutes often respond to immediate, vexing problems. For example, several Midwestern states adopted farmer-lender mediation programs during the recession of the 1980s.\(^{39}\) Similarly, the perception that medical malpractice

\(^{34}\) See Lash, supra note 15, at 4; Greenbaum, supra note 15, at 14; Dilworth, supra note 25, at 30.

\(^{35}\) See generally Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes 104–10 (2d ed. 1992) (excerpting from Nancy H. Rogers & Richard A. Salem, A Student's Guide to Mediation and the Law 7–39 (1987), discussing the stages of the mediation process, from getting the parties to agree to mediate their dispute to drafting the agreement).


\(^{38}\) See Fed. R. Civ. P. 16 advisory committee's notes. The Advisory Committee made case-scheduling "an express goal of pretrial procedure," acknowledging "that it has become commonplace to discuss settlement at pretrial conferences." See id.

\(^{39}\) See Ind. Code Ann. §§ 22-9-1-12.1(b)–(c)(1), 22-9.5-2-5, 22-9.5-2-6, 22-9.5-6-5, 22-9.5-7-1 (West 1993) (authorizing the adoption of ordinances, which may include establishment or designation of an appropriate commission, to effectuate the public policy of the state); Iowa Code Ann. §§ 13.13, 13.15, 13.20, 554.9501(6), 654A.11,
premiums were escalating out of control,\(^4\) perhaps due to the bringing of frivolous lawsuits, led some states to require screening and mediation of professional negligence claims prior to allowing suits to be filed.\(^4\) Presumably, such prelitigation procedures help control insurance costs by weeding out nonmeritorious claims and fostering early settlement of other cases.\(^4\)

A few states have enacted statutes requiring parties to use settlement processes before filing suit in other types of cases, including breach of warranty matters, civil rights cases, disputes between agricultural distributors and producers, environmental matters, and education conflicts.\(^4\) These statutes respond to individual problems endemic to the substantive area of law in question.\(^4\)

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654.2A, 654.2C, 656.8 (West 1995) (authorizing the state's farm assistance program to create a farm mediation service and establishing requirements for farm creditors to utilize this service); KAN. STAT. ANN. § 74-545(g) (1993) (requiring creditors of farm borrowers to provide notice to borrowers of the state's mediation service); MINN. STAT. ANN. §§ 336.9-501, 514.661, 550.42, 559.209, 582.039 (West 1991) (describing rights of farm debtors to mediation); NEB. REV. STAT. §§ 2-4801-2-4816 (1997) (establishing a farm mediation service to assist borrowers); NEV. REV. STAT. § 561.247 (1997) (instructing the state Division of Agriculture to adopt regulations for an agriculture loan mediation program); N.C. GEN. STAT. § 44-69.3(e) (1985) (allowing the state Milk Commission to act as mediator when there are claims of nonpayment); N.D. CENT. CODE §§ 6-09.10-0-6-09.10-10 (1991) (establishing an agricultural mediation service); OR. REV. STAT. § 36.245 (1997) (requiring mediation of foreclosures of agricultural property); PA. STAT. ANN. tit. 73, § 1959 (West 1993) (allowing car manufacturers to establish an informal dispute settlement procedure to deal with defect claims of purchasers); S.D. CODIFIED LAWS § 54-13-1 (Michie Supp. 1989) (creating a state farm loan mediation board).

40 See James Gray, How Did It Ever Come to This?, MED. ECON., Oct. 19, 1998, at 104 (discussing increases in premiums of 100% to 750%), available in 1998 WL 14467460.

41 For an example of such a statute, see section 766.108 of the Florida Code, which requires parties involved in medical malpractice suits to attend a settlement conference at least three weeks before trial. See FLA. STAT. ANN. § 766.108 (West 1997).

42 See discussion infra Part III.


44 See ROGERS & MCEWEN, supra note 4, §12:02, at 2.
In some jurisdictions, mandatory settlement programs have been given teeth by being coupled with disincentives to further litigation of the case. For example, several states impose the costs of trial and the other party's attorney's fees on a litigant who rejects a pretrial settlement recommendation and fails to obtain a better result at trial, even if that party wins in court.\textsuperscript{45} Some California divorce mediation programs permit the mediator to make a custody recommendation to the court if the parents do not settle.\textsuperscript{46}

Various mandatory settlement programs exhibit inconsistent goals. On the one hand, court-annexed alternative dispute resolution has been promoted as a way of benefiting litigants by reducing costs and delays, thereby enhancing access to the courts. On the other hand, shifting fees and costs to a party unwilling to accept a pretrial settlement recommendation coercively decreases access to the courts.

Diverting cases from the traditional advocacy system raises a serious dilemma. Public funds pay for the services of judges to resolve disputes. Mediators also resolve disputes, however at the parties' expense. When parties are forced to mediate, and to pay the mediator as well, the court's interest in inexpensive docket control trammels the litigant's interest in free choice of an affordable dispute resolution process.

Our justice system has long valued the ideal of "justice for all" by compensating judges with tax dollars and establishing reasonable court filing fees to enable individuals from every existing economic level to bring their grievances to court. Inserting mandatory dispute resolution into standard pretrial procedures, without providing free or low-cost neutrals, can add a substantial expense to the cost of pursuing a claim or protecting one's rights. Although some parties can easily afford the additional

\textsuperscript{45} See, e.g., CAL. CIV. PROC. CODE § 1141.10–1141.32 (Deering 1981) (requiring that a party seeking a de novo trial after arbitration and receiving a lower judgment than originally obtained in arbitration pay costs of the opposing side); WASH. REV. CODE ANN. § 7.06.060 (West 1992) (allowing the state supreme court to assess costs and fees from the appealing party who does not improve on his original judgment); DEL. SUPER. CT. R. CIV. P. 16.1(h)(4) (1997) (imposing fees and costs on a party appealing from mediation who fails to achieve a more favorable verdict at trial); MICH. CT. R. 2.403(O) (1997) (allowing either side to reject a mediation evaluation, but requiring a party who does not receive a more favorable recovery to pay costs of the opposing party).

\textsuperscript{46} CAL. FAM. CODE § 3183 (Deering 1994 & Supp. 1997) (authorizing the mediator to make various recommendations to the court).
expense, others may not be so lucky. When trial disincentives are linked to mandatory settlement, the problem worsens. This issue arises at a time of concern about poor members of our society being frozen out of entry to the courts.47 Funding for legal services to the poor has been slashed.48 Surviving programs have been subjected to restrictions on the types of cases they can handle and clients they can serve.49

Judicial referrals of cases to private mediators at the litigant's expense raise another issue. For any adjudicatory system to be effective, it must be perceived by the public as fair and impartial. When parties to litigation are referred by the court to private service providers, some may question the motivations of both parties to the transaction. As one of the respondents to our Ohio survey of divorce mediation charged, "Mediation is a money-making scheme the courts use. Mediators give money to the courts so that they can get referrals."50

A different, related issue concerns the cultural values underlying society's long-standing commitment to the adversarial concept of justice. The fundamental notion behind the litigation system, that the presentation of both sides of a case by dedicated advocates to a neutral decision-maker is the best way of arriving at the proper result in all cases, is subject to question.

Proponents of mediation explain that parties to a dispute often have valid, but differing, points of view.51 Guided discussions, during which all disputants have the opportunity to express their own perspectives and to hear the perspectives of

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48 See Rhonda McMillion, No Reprieve for LSC, 83 A.B.A. J. 96 (Sept. 1997); Hearings Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 102d Cong. 979, 1037, 1040, 1043 (1992) (statement of George W. Wittgraf, Chairman, Board of Directors of Legal Services Corporation) (finding that only 15–20% of the legal needs of the poor are being met).
49 See McMillion, supra note 48.
50 Jeanne Clement et al., Descriptive Study of Children Whose Divorcing Parents Are Participating in Voluntary, Mandatory, or No Custody/Visitation Mediation 8–10 (1993) (unpublished study) (on file with author) [hereinafter Descriptive Study of Children]. For a more comprehensive discussion of the policy issues surrounding court-annexed mediation, see infra Part IV.
others, can lead to increased understanding and foster reasonable, informed compromises in settlement of the dispute. No one method of dispute resolution is perfect for all types of cases, and few mediators would advocate dismantling the adversary system. As our society becomes more diverse and complex, the wisdom of compromise and accommodation in appropriate cases becomes ever more apparent.\(^6\)

A recent case concerning the allocation of fishing rights in Lake Michigan\(^5\) illustrates how the problem of complexity can be alleviated. The parties involved, the State of Michigan, Indian tribes, and commercial and sport fishermen, had converging interests.\(^6\) The trial was expected to take months, yet not necessarily reduce the tensions between the competing lake users.\(^5\) Neither the law, nor the evidence for the case was well developed. Before trying the case, the judge referred the matter to a settlement process that allowed the interests of almost all the stakeholders to be balanced satisfactorily.\(^7\) The trial was thus limited to the claims of the single party that remained after the pretrial settlement.\(^7\) A situation that seemed unmanageable in the beginning was simplified through partial settlement.

Non-adjudicatory methods of dispute resolution can also be appropriate in controversies involving parties with a continuing relationship who would benefit by future cooperation. Business disputes arising in today's global economy can be well served by settlement devices aimed at building trust and generating coop-

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\(^6\) Compare Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 1-2 (1989-1990) (examining the divergent positions taken by the four lawyers in his "imaginary conversation" on the proper role of mediation in dispute resolution) with Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that alternative dispute resolution is "a highly problematic technique for streamlining dockets"). The cases entering the justice system are becoming more complex. Many involve difficult policy choices, not merely application of the law after determination of the facts. Some cases can involve many parties and even impact non-parties. Complex cases often involve difficult evidentiary issues.


\(^7\) See id. at 458-60.

\(^7\) See id. at 460-65.

\(^7\) See id. at 466.
eration. In a recent, complex intellectual property dispute involving IBM and Fujitsu Corporation, innovative resolution procedures led to an agreement including future business dealings between the two companies.88

Perhaps society would benefit from the allocation of more public resources to facilitate settlement efforts. If mediation is not expensive, it will not operate as a disincentive to the usage of courts, even if it is a mandatory part of pretrial procedure. Thus, a generous allocation of funds will give an equal opportunity to all parties to try to settle before trial. This is not to imply that there is no place for trials, but to argue that our society should reserve trials for cases that cannot or should not be settled. This goal would be advanced by providing publicly financed mediation through the court system, in addition to adjudication, at no charge or for a nominal filing fee.

II. THE DEVELOPMENT AND CURRENT STATUS OF PARTY-PAID DIVORCE MEDIATION

Early in this century, a number of states passed family law conciliation statutes or formed specialized family conciliation courts in an attempt to encourage reconciliation between divorcing spouses.69 If private reconciliation efforts did not succeed, the laws or courts encouraged the parties to reach agreement by arranging for custody and visitation with the minor children. The conciliation movement was spurred by the desire to find a way to reduce the bitterness created by contested divorce trials, a goal that continues to drive the modern mediation movement. Due to low voluntary use, the statutes fell out of favor and subsequently failed to serve their intended purpose.69

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69 See, e.g., ARIZ. REV. STAT. ANN. § 25-381.08 (West 1991) (giving conciliation courts jurisdiction over potential divorce cases); MONT. CODE ANN. § 40-3-121 (1991) (allowing individuals seeking a dissolution of marriage to file in conciliation court in an attempt to reconcile or effect an amicable settlement); NEB. REV. STAT. § 42-823 (1988) (authorizing courts to accept conciliation proceedings if there is a probability of reconciliation or amicable settlement); UTAH CODE ANN. § 30-3-16.2 (1989) (permitting spouses to reconcile or amicably settle by invoking the jurisdiction of conciliation courts).

68 See ROGERS & MCEWEN, supra note 4, § 5:01, at 3.
Over twenty years ago, several well-known scholars and practitioners who found themselves frustrated by certain aspects of the adversarial divorce system proposed divorce mediation as an alternative to litigation. In the early 1970s, O.J. Coogler, an attorney who had been left disillusioned after a bitter adversarial divorce, began to experiment with a model of divorce mediation. Coogler proposed using a neutral mediator to structure settlement discussions between the parties. He focused on avoiding lawyers and the court system as much as possible, preventing personal and financial devastation, and allowing for development of positive post-divorce family relationships.

At the 1976 Pound Conference on the administration of justice, Professor Frank Sander discussed the potential benefits of mediation of family matters. He further proposed the idea of the "multi-door courthouse," in which disputants could be directed to a variety of dispute processing avenues, including mediation and trial.

Therapists and others outside the legal system also became interested in divorce mediation as a way to resolve family conflicts more productively. As did Coogler and Sander, therapists often observed the destructive fallout of adversarial divorce and sought a better way to minimize the pain and trauma experienced by many divorcing couples. The interests of children were often noted as a reason to avoid litigation.

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61 See O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 2 (1978).
62 See id. at 63 (explaining the benefits of a mediated agreement over a court-imposed order).
63 See id. at 70. As Coogler notes: The couple should agree to keep each other informed about all significant events in the lives of the children, such as birthday parties, school plays, honors, sporting events, vacations, prizes, loss of a friend, illnesses, and the like. The parents may also agree that they will keep each other posted as to their own illnesses or other circumstances which may in some way affect the lives of the children.

Id.
64 See Frank E. A. Sander, Varieties of Dispute Processing, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 83–84 (A. Leo Levin & Russell R. Wheeler eds., 1979) (describing his vision of a Dispute Resolution Center, with several specialized departments, in which a screening clerk would direct a grievant to the appropriate process).
65 See DONALD T. Saposnek, MEDIATING CHILD CUSTODY DISPUTES: A SYSTEMATIC GUIDE FOR FAMILY THERAPISTS, COURT COUNSELORS, ATTORNEYS, AND JUDGES 17–22 (1983) (contrasting mediation with the adversarial approach and noting that "it helps children to feel safer and more loved"). See generally JOHN M.
Originally, most divorce mediation practitioners were privately retained and paid by the parties, while a few community mediation centers provided free services. This was in line with one of the primary rationales for advancing the mediation movement—avoiding the court system. Mediation was intended to provide a dispute resolution process that differed greatly from the adjudicatory model, by emphasizing consensual, voluntary participation in both the process and outcome of mediation. People were not ordered to attend mediation. Instead, they were given the opportunity to negotiate freely. Mediators were philosophically opposed to forcing a settlement on an unwilling party. One of the goals of mediation was to address the root causes of the conflict by generating understanding and consensus. Rather than focusing on fault-finding or seeking to impose a decision on the parties in conflict, mediation sought to promote lasting resolutions.

Recently, mediation has begun to diverge greatly from many of the precepts originally guiding the movement and mandatory mediation is no longer viewed as being antithetical to the goals of mediation. Early experience in community mediation pilot programs showed that voluntary usage rates were low. In many cases, one party was interested in trying mediation, but one or more of the other parties would decline to participate. Policy makers grew more interested in mandating participation, particularly in light of studies indicating that satisfaction rates

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68 See generally Coogler, supra note 61, at 79; Haynes, supra note 65, at 3–14 (discussing how the cooperative approach advanced by mediation produces a successful result for both parties); Rogers & McEwen, supra note 5, § 12:09, at 32; Saposnek, supra note 65, at 14.

69 See Rogers & McEwen, supra note 4, § 12:09, at 32; see also John P. McCrory, supra note 16, at i (noting ADR processes are not as widely used as would be expected, partly due to parties' lack of knowledge); Pearson & Theennes, supra note 5, at 10–15 (stating that a large number of people are reluctant to use mediation).
were high even under mandated conditions.\textsuperscript{70}

Interest in expanded use of mediation through mandatory participation was not limited to the types of cases typically seen in neighborhood or community mediation centers. Family courts began to explore mediation when possible systemic benefits, such as docket reduction and cost savings, became known. In the past few years, there has been a significant increase in the number of states authorizing mandatory divorce mediation—there was a vast leap in a single year, from reports of four to six states in 1993,\textsuperscript{71} to thirty-three states in 1994.\textsuperscript{72}

Courts have taken several different approaches to funding mandatory divorce mediation programs. On one end of the continuum, courts fully fund mediators for the disputants. On the other end, judges are permitted to refer cases to private providers at party cost, manifesting little official concern for the financial constraints on the parties.

Systems of funding are crucial to the implementation of mediation. Unfortunately, private mediation can be costly. In St. Croix, mediators charge $150 per hour.\textsuperscript{73} In St. Thomas, the hourly rate increases to $200.\textsuperscript{74} Some jurisdictions have attempted to deal with the expenses that result from private mediation by dividing them amongst the parties. For example, courts in the Virgin Islands can order parties to pay for court-ordered divorce mediation, with the cost to be split equally between the parties.\textsuperscript{75}

Other jurisdictions show similar patterns. South Dakota authorizes mandatory dispute resolution and fee allocation between the parties.\textsuperscript{76} In Wisconsin, judges may order mediation

\begin{footnotes}
\textsuperscript{70} See, e.g., Douglas Henderson, \textit{Mediation Success: An Empirical Analysis}, 11 OHIO ST. J. ON DISP. RESOL. 105, 121 (summarizing the research on mediation’s success); McEwen & Maiman, \textit{supra} note 5, at 254–59 (citing empirical studies showing participants’ satisfaction with mediation).

\textsuperscript{71} See Dane A. Gaschen, Note, \textit{Mandatory Custody Mediation: The Debate Over Its Usefulness Continues}, 10 OHIO ST. J. ON DISP. RESOL. 469, 469 (1995) (explaining that very few states have enacted state-wide mediation statutes).

\textsuperscript{72} See Lisa Newmark et al., \textit{Domestic Violence and Empowerment in Custody and Visitation Cases}, 33 FAM. & CONCILIATION CTS. REV. 30, 31(1996) (discussing the Virgin Islands) [hereinafter SPIDR].

\textsuperscript{73} See id.

\textsuperscript{74} See \textit{id.}

\textsuperscript{75} See \textit{TERR. CT. R. 40(e)(7) (1998); see also SPIDR, supra note 73 (discussing the Virgin Islands).}

\textsuperscript{76} See S.D. CODIFIED LAWS § 25-4-56 (Michie Supp. 1998) (stating that “i[n any custody or visitation dispute between parents, the court shall . . . order mediation”)
and may also include the mediator's fee in judgments for property division, maintenance, attorneys' fees, and maintenance modification. Wisconsin does not address the allocation of mediation fees in custody and visitation disputes, although mediation is favored in such cases and often disfavored in cases involving monetary issues.

South Carolina permits mandatory mediation of custody and visitation disputes. Indigent litigants can petition the court for a waiver of the mediator's fee—a potentially expensive process unless the parties have free legal representation. In Alaska, courts can mandate custody mediation and mediators can charge parties up to $150 per hour. In Alabama, the court can divide fees—of $100 per hour and up—between the parties. In Michigan, the mediating parties may never enter mediation and still be responsible for their fees. In that jurisdiction settling a matter before the mediation hearing does not ensure the return of paid fees. The parties must put the mediation clerk on notice fourteen days before the hearing date or forfeit the paid fees.

A subset of programs that normally assesses the costs of mediation to parties, provides for free services for the indigent. Some counties in Florida have mandatory party-paid mediation at fees ranging from $75 to $200 per day, but provide subsidized services to the very poor. Georgia also refers parties to pri-

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77 See Wis. Stat. Ann. § 802.12(2)(a)-(d), (3)(c) (West 1998) (allowing a judge to order parties to select an alternate dispute resolution process as a means to settlement and requiring the parties to pay the reasonable fees and expenses of such method).
78 See SPIDR, supra note 73 (discussing Wisconsin).
79 See S.C. R. Cir. Ct. Mediation R. 2(a) (providing that most civil actions, including custody and visitation disputes, are subject to court-ordered mediation).
80 See S.C. R. Cir. Ct. Mediation R. 8(c) (requiring equal division of mediation fees unless otherwise agreed by the parties or ordered by the court).
81 See S.C. R. Cir. Ct. Mediation R. 8(d) (providing that an indigent party may petition the court to be exempted from payment of mediation fees).
82 See ALASKA STAT. § 25.20.080(a) (Michie 1996) (explaining the "court may order parties to submit to mediation").
83 See SPIDR, supra note 73 (discussing Alaska).
84 See ALA. CIV. CT. Mediation R. 15(b); SPIDR, supra note 73 (discussing Alabama).
85 See MICH. CT. R. § 2.403(H) (describing general mediation procedures).
86 See FLA. Stat. Ann. § 44.102(5)(b) (West 1998) (stating that where parties have been subjected to court ordered mediation and a "party has been declared indigent or insolvent, that party's pro rata share of a mediator's compensation shall be
vately paid mediators, unless the litigants are indigent. In Kansas, custody and visitation mediation can cost parties $125 per hour, but free services are provided to the poor. In Kentucky, parties in family cases pay fees of $60 per party per session, but volunteer mediators are used where available. In such cases, mediators’ fees are waived. In Utah, indigents can receive free services, but other parties can expect to pay mediators up to $200 per hour, divided by agreement.

Rules and statutes permitting the court to assess the mediator’s fees between the parties can create expensive, time-consuming satellite litigation. Attorneys for each party have to prepare for a contested hearing on the parties’ relative abilities to pay the fees if the parties do not agree on their own. This further burdens the parties and creates extra work for the court—work that is meant to be avoided through the implementation of mediation.

Some states have partially funded mediation programs (often through filing fee surcharges), which help to keep costs under control and provide free services to indigent parties. Pennsylvania has a mix of mandatory and discretionary mediation, partially funded by a filing fee surcharge. The remaining fees can be equitably assessed to either party. Colorado partially subsidizes mediation, keeping fees charged to parties at $35 per hour and providing limited free services for the indi-
Oregon partially funds mediation services through divorce filing fees.93

In some jurisdictions sliding fee scales are utilized. For example, Nevada charges a case administration fee for mediation, based upon the income of the parties. Participants earning less than $15,000 per year pay $25 each, those earning between $15,000 and $30,000 pay $75 per person, and those with incomes over $30,000 per year pay $150 each.94 Sliding fee scales are used in Vermont, where mediation is mandatory if the case does not settle within three months of filing.95 New York uses sliding fee scales for specialized mediation such as family disputes.96

A number of states fund court-annexed mediation programs themselves, avoiding the need for private payment. North Carolina, California, Hawaii, New Mexico, and Maricopa County, Arizona, provide public funding to fully subsidize child-custody mediation.97 New Jersey courts can require parties to attend one free mandatory mediation session.98

A few court systems use volunteer mediators to provide services to parents in conflict. Two counties in the State of Washington require mediation of parenting plans and use volunteers as neutral third parties.99 Washington, D.C.100 and Oklahoma rely on a cadre of volunteer mediators. The latter, however, does not mandate mediation.101 West Virginia allows court-ordered mediation, but uses a mixed system of volunteers and

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92 See COLO. REV. STAT. § 13-22-305 (1998) (providing that a party who uses mediation services shall pay a fee to cover the reasonable expense of operating the program; that the fee will be put into an ADR fund; and that the fees may be waived at the discretion of the program's director); SPIDR, supra note 73 (discussing Colorado).
93 See OR. REV. STAT. §§ 36.100–36.210. (1997) (providing that filing fees for alternate dispute resolution be placed into an ADR fund to help pay for the program); SPIDR, supra note 73 (discussing Oregon).
94 See NEV. REV. STAT. ANN. §§ 3.5000(2)(e), 4.063(3) (Michie 1998) (providing for sliding fee scales and permitting courts to impose a filing fee of not more than $10); SPIDR, supra note 73 (discussing Nevada and noting that the mediator has the discretion to reduce or waive the sliding scale fees).
95 See SPIDR, supra note 73 (discussing Vermont).
96 See id. (discussing New York).
98 See SPIDR, supra note 73 (discussing New Jersey).
99 See id. (discussing Washington).
100 See id. (discussing Washington, D.C.).
101 See id. (discussing Oklahoma).
paid mediation providers, with fees ranging from $50 an hour to $500 a day.\textsuperscript{102}

A few states refer divorcing parties to some form of pre-mediation education, assessment, or screening to encourage voluntary use of the process. Oregon requires attendance at a mediation orientation session.\textsuperscript{103} In Hawaii, litigants are screened to determine if referral to mediation would be appropriate.\textsuperscript{104}

As demonstrated, many jurisdictions have chosen to require parties to submit their family disputes to mediation. Parties are generally required to pay the mediator's fees. Sometimes, free services are made available at least to some of the very poor. Unfortunately, many low-income divorcing parties, who are unable to pay mediation fees on their own, do not qualify for free services. A few programs attempt to mitigate the financial strain on lower-income mediation participants through sliding fee scales. The actual affordability of mediation services offered under sliding fee scales remains unexamined. Statutory provisions allowing parties to request fee waivers may be ineffective because the parties are often unaware of them. Some courts do not address the affordability problem at all, and leave the allocation of fees to the court's discretion if the parties cannot agree. If the fees are substantial, which is often the case, the allocation of such fees is a deciding factor when parties are determining whether to pursue mediation.

\section*{III. CONSTITUTIONAL CHALLENGES TO MANDATORY MEDIATION}

Before addressing the constitutional issues that arise in the mediation setting, it is necessary to understand the various dispute resolution procedures that are covered by the term "mediation." This Article defines mediation narrowly as a negotiation process. Mediation, however, has been used to refer to procedures that go beyond the scope of this definition.

One type of dispute resolution procedure is arbitration. Arbitration employs a neutral third party to render a decision on the merits of the claim. The hearing procedures are frequently less formal than a trial. For example, the rules of evidence are often relaxed, and discovery may be eliminated or curtailed in

\textsuperscript{102} See id. (discussing West Virginia).
\textsuperscript{103} See id. (discussing Oregon); see also OR. REV. STAT. §§ 36.100–36.245 (1998).
\textsuperscript{104} See SPIDR, supra note 73 (discussing Hawaii).
order to save the parties time and money. If the parties have agreed to be bound by the arbitrator’s decision, the determination is generally final. If the parties have not agreed to binding arbitration, or if the hearing is part of a court-annexed, non-binding arbitration program, a party dissatisfied with the result may request a trial de novo.\(^{105}\)

Early neutral evaluation is another type of dispute resolution technique. It involves a third party, usually one with expertise in the subject matter of the case, who recommends a result as a stimulus for a negotiated resolution by the parties.\(^{106}\) The evaluator’s recommendation is not binding.\(^{107}\)

Some laws and court-related dispute resolution programs that resemble arbitration or early neutral evaluations are called “mediation” even though they are evaluative in nature. For example, Florida’s ill-fated medical malpractice reform legislation established a so-called mediation system.\(^{108}\) The function of the “mediators” was to evaluate the merits of the malpractice claim at an adversarial hearing, rather than structure discussions in order to facilitate a consensual resolution.\(^{109}\) Thus, the process was outside the scope of “mediation” as defined by this Article.

Another example of a broad definition of mediation is found in Michigan’s court rules. The Michigan Supreme Court has adopted Michigan Court Rule 2.403(A)(1), which allows a court to submit civil cases requesting money damages or division of property to a process it terms “mediation.”\(^{110}\) A panel of three at-

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\(^{105}\) See Goldberg et al., supra note 35, at 244.

\(^{106}\) See id. at 250–51 (explaining that the neutral party makes an assessment based on the parties’ brief presentations).

\(^{107}\) See id. at 251 (noting the possibility that the case may not settle).


\(^{109}\) Like many malpractice statutes, the Florida law set up a panel consisting of a judge, a practicing attorney, and a health care practitioner. The panel members presided over a hearing. As in an arbitration or a traditional court hearing, both sides introduced evidence and argued the merits of the case. After the hearing, the panel decided whether the claim had merit. If so, the panel made an award of damages. Neither party was forced to accept the panel recommendation, but the law included disincentives to seeking a new trial. See Fla. Stat. Ann. § 768.44 (repealed 1983); Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (recognizing that Florida’s statute making it mandatory for a plaintiff to submit to mediation before filing a complaint in court in a medical malpractice suit places a “pre-litigation burden” on the plaintiff).

Attorneys is formed to hear the parties' contentions. In operation, the mediation proceeding results in a cursory preliminary evaluation of the merits of the controversy.

The various types of court-annexed mandatory mediation and alternative dispute resolution programs discussed above can be subject to challenge on constitutional grounds. Particularly during the last twenty years, a number of cases have addressed constitutional challenges to mandatory pretrial dispute resolution programs. To date, no cases have specifically addressed the issue of whether involuntary party-paid divorce mediation schemes unconstitutionally impinge upon a party's constitutional rights.

The actual distinctions between the various types of alternative dispute resolution programs, regardless of how they are termed, should be kept in mind when examining case law challenging the legality of the programs. Many programs share the common goals of reducing court dockets and delays, as well as diminishing the cost of litigation to the parties. The particular way a program is structured imposes different burdens and benefits on the parties to the dispute. These differences influence the results of the cases.

As discussed above, parties referred to the various programs are not required to settle. Nevertheless, they may be pressured to settle. Settlement pressure can arise due to the cost of the dispute resolution proceeding. The delay attendant to the pretrial case processing can also influence parties to agree to an unwanted resolution. In addition, delay can increase both the financial and emotional costs of continuing to litigate the case. Disincentives to exercising the right to a trial de novo, such as cost-shifting or pretrial assessment of the merits, can also pressure parties to settle.

A number of cases have dealt with challenges to mandatory non-binding court-annexed arbitration programs. During the 1970s, many states passed laws establishing medical malpractice screening panels in response to the perceived malpractice insur-

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111 See id. at 2.403(D)(1).
ance crisis.\textsuperscript{113} Litigants frequently challenged these laws as unconstitutional.\textsuperscript{114}

A few themes are reiterated throughout the cases challenging the constitutionality of mandatory court-annexed dispute resolution laws and programs. The major grounds for the challenges are that the programs deny litigants' rights to a jury trial\textsuperscript{115} and that they deny due process and equal protection of the law.\textsuperscript{116}

\textbf{A. The Jury Trial Cases}

The Seventh Amendment to the Constitution preserves the right to a jury trial in federal cases as traditionally permitted by the common law.\textsuperscript{117} Every state, except for Louisiana and Colorado,\textsuperscript{118} has created an analogous right to a jury trial in state proceedings. At common law, divorce cases were not entitled to be tried before a jury.\textsuperscript{119} Cases dealing with the right to trial by jury in mandatory alternative dispute resolution are not directly applicable to mandatory mediation in domestic relations matters. The constitutionality tests used in the Seventh Amendment cases, however, are substantively similar to the tests used for evaluating the right to a jury trial in medical malpractice actions.\textsuperscript{120}


\textsuperscript{114} In \textit{Everett v. Goldman}, 359 So. 2d 1256 (La. 1978), the plaintiffs in a medical malpractice action challenged the constitutionality of the Louisiana Medical Malpractice Act. See \textit{id.} at 1265. The Supreme Court of Louisiana declared the Act constitutional, finding no violation of equal protection, see \textit{id.} at 1267, due process, see \textit{id.} at 1268, or access to the courts, see \textit{id.} at 1269.

\textsuperscript{115} See \textit{Davis}, 396 S.E.2d at 220 (discussing plaintiff's claims that the arbitration program infringes on the right to a jury trial); \textit{Paro v. Longwood Hosp.}, 369 N.E.2d 985, 991 (Mass. 1977) (same).

\textsuperscript{116} See \textit{Firelock}, 776 P.2d at 1099 (rejecting equal protection claim); \textit{Everett}, 359 So. 2d at 1268 (rejecting plaintiff's due process claims).

\textsuperscript{117} The Seventh Amendment states that, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. ..." U.S. CONST. amend VII. See Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (explaining that in order to secure a right to a jury trial, a court must compare the current action to one brought in the eighteenth century, and the remedy sought must be legal rather than equitable).

\textsuperscript{118} Article 1, Section 4 of the Louisiana Constitution grants a right to jury trial in certain expropriation cases. See LA. CONST. art. I, § 4. In Colorado, only the legislature can authorize a jury trial for civil matters. See \textit{Miller v. O'Brien}, 223 P. 1088 (Colo. 1924) ("There is no constitutional right to a trial by jury in most civil cases in this state.").

\textsuperscript{119} See \textit{Evans v. Evans}, 547 So. 2d 459, 461 (Ala. 1989) (explaining that because a divorce proceeding is equitable in nature, there is no right to a jury trial); \textit{Wright v. Quillen}, 909 S.W.2d 804, 813 (Tenn. Ct. App. 1995) (stating that at common law "the constitutional right to a trial by jury did not extend to divorce actions").
to examine challenges to mandated pretrial settlement programs as a denial of access to the courts under the more flexible Due Process Clause. Accordingly, the jury trial cases are helpful, although not controlling, in analyzing due process issues relating to divorce mediation.

Several early cases of the Supreme Court of the United States, which reviewed challenges to pretrial procedures in civil lawsuits, set the tone for the modern Seventh Amendment cases. In *Capital Traction Co. v. Hof*, the Court upheld a local statutory requirement that a full jury trial, before a justice of the peace, was a precondition to exercising the right to a jury trial presided over by an Article III judge. Although the dual trial requirement imposed significant costs and delays upon a party dissatisfied with the results of the preliminary proceeding, the Court justified the procedure for reasons of court efficiency.

The Court reasoned that the Seventh Amendment “does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it.”

In *Meeker v. Lehigh Valley Railroad Co.*, the Court decided that the admission of a prior non-binding finding issued by an administrative panel was not a complete block to the subsequent examination of the issues by a jury. The procedure was held to be consistent with the requirements of the Seventh Amendment and principles of due process.

The Court, in *Ex Parte Peterson*, weighed the impact of the participation of a court-ordered auditor on the parties’ jury trial rights. The case involved a dispute over unpaid bills and related counterclaims. The trial court decided that appointing an auditor to review the accounts, determine uncontested facts, hold

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174 U.S. 1 (1899).
121 See id. at 44-45. The Court also noted the legislature’s broad discretion in enacting legislation. See id.
122 Id. at 23.
123 236 U.S. 412 (1915).
124 See id. at 430 (stating that the evidence “cut[] off no defense, interpose[d] no obstacle to a full contestation of all the issues, and [took] no question of fact from either court or jury”); see also Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (upholding section 768.134(2) which allows that results of mediation proceedings between plaintiff and defendant-physicians be admitted into evidence).
125 253 U.S. 300 (1920).
126 See id. at 304.
hearings, assess witness credibility, and prepare a report would shorten the eventual jury trial and assist the jury in rendering an intelligent determination. The Supreme Court examined the burdens on the litigants by participation in the auditor's proceedings, including cost, delay, disclosure of trial strategies, and the effect on the jury of hearing the auditor's recommendation. The Court found that these burdens were outweighed by the benefits of the procedure, particularly the benefit of streamlining the subsequent trial.

The lower courts have evaluated programs concerning screening panels, arbitration, and mediation. In light of the Supreme Court's rulings, these lower courts have weighed the

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128 See Peterson, 253 U.S. at 314–17.
129 See id. at 307.
130 See id. at 309–10.
131 See id. at 310–11.
132 See id. at 312.
benefits of various pretrial dispute settlement requirements to the justice system against the burdens imposed on the individual litigants.\textsuperscript{134} Although the burdens primarily affect only the litigants, while the benefits inure primarily to the justice system, the cases generally hold that the rationales for the mandatory procedures justify the impact on the jury trial right.\textsuperscript{135}

The parties challenging pretrial procedures have argued that the mandatory schemes imposed unreasonable costs and delays. Litigants have challenged the introduction of reports issued by arbitrators or screening panels into evidence, claiming that such an introduction would constitute a shift in the burden of proof and thus an insupportable burden on the right to trial by jury.\textsuperscript{136} In response, most courts have questioned the adequacy of the evidence supporting claims of unreasonable costs and delay and have ruled that reasonable procedural changes are acceptable. As long as a jury trial is available at some stage of the case, the law can require sensible preconditions to its exercise. Generally, courts have not developed any bright-line rule beyond which preconditions become unreasonable,\textsuperscript{137} although one court has struck down required pretrial evaluation hearings, regardless of conditions.\textsuperscript{138}

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The decisions invalidating dispute resolution schemes are narrowly drawn. Further, these decisions give scant guidance on the question of whether mandatory pretrial mediation is constitutional. For example, the Illinois Supreme Court invalidated portions of two versions of that state's medical malpractice reform legislation. The court's rationale was based on the composition of the malpractice screening panel. The panel, designed to conduct adversary hearings, consisted of a judge, an attorney, and a physician. The court held that the panel's structure improperly allowed nonjudicial members to exercise judicial functions in contravention of the state constitution.

The Illinois cases shed no light on the legal issues surrounding mandatory pretrial mediation. A mediator does not conduct an adversarial hearing. Although non-lawyer mediators may be perceived as engaging in the unauthorized practice of law, this is an ethical issue between the mediator and the bar overseers. It does not bring the constitutionality of court-annexed mediation into question.

Two other jurisdictions have struck down pretrial dispute resolution, possibly signaling that mandatory mediation may be unconstitutional. In both cases, the courts invalidated medical malpractice screening panel requirements that had earlier been approved in principle. Further, both courts found that the purposes of the statutes were not carried out in application. First,

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139 See Bernier, 497 N.E.2d at 774 (holding that review panels are unconstitutional, but that provisions mandating periodic payment of medical malpractice damages are constitutional); Wright, 347 N.E.2d at 745 (invalidating medical review panels and limiting policy rate increase, but upholding a limitation on recoveries in medical malpractice cases).

140 See Bernier, 497 N.E.2d at 770 (stating that the ability of the nonjudicial members of the medical malpractice review panel to make factual determinations impermissibly infringes on the role of the judicial panel members); Wright, 347 N.E.2d at 739 (stating that the statute violated the Illinois state constitution because it empowered the lawyer and physician members of the panel to draw conclusions of fact and law).

141 See Mattos v. Thompson, 421 A.2d 190, 196 (Pa. 1980) (holding unconstitutional section 309 of the Pennsylvania Health Care Services Malpractice Act, which had granted a "original exclusive jurisdiction" over medical malpractice claims because the delays involved in processing these claims under the... Act result[ed] in an oppressive delay and impermissibly infringe[d] upon the constitutional right to a jury"); Aldana v. Holub, 381 So. 2d 231, 239 (Fla. 1980) (stating that the Florida State Medical Mediation Act cannot be rendered workable, because to extend the ten-month time limit would result in an unconstitutional denial of access to the courts).
in *Aldana v. Holub*, the Florida Supreme Court found the statutory scheme violative of due process on very narrow grounds. The statute required the panel procedures to be completed within ten months of the date the claim was filed. The time limits were held to be jurisdictional and not subject to waiver or alteration. Examining a number of previous cases, the court found that, in over half the cases surveyed, the jurisdictional time limit had expired prior to completion of the panel proceedings, disqualifying the claims. This was enough, in the court's opinion, to render the scheme so arbitrary and capricious in its operation that it could not stand.

Second, in *Mattos v. Thompson*, a malpractice panel procedure was designed to cut delays in the disposition of cases. In reality, the scheme added significant delays in handling cases. The Pennsylvania Supreme Court decided that the burden imposed on the right to a jury trial was not sufficiently lightened by the promised benefits of the procedure because they were elusive. Since the arbitration program, as operated, did not fulfill its stated purposes, the majority found that its negative impact intolerably burdened the litigants' rights to a jury determination. The entire statute was declared unconstitutional in its operation.

The precise holding in *Aldana*, that the dispute resolution time lines were jurisdictional, is unlikely to be influential in examining mandatory mediation programs as they are currently structured. This is because mediation referrals are seldom governed by strict time lines. The court's examination of the extent of the actual delays created by the operation of the panel system is interesting. The decision indicates that mandatory mediation schemes which impose significant delays or undue constrictions on parties' access to the courts may not be tolerated.

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142 381 So. 2d 231 (Fla. 1980).
143 See id. at 235.
144 See id. at 237.
145 421 A.2d 190 (Pa. 1980).
146 See id. at 195.
147 See id.
148 See id.
149 See id. at 196.
150 See *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980).
151 *See id.* at 238 ("What was originally contemplated as an inexpensive, summary procedure would now extend to twelve, fourteen, or possibly even sixteen months or more, thereby effectively denying one's access to the courts.")
The Mattos decision is of even more interest to policy makers. The Mattos court noted that drafters of statutes and rules should be careful in stating the purposes underlying court-annexed dispute resolution programs. If the purpose of an enactment is quick resolution and this is not achieved, the program could be found invalid because it is outweighed by constitutional rights. The Mattos case involved delay. Viewed broadly, however, it stands for the proposition that if dispute resolution programs do not meet whatever purpose they set out to achieve, then they will be outweighed by the right to trial by jury. For example, a custody mediation program that sets out to improve children's adjustment to their parents' divorce or separation will be at risk if research does not clearly document improvements.

B. Due Process and Access to the Courts

Many of the Seventh Amendment cases involving pretrial medical malpractice screening panels and nonbinding court-annexed arbitration raise due process challenges. The basic theory supporting these challenges under the Due Process Clause of the Fifth Amendment, as applied to the states under the Fourteenth Amendment, and under similar state constitutional guarantees, is that litigants in civil cases have a protected right to access to the courts for adjudication of their claims. Many civil due process cases have addressed contentions that before a person may be deprived of liberty or property rights she must be afforded the right to a hearing to test the legitimacy of the claims against her. While the pre-deprivation hearing cases are not directly on point concerning claims of a general right of access to the court, they indicate that there must be a basic right of access to the judicial process for other disputes as

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152 See Mattos, 421 A.2d at 193.
153 See id. at 195 n.5 ("We must conclude that the Act is incapable of achieving its purpose of prompt dispute resolution and that the extensive delays in such resolution cast an impermissible burden upon the constitutional right to a jury trial.").
154 U.S. CONST. amend. V ("No person shall be... deprived of life, liberty or property, without due process of law...").
155 U.S. CONST. amend. XIV, § 1(“No State shall... deprive any person of life, liberty, or property, without due process of law...”).
156 One court, however, does not agree. See Everett v. Goldman, 359 So. 2d 1256, 1269 (La. 1978) (determining that, at the worst, medical malpractice mediation delays a claimant's access to the courts; it does not deprive him of any fundamental right).
well.

The Supreme Court stated in *Mathews v. Eldridge*, that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Due process has long been deemed a flexible concept, requiring varying degrees of protection depending on the importance of the underlying interest at stake. In criminal cases, the right of the accused person to be free from unwarranted punishment is so important that strict procedures are required in order to safeguard fairness.

Outside the criminal justice system, a litigant’s protected interests in access to the courts diminish. Entry to the courthouse is protected in matters implicating fundamental rights, even though the individual is not facing a criminal penalty. To be considered fundamental, the right must be "explicitly or implicitly guaranteed by the Constitution." Fundamental rights include the right to vote, travel, marry, the right of privacy,
and the right of freedom of association.\textsuperscript{166} For example, in cases seeking termination of parental rights, those facing allegations of child abuse and neglect risk a potential deprivation so severe that they are granted rights similar to those established in criminal cases.\textsuperscript{167} In these cases, a parent may be entitled to the assistance of counsel, which will be subsidized by the state if the person is indigent.\textsuperscript{168} In more routine civil matters, however, case law clearly allows some limits on the litigants' access to the courts.\textsuperscript{169} The exact parameters of these limits are unclear.

One of the most influential cases dealing with the right of access to the courts for resolution of civil claims is the United States Supreme Court decision in \textit{Boddie v. Connecticut}.\textsuperscript{170} This case challenged Connecticut's requirement of a sixty-dollar non-waivable filing fee in divorce cases.\textsuperscript{171} The appellants in \textit{Boddie} were indigent, and depended on welfare for their survival.\textsuperscript{172} It was undisputed that they could not afford to pay the filing fee.\textsuperscript{173} The Court noted that there were few cases that squarely raised the issue of access to the courts.\textsuperscript{174} It reasoned that "resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount."\textsuperscript{175}

The \textit{Boddie} court stated that filing fees are not unconstitutional per se.\textsuperscript{176} The question of validity must be examined in

\textsuperscript{166} \textit{See} NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . .").

\textsuperscript{167} \textit{See} Lassiter v. Department of Soc. Servs., 452 U.S. 18, 26-27 (1981) (expanding the Court's previous holding, that there is a right to appointed counsel for an indigent litigant facing a loss of liberty, to cases where a parent may be deprived of her child).

\textsuperscript{168} \textit{See id.} at 30-31 (balancing the interests of the state and the parent to determine if due process requires appointment of counsel); \textit{M.L.B. v. S.L.J.}, 519 U.S. 102, 107 (1996) (holding that a parent could not be denied an appeal in a parental rights termination case due to inability to pay filing and transcript fees).

\textsuperscript{169} \textit{See infra} notes 180-90 and accompanying text.

\textsuperscript{170} 401 U.S. 371 (1971).

\textsuperscript{171} \textit{See id.} at 372.

\textsuperscript{172} \textit{See id.}.

\textsuperscript{173} \textit{See id.}.

\textsuperscript{174} \textit{See id.} at 375.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{See id.} at 380 (noting that fees, like notice, are simply part of the procedure
light of the facts of the case. The Court noted that "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Under the facts in Boddie, the Court determined that the nonwaivable filing fee in divorce cases presented an unconstitutional bar to court access. None of the states allow citizens to divorce or remarry without state court approval. Therefore, unless the state could show that its interest in receiving filing fees exceeds the litigants' need to gain entry to the courts, imposing a nonwaivable filing fee on indigents deprives a poor divorce litigant of the opportunity to be heard "at a meaningful time and in a meaningful manner."

The Court found that the state's interest in deterring frivolous lawsuits, allocating scarce resources, and recovering costs did not outweigh the harm to divorce litigants resulting from denial of access to the courts. The state would have to satisfy its needs through other avenues, such as assessing penalties for filing spurious lawsuits. In closing, the Court emphasized the flexibility of the concept of due process. Not all litigants are guaranteed access to the courts under the Due Process Clause.

In the Boddie case, unlike many nonmarital civil disputes, access to the courts was mandated as "the exclusive precondition to the adjustment of a fundamental human relationship." The Court reasoned that the basic importance of marriage in society, and the total state monopoly over the dissolution of the marriage relationship, meant that upholding the filing fee requirement would bar the indigents from the only available forum for settling their claims. The Boddie holding, however, has not been found to invalidate mandatory filing fees in routine civil cases.

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177 Id.
178 See id. at 383; see also infra notes 247–81 and accompanying text (discussing the pretrial mediation in divorce and family law).
179 Id. at 378 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
180 See id. at 381 (holding that the stated interests did not satisfy the rational basis test).
181 See id. at 381–82.
182 See id. at 382–83 (noting that access to court is not a right guaranteed unconditionally to all individuals).
183 Id. at 383.
184 See id. at 376.
185 See, e.g., Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (upholding the fee in a hearing to reduce welfare benefits); United States v. Kras, 409 U.S. 434
In cases that do not involve fundamental rights, a "rational basis" standard is used to determine whether a statute requiring litigants to pay a fee is valid. In other words, Congress has plenary power to charge fees of litigants in civil cases that do not involve fundamental rights.

In United States v. Kras, the Supreme Court upheld the imposition of a mandatory, nonwaivable filing fee for obtaining a discharge in bankruptcy. The Court did not consider the right to obtain the discharge of fundamental importance and recognized that the state did not have a monopoly over the only avenues for resolution of the problem. At least in theory, a debtor could compromise his debts with his creditors informally. In Ortwein v. Schwab, the Court evaluated a twenty-five dollar filing fee that welfare recipients were required to pay when seeking judicial review of an administrative ruling that reduced their benefits. The appellants contended that the fee violated their rights under both due process and equal protection theories, but the Supreme Court disagreed. It held that the appellants had received an agency hearing and that, since their claims were not of the same level of importance as the interests in Boddie, due process did not require a state to provide an appellate review system. With respect to appellants' equal protection claims, the Court refused to recognize poverty as a suspect classification. The purpose of the filing fee was obviously to offset some of the costs incurred by the state in operating its appellate courts, and this was held to be reasonable.

Lower federal and state courts have generally upheld man-
Burdening Access to Justice

Datory pretrial dispute settlement programs against challenges that they result in a denial of access to the courts. Similar to the jury trial cases discussed above, these challenges rest upon allegations that participation in prelitigation hearings creates undue delay and expense in reaching the court. Supreme Court decisions which uphold extensive pretrial proceedings against the more exacting jury trial challenges, indicate that dual proceedings serving a reasonable purpose will satisfy the less rigid requirements of due process. As long as a rational reason exists for the state's actions, and no fundamental right of a litigant is impaired, the procedure will usually be upheld.

Some judges have shown concern for litigants that experience delay in reaching the courts, or incur costs when they are forced to arbitrate their claims as a precondition to trial. Furthermore, judges have recognized that dual proceedings, such as those which require arbitration before trial, present an obstacle to accessing the courts.

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198 See supra notes 133-49 and accompanying text.
199 See supra notes 135-36 and accompanying text.
200 See Capital Traction Co. v. Hof, 174 U.S. 1, 27-28 (1899) (finding not unduly burdensome a requirement that a litigant dissatisfied with the decision of a first jury proceeding before a justice of the peace, who decides to appeal, might be required to shoulder the burden of conducting two full trials). These proceedings were limited to relatively small claims, and the Court was unconcerned with deterring the retrial rights of litigants in small cases. See id. at 43-44.
201 See Ex Parte Peterson, 253 U.S. 300, 314-15 (1920) (permitting pretrial hearings before an auditor, and taxing the fees to the parties for payment, while noting that the court was free to assign special masters at litigant cost in appropriate cases), aff'd, 603 F.2d 646 (7th Cir. 1979); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 432-33 (N.D. Ind. 1979) (holding that the delay caused by medical malpractice arbitration would be found in any two-stage proceeding, and the goal of reducing the cost of medical malpractice insurance in order to keep down costs of medical care was reasonable enough to justify effecting plaintiffs' access to the courts); see also Ex parte Peterson, 253 U.S. 300, 314-15 (1920) (permitting pretrial hearings before an auditor and taxing the fees to the parties for payment, while noting that the court was free to assign special masters at litigant cost in appropriate cases).
202 See, e.g., Mattos v. Thompson, 421 A.2d 190, 195 (Pa. 1980) (finding these delays to be "unconscionable, and [to] irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system").
203 See Carter v. Sparkman, 335 So. 2d 802, 806 (1976) (upholding the constitutionality of Florida's medical malpractice dispute resolution scheme, initially, but cautioning that the expense and delay caused by the proceedings, "reaches the outer limits of constitutional tolerance"). A concurring justice stated that, "It troubles me that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials on their claim. . . ." Id. at 807 (England, J., concurring). But see Aldana v. Holub, 381 So. 2d 231, 238 (Fla. 1980) (retreating from its holding in Carter and stating that the statutory ten-month limit for extrajudicial case-processing
A separate line of federal court cases arising under Rule 16 of the Federal Rules of Civil Procedure indicates that there may be limits to trial preconditions imposed on litigants. These cases address the propriety of ordering parties to participate in a summary jury trial.\(^{204}\)

In *Strandell v. Jackson County*,\(^{205}\) the Seventh Circuit reversed a contempt citation against an attorney for refusing to participate in a one- or two-day summary jury trial.\(^{206}\) The court decided that requiring a summary jury trial would upset the balance between confidentiality and disclosure created by the discovery and work product privilege rules.\(^{207}\) The court also held, in part, that mandating a summary jury trial exceeded the court's pretrial conference authority under Rule 16, which was designed to help judges manage their dockets, not to force the parties into an unwanted settlement.\(^{208}\)

In *In re NLO, Inc.*,\(^{209}\) the Sixth Circuit agreed with the *Strandell* holding, focusing on the extensive, preparation required for a summary jury trial.\(^{210}\) Earlier, in *Rhea v. Massey-Ferguson, Inc.*,\(^{211}\) the Sixth Circuit upheld mandated pretrial "mediation," which was more like arbitration, against a consti-

\(^{204}\) See GOLDBERG ET AL., *supra* note 35, at 235–36. A summary jury trial is a settlement device where a jury is empanelled and that jury hears a shortened presentation of the major arguments and evidence by all advocates. The jury deliberates and renders a decision. This determination is advisory only, although the jurors are generally not told that their decision is non-binding. The point of this proceeding is to give the parties and their attorneys an idea of how an actual jury would rule in a full trial, in order to assist the parties in arriving at a realistic assessment of the strengths and weaknesses of their cases. Following the return of the summary jury's verdict, the parties attempt to negotiate a resolution of the matter. See *id.*

\(^{205}\) 838 F.2d 884 (7th Cir. 1987).

\(^{206}\) See *id.* at 888.

\(^{207}\) See *id.* at 888.

\(^{208}\) See *id.* at 887.


\(^{210}\) See 5 F. 3d at 157–58. In this case, the trial court's order was challenged as being beyond the permissible scope of Rule 16, rather than being challenged as unconstitutional. See *id.*

\(^{211}\) 767 F.2d 266 (6th Cir. 1985).
tutional challenge. The Sixth Circuit's concern over time consuming preparation could be alleviated by less onerous mandatory pre-trial dispute resolutions. An informal proceeding such as mediation that is conducted as a facilitated negotiation may be more palatable to the court. Other federal district courts have upheld non-binding arbitration and required participation in summary jury trials.

Mandatory pretrial mediation would normally be far less time-consuming than participation in a summary jury trial, arbitration, or evaluation of a case by a screening panel. There is also less risk of unwanted disclosure of key facts in mediation than in other evaluative processes. First, the parties in mediation have a great deal of control over what they decide to disclose and what they hold confidential, just as in an unfacilitated negotiation. Second, information disclosed in separate caucus sessions can be kept confidential by the mediator. These factors make it more likely that a reviewing court would uphold a trial court's order to attend mediation under Rule 16, as contrasted with a mandated summary jury trial.

C. Equal Protection Issues

Equal protection challenges have also been raised against required participation in prelitigation evaluation and settlement proceedings. Usually, such claims are raised together with due

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212 See id. at 268-69.
216 See id. at 713.
process claims. Although theoretically distinct, the two concepts are often difficult to operationally separate. In *Ross v. Moffitt*, the United States Supreme Court was able to draw a distinction, stating that, "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."

Thus, an equal protection analysis typically focuses on classifications drawn by legislation or governmental rule. Over time, the courts have developed standards of review for legal challenges based on equal protection grounds. The standard used depends upon the facts of the case.

The most lenient standard of review, the "rational relationship" or "minimal scrutiny" test, presumes the constitutionality of the challenged state action. As long as the classification bears some rational relationship to a legitimate governmental interest, it will be upheld. This test is often used to determine the constitutionality of social and economic welfare legislation.

If the governmental classification burdens a suspect class, such as a class based on race, alienage, and ancestry, the courts apply "strict scrutiny," and will closely examine the action

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217 See, e.g., New England Merchants Nat'l Bank, 556 F. Supp. at 714 (discussing both equal protection and due process); *Kimbrough*, 478 F. Supp. at 577 (applying both due process and equal protection).
219 Id. at 609.
221 See *Ross*, 417 U.S. at 615.
222 See id. at 607 (noting that states cannot arbitrarily limit the rights of indigent people while leaving rights of wealthy people untouched); see also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (stating that the rational basis standard has been consistently applied to state economic legislation); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (noting that the Eleventh Amendment is no longer used to strike down state regulatory laws).
223 See *McLaughlin v. Florida*, 379 U.S. 184, 192–93 (1964) (applying strict scrutiny to invalidate a criminal statute forbidding adultery between individuals of different races).
224 See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Classifications based on alienage... are inherently suspect and subject to close judicial scrutiny.").
225 See *Oyama v. California*, 332 U.S. 633, 646 (1948) (noting that discrimination based on the basis of ancestry can only be justified in the most exceptional instances).
to decide whether or not it is justified by a compelling governmental interest.\footnote{226 See NOWAK & ROTUNDA, supra note 220, § 14.3, at 602.} Strict scrutiny is also employed when the governmental action impinges upon a fundamental right, as discussed above.\footnote{227 See id.; see also supra notes 159–64 and accompanying references.}

Equal protection challenges to mandatory pretrial dispute resolution have been raised in the medical malpractice context.\footnote{228 See generally supra notes 115–16, 141–51 and accompanying text.} Some argue that no sensible rationale can exist for treating medical malpractice tort claimants or defendants differently from other tort plaintiffs or defendants.\footnote{229 See, e.g., Boucher v. Sayeed, 459 A.2d 87, 93 (R.I. 1983) (stating that the different treatment of medical malpractice and nonmedical tort cases is a violation of equal protection).} The cases do not claim that there is a fundamental right to bring a malpractice case to trial without complying with required pretrial procedures.\footnote{230 See Kimbrough v. Holiday Inn, 478 F. Supp. 566, 575 n.20 (E.D. Pa. 1979) ("Cases dealing with arbitration have consistently held that there is no fundamental right to a jury free from preconditions.").} In addition, medical malpractice claimants or tortfeasers have not been classified on impermissible grounds.

Most courts hearing equal protection arguments challenging mandatory pretrial resolution procedures applied the “rational basis” test, the most lenient standard of review, in evaluating the claims.\footnote{231 See Prendergast v. Nelson, 256 N.W.2d 657, 667–68 (Neb. 1997) (finding a rational basis supporting medical malpractice litigation); Eastin v. Broomfield, 570 P.2d 744, 750–51 (Ariz. 1977) (applying the rational basis test to the medical liability review panel). But see Galloway v. Baton Rouge Gen. Hosp., 602 So. 2d 1003, 1005 (La. 1992) (analyzing the medical malpractice statute under the strict scrutiny standard); Attorney Gen. v. Johnson, 385 A.2d 57, 77–78 (Md. 1978) (applying an intermediate, or means-focused, test).} If the issue addressed “is at least debatable,”\footnote{232 United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).} and the legislative remedy is not wholly irrational, the law will be upheld.\footnote{233 See id. (upholding the state’s power to regulate interstate commerce because the statute was valid on its face).}

In malpractice cases, two of the most common justifications for the reform legislation included the need to bring medical malpractice insurance premiums under control\footnote{234 See, e.g., St. James Hosp. v. Heckler, 760 F.2d 1460 (7th Cir. 1985) (discussing a study addressing the important issue of reducing malpractice insurance premiums).} and to reduce medical care costs while encouraging the delivery of quality care.
to the consumer. Both goals could arguably be advanced by using screening panels to weed out unmeritorious claims and encourage early settlement of valid cases. Not surprisingly, the vast majority of equal protection challenges to the use of arbitration, "mediation," or screening panels in medical malpractice legislation have failed.

In *Kras*, discussed above, the Supreme Court limited the *Boddie* holding and upheld a bankruptcy filing fee requirement. The Court reasoned that obtaining a discharge in bankruptcy was not as important as an individual's associational interests in the creation and dissolution of a marriage. The Court also emphasized the fact that divorce must be granted by the state and cannot be privately obtained by mutual agreement of the parties. The appellee in *Kras* also argued that the filing fee requirement denied him equal protection of the laws. The Court rejected this contention, finding that bankruptcy protection was not a fundamental right, in contrast to rights such as marriage or free speech, which would require the substantial counterweight of a compelling governmental interest in order to justify state infringement. Since the bankruptcy constituted social and economic welfare legislation, equal protection demanded only that it meet the requirements of the rational basis test. The state aim of offsetting some of the costs of the bankruptcy system was reasonable enough to trump the financial

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235 See *Woods v. Holy Cross Hosp.* 591 F.2d 1164, 1167 (5th Cir. 1979) (indicating the purpose of medical malpractice legislation, which was to lower the prices of medical malpractice insurance, and thus the financial burden on the consumers, but setting up a screening process and procedural guidelines for all malpractice claims).

236 See *id.* at 1174 (noting that if a screening panel found the defendant doctor negligent, the defendant would be likely to settle and avoid trial).

237 See *id.* at 1167; *Bernier v. Burris*, 497 N.E.2d 763, 774 (Ill. 1986) (holding that periodic payment of medical malpractice judgments is supported by rational basis); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 430 (N.D. Ind. 1979) (holding that the statute requiring a review board is supported by rational basis), aff'd, 603 F.2d 646 (7th Cir. 1979). *But see Boucher v. Sayeed*, 459 A.2d 87, 93 (R.I. 1983) (holding that, since there was no medical malpractice crisis, medical malpractice legislation was unconstitutional under rational basis analysis).

238 See supra notes 188-91 and accompanying text (discussing the due process challenges of *Kras*).


240 See *id.* at 444.

241 See *id.* at 446.

242 See *id.*

243 See *id.* at 446–47.
burden placed on the individual debtor.\textsuperscript{244}

\textbf{D. Substantive Due Process Claims}

Some argue that mandatory arbitration or evaluation panels violate substantive, as well as procedural, due process. Dispute settlement programs have been classified as economic and social welfare statutes. In analyzing these statutes the courts have asked whether any reasonable justification exists for their enactment, thereby applying rational basis.\textsuperscript{245} Thus, the reasons advanced to justify such programs—generally to reduce costs and delays—have survived judicial review.\textsuperscript{246}

A majority of courts have upheld mandatory pretrial programs designed to encourage settlement and reduce court caseloads. In the equal protection area, courts defer to the legislative remedies enacted to resolve social and economic problems. The substantive due process challenges have been upheld based on similar reasoning. The procedural due process cases explain the flexibility of the concept, finding that the requirements are satisfied as long as the litigants are granted a right to a meaningful hearing at a reasonable time, even if pretrial procedures delay the parties' access to the courts. Programs that impose significant costs and delays on litigants could be found unconstitutional. This result is particularly likely if the benefits to the judicial system prove illusory.

\textbf{E. Required Pretrial Mediation in Divorce and Family Law}

Based on the cases discussed above, it would appear that mandatory divorce and family law mediation programs would be immune to constitutional challenge. Some courts have upheld

\textsuperscript{244} See id. But see (Marshall, J., dissenting) (urging that the distinction between the state's monopoly over divorce and the state's power to enforce the appellee's debt was essentially meaningless, and explaining that, in both cases, "the role of Government in standing ready to enforce an otherwise continuing obligation is the same").

\textsuperscript{245} See Kras, 409 U.S. at 446 (stating that the applicable standard for economic and social welfare legislation is the rational basis standard).

\textsuperscript{246} See Woods v. Holy Cross Hosp., 591 F.2d 1164, 1174 (5th Cir.) (holding that the plaintiff failed to overcome the presumption of constitutionality attributed to the statute); Bernier v. Burris, 497 N.E.2d 763, 773–74 (Ill. 1986) (holding due process was not violated by periodic payments); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 434 (N.D. Ill. 1979) (noting that because the right to pursue litigation is not a fundamental right, statues providing for screening panels cannot give rise to due process claims).
mandatory mediation as a precondition to obtaining relief via court order. Courts have yet to decide whether mandatory party-paid divorce mediation is constitutional. If faced with the issue, the courts will need to balance the benefits to both the litigants and society, against the systemic burdens imposed upon certain individuals. Most of the cases discussed above find that the potential gains of pretrial dispute resolution or screening procedures outweigh the extra costs imposed on certain litigants.

The language in *Boddie* may undermine the constitutionality of mandatory party-paid divorce mediation. Mr. Justice Harlan, writing for the majority, stated,

> Our conclusion is that, given the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

The majority emphasized the importance of a reliable, final means of dispute settlement to the peaceful functioning of society. The distinction between family cases and other civil disputes places the petitioner seeking to end a marriage—and faced

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247 See *In re Marriage of Economou*, 274 Cal. Rptr. 473, 486 (Ct. App. 1990) (stating that the husband’s failure to submit to mandatory mediation precluded the trial court from modifying the visitation order); *Kurtz v. Kurtz*, 538 So. 2d 892, 894 (Fla. Dist. Ct. App. 1989) (upholding a procedural rule and administrative order referring a custody and visitation case to family mediation prior to a court hearing; holding that the delay caused by mediation does not contravene the right to access to the court; and rejecting the appellant’s contention that the referral unconstitutionally delegated a judicial responsibility, as the mediation was non-binding); *Stockwell v. Stockwell*, 775 P.2d 611, 615 (Idaho 1989) (ordering mediation before further trial court proceedings); *Goldberg v. Goldberg*, 691 S.W.2d 312, 316 (Mo. Ct. App. 1985) (rejecting a constitutional challenge to mandatory mediation on the narrow statutory ground that the mandatory provision did not apply to child custody cases); *Schmeiden v. Normand*, No. 90-0304, 1991 WL 44596, *1* (Feb. 12, 1991 Wis. Ct. App.) (refusing to hear a change of child-custody request because the party failed to submit to preliminary mediation).

A policy of refusal to consider motions to modify custody, in particular, without compliance with a pretrial mediation requirement, can be criticized if the court fails to hear cases in which children can be harmed due to the delay. The court needs to bear in mind its duty to protect the best interests of children. See *Stockwell*, 775 P.2d at 613.

248 See *supra* notes 170–79 and accompanying text (discussing the substantive due process challenge).


250 See *id.* at 375 (describing the importance of quasi-judicial offices, in supporting due process and other constitutional mandates).
with unaffordable fees as a prerequisite to seeking relief—in a position quite similar to that of the criminal defendant, forced to seek justice in court. Therefore, the state could not monopolize the means for dissolution of marriage without allowing all citizens access to the required court process.

These Supreme Court decisions indicate that in civil cases, outside the divorce or family law context, fees imposed on litigants for mandated pretrial dispute resolution efforts are likely to be upheld, provided the fees are rationally justifiable and do not operate to totally deprive a litigant of access to the courts. The point at which dispute resolution fees become high enough to be deemed irrational, or to work a sufficient denial of access to the judicial forum is not clear. The weight of authority, however, indicates that legislative or other rules mandating parties to pay neutrals as a precondition to ordinary civil litigation will be given substantial deference by the courts.

Mandatory party-paid mediation in the divorce and family law context deserves a closer look. The *Boddie* case has been characterized and discussed in ways that suggest there may be a fundamental right to a divorce, or that people have a "constitutionally guaranteed right of freedom of choice in marital decisions." When examined closely, these statements prove to be overbroad. This view of the *Boddie* decision misconstrues the grounds on which the opinion was based. Protection of the fundamental right of freedom of association both explains the *Boddie* holding and supports concerns about the constitutionality of mandatory divorce mediation fees.

While the state may be limited in its power to deny competent, unrelated adults permission to marry, it is far less limited in its power to deny divorce. Modern divorce is a creation of state statute. The grounds for divorce are established by legis-

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252 NOWAK & ROTUNDA, *supra* note 220, § 13.10, at 591. Formulated slightly differently, the *Boddie* decision has been explained as "predicated upon the fundamental nature of the right to marry or dissolve that relationship." *Id.* § 14.28, at 802.

253 *See, e.g.,* Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a Wisconsin statute prohibiting any divorced resident with children not in his custody from marrying, absent a showing that his child-support payments have been made); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating a Virginia statute banning interracial marriages as violative of the Fourteenth Amendment).

254 *See* NOWAK & ROTUNDA, *supra* note 220, § 14.28, at 801–09 (discussing the Supreme Court's reviews of state laws pertaining to marriage and divorce); see also ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY
The grounds can be amended, broadened, or constricted by legislative enactment. In the recent past, most states restricted the availability of divorce by requiring parties to prove that the marriage partner was at fault for the breakdown of the marriage. If fault could not be proved, or if it was shown that both parties were at fault, the state could dismiss the divorce petition and force the parties to stay married. Collusion by parties who both wished to conceal their mutual fault so as to escape the marriage was also prohibited. Even today, with the dramatic increase in "no fault" divorce laws, when divorce is common and liberally granted, the parties must allege some grounds for divorce. The newer "no fault" laws often permit divorce when a partner alleges that irreconcilable differences have arisen, or when the marriage exists in name only, because the partners have been living separately for a required period of time.

The Boddie decision is more accurately construed as resting on the Court's recognition of the right of freedom of association, a right explicitly guaranteed by the Constitution. In fact, the Court mentioned that the right to remarry was more important

ANALYSIS 9-12 (1969) (providing early discussion on the traditional differences in divorce law from state to state, and the need for uniform state legislation).

255 See, e.g., UNIF. MARRIAGE AND DIVORCE ACT §§ 301-16, 402-10 (amended 1971 & 1973); CAL. FAM. CODE § 6, 8 (Deering 1994); N.Y. DOM. REL. LAW § 170 (McKinney 1988).


257 See WEITZMAN, supra note 256, at 10.

258 See id.

259 See id. at 41-42 (drawing a distinction between "pure" and "hybrid" no-fault acts and observing that many hybrid acts contemplate a no-fault "marital breakdown" ground for divorce).

260 See id.

261 See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (explaining that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"). See generally Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977) (indicating "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the ... Fourteenth Amendment")
than the right to end an unworkable marriage. Within the context of marriage and family relations, the associational right is not absolute. It varies with respect to the context and the public need for intervention. Clearly, Supreme Court jurisprudence indicates that the state has limited rights to intervene in the establishment of family relationships, or in the choices made regarding conduct within the family.

Equally clearly, the state does have power to place limits on the formation and behavior of families. For example, the state can deny marriage licenses to individuals within a certain degree of consanguinity, or to people suffering from sexually transmitted diseases, mental illness or incompetence. Domestic violence is subject to both civil remedies and criminal sanctions. Child abuse can be a crime. Neglect, abuse, or inability to properly care for one's children can warrant state intervention for treatment or temporary or permanent removal from the family. These invasions of the family unit are justified by the need to protect the interests of society, the best interests of children, or victims of violent behavior.

The integrity of the family unit has also been protected by finding a right to privacy in matters of marriage and the family. The Boddie Court did not need to invoke this line of
authority in reaching its decision, as the privacy jurisprudence deals with behavior within an intact family unit. The creation of marriage and the filing for divorce are more aptly analyzed by reference to protected associational interests, since both involve adjustment of interpersonal relationships.

The application of Boddie's holding and reasoning to the context of the state mandates that divorcing parties mediate and pay a fee for the mediation service raises serious questions about the constitutionality of these practices. Unless Boddie is overruled, it is clear that requiring indigent divorce applicants to attend and pay for mediation would be an impermissible block to access to the courts. If an individual is too poor to pay a standard filing fee, it logically follows that he or she will also be too poor to pay a mediator for services required as a precondition to a divorce hearing. Since, as Boddie states, a divorce litigant is unable to privately alter the marital bond, any state practice that makes the judicial system practically unreachable to the poor cannot stand.

The Boddie Court's reasoning also affects imposing mandatory mediation fees on non-indigent divorce litigants. The Court noted that precedent established that a facially valid rule can be unconstitutional as applied to a particular case involving a protected right. The Court stated that in addition to protected fundamental rights, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." The Court applied this principle to the issue of required costs, stating:

Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

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271 Id. (citations omitted).
272 Id. at 380.
This language indicates that the constitutionality of state-imposed mediation costs must be examined carefully with respect to their impact upon the litigant's ability to pay them, as a precondition to access to the judicial machinery needed to obtain a divorce. Even if a party is not indigent, the imposition of more than nominal mediation costs could effectively foreclose subsequent recourse in the courts.

A recent study defined the minimum adequate wage for a family of three is more than $25,907 per year. This is greater than the 1998 federally recognized poverty level of approximately $13,650 per year for a family of three, yet it would be quite difficult for members of a dissolving family making $25,000 per year to hire a mediator, an attorney, or both.

The next question is whether mandatory party-paid family mediation outside the divorce context could present constitutional dilemmas. For example, child custody and visitation disputes can arise as a post-divorce matter, and can involve parents who were never married to one another. Are mandated fees in these cases immune from attack merely because the required filings are not for divorce? Or, stated differently, is the termination alone the area of family law protected by due process?

By analogy, the answer should be no. Both critical underpinnings of the Boddie decision are present in non-divorce family cases concerning children. First, parents are not always free to resolve their controversies over their children themselves. Second, the parent-child relationship involves constitutionally protected associational interests.

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275 See Ford v. Ford, 371 U.S. 187, 193 (1962) (indicating the issue of child custody should not “be left to the discretion of parents”).
As a practical matter, a married couple or unmarried parents can separate and privately arrange for the children's residency and future parent-child contact. The state, however, is not bound by any private agreement. Private parties cannot divest the state of its parens patrie power to protect the best interests of children. When parents cannot agree on the care of their children, the state has the right to step in and impose terms of custody on them.

Family relationships, other than those between husband and wife, involve the types of fundamental associational interests crucial to the Boddie holding. A parent's interest in the love and companionship of the child has long been recognized in the law. The child's reciprocal interest in the love, guidance, and economic support of his or her parents is so obvious that it warrants no further elaboration. These needs remain long after the breakup of the child's parents, regardless of whether the parents are married. Few ties in our society are as important as these.

Supreme Court cases such as Stanley v. Illinois, highlight the importance of the parent-child bond, noting that due process protections apply to these relationships. In that case, the Court concluded that a state law, which created a presumption that unwed fathers were unfit, was violative of due process re-

277 See Rabuse v. Rabuse, 231 N.W.2d 493, 495 (Minn. 1975) (citing Anderson v. Anderson, 109 N.W.2d 571, 575 (Minn. 1961)) (asserting the court's power to provide for the care of children when parents are living apart).

278 See Anderson, 109 N.W.2d at 575 (noting the court has "the right to make provisions for the custody and maintenance of minor children").

279 See, e.g., Alexander v. Whitman, 114 F.3d 1398-99 (3d Cir. 1997) (quoting Green v. Bittner, 424 A.2d 210, 211 (N.J. 1980) (stating that "the jury should be allowed, under appropriate circumstances, to award damages for the parents' loss of their child's companionship . . . as well as the advice and guidance that often accompanies it") (emphasis added), cert. denied, 118 S. Ct. 367 (1997); see also Yako v. United States, 891 F.2d 738, 747 (9th Cir. 1989) (concluding that under Alaska law, a parent may be allocated damages based upon the loss of love and companionship of a child) (emphasis added); Scott v. United States, 884 F.2d 1280, 1282 (9th Cir. 1989) (recognizing a parent's claim for damage to the parent-child relationship); Ueland v. Reynolds Metal Co., 691 F.2d 190, 197 (Wash. 1984) (holding that "a child has an independent cause of action for loss of love, care, companionship, and guidance of a parent tortiously injured by a third party"); Wycko v. Gnodtke, 105 N.W.2d 118, 122 (Mich. 1960) (recognizing that an individual member of a family can be measured by his or her "value" or "the value of mutual society and protection, in a word, companionship") (emphasis added).

280 405 U.S. 645 (1972).

281 See id. at 658.
Based on this analysis, mandated party-paid mediation in family conflicts, outside divorce cases, can also pose constitutional problems. Indigents cannot be forced to pay for such services. If mediation fees were to become extremely high, even those litigants who are not indigent could successfully argue that the high fees present a bar to ready access to the courts.

IV. POLICY ISSUES CONCERNING COURT-ANNEXED MEDIATION

A policy that is constitutional is not necessarily also wise. While the law might allow courts to order non-indigent domestic relations litigants to attend and pay for mediation sessions against their will, there are a number of policy reasons for adopting an approach that encourages public financial support of institutionalized dispute resolution.

First, all members of society should have equal access to programs that are deemed important enough to warrant either officially encouraged or mandatory participation. If mediation is valuable for individuals or society, or for both, it should be made easily available to all, not just those parties who can pay for it. Litigants should not be excluded from mediation due to lack of the necessary funds to pay for the process. The decision to exclude parties should be based on evidence that participating in mediation is likely to be detrimental to these parties, rather than on financial evidence. One way to achieve this goal would be to exclude persons due to case characteristics, such as a history of domestic violence.

A close examination of the benefits and costs of mediation can help determine if its advantages to litigants and the courts are substantial enough to encourage broad public participation. Proponents of mediation have advanced many justifications for promoting its use. The use of mediation is justified in many

222 The case also stands for the proposition that as the family unit dissolves, constitutional privacy interests decline, permitting the state to assert its authority over parental choices. See id.

223 See Bernier v. Burris, 497 N.E.2d 763, 769 (Ill. 1986) (citing In re J.S., 469 N.E.2d 1090 (1984)) (declaring that the court's task "is limited to determining whether the legislation in question is constitutional, not whether it is wise as well").

224 See Patricia L. Franz, Habits of Highly Effective Transformative Mediation Program, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1061-62 (1998) (citing ROGERS & MCEWEN, supra note 4, § 6.04, at 15 (Supp. 1996)) (noting that proponents of mandatory mediation justify the costs of a mediation program because of the diminished caseload in the courts); id. at 1056-61 (discussing pragmatic and social benefits of
settings, including the areas of family and divorce mediation. Empirical research has begun to test the validity of some of the theoretical hypotheses set out in support of mediation.

This Article presents the findings of a new empirical research project examining three different models of divorce mediation in three different Ohio court systems (the "Descriptive Study"). All of the court systems studied encouraged settlement of contested custody cases, but each court approached this goal in different ways. In both the Toledo (Lucas County) and Columbus (Franklin County) metropolitan areas, divorcing parents were encouraged to resolve child custody issues by participation in face-to-face negotiations guided by a trained mediator. The Cincinnati area (Hamilton County) domestic relations court encouraged settlement through the more traditional means of conducting a custody investigation and evaluation of both parents, culminating in a recommendation that one parent be chosen over the other as the custodian. The court did not officially encourage parties to try mediation.

The Toledo domestic relations court established its internal mediation, such as efficiency and creative problem-solving and noting the appropriateness of mediation for child custody and domestic relations cases; Jeanne Fuller & Rose Mary Lyons, Mediation Guidelines, 33 WILAMETTE L. REV. 905, 909–11 (1997) (listing some of the advantages of mediation, such as a more manageable court docket, lower costs for indigent parties, parent interaction in planning and negotiating, increased compliance with agreements or orders, and opportunities for personal growth); ROGERS & MCEWEN, supra note 4, §4.4, at 41 (discussing various groups' objectives in mediation, such as accessibility and promotion of personal or business values); id. § 5.04, at.17-18 (discussing policy objectives for and against mediation).

For example, it is advantageous to use mediation in a situation where divorce or custody are at issue, there is danger of violence or other forms of abuse, and when a quick resolution is critical to the well-being of the parties involved. See Fuller & Lyons, supra note 284, at 905–07. The time advantage that can be gained through the use of mediation is highly valuable. See id. at 906. Another reason mediation is a good fit for the resolution of divorce or custody cases is that it empowers the parties. See id. at 907. Because we are dealing with family law, feelings, rather than just facts, become central to conflict resolution. See id. Allowing the parties to work through their problems on their own provides for individualized agreements that may be more beneficial than those reached after lengthy court proceedings. See id.

See Descriptive Study of Children, supra note 50 (compiling data on divorce mediation in the Ohio counties of Lucas, Franklin, and Hamilton); see also OHIO REV. CODE ANN. § 3109.052 (Anderson 1996 & Supp. 1997) (allowing courts to order parents to mediate disputes in accordance with the procedures adopted by the court or by local rule).

See Descriptive Study of Children, supra note 50, at 14.
divorce mediation program by training its court employed counselors as mediators. The court used no formal guidelines governing referral of cases to mediation. Referrals, however, were not made in a random manner. There were a number of ways for a case to be referred to mediation. The parties to a divorce or post-divorce child-custody dispute could be referred to mediation by a domestic relations judge or referee—either sua sponte or after a request for a referral by a party's attorney—by a court counselor, or through self-referral. Since the court counselors had many duties in addition to mediation, not all parents in conflict over their children could be seen for mediation.

In about half the cases referred for mediation, when the parents were at court for another matter the mediator conducted a brief, fifteen-minute orientation to the mediation process. The parents then had the option of refusing to participate. A number of parties, however, agreed to attempt mediation of the substantive issues involved in their dispute. In the other half of the cases, the parties were called and scheduled for a ninety-minute mediation session. This initial session included an orientation and subsequent discussion of the issues in dispute. Either party, or the mediator, could withdraw from or terminate mediation at any time following the initial session. Participants were not required to give a reason for terminating mediation. Mediation could also end by agreement between both parties and the mediator.

The court counselors observe that a high percentage of the parties referred to mediation were involved in difficult custody or visitation disputes. While the Descriptive Study defined "contested" cases as those containing conflicting requests for custody by both parents at the pleading stage, it seemed that the parties seen by the Toledo mediators had serious disputes over the care of their children. Cases involving competing custody claims made primarily for tactical reasons would likely avoid referral to mediation.

In the Toledo study, mediation services were provided free of charge, regardless of the parties' ability to pay. Court research indicates that many of the parties served by the mediation pro-

\[223\] See id. at 8.
\[229\] See id.
\[226\] See id. at 8-9.
\[224\] See id. at 9.
gram were in lower income groups.292

In the Columbus area, parents involved in child-custody disputes were required to attend a free mediation assessment and education session conducted by a court-employed mediation coordinator. In new divorce filings, a court referee usually referred the parties for assessment at the time of the temporary orders hearing. If a party filed a post-decree request for a change of custody or visitation, the parties were referred to the coordinator. The coordinator interviewed each parent separately to educate them about the mediation option, stressing the benefits to both parents and children of settling the dispute amicably and without litigation. Unless the interview revealed a history of severe domestic violence, child abuse, or chronic alcohol or drug abuse, the coordinator strongly encouraged the parties to attempt mediation. In practice, very few cases were found unsuitable for mediation.293

Although the mediation assessment was mandatory, actually participating in mediation was not. Parties were referred to private mediators if they wished to attempt to settle their dispute out of court. The court maintained a roster of divorce mediators approved by its accreditation committee. The pool of mediators was comprised primarily of lawyers, psychologists, and social workers. Each parent was given a list of all the court-approved mediators.294

If the parents in a custody dispute decided to try mediation, it was generally their responsibility to hire and pay the private mediator. About two or three organizations and three individuals provided mediation on a sliding fee scale, with the charge determined by the income of the parties. Each mediator also agreed to provide free services to a maximum of three indigent couples per year. Additionally, the Columbus Legal Aid Society provided some free mediation to income-eligible couples.295

In contrast, the Cincinnati family court had no court-related, structured mediation program.296 Mediation was entirely voluntary. If parents wanted to try mediation, they had to act on their

292 See id. at 8–9; Memorandum from Paul J. Langevin to Michele MacFarlane, Judge Galvin, and Judge Yarbrough (Jan. 15, 1992) (on file with author) [hereinafter Memorandum from Paul J. Langevin].
293 See Descriptive Study of Children, supra note 50, at 10.
294 See id.
295 See id.
296 See id. at 11.
own to seek out a private mediator in the community.297

According to statistics maintained by the court, custody was disputed in approximately 10% of all divorce filings involving minor children. As in Columbus and Toledo, the Cincinnati court, upon review of affidavits submitted by the attorneys, could issue temporary orders covering custody, support, and other financial issues.298

Contested custody cases involving children under the age of 12 were referred to the court's investigators for evaluation and recommendations, after payment of a $75 fee. The court employed five masters-level social workers as investigators. When an investigation was requested, a pretrial conference—attended by both parties' attorneys and the judge—was scheduled for the time that the investigation should be completed. The investigation usually required approximately three months. Preferably, a temporary custody order was in place before the case was referred to investigation, but this was not always the case.299

The investigator began by seeing both parents together. In this session, the court's social workers encouraged the parties to settle the case. Very few parents were referred to mediation at this point. Some, however, were sent to a psychologist or marriage counselor. Next, the evaluator conducted one to three interviews of each parent to obtain a psychosocial history, discuss child-care arrangements, inquire about the parent's plans if he or she was awarded custody, and to screen for any mental health problems. The parents completed questionnaires. The counselor then saw the parents and children together, followed by visits with each child alone, and then with each parent and their children, separately. The evaluator could also conduct announced or surprise home visits.300

In addition to the contact with the family members described above, the investigators contacted the children's teachers and counselors for information about the children's adjustment. The investigators could also send for reports from hospitals, professionals, the police department, and the welfare department. At times, parties were referred for psychological evaluation. Statements from two witnesses chosen by the parents were also

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297 See id.
298 See id.
299 See id. at 11-12.
300 See id. at 12.
obtained. At the close of the evaluation, the investigator submitted a custody recommendation to the court. The parties could then choose to abide by the recommendation or pursue litigation.\textsuperscript{301}

The study has two phases. Initially, in the fall of 1991, questionnaires were sent to a sample of 522 divorce litigants in the three counties. Information was also gathered from the court files. The information was initially analyzed and discussed in the Descriptive Study. In the spring and summer of 1993, questionnaires were sent to parties in an additional sample of 300 cases in Franklin and Lucas counties. Cases from Hamilton County were omitted from the second sampling due to the very low use of mediation in that court system. The new information was added to the data initially analyzed in the Descriptive Study. The results of the entire study are presented in this Article.

None of the three court systems that were studied forced parties to mediate at their own cost.\textsuperscript{302} Some of the information collected in the Descriptive Study sheds light on the jurisprudential implications of mandatory party-paid mediation. In addition, each model illustrates the shortcomings and strengths of the different court systems. This information can aid program designers in structuring mediation systems that best meet the individual goals of each court system.

Previous mediation research projects have compared the process and outcome of mediation solely to adjudicated cases. That format sets up a false dichotomy, as the vast majority of all civil cases, including divorce, are resolved through negotiation rather than litigation. The Descriptive Study, however, polled the parties' perceptions of mediation and compared that with attorney and party-negotiation, and with traditional adjudication.

Survey respondents were asked a number of questions regarding their satisfaction with both the process and outcome of the various methods of dispute resolution used during family court proceedings. Parties were also asked a number of questions regarding their children's health and behavior before, dur-

\textsuperscript{301} See id. at 11–12.

\textsuperscript{302} In Toledo, the service was free. See id. at 8. In Columbus, the parties were assessed for mediation and could then find and pay a private mediator if they chose to do so. See id. In Cincinnati, the court encouraged settlement and then recommended one parent as custodian. See id. at 8. Thus, there was no need for payment.
ing, and after the divorce. Those parties that used mediation were more likely to respond to the survey.

The research revealed that processing divorce cases involves a complex mix of procedures. It is not a simple, linear process. One case can, and often does, encompass court hearings, negotiation, and mediation. These steps in the process of resolving the dispute could occur in any order. Information regarding the settlement process allows description and comparison of various modes of dispute processing. Out of all the respondents, 45.4% reported that they participated in some type of court hearing during the processing of their divorce and custody cases. The high number of reported court hearings likely include hearings held shortly after filing for divorce to establish temporary orders for child custody and support. Some hearings could be post-settlement proceedings to obtain court approval of the agreement. Others are likely to reflect contested custody trials. The vast majority of the survey participants report that they eventually settled their contested custody matter. There were 16.7% that stated they settled their case through mediation and 26.7% settled through attorney negotiations. Respondents reported significant use of direct spouse-to-spouse negotiation, settling 29.3% of the cases this way. Another 6.7% of the cases were resolved when the other spouse dropped the request for custody. In addition, 6.7% stated they did not settle. The settlement mode could not be clearly categorized for the remaining 14% of the sample. Resolution of contested divorce and custody matters seems to be achieved by the interrelationship of a number of processes. Therefore, it can be difficult to attribute a certain hoped-for outcome, such as benefit to the children, to only one process, such as mediation.

Proponents of mediation have advanced a number of justifications for its broader use. Critical analysis of these rationales can either weaken or add support to the move for expansion of mediation programs, particularly in the court context. It can also shed light on the question of who should pay for mediation—the parties or the public in general—by identifying the major beneficiaries of mediation.

One persuasive reason for divorce and custody mediation is that civilized settlement of family disputes will inure to the
benefit of children. This theory is based upon the substantial body of knowledge showing that high levels of conflict between divorcing parents is associated with poor post-divorce adjustment of the children. If parents can amicably settle their disagreements concerning custody, visitation, and care of the children, children will fare better in adjusting to divorce, particularly when compared to children whose parents are unable to resolve their conflicts voluntarily.

Obviously, for children who have experienced their parents’ divorce, improved adjustment is a benefit to society as a whole, as well as to the parents and children. Better-adjusted children are less likely to need mental health treatment, less likely to engage in anti-social behavior or have trouble in school, and are more able to form stable families of their own when they become adults.

Gathering support for the supposed positive effects of mediation on children has proven difficult. Mediation is a brief, problem-solving intervention that takes place between the parents. If it is used, mediation is a small factor amid the chaos and disruption a divorce proceeding causes in the lives of all the par-

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303 For a discussion of the relation between family turmoil and children's behavioral problems, see generally Interparental Conflict, supra note 8, at 313–14.
304 See id. at 325 (suggesting that mediation could reduce conflict).
305 See RENEGOTIATING FAMILY RELATIONSHIPS, supra note 8, at 202 (reporting that children of divorced parents are more likely to seek therapy than children of married parents).
306 See Interparental Conflict, supra note 8, at 314 (noting that studies show that children from broken homes have conduct problems); see also RENEGOTIATING FAMILY RELATIONSHIPS, supra note 8, at 209 (noting that disobedience, aggression, and conduct problems are more linked to divorce than fear, depression, and low self-esteem); MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT, supra note 8, at 51–54 (discussing conduct problems) (1988); Cummings, supra note 8, at 976 (explaining that children are sensitive to others' anger, as evidenced by studies on marital discord); Guidibaldi et al., supra note 8, at 142 (“Children of divorce have consistently been found to perform more poorly on a wide variety of social, academic, and physical health criteria.”).
307 See Interparental Conflict, supra note 8, at 316 (mentioning a study that found boys’ problems in school were related to marital turmoil).
308 See RENEGOTIATING FAMILY RELATIONSHIPS, supra note 8, at 204 (stating that experiencing a parents' divorce increases the chance that the child's own marriage will end in divorce); JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES, MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 15 (1989) (positing that children of divorced parents “may recreate the kinds of traumatic relationships that they witnessed in their parents' marriage”); id. at 54 (stating that “many who experienced divorce as children are entering adult heterosexual relationships with the feeling that the deck is stacked against them”).
ties, including the children. In addition, the Descriptive Study shows that mediation is often only one out of several alternate resolution methods used during the course of a divorce case through the courts. When parents begin to live apart, children often change neighborhoods and schools. Children have less contact with the absent parent, who is usually the father. Most children live primarily with their mother after divorce. Even today, ten years after the implementation of federally-mandated reforms in child support calculations and collections designed to help women and children escape poverty after divorce, women and children still experience a decline in economic well-being following a parental breakup, while the economic situation of fathers usually improves. These dramatic life changes make the task of isolating and measuring the effects of divorce mediation on children very complex.

One study of eight to ten-year-old children found no differences in behavior and adjustment whether parents mediated or litigated. Other studies lend encouragement to the use of mediation. One study found that children of parents who used mediation were more involved in school and performed better academically when compared to the litigation group. Another study found that children of mediated divorce seemed better-adjusted, and that their parents were less hostile to each other.

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290 See Wallerstein & Blakeslee, supra note 308, at 9 (stating that children are “uprooted”).
291 See Renegotiating Family Relationships, supra note 8, at 210 (discussing children’s relationship with a non-residential father).
292 See id. at 196 (reporting statistics that show mothers usually gain custody of their children upon family dissolution).
293 See id. at 213–14 (discussing economic effects of divorce on mothers, children, and fathers); Jessica Pearson, The Equity of Mediated Divorce Agreements, 9 Mediation Q. 179, 195 (1991) [hereinafter The Equity of Mediated Divorce Agreements] (stating that women suffer financial hardship following divorce regardless of the forum in which divorce agreements are generated); Advisory Committee on Women in the Courts, Report on the Financial Impact of Divorce in Rhode Island 23 (1993) [hereinafter Advisory Committee Report] (noting that men “fare better after divorce than do custodial parents and their children and may even experience improved standards of living.”).
294 See Pearson & Thoennes, supra note 4, at 9, 23.
295 See Donald E. Stull & Nancy M. Kaplan, The Positive Impact of Divorce Mediation on Children’s Behavior, 18 Mediation Q. 53, 57, 58 (Winter 1987) (comparing the behaviors of children in mediated and nonmediated groups following divorce, and concluding that children in the nonmediating group were “more likely to engage in delinquent behavior”).
296 See Gary Paquin, Protecting the Interests of Children in Divorce Mediation,
A third research project perceived improved parental relationships among the mediation participants in the year following the divorce.\textsuperscript{316} It found that better cooperation between the parents could result in better outcomes for the children.\textsuperscript{317} The difference between the mediation and adjudication groups did not persist at the two-year post-divorce mark.\textsuperscript{318}

It may be that parental perceptions of their children's adjustment differ, depending on whether they engage in voluntary or mandatory mediation. Entirely voluntary private mediation tends to attract well-heeled, better-educated parents.\textsuperscript{319} These parents are more apt to perceive their spouse as honest and fair-minded than are individuals choosing an adversarial divorce process.\textsuperscript{320} They will tend to have a positive outlook with respect to their children's adjustment. In contrast, when parents are enmeshed in difficult disputes, children are more likely to suffer, and parents may well be more apt to be blind to the child's distress. Recent anecdotal reports from mediators indicate that courts tend to refer parents with high levels of interpersonal conflict to mediation.\textsuperscript{321} Further research needs to be done to gauge the effectiveness of different types of mediation in various populations.

The three above mentioned empirical studies compared parties in mediation to parties who adjudicated their cases. Cases settling in negotiations were omitted from the research, although negotiation is an important, heavily used dispute resolution method. In theory, disputing parties voluntarily reach agreement in negotiations. An amiable settlement process may arguably lead to more positive outcomes for children than adjudi-
cation, although significant measurable outcomes may not be readily identifiable.

Some experts suggest that successful mediation can help divorcing parties handle future disagreements more productively. This effect could also lead to improved adjustment for the children. In addition, post-decree litigation rates might decrease if parents are able to negotiate productively between themselves, without requiring recourse to the courts. If that is the case, the beneficiaries of mediation will include the parents, their children, and the court system.

There are research results that provide support for the hypothesis that divorce mediation reduces relitigation, at least for half a year after divorce, although relitigation rates even out after around five years. Early decreases in relitigation support the use of mediation because less expressed conflict during the initial divorce period can be psychologically beneficial to the children. However in the long run, reduced relitigation rates do not necessarily reflect a benefit of mediation. In fact, increased relitigation may be desired. For example, many mediators encourage parents to frequently review child care and custody arrangements to ensure that the plan is working well and to make adjustments as indicated. Flexibility can be valuable and relitigation may be necessary to adjust to new circumstances.

In addition, though mediation promises a more detailed parenting plan than one achievable through "overworked courts,"
this does not automatically mean that lawyers and the court system can be avoided. In order to make a revised agreement enforceable, parents usually need a lawyer to draft and file the terms of the new arrangement with the court. For reference purposes, courts may require a motion for modification to be filed along with the new court order. Researchers must count such motions when calculating relitigation rates, even though the motions are totally uncontested. Thus, merely counting the number of post-decree motions, and equating low numbers with mediation success can be misleading.

Furthermore, at least at first blush, it is not reasonable to expect that engaging in mediation will teach parties better interpersonal negotiation skills. First, direct negotiation skills differ from mediation skills. Even assuming that parties can learn a significant amount by modeling, they are exposed to a set of skills in mediation that are different from those used in direct negotiation. Second, the focus of mediation is on problem-solving, not skill-building. Despite the fact that mediation does not focus on teaching negotiation skills, parties who react positively to their experiences in mediation may be more likely to voluntarily pursue mediation to settle post-decree disputes. Over time parties may develop increasingly effective negotiating techniques on their own, incidental to the prolonged period of

See Richard Chernick, Successfully Concluding a Mediation and Creating an Enforceable Settlement Agreement, in Alternative Dispute Resolution: How to Use It to Your Advantage, A.L.I.-A.B.A., Dec. 12–13, 1996 at 515, 519 (1996) (discussing methods to adequately enforce settlement agreements); see also Susan C. Zuckerman, Enforceability of Settlement Agreement, DISP. RESOL. J., Aug. 1998, at 33 (noting that the Minnesota Civil Mediation Act requires a statement in a settlement agreement that the parties acknowledge the agreement to be binding and that absent such express provision, the settlement agreement is not enforceable).


See Kathy Kirk, Mediation Training: What’s the Point, Are the Tricks Really New, and Can an Old Dog Learn?, 37 WASHBURN L.J. 637, 650 n.64 (1998) (noting that “[t]he major underpinnings of mediation are communication, negotiation, and problem solving”); see also Stark, supra note 329, at 475–76 (discussing the importance of problem-solving in mediation resolutions).
parental interaction required by mediation.

Compliance with mediated agreements compares favorably to compliance with court decrees. The data supports the hypothesis that direct involvement in the settlement process results in greater commitment to the agreed upon resolution. Thus, better compliance rates should result in fewer ongoing post-divorce conflicts. This can benefit divorcing spouses and their children from both an economical and a psychological standpoint. Courts will also benefit if less litigation is required to enforce agreements or decrees.

Mediation advocates suggest that reaching a divorce settlement in mediation, rather than through the adversarial system, will save money for the parties. Studies of several programs have documented cost savings to parties. One American study showed that, compared to mediation, divorce fees were 28% to 48% higher for parties who used the traditional adversarial model. A British study was less sanguine concerning costs to parties, however, finding that in some cases costs for parties who settled in a conciliation process were higher.

The studies that found cost savings were generally conducted in jurisdictions that follow a "non-lawyered" model of mediation, in which lawyers do not usually attend actual mediation sessions. Recently, a persuasive argument was advanced in favor of direct attorney attendance at mediation sessions as a

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323 See The Equity of Mediated Divorce Agreements, supra note 312, at 193. The differences in cost were most extreme for parties mediating in the private sector. See id.

324 See Rogers & McEwen, supra note 5, §6:03, at 10 n.34 (reporting findings of Anthony Ogus et al., Report of the Conciliation Project Unit, University of Newcastle Upon Tyne to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales 349 (1989), that divorce conciliation "involves significant net addition to the overall resource cost [both for parties and for the state] of settling disputes" (alterations in original)). Differences between the American and British legal systems must be taken into account in comparing study results.
way of ensuring fairness, as is routinely the practice in civil case mediation.\textsuperscript{335} If attorneys do begin to attend sessions, the effects of mediation on party costs will have to be reexamined. It is unknown how much time lawyers spend in their reviewing capacity, as opposed to the time spent in attending the sessions, so it is not immediately apparent how much billable time attorneys attending mediation sessions would acquire.

The justification offered for mandating mediation has been that the process promotes judicial economy.\textsuperscript{336} Theoretically, if cases awaiting trial can be diverted through settlement, backlogs will be reduced and cases that cannot—or should not—be settled will go to trial more quickly. Cases that do not require trial will also save the cost of providing the services of a presiding judge. Attempting to document cost savings for the court system, however, is difficult. Before evaluation can begin, a number of preliminary questions must be answered about which costs to consider and how to compare these costs between the mediation and trial scenarios.\textsuperscript{337}

In the domestic relations context, establishing court-annexed mediation programs increases costs to the justice system.\textsuperscript{338} Even if use of a mediation program is extensive enough to reduce the number of contested court hearings required, more cases are continually filed, and there is always more work waiting for judges. It is to be expected that a heavily used mediation program will help speed up the handling of cases that are not sent to or settled in mediation rather than those that are.

Current data indicates that cases sent to mediation tend to be resolved more quickly than traditionally handled cases.\textsuperscript{339} The

\textsuperscript{335} See McEwen et al., supra note 30, at 1375–78.

\textsuperscript{336} See David S. Winston, Note, Participation Standards in Mandatory Mediation Statutes: "You Can Lead A Horse to Water...", 11 OHIO ST. J. ON DISP. RESOL. 187, 190–91 (1996) (reporting that mandatory mediation may reduce both the cost and the time necessary to reach settlement); see also Maggie Vincent, Note, Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support, 20 VT. L. REV. 255, 290 (1995) (noting the potential for "significant savings of courts' resources" through the use of mandated mediation, but stating that participants can revert to the adversarial process if unable to reach agreement).

\textsuperscript{337} See ROGERS & MCEWEN, supra note 4, § 6.15, at 40 (questioning whether and how to factor in costs such as mediation staff training, postjudgment enforcement and the cost of the courthouse itself).

\textsuperscript{338} See id. § 6:03, at 10 n.34 (citing a "fivefold increase" in costs associated with implementing a mandatory mediation program in Maine).

\textsuperscript{339} See Craig A. McEwen, Evaluation of the ADR Pilot Project: Final Report 7–9 (1992) (reporting the timeliness of cases sent to ADR); NANCY H. ROGERS & CRAIG
ability to speed up settlement time benefits parties in particular and the court system in general. Faster case processing benefits parties in many ways. For example, discovery costs may be curtailed for the litigants, due to the informal discovery process of many mediations. Further, the emotional strain that protracted litigation exerts on the clients can be reduced. Additionally, courts would benefit from reduced delays, thus improving the public's perception of the justice system.

Delays and continuances often pose hidden attorney fee costs to the parties. When a case has been dormant, the attorney needs to refresh his or her recollection prior to the next court appearance. This is true with all litigation, but it is particularly problematic in the context of family law. The domestic relations attorney is constantly aiming at a moving target. The factors influencing the outcome of a domestic case change continuously, due to the major life changes caused by family dissolution. Whenever resolution of a family case is delayed, the lawyer must gather new information and adjust the prior preparation done for the case in order to address the changed circumstances. Unless the attorney charges a flat fee, additional preparation costs the client money. Thus, there are many ways that settling a case early through mediation can control costs for the parties.

Earlier settlement and the consequential avoidance of delays and continuances prevents unnecessary work for judges in the future. Once a case is resolved by a mediated agreement, the judge is free to turn her or his attention to the next matter or to devote more time to the cases remaining on the docket.

Mediation can result in benefits other than avoidance of delays and costs. First, process satisfaction studies show that, compared to trial, mediation receives high marks from participants. Thus, mediation may be an effective problem solving

C. McEwen, MEDIATION: LAW, POLICY & PRACTICE § 4:04, at 17-18 (Supp. 1998) (noting that cases sent to ADR settled at least 40% more quickly than non-mediated cases); Pearson, supra note 332, at 7-8.

Of course, this constant change also creates the need for much post-divorce litigation over modifications of child support, custody, visitation, and alimony.

See Clement & Schwebel, supra note 5, at 98-99; see id. at 98 n.7 (citing Margaret Little et al., A Case Study: The Custody Mediation Sources of the Los Angeles Conciliation Court, 23 CONCILIATION CTS. REV. 1, 9-10 (1985); A. Elizabeth Cauble et al., A Case Study: Custody Resolution Counseling in Hennepin County, Minnesota, 23 CONCILIATION CTS. REV. 27, 27-35 (1985); Eleanor Lyon et al., A Case Study: The Custody Mediation Services of the Family Division, Connecticut Superior Court, 23 CONCILIATION CTS. REV. 15, 23 (1985) (reporting that 81% of survey re-
tool, at least for some parties. The favorable reports returned by mediation users do not dissipate when the parties are required to participate.\textsuperscript{342} The litigants seem to be able to distinguish between pressures to attend mediation and pressures to settle. Concerns about tainting mediation—a voluntary settlement process—by coerced attendance, have no evidentiary basis.\textsuperscript{343} Similar to voluntary mediation, mandatory mediation participation also results in acceptable settlement rates, generally ranging from 40% to approximately 75%.\textsuperscript{344}

The Descriptive Study results suggest additional reasons to make divorce and family mediation widely available and affordable. Prior studies of divorce mediation have primarily contrasted mediation with adjudication only. The Descriptive Study compared process satisfaction measures for mediation to attorney-negotiated settlements and direct party-to-party negotiation, as well as to adjudication. The reported indicia relating to satisfaction varied noticeably across settlement modes.

Of the seventy-six survey respondents reporting they had used mediation, twenty-two stated they reached agreement in mediation. Of this group, 72.7% agreed or strongly agreed with the proposition that they were satisfied with the outcome of mediation. Furthermore, 18.2% disagreed or strongly disagreed with that proposition, and 9.1% were undecided. Also, 68.2% agreed that the outcome of mediation was close to what they wanted, while the rest disagreed with that statement. The respondents who did not settle in mediation were dissatisfied with the mediation’s outcome. They stated that the outcome—non-settlement—was not close to what they wanted. Therefore, when people mediate, they want to arrive at a resolution and are disappointed when they do not. In the group of respondents not

\textsuperscript{342} See Clement & Schwebel, supra note 5, at 99-100 (explaining higher compliance rates with mediation agreements rather than court decrees).

\textsuperscript{343} See Campbell & Johnston, supra note 323, at 238 (reporting that families reached agreements following the impasse model of mediation); Cauble et al., supra note 326, at 33; Clement & Schwebel, supra note 5, at 106; Kelly & Gigy, supra note 319, at 273.

\textsuperscript{344} See supra note 316.
using mediation, 29.6% settled through attorney negotiations and 30% reported reaching agreement by direct party negotiation. Furthermore, 7% did not settle, and 23.9% responded that the spouse had dropped the custody request or that they had reached agreement using another method. The only clearly identified method of settlement receiving high marks was direct negotiation with the spouse. Of the survey’s respondents, 69.2% said the outcomes were satisfactory and close to their desired result. Conversely, attorney-negotiated settlements did not fare particularly well with the respondents. Two-thirds disagreed or strongly disagreed with the statements that the outcome was close to what they wanted and that they were satisfied with the outcome. Only 23.8% agreed the outcome of the lawyer negotiation was close to what they wanted, and one-third were satisfied with the outcome.

Mediation and party negotiations are the two settlement processes directly involving the disputants in the search for agreement. The high satisfaction levels resulting from these methods support the theory that direct participation in the search for resolution is important in generating participants’ perceptions that the process is fair and just. Court policies should encourage greater party participation in dispute resolution methods.

The Descriptive Study also demonstrates that parties are much more likely to participate in mediation when their attorneys endorse the process. Of the respondents who had met with a mediator, fifty-three of the seventy-six respondents, or 69.7%, stated that their attorneys had encouraged mediation. Twelve respondents were undecided on this question, and only 14.5% of the respondents met with a mediator when their lawyers did not support mediation. Attorneys opposing mediation would be well-advised to reconsider their opinions, given the comparatively low

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346 One “non-mediation” respondent reported settling in mediation and being satisfied with the outcome. This individual likely filled out the wrong portion of the questionnaire.

347 Eleven of the 17 people who settled when the spouse dropped the request for custody or who settled through “other” means were happy with the outcome. In total, nine respondents said their spouse gave up the custody demand.

satisfaction ratings for lawyer-negotiated agreements. Courts wishing to launch successful mediation programs also must gain support from members of the local bar.

A number of commentators have opposed divorce and custody mediation out of fear that women will be at a bargaining disadvantage in negotiations with their former partners. As a result of their weaker position, women may be pressured into settling on unsatisfactory terms. The data from the Descriptive Study does not support the fears that women feel disadvantaged in mediation.

Individuals answering the questionnaire ranked propositions on a scale ranging from "strongly agree" to "strongly disagree." In the group attending mediation, 80.9% of the women and 69% of the men agreed or strongly agreed that they received the opportunity to tell their side of the story. Also, 61.7% of women and 75.9% of men agreed that they participated in many discussions of the case. Women were more apt than men to agree that the sessions focused on problem-solving: 51.1% to 34.5%. Women were somewhat more inclined to agree with the statement that the discussion was thorough in mediation, with 48.9% agreeing or strongly agreeing, 12.8% undecided, and 38.3% disagreeing. Men were evenly divided in ranking the thoroughness of the issues discussed, with about one-third agreeing, one-third disagreeing, and one-third undecided on this measure. The majority of both women, 66%, and men, 62.1%, agreed that the mediator conducted the sessions fairly. Regarding perceptions that the mediator pressured settlement, 46.8% of the women disagreed or strongly disagreed, 23.4% were undecided, and 29.8% agreed. Figures for the men were quite similar: 41.4% disagreed that the mediator pressured them to settle,

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348 See Hon. Anne Kass, Women and Mediation, in FAIRSHARE: THE MATRIMONIAL LAW MONTHLY, Aug. 1992 at 23, 23 (discussing the argument that women are disadvantaged in mediation); see also Cynthia Grant Bowman & Elizabeth M. Schneider, Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession, 67 FORDHAM L. REV. 249, 269 (1998) (commenting that women are often disadvantaged by informal processes such as mediation) (footnote omitted).

349 See, e.g., Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441, 445 (1992) (postulating that mediation empowers only the already more powerful husband); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1549 (1991) (observing that mediation, as practiced, fails to live up to the benefits promised and "can be destructive to many women"); Silberman & Schepard, supra note 7, at 406 (stating the concern of women's groups that women are disadvantaged by custody procedures).
26.6% were undecided, and 31% agreed. Satisfaction with the mediation's outcome did not differ by gender. Both sexes were usually pleased when they reached an agreement in mediation and displeased when settlement proved elusive. Women tended to be somewhat more likely than men to report that the outcomes of mediation were close to what they wanted, 41.3% to 21.4%. Again, this measure was more closely correlated with reaching settlement than with any other factor.

Concerns about the inequality of bargaining power in divorce and custody mediation between men and women increase substantially when women have been the victims of domestic violence. In response, almost all states mandating or permitting mediation have enacted legislation exempting battered women from family mediation. Since reliable estimates place the incidence of domestic violence in at least 50% of the cases, these policies will exclude from mediation half the divorce and custody cases entering the courts.

As previously noted, a Columbus mediation program coordinator individually screened litigants to determine whether or not to recommend mediation. Mediation was thought to be contraindicated in cases with histories of severe domestic violence, child abuse, and chronic drug and alcohol abuse. In practice, very few cases were found to be unsuitable for participation in mediation. The Toledo mediators unofficially lobbied against judicial referral to mediation of cases involving domestic violence. Many of the custody disputes sent to mediation did involve spousal abuse issues. The Descriptive Study does not confirm the fears of critics that battered women, in general, are

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52 See Renee M. Yoshimura, Recent Development: Empowering Battered Women: Changes in Domestic Violence Laws in Hawaii, 17 HAWAI'I L. REV. 575, 576 (1995) (citing that 50% of all women have or will suffer from domestic violence); Holly Joyce, Mediation and Domestic Violence: Legislative Responses, 14 J. AM. ACAD. MATRIMONIAL L., 447, 449 (1997) (same).
detrimentally impacted by participation in mediation. Overall, 58.7% of the respondents, including 20% of the men, reported violence in the home ranging from some to a great deal. Of the women, 26.7% reported high levels of domestic violence before the divorce, rating the degree of severity at six or seven on a scale of one to seven. The scale ranges from one, representing no violence, to seven, which indicates a great deal of violence. Of the women reporting very high levels of abuse, 90% felt they had the opportunity to tell their side of the story in mediation. Also, 70% stated that it was their choice to go to mediation, although half felt pressured to attend. Similarly, 70% said they participated thoroughly in the mediated discussions, and 60% did not feel hurried in the process. Half the abused women reported that the discussions focused on problem-solving, 30% were undecided, and 20% disagreed. In addition, 70% said discussion of the issues was thorough, and 80% felt the mediator conducted the sessions fairly. Furthermore, 60% disagreed or strongly disagreed with the statement that they felt pressured to settle in mediation. There was also no correlation between satisfaction with the outcome and the presence of domestic violence in the home. Of the women reporting high levels of family violence, 60% were encouraged by their attorneys to use mediation, and 40% of these women said mediation helped them reach settlement on contested issues. Overall, women who came from very violent homes reported slightly more favorable impressions towards mediation than women reporting a range of none to moderately high levels of domestic abuse. These differences, however, were statistically insignificant.

Process satisfaction reports from domestic violence victims using mediation compared favorably with similar measures relating to attorney-negotiated settlements. In the group of women who reported high levels of violence and who did not mediate, 63.6% disagreed or strongly disagreed with the statement that they participated thoroughly in the discussions. More women reported feeling pressure to settle outside mediation than in mediation.

The Descriptive Study's findings are consistent with prior reports that found no correlation between the existence of domestic violence and satisfaction with or pressure to settle in
mediation. One study found that 45% of abused women, and 40% of women reporting no abuse, felt empowered by mediation.

Impasse is more common in domestic violence cases, indicating that walking away from the table, rather than giving in, is often the reaction to power imbalances. To date, research provides no strong empirical support for policies fostering the blanket exclusion of all domestic violence cases from mediation. Some cases, however, do present significant power imbalances that can cause bargaining inequality. Moreover, mediation in some domestic violence cases can endanger the victim's safety by facilitating the abuser's access to her. Physical abuse is not the only factor that can lead to bargaining imbalances, and thus, the presence or absence of domestic violence is too crude a screening measure for evaluating mediation programs. Instead, mediators must assess the parties' ability to meaningfully engage in negotiations on a case by case basis. Parties should be able to opt out of mediation when there is cause for concern. Additionally, mediation programs can screen for significant power imbalances, address safety issues, provide training on domestic violence issues, use shuttle negotiation instead of direct party negotiation where indicated, and provide victims with information about community resources.

Women reporting domestic violence can also reach agreement on custody disputes through direct negotiation with their spouses. This settlement mode has received high marks, both

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354 See THEONNES ET AL., supra note 353, at 75-76.

355 See id.

356 This bargaining inequality can also affect the results of other settlement mechanisms, not just mediation. See Andree G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, 15 HARV. WOMEN'S L.J. 272, 274–75 (1992) (arguing that mandatory mediation is not appropriate for divorce cases which follow acts of domestic violence, due to the resulting lack of equality in bargaining power and lack of mutual cooperation between the parties).

357 See id. at 276.

from abused wives and from women who reported no violence. Clearly, not all women feel a need to cut off all contact with a former spouse. Adherence to such assumptions places all abused women into a single group and ignores evidence suggesting that there is much variability among abused women as a class.

In order to determine whether there was a statistically significant correlation between marital conflict and the settlement success/failure rate of mediation, the Descriptive Study also examined levels of conflict before, during, and after the divorce. If couples reporting high interpersonal discord settle significantly less often in mediation than couples reporting little overt dis- sension, screening for conflict could help discern which couples are more—or less—apt to benefit from mediation. Efficient screening will enable the courts to allocate resources more effectively.

Unfortunately, as with domestic violence, research on conflict levels compiled in the Descriptive Study provides no easy answers to the screening dilemma. Overall, 65%, of respondents reported experiencing very high levels of interpersonal conflict before the divorce, six or seven on a scale of one to seven points, with the vast majority of those reporting high conflict choosing number seven. Furthermore, 14.5% reported low conflict, and 20.4% reported moderate—three to five—levels of dissension. Of individuals settling their disputes in mediation, 76% grouped themselves in the highest pre-divorce conflict sector. Of respondents settling by attorney-negotiation, 70% were similarly situated, and 52% of divorcing parties settling the custody dispute between themselves reported very high occurrences of pre-divorce disagreement.

Conflict levels reportedly increased during the divorce process. Still, 92% of the parties settling in mediation claimed membership in the highest conflict group. Of the ten people reporting that they were unable to reach agreement in their custody dispute, eight claimed that the level of disagreement during the divorce was quite high. Since 75.8% of the total sample so reported, this difference is not at all significant.

For most parties, conflict levels decreased noticeably after resolution of the divorce issues. Roughly one-third of the respondents placed themselves in each category, ranging from low to high rates of continuing tension with the former partner. Interestingly, six of the ten respondents reporting failure to settle
continued to rate post-divorce conflict as very high.

In sum, the new research indicates that simple self-reports of high frequencies of disagreements are too unsophisticated a measure to be useful in screening potential clients for mediation. Couples who feel that it is not possible to speak civilly with each other may actually find mediation beneficial. The same holds true for many individuals in relationships marred by domestic violence. Our results fail to support critics' fears that women will generally feel disadvantaged in mediation. In addition, the respondents indicated high levels of satisfaction with the mediation process. Mediation compared favorably not only with adjudication, but also with attorney-negotiation. The conjunction of several factors upholding the benefits of mediation supports policies encouraging open access to mediation.

Both past and current research indicates that both litigants and the court system can benefit from the establishment of court-annexed, mandatory mediation programs. Mandatory participation significantly increases the number of cases mediated. The numerical increase benefits individuals by increasing access to a process that many find to be more satisfactory than traditional negotiation and adjudication. Mediation may also reduce the parties' emotional and financial tolls. When mediation succeeds in resolving conflict, it ameliorates some of the emotional trauma of divorce. In addition, early settlement can reduce expense and anxiety. Although there is no conclusive evidence establishing a causal relationship between successful mediation and children's post-divorce adjustment, there is also no evidence that successful mediation has an adverse effect on children.

The court system also benefits from mandatory mediation.

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359 See Clement & Schwebel, supra note 5, at 95, 96 (noting various advantages of divorce mediation).

360 See Allan Wolk, Divorce Mediation: Today's Rational Alternative to Litigation, Disp. Resol. J., Jan.–Mar. 1996, 39, 41 (noting that mediation can help level the playing field in emotionally unstable relationships and that it is more cost effective than alternative adversarial procedures).

361 See Dana A. Gaschen, Note, Mandatory Custody Mediation: The Debate Over Its Usefulness Continues, 10 Ohio St. J. on Disp. Resol. 469, 481–82 (1995) (noting several studies that demonstrate the advantages of mediation to the court system); see also Rudolph J. Gerber, Recommendation on Domestic Relations Reform, 32 Ariz. L. Rev. 9, 16–17 (1990) (indicating that participants in the mediation process are "less likely to bring post-divorce disputes back into the legal system because they have a sense of fairness and self-determination") (footnote omitted).
The research data compiled in the Descriptive Study indicates that cases that initially seem inappropriate for mediation, such as those involving high levels of party conflict and violence, can turn out to be a good fit for the process. Parties experiencing high levels of conflict would be unlikely to voluntarily explore mediation, understandably, due to the belief that it would never work. High use and reasonable settlement rates can help divert many difficult, emotionally charged contested custody cases from trial to mediation—a forum capable of being more responsive to the parties' needs. Greater compliance with settlements, reduced relitigation, and earlier settlement help streamline court dockets. Additionally, providing a service that is generally well received by the parties, and is often viewed as superior to attorney-negotiated settlements and adjudicated outcomes, enhances the public's perception of the justice system.

However, mandatory divorce mediation also carries costs for courts and litigants. Although participants invest time and effort in mediation, settlement cannot be guaranteed. If a court stays the adjudicatory process during mediation, the parties may incur delays and inconvenience in attaining a final resolution. In addition, many jurisdictions recommend or mandate party-paid mediation, causing litigants to bear the financial burden. Courts also incur costs in establishing mediation programs. The costs are literally limited to time and money; but, as the truism states, time is money. Administrative time, money, and effort are expended in setting up and running any type of court-annexed program. Oversight is necessary when any new program is integrated into established court procedures. Financial costs arise when mediators are paid by the court. These costs can be substantial.

On balance, the potential benefits of the increased use of mediation outweigh the costs. Although both litigants and courts stand to gain from mediation, courts are the major beneficiaries of court-annexed, mandatory mediation. If this were not the case, courts would be satisfied providing the option of totally voluntary mediation and requiring nothing more. The push for greater implementation of mandatory mediation is therefore coming from the courts.

Once policy makers decide to require divorce and custody mediation, the next question is how to fund such court-annexed programs. As discussed above, courts have tried several ap-
approaches to institutionalizing mediation. Some jurisdictions hire and pay mediators, either as employees or independent contractors. Others use a combination of approaches to funding, providing free services to the indigent and partially subsidized services to others. Another group of jurisdictions place the costs directly on the litigants, with no provision for public support of mediation programs.

In theory, different referral and payment schemes should result in different patterns of litigant use based on relative income. The Descriptive Study allowed formulation and testing of assumptions about the impact various funding options have on access to mediation services. Consistent with prior evidence, we hypothesized that when mediation is completely voluntary, the middle class and relatively well off are likely to choose that option, whereas lower income couples would be less likely to seek mediation. If the data supported uneven access favoring the wealthy, critics would be justified in fearing that the poor would be relegated to operating in an underfunded, overburdened public court system.

We also assumed that courts, such as those in Columbus, that officially encourage, but do not require parties to try mediation through private providers, should expect to see uneven patterns of mediation use, depending upon the availability of truly affordable services for participants at all income levels. As with completely voluntary mediation, we expected the relatively affluent to try mediation fairly frequently. The very poor may also be more capable of trying mediation when, in order to be included on a court referral list, mediators must agree to provide pro bono services to the indigent. Absent a coordinated effort to

\[\text{See supra notes 73–104 and accompanying text (noting the various methods courts throughout the country have utilized in attempting to institutionalize mediation).}\]

\[\text{See supra notes 97–98 and accompanying text.}\]

\[\text{See supra notes 86–98 and accompanying text.}\]

\[\text{See supra notes 73–85 and accompanying text.}\]

\[\text{See Felice D. Perlmutter, Divorce Mediation in Family Service Agencies, MEDIATION Q., Fall 1987, at 17. A study of not-for-profit family service agencies offering divorce mediation found that most clients were middle class and above. Of the mediation group, 77.2% had joint incomes in excess of $25,000 per year, although the agencies would generally be expected to serve members of a lower economic class. See Pearson & Thoennes, supra note 5, at 14 (indicating that “as long as it remains a voluntary procedure, mediation will be most widely used by couples with relatively high socioeconomic standing”).}\]
provide free services, however, the demand for services by the poor might not be fully met by volunteers. The indigent divorce litigant generally has a difficult time retaining legal representation.\footnote{A recent study found that 35.3\% of indigent individuals seeking subsidized legal assistance needed help with family law problems. This was the area most in demand, with public benefits issues ranked next at 23.5\%, and housing at 13.7\%. See Young, \textit{supra} note 347, at 582 (table 6).} If official encouragement of mediation increases, similar difficulties in obtaining free dispute resolution services may reasonably be expected to develop.

We also hypothesized that court encouragement of privately paid mediation would result in lower levels of use among members of lower income groups. Individuals who are above the poverty level, but whose incomes are not high enough to allow for much discretionary spending before a family breakup, are seriously strained by the costs of divorce. When the basic necessities of life are barely within reach, mediation fees are likely to be perceived as an unaffordable luxury.\footnote{Programs offering sliding fee scales for mediation could help ameliorate the financial strain on this group, if fees are sufficiently low.} In sum, this type of court program will foster reasonably high levels of participation by the very poor and the relatively comfortable, but will lower rates of use among the lower middle class and the working class.

Finally, we believed that courts offering free family mediation could expect to see relatively equal rates of use by members of all income groups. When programs are supported by public funds, mediation costs would not be a deterrent to use. Litigants in all socioeconomic groups would be able to access mediation easily.

In the Descriptive Study, questionnaires were mailed to a random sample of divorcing couples identified through court records. Almost all survey respondents disclosed their annual incomes. Income information was also collected for 413 individuals from required financial disclosure forms in court files.

The court files showed that 57.6\% of the individuals in the random sample earned less than $20,000 per year, while the remaining 42.4\% earned in excess of that figure. Gender differences were quite clear. Of the women, 76.6\% earned less than $20,000 annually, while only 39.6\% of the men were in this relatively low-income bracket. Accordingly, 60.4\% of the men, but only 23.4\% of the women, earned over $20,000 per year.
The respondents from Hamilton County, which relied on the parties to seek out and pay for private mediation on their own, rarely tried mediation. From a sample group of seventy-three cases, only eight respondents reported using mediation. These findings confirm prior research showing low use when mediation is completely voluntary. In addition, these few cases also reveal that the people choosing voluntary mediation were predominantly from higher income levels. Six of the ten mediation participants had incomes of over $26,000, and five of these reported individual annual incomes of more than $30,000. Three respondents with incomes of $10,000 to $15,000 per year used mediation. One was the spouse of a respondent earning more than $30,000 per year. Another was the spouse of an individual earning between $21,000 and $25,000, giving this couple a combined annual income between $31,000 and $40,000.

These results must be interpreted with caution, as the response rate was quite small. In addition, the survey respondents tended to have higher incomes, on average, than the sample as a whole. Of Hamilton County residents answering the questionnaire, 55% earned more than $20,000 per year, compared with only 42.4% of the entire group studied. Even so, these new findings support prior research evidence. A system relying on private, party-paid mediation alone can anticipate generally low rates of use, with the predominate use being made by relatively economically privileged parties.

The data from Lucas County, where the court provided free mediation, showed even patterns of mediation use across all income levels. Internal court research indicated that many lower income individuals received mediation services. The mean annual income for women in mediated divorce cases was only $12,320 while men's mean earnings were $25,487. In post-divorce mediation cases, women earned a mean yearly income of $12,624, and men earned $20,924. Court records show that 12% of the initial sample of sixty-four Lucas County cases were referred to court-annexed mediation. The limited number of court-employed mediators placed artificial constraints on the number of cases that could be referred to the program. This phenomenon illustrates a potential problem with inadequately funded court based programs.

292 See Memorandum from Paul J. Langevin, supra note 292.
Franklin County's system of mediation education and assessment and referral to private mediators resulted in higher use of mediation. Court records revealed that, of the 124 Columbus area cases included in the first sample, the parties in fifty-eight cases tried mediation. This relatively high percentage demonstrates a possible benefit to this model. The court records also indicate that income level may affect the willingness of parties to attend court-recommended but privately paid mediation. The data indicates that, after assessment, 80% of Columbus-area fathers and 79.5% of mothers agreed to attend mediation, regardless of annual earnings. Fewer parents, however, actually attended mediation. The dropout rate among men was consistent regardless of income level. The differences among women are more striking. While 74.1% of the mothers in the subset earned less than $20,000, and almost 80% agreed to mediate, only 50.8% participated in mediation. Of the 25.9% of mothers that earned more than $20,000 per year, 82.6% agreed to try mediation, and 77.3% actually did mediate. The number of participants in the Descriptive Study was small, and thus the statistics cannot be considered particularly reliable. The preliminary findings are intriguing and worthy of further study. The low-income mothers, most of whom can safely be presumed to be the primary custodial parent even while the divorce is pending, may have desired mediation but could not afford the service. In general, though, when all respondents were grouped together, the small dip in the rate of mediation use by members of the lower income groups was not statistically significant.

A number of factors other than individual income can influence the affordability of mediation for a divorcing couple. As shown in two of the cases from Hamilton County, total family income for some couples may be relatively high even when one spouse has little or no income. Total disposable family income is likely to be more important in the decision to use mediation than is the income of only one former partner. Other members of the low-income group could have felt sufficiently committed to the mediation process to pay the fees, despite the difficulty of payment. Since mediation in Columbus was not mandatory, people could easily opt out of the process. Some organizations provided divorce mediation on sliding fee scales based upon income.370

370 During the times covered by the Study, Crittenden Family Services provided
This option may have mitigated the financial strain for some low-income couples choosing mediation, but did not completely eliminate the disparity in the rates between actual use of mediation and agreements to use the process shown by the Descriptive Study. We were not able to assess the degree to which financial concerns were a factor in the decision not to participate in mediation. It is sensible, however, to assume that costs were a factor in a respondent’s decisions to use or avoid mediation. In a study of voluntary, private divorce mediation with fees set according to income, the main reason given by participants for dropping out of mediation was the cost.

The Columbus model carries additional risks. Courts suffer when litigants are dissatisfied. Another recent study of the Columbus divorce mediation program examined here shows that mediation participants were more likely to be satisfied with their mediators if they did not experience problems with the fees they were charged. If parties felt the mediation sessions had value, they were more apt to tolerate the added expense. Where the parties did not comprehend the purpose of mediation, the costs were more likely to come under attack. For example, one respondent stated, “The cost is expensive with attorney fees and mediation. And it can get out of hand. But now that I understand that we might be able to agree on what’s in the children’s best interest, then it’s worth the trouble and expense.” Another dissatisfied respondent wrote, “This is a bunch of bull. I have to pay all this money [for mediation] and I have to pay my lawyer too.” Although mediation was theoretically voluntary in the Columbus program, this comment also reflects the perception that attendance was mandatory. This belief could have increased this respondent’s frustration. If a quality mediation program had been provided at public expense rather than party mediation based upon a sliding fee scale. Community Mediation Services of Central Ohio provided both free and sliding fee services, but this organization was not listed on the court’s referral list. A few individuals also charged fees based on income.

See Kelly & Gigy, supra note 319, at 274.


Id. at 415.

Id. (alteration in original).

One referee required parties in contested custody cases to attend mediation if the case was found suitable by the assessment coordinator.
expense, these expressions of concern about cost and correlative dissatisfaction with the court system could have been avoided.

It has been suggested that, to mediate seriously, parties to mediation must have a financial stake in the process. Our data does not support this contention. There was no significant difference in settlement rates between the free program in Toledo and the party-paid program in Columbus. Party payment also failed to correlate with the efficient use of time in mediation. The cases in Toledo took somewhat less time, on average, to resolve or terminate than did Columbus area cases involving hourly fees. Toledo respondents were no more likely to report feeling rushed in mediation than were the other respondents.

In sum, the low rates of mediation use experienced in the Hamilton County court system serves no one's best interests. In contrast, the Toledo program helped parties who would not otherwise have entered mediation attain satisfactory settlements in a number of cases. None of the litigants incurred costs for participating in mediation, and access was even across all income levels. Due to insufficient staffing, however, not all suitable cases were referred to mediation. The Columbus program was certainly cost-effective, since only one employee staffed the program. It also had relatively high rates of use and settlement, but still did not reach all the suitable cases or serve all the parties who expressed an interest in mediation. In addition, some litigants were dissatisfied with the cost of attending mediation, even though some free and sliding fee services were available. None of the three courts studied had devised a perfect system, but none had chosen the easy option of mandating mediation at party expense.

Serious concerns arise when courts mandate party payment for mediation. This approach risks creating untoward pressures on the participants to settle. The extra monetary demands come at a time when the parties are under financial strain caused by the need to set up two households on an income formerly used to

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376 See Kimberlee K. Kovach, Costs of Mediation: Whose Responsibility?, MEDIATION Q., Fall 1997, at 18 (stating that some attorneys in Texas view the "settlement week" process, in which lawyers volunteer to mediate or facilitate settlement, less seriously than cases in which the mediator is paid).

377 We do not have an explanation for the difference. Perhaps most of the Columbus cases involved both financial and custody issues, while the Toledo mediations remained focused on custody issues only. Perhaps the Toledo cases were more complicated, and reached impasse sooner.
support one. In addition to the fiscal pressure caused by the breakup, a parent with serious custody disputes is likely to feel a need to hire an attorney. The added expense of a mediator’s service compounds the parties’ economic woes. After paying for an unsuccessful mediation, litigants may agree to terms they dislike, because they will be unable to pay for litigation or attorney negotiations. Such pressured settlement may not adequately respond to the merits of the case or the needs and interests of the children involved. The agreement may break down more easily than a settlement that is not the product of financial constraints. The parties may be less committed to carrying out the terms of a settlement when it is perceived as expeditious rather than wise.

It would be naive to presume that monetary considerations do not influence parties to settle outside mediation. For example, many divorce cases settle through attorney negotiations. Particularly when bargaining becomes protracted, party costs increase and may encourage the less financially resilient party to agree to an unwanted settlement. This result is no improvement over pressured settlements in mediation, and mediation presents a discrete, additional expense for the parties. Empirical research indicating that parties may save money by mediating, or spend no more to mediate and then litigate, is likely to seem too abstract and theoretical to reassure the parties and influence them to reject unacceptable settlements.

Jurisdictions mandating party-paid mediation need to be particularly concerned about the effect of the policy on women. As discussed above, some court systems requiring party payment assess the fees equally between the parties. The Descriptive Study clearly shows that female divorce litigants earn significantly less than their former husbands. Most mothers will be the primary custodial parent. Child support payments do

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378 See MARRIAGE, DIVORCE, AND CHILDREN’S ADJUSTMENT, supra note 8, at 133 (noting that 90% of divorce cases are settled through attorney negotiations).
379 See supra notes 75–76 and accompanying text.
380 See Bryan, supra note 349, at 449–50 (noting that the “[l]ncome disparity between negotiating spouses then affects their negotiating strength”).
381 See MARRIAGE, DIVORCE, AND CHILDREN’S ADJUSTMENT, supra note 8, at 31 (discussing statistics that show children are not likely to reside with their fathers in the post-divorce period); Advisory Committee Report, supra note 312, at 13 (providing a table showing that physical placement of children in Rhode Island is generally with their mother).
not reliably cover the actual costs of raising children.\textsuperscript{382} Alimony awards are becoming shorter in duration and more rare than in the past.\textsuperscript{383} The evidence continues to show that men's financial positions improve after a divorce, while women's standards of living decline.\textsuperscript{384}

Equal division of mandatory divorce mediation fees clearly has a disproportionately harsh effect on women.\textsuperscript{385} The required fees can exacerbate pressures to settle for financial reasons, and indirectly reduce women's access to court proceedings by reducing the funds available for further litigation of the case.\textsuperscript{386} In addition, requiring payment for mediation from a financially strapped divorcing party can reduce the inherent value of mediation. A woman faced with monetary strain may be tempted to show up for one required mediation session, cut the session short, and terminate the process prematurely to save funds to pay her attorney.

Some courts divide the mediation fees "equitably" between the parties.\textsuperscript{387} This does not necessarily remove the deleterious

\textsuperscript{382} See Pearson, The Equity of Mediated Divorce Agreements, supra note 312, at 195 (describing post-divorce problems such as: inadequate arrangements for payment of children's higher education, the low economic status of women, and raising orders that comply with child-support guidelines but fail to meet the needs of children); Advisory Committee Report, supra note 312, at 23–24 (noting the harshness of short-term alimony).

\textsuperscript{383} See Advisory Committee Report, supra note 312, at 8–10 (discussing declining alimony awards and the factors that effect them as well as the length of the awards). "By 1988 the median length was down to 2.5 years." Id. at 11.

\textsuperscript{384} See id. at 23 (analyzing post-divorce standards of living based on a study conducted by the Women's Legal Defense Fund of Washington, D.C.).

\textsuperscript{385} See generally Jana B. Singer, The Privatization of Family Law, 1992 WIS. L. REV. 1443, 1499 (discussing mandatory divorce mediation). Singer describes the impact of mediation on women. See id. at 1546–49; see also Grillo, supra note 349, at 1581–94 (discussing several ways in which mediation places women at severe disadvantages); McEwen et al., supra note 30, at 1319 (explaining the imbalances between the sexes and why women are at a disadvantage).

\textsuperscript{386} See Craig A. McEwen & Laura Williams, Legal Policy and Access to Justice Through Courts and Mediation, 13 OHIO ST. J. ON DISP. RESOL. 865, 872 (1998) ("The financial cost of mediation may determine whether the parties can continue on to court if the mediation does not produce settlement."); cf. Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971) (holding that mandatory fees in divorce actions are a violation of Due Process because they deny indigent plaintiffs access to the judicial process). But see Susan C. Kuhn, Comment, Mandatory Mediation: California Civil Code Section 4307, 33 EMORY L.J. 733, 756 (1984) (asserting that people who resolve their disputes through mediation usually comply with the agreement, thus making further litigation unnecessary) (footnote omitted).

effect mandatory divorce mediation has on women. The wife may be truly unable to afford anything, yet may still be assessed a portion of the fee. Furthermore, litigation of the fee assessment is often impractical and expensive.

Mandatory party-paid divorce mediation may also be disproportionately unfair to members of racial and ethnic minorities. It is no secret that Black and Hispanic Americans, when compared to white citizens, continue to suffer economic disadvantages. Requiring parties to participate in and pay for mediation can be expected to harshly affect minorities, as it does women, making unfettered access to the court more difficult. In addition, many mediation programs require entry level mediators to have a postgraduate degree in a human services field or a law degree, as well as specialized mediation training. These educational credentials tend to close out minorities from the ranks of mediation service providers.

(seeking equitable billing of fees and costs).

See Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1368 (suggesting that there is an enhanced risk of prejudice in alternative dispute resolution because the traditional constraints on judicial bias are absent); see also Carol J. King, Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader, 10 OHIO ST. J. ON DISP. RESOL. 65, 82–83 (1994) (summarizing critiques that cultural differences, societal prejudice, and power imbalances can lead to unfair treatment of minorities in the mediation process). The article was written in response to Professor Nader’s view that “all mediation, not just mandatory mediation is dangerous, except among equals.” See id. at 82 (citing Laura Nader, Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology, 9 OHIO ST. J. ON DISP. RESOL. 1, 9 (1993) (emphasis added)).

See Alissa J. Rubin, Racial Divide Widens, Study Says, L.A. TIMES, Mar. 1, 1998, at A18 (finding that the median family income of blacks and Hispanics is only 55% that of whites, and that minorities are three times more likely to live below the poverty line).

See McEwen et al., supra note 30, at 1343–44 (stating that in a number of jurisdictions mediators receiving court referrals must hold advanced degrees in such disciplines as law, mental health, or accounting and must complete mediation training, which sometimes also includes a continuing education requirement); Silberman & Schepard, supra note 7, at 409 (noting that the New York State Law Revision Commission recommendation on the child custody dispute resolution process requires that mediation be conducted by a licensed mental health professional with a master’s degree and at least two years of experience in working with families or by a lawyer with two years of experience working with families). See generally Donald T. Weckstein, Mediator Certification: Why and How, 30 U.S.F. L. REV. 757 (1996) (discussing the advantages and disadvantages of mediator certification requirements).

See Silberman & Schepard, supra note 7, at 409 (noting that several practitioners are concerned that qualifications can “carry a professional bias” and disen-
programs order minorities to use and pay for a process that could easily be perceived as culturally insensitive and racially exclusionary.

There are additional reasons that support free mandatory mediation. In the recent past, there has been a shift in the characterizations of the judge's role. Rather than being viewed as arbiters of the rule of right presiding over trials, or as the filters for determining the truth, or as protectors of societal values as expressed in the law, judges are now often seen as resolvers of disputes. Thus, the role of the judge closely approximates the role of the mediator. Therefore, if public funding is appropriately used to support the judiciary, it is equally appropriate to use it for mandated mediation.

It is possible, though unlikely, that given the recent trend toward preservation of tax revenues, party-paid mandatory pretrial mediation could be held an unconstitutional denial of access to the courts. As discussed above, unconstitutionality would be determined by weighing the relative burdens imposed on the litigants by the program fees, including the negative impact of the fees upon the individual's ability to pursue the case in court. If the burden is deemed excessive, a statute requiring mandatory participation in the program could be struck down because it denies due process. Further, a program with a fee structure that disproportionately burdens women and minorities may violate the constitutional requirement of equal protection by the states.

franchise many practicing mediators, but not specifically noting race and national origin as concerns).


Compare Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971) (holding that access to the court for a divorce proceeding is a fundamental right, therefore, a statute that limits such access must be viewed with heightened scrutiny) and McEwen & Williams, supra note 386, at 881–82 (asserting that because "access to justice means availability of mediation to all parties," mediation services must be adequately funded and effectively made available to everyone) with Kuhn, supra note 386, at 760–63 (discussing state and federal precedent regarding access to the judicial system in divorce proceedings and concluding that mandatory mediation does not violate Due Process, because it delays rather than denies access) and Martin M. Loring, Recent Cases, Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts, 45 Mo. L. REV. 316, 321 (1980) (stating that access to the courts is not a fundamental right; therefore, only a rational basis test needs to be applied to statutes abridging such access).

See supra notes 170–283 and accompanying text.
Mediation is not, and should not, be viewed as a guarantee of resolution. Litigation, however, does not guarantee finality. Although many parties view litigation as a promise of eventual finality through adjudication or attorney negotiation, this may not always be the case. When faced with limited funds, divorcing parties might sensibly want to forego paying for and investing their time in a process such as mediation which might fail to result in any settlement. Instead, the parties may choose litigation because it appears to lead to successful results and seems to be a better use of their time and money. Appearances, however, can be deceptive, as is especially apparent in child custody disputes. In these cases finality is often elusive. If the underlying conflict between the parents persists, post-decree litigation may become relentless. Providing truly affordable mediation preserves the parties' ability to make a fiscal choice, yet increases the odds of attaining a more lasting resolution through mediation.

Courts that mandate party-paid mediation run the risk of causing public dissatisfaction with the program, which reflects poorly on the courts. The Descriptive Study shows that settlement in mediation correlates with party satisfaction with the process. Conversely, those who do not settle are less pleased with mediation. Dissatisfaction only stands to increase when those who have not settled in mediation are required to pay more than a nominal fee for the services.

The number of couples who obtain a divorce without hiring counsel has increased steadily since the 1960s. In some metropolitan areas, close to half of all divorces are granted to unrepresented couples. One Arizona county estimates that in 90% of

595 See Barbara Stark, Divorce, Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities, 38 UCLA L. REV. 1483, 1522 (1991) (discussing mothers' post-decree worries that a custodial father cannot care for his children as well as a mother).

596 See Richard K. Schwartz, A New Role for the Guardian ad Litem, 3 OHIO ST. J. ON DISP. RESOL. 117, 142 (1987) ("The most salient problem accompanying joint custody mediation is the mediator's inability to compel participation by reluctant parents and to ensure their compliance with the joint custody decree or mediated agreements.").

597 See generally McEwen et al., supra note 30 (discussing the advantages of lawyer participation in mediation); Peter E. Van Runkle, Lassiter v. Department of Social Services: What it Means for the Indigent Divorce Litigant, 43 OHIO ST. L.J. 969, 979–80 (discussing the state's interest in having counsel present).

598 See Robert B. Yegge, Divorce Litigants Without Damages, 28 FAM. L.Q. 407,
divorce cases at least one litigant is unrepresented. The reason is simple—lack of money to hire an attorney. Free legal services for the divorcing poor have also suffered serious cutbacks. One potential solution to this problem would be to supply free or very inexpensive access to mediation programs. Mediation programs provide an opportunity for productive discussion of divorce issues between the pro se litigants. If mediation resolves the dispute, then the cost of subsequent legal services for processing the divorce is obviated or substantially reduced. Providing access to divorce and custody orders for the poor will help reduce the inappropriate use of pro se protective orders.

The best way to provide non-discriminatory access to mediation is to provide public funding for court-annexed mediation programs. Eliminating the requirement that parties pay mediation fees will prevent unintended settlement pressure that is economically based. Public financing will alleviate the significant disparate impact that mandated utilization and payment of mediation has on women. Directives to divide a divorce mediator's fee equally between the parties rest upon unsupported assumptions of financial equality between wives and husbands, and should be avoided in an effort to relieve settlement pressure. Publicly supported mediation programs also mitigate

408 (1994); Pearson, supra note 353, at 321 (citing Michelle Duryee, Mandating Mediation: Myth and Reality, 30 FAMILY & CONCIL. CTS. REV. 507, 518 (1992), and indicating the rate is 40% in Alameda County, California).


See Pearson, supra note 353, at 330 (finding that in most study communities, legal services have been severely curtailed for divorcing parties).

See McEwen & Williams, supra note 386, at 874 ("A party who is mindful of a ticking cost meter for the mediation session may feel pressure to settle the mediation . . . .").

See Singer, supra note 385, at 1549 (suggesting that privatized mediation exacerbates "gender-based power inequalities within the family").

See Joel Douglas and Lynn J. Marer, Bringing the Parties Apart—Divorce Mediations Debt to Labor Mediation, 49 DISP. RESOL. J. 29, 31 (1994) (discussing mediators' fees); see also McEwen et al., supra note 30, at 1323–24.
concerns about race-based economic unfairness. Concerns about the composition of the mediator pool, however, are not addressed by program funding. Public financial support will make the individual benefits of mediation available to the widest possible spectrum of divorcing parties. In turn, the process will be used extensively by individuals, maximizing the potential benefits to the court system and the public at large.

A. Suggestions for Program Funding

 Courts have a number of options for the structure and funding of free or very low cost divorce and custody mediation services. Courts can hire mediators as employees, or contract with private sector mediators for a set fee. Funding for personnel can be provided by general state revenues. Some courts have sought to generate additional income to fund mediation programs by increasing the filing fees for the particular types of litigation or marriage licenses. Other jurisdictions provide some public subsidies for mediation. For example, Colorado charges reduced rates and Maine charges small administrative processing fees.

 Currently, many courts employ workers to screen couples to determine which cases are appropriate for mediation. Courts may, however, be better served by shifting job duties and providing mediation in lieu of, or in addition to, screening. In the court

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405 See Weckstein, supra note 390, at 761 (expressing concern that licensing requirements for mediators exclude otherwise competent persons who lack the finances to enroll in training).


409 See generally CAL. GOVT CODE § 26840.3 (Deering Supp. 1999) (authorizing the superior courts of all counties to raise the marriage license fee by up to $5 to fund mediation services).


412 See Me. CT. R. 1(a) (requiring a fee of $120.00 for mediation of domestic relations cases).
program administered in Franklin County, Ohio, employees who spoke with custody disputants found very few cases inappropriate for mediation referral. Based on this information, it would be beneficial to allow employees to provide mediation in custody disputes. Instead of simply completing assessments and referrals, a few mediation coordinators, or even just one, could provide direct services to a number of couples.

Implementing a small court-annexed mediation program is another option for jurisdictions faced with monetary constraints. A court can train currently employed custody investigation and evaluation personnel in mediation. For example, in Toledo the court trained several current employees in mediation and was thus able to divert a small number of cases to them. Random referrals allow for research and evaluation geared towards examining case characteristics associated with successful outcomes. This makes it possible to select future referrals most productively. Over time, if the court is satisfied with the program, resources can be reallocated or generated to fund service expansion.

Some jurisdictions have attempted to make mediation more affordable to those with low to moderate incomes through the adoption of sliding fee scales. Carefully developed sliding fees may make mediation affordable for both the parties and the courts. The effect of this approach has not yet been closely examined. The financial strains experienced by almost all middle- and low-income families would have to be carefully considered by program designers in setting fees, in order to ensure that the fees are reasonable.

Not all divorcing couples have a financial need for free mediation services. Although requiring only the very wealthy to make party payments for court-ordered mediation is seemingly unfair, it can be supported by an analogy to the Federal Rules of Civil Procedure. Rule 53 permits the appointment of special masters at party expense in exceptional cases. The same

413 See McEwen & Williams, supra note 386, at 876 (discussing a Minnesota program designed to make mediation available to low income populations); Kimberlee K. Kovach, The Costs of Mediation: What Should They Be, and Who Should Pay Them?, DISP. RESOL. MAG., 1996, at 13, 15 (discussing solutions to mediation funding problems).

414 See FED. R. CIV. P. 53(a).

The court in which any action is pending may appoint a special master therein. As used in these rules, the word 'master' includes a referee. . . .
practice can be followed in domestic relations courts.

Few, if any, divorce mediation programs currently rely on volunteer mediators to provide services to divorcing or separating couples.\textsuperscript{415} This is based on a false underlying assumption that mediators must be paid for their time in order for mediation to be successful. In reality, using volunteer mediators to staff community mediation centers may enhance the value of the services provided and the productivity level of the staff. Most community programs can recruit more volunteer mediators than they can actually use.\textsuperscript{416} The volunteers generally bring great commitment and enthusiasm to the job, finding real satisfaction in helping people resolve their problems. Many volunteers also feel they are providing a valuable public service.\textsuperscript{417} The volunteers' availability and their positive attitudes tend to lead toward a program just as successful, if not more so, than one in

\begin{quote}
The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or pay out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct.
\end{quote}

\textit{Id.}\textsuperscript{415} Courts differ as to the quality that mediation must meet in order to be eligible for public funding. See ROGERS & MCEWEN, supra note 4, at § 10.2, at 181–82. Generally, quality mediation is viewed as supervision by an honest third party who allows the disputing parties to decide whether to settle. See \textit{id.} § 10.2, at 181. This would seem to indicate that volunteers would be able to administer a mediation program as third parties even if they lacked professional expertise and were not getting paid. Most mediators in divorce or custody cases are either mental health professionals or lawyers. See \textit{id.} § 11.2, at 204 (reporting that mental health professionals constitute 78% of private sector mediators and 90% of public sector mediators, and lawyers constitute 15% of private sector mediators and 17% of public sector administrators). In addition, the Codes of Ethics for Mediators make it clear that mediators are not unpaid volunteers and may charge for their services. See \textit{id.} at Appendix D, at 7. Costs and fees must be agreed upon with the parties and they must be reasonable. See \textit{id.} at 8. Contingent fees and commissions for referral are not allowed. See \textit{id.}\textsuperscript{416} Staffing was never a problem while the author served on the board of directors of a community mediation center staffed by volunteer mediators. \textit{But see} Susan E. Raitt et al., \textit{The Use of Mediation in Small Claims Courts}, 9 OHIO ST. J. ON DISP. RESOL. 55, 87 (1993) (stating that there is often an insufficient number of volunteers to staff publicly funded mediation centers).\textsuperscript{417} The main complaint received from our volunteers was that they wanted more cases to mediate. When services were expanded to include divorce and family mediation, volunteers did not shy away from these cases. See Amy Roquemore, \textit{Volunteers Use Mediation to Keep Fights Out of Court}, DALLAS MORNING NEWS, Sept. 14, 1998, at 8A (discussing a mediation program made up of two hundred volunteers and quoting one volunteer who gets "personal gratification out of helping people discover that they have the ability within themselves to solve their problems"), \textit{available in} 1998 WL 13102457.
which mediators are paid.

Poverty-stricken courts interested in expanding mediation services to domestic relations cases should seriously consider staffing a program with volunteers. Doing so would certainly control the costs of starting and running a program. A paid court employee would be needed to coordinate the training and schedule the cases to be handled by volunteer mediators. Employing one coordinator, however, would be far less costly than hiring a full staff of mediators.

Volunteer mediators would have to be adequately trained. Their training should be provided free of charge. Perhaps, experienced mediators would be willing to donate their time to train new volunteers and to act as mentors and co-mediators for the newest recruits. On-the-job training is recommended, since it is an excellent quality control mechanism.

Naysayers will certainly raise objections to the idea of staffing court-annexed divorce mediation programs with volunteers. One of their concerns may be whether there would be enough qualified volunteers to sustain a program providing free mediation services to all, or at least a majority, of the suitable cases.

Many court-approved mediation programs require mediators to hold certain credentials, such as a college or masters degree in human services, or a law degree.\textsuperscript{418} The possession of these credentials is a common requirement for mediators in various states. For example, the Tennessee Mediation Association formed a Qualifications Committee that established a college degree plus advanced degree or four years post-college work experience as a requirement for mediators. See Judge Marietta Shipley, \textit{Family Mediation in Tennessee}, 26 U. MEM. L. REV. 1085, 1094 (1996). North Carolina has a four-year college degree requirement as well. See Tony Biller, Comment, \textit{Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina’s Pre-trial Process}, 18 CAMPBELL L. REV. 281, 287 n.43 (1996). Jefferson County, in Kentucky, has a rule that mediators must have a college degree and basic education or training in behavioral science. See Louise Everett Graham, \textit{Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience}, 81 KY. L.J. 1107, 1114 (1993). For the proposition that college or professional experience is not necessary, see Jill Richey Rayburn, \textit{Neighborhood Justice Centers: Community Use of ADR—Does It Really Work?}, 26 U. MEM. L. REV. 1197, 1216 (1996) (stating the only requirement for being a successful mediator is possessing “the skills to do the job.”); see also Elizabeth R. Kosier, \textit{Mediation in Nebraska: An Innovative Past, a Spirited Present, and a Provocative Future}, 31 CREIGHTON L. REV. 183, 190 (1997) (stating that a college degree is not a pre-requisite to becoming a mediator). But see Bobby Marzine Harges, \textit{Mediator Qualifications: The Trend Toward Professionalization}, BYU L. REV. 697, 708 (1997) (discussing Professor Kimberlee Kovach’s view that a four-year college degree is necessary in order to assure that a mediator is competent).
qualifications by volunteers is meant to advance the quality of mediation services. The requirement of educational credentials functions as a filtering mechanism, in that it diminishes the size of the pool of potential volunteer mediators and locates only the most “qualified” ones.

However, there is reason to doubt the validity of the assumption that paper credentials promote quality. Intelligent laypersons can develop a good understanding of family law as well as the psychological dynamics of divorce and separation on parents and children. One’s maturity level, life experience, and experience mediating cases are more predictive of success in the mediation field than one’s professional background.\(^4\)

In addition, evaluating volunteers based on their educational degrees may reduce the racial, ethnic, and economic diversity of mediators. A group of homogenous mediators is not desirable, given the tremendous diversity of parties appearing before the court. Encouraging people of different backgrounds to become mediators would be a preferable alternative. It would go a long way towards diminishing both the language and cultural barriers that stand between the mediators and the people they serve. Furthermore, by encouraging mediator diversity, the court could be sending a message to the parties that they are represented by the judicial system and are valued just as much as white, upper and middle-class people.

If paper credentials are adopted, the program’s administrators may encounter difficulties in generating a sufficient number of volunteers to staff the program adequately. Although the likelihood of this problem occurring cannot be precisely ascertained without experimentation, there is evidence that it would not occur. The experience of community mediation centers has been encouraging, in that their volunteer positions were filled when a credential requirement policy was implemented. Many—some might argue too many—community mediation center volunteers are well-educated professionals. A sufficient number of family mediation volunteers could reasonably be expected to be drawn from the same pool.

Courts that decide to set up a divorce mediation program

\(^4\) See James J. Alfini, Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?\(^1\), 19 FlA. ST. U. L. REV. 47, 48 (1991) (suggesting that professional and academic credentials are not the most reliable criteria for “good mediation.”).
staffed by volunteers could anticipate resistance from mediators who are interested in establishing themselves in fee-generating private practices. Hopefully, such political concerns will not deter public policy makers from exploring the feasibility of establishing programs that cost the public very little, yet provide services to many. Although the experience of community mediation centers can shed light on the proposed family mediation model, it should be noted that the time frame for family mediation differs somewhat from the time frame for routine mediations conducted by community centers. In contrast to many neighborhood justice center mediations, family and divorce mediation is seldom concluded in one session. The time required for family mediation can be expected to increase when the sessions are not limited to custody issues and involve financial issues as well. Despite the increase in time, full scale mediation is preferable to limited issue divorce mediation. Volunteers who participate in divorce mediation programs must plan to spend more than one session per case. This could increase administrative coordination time.

Although providing cost-free mediation to all parties is the ideal option, cash-strapped courts could charge non-indigent parties referred to mediation a small fee to offset administrative costs. Fees, even if nominal, however, should be waived for those unable to afford them.

B. Two-Stage Protocol for Court-Annexed Divorce Mediation

Although mediation can be helpful in resolving divorce and custody conflicts, it is not a panacea. Two major areas pose problems for planners of court mediation programs. First, quality control could prove to be a significant problem for planners of

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420 Our data revealed that the Toledo court-annexed mediations were more quickly resolved than the Columbus cases conducted by private sector mediators, with no reports of decreased satisfaction levels by the respondents. We have no explanation for this difference. Even the shorter Toledo mediations frequently required more than one mediation session.

421 This is due to the fact that family issues are difficult to isolate. For example, the issues of divorce and custody are closely linked. They can be viewed as "polycentric" problems which can be solved in many ways but are without precise legal rules to govern them. See Rogers & McEwen, supra note 4, § 12.2, at 4, n.18 (citing Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 394–404 (1978)). Lawmakers approach custody disputes in tandem with divorce proceedings when they attempt to protect the children involved in these matters. See id. at § 12:02, at 229–30.
public court-annexed mediation programs. The courts certainly have a significant stake in resolving contested cases in mediation and controlling costs. If the courts’ interests in docket reduction takes precedence over mediation’s values for free party choice of settlement, trial, or other methods of resolving the dispute, many of mediation’s benefits will be compromised.

Administrators of court programs may be tempted to assign court employed mediators high caseloads. Although this would solve the short-term problem of docket congestion, it would not yield positive long-term results. Because mediation is intense and tiring work, mediators may become exhausted by intervening in family problems day after day. Obviously, when caseload pressures become overwhelming, the quality of services provided will suffer. Prior studies of court-annexed mediation indicate that in some programs one-quarter to one-third of the participants felt rushed, and that the process required more time.\(^4\) This perception has a negative effect on client satisfaction rates. Cursory discussion of issues also jeopardizes the parties’ chances of achieving a satisfactory, lasting outcome.

In addition, mediators may be tempted to increase settlement pressure on the parties when the courts issuing their paychecks press for high agreement rates. The court’s agenda can influence mediators to become more directive. Settlement-focused mediation risks diluting mediation’s benefits of enhanced, more therapeutic communication and informed bargaining.\(^4\)\(^3\)

Court-annexed programs face significant problems because the cases that judges most want to divert from their dockets are often the cases that are least likely to settle in mediation. The protracted, convoluted case of *Stockwell v. Stockwell*\(^4\)\(^2\) provides such an example. In that case, a mother fled from Idaho to Connecticut with her two daughters. Once in Connecticut, she changed her children’s names in order to avoid complying with her ex-husband’s court-ordered visitation rights. Her former husband had to search for several months to find the children.

\(^4\)\(^3\) See id. at 28 (stating that parties view the out-of-court process of mediation as more humane than the parallel in-court legal process); id. at 24–25 (finding that mediation is most successful when more time is devoted to discussion of settlement terms and less to coaching spouses on negotiation).
\(^4\)\(^2\) 775 P.2d 611 (Idaho 1989).
During the subsequent proceedings, the court stated that it believed that unless the father was awarded custody, he would never see the children again. The court further noted that the proceedings had been "unusually acrimonious and expensive," and that the parties were placing their interests above the best interests of the children. Therefore, the court ordered mediation before authorizing the continuation of trial court proceedings.

The extraordinarily high levels of longstanding distrust and conflict in this case do not bode well for the eventual success of mediation. Research indicates that clients choosing divorce mediation were significantly more likely to believe their spouses had integrity, were fair-minded, and had ability to cooperate regarding the children than did those rejecting mediation. Mediation clients also seemed less likely to project all blame for the failure of their relationships onto an ex-spouse, and they were more willing to admit that they shared some responsibility for the breakup. Mediation participants who obtained no benefit from the mediation process were more likely to be divorcing in reaction to an angry, demeaning, emotionally unstable, or substance-abusing spouse than were successful mediation clients.

It is a rather safe bet that the Stockwell litigants had little mutual trust, respect, ability to cooperate, or recognition of mutual responsibility for the divorce. One or both of the parties may have been psychologically impaired or angry. Further, given the court's comments about the need for a change of custody, the ex-husband had little incentive to cooperate or compromise. This constellation of factors should elicit sympathy for the plight of the mediator in the case, who has been assigned an extraordinarily difficult job.

Some contentious, thorny custody cases that drain judicial time and energy do resolve in mediation. For example, in the Toledo Study discussed in this article, mediators felt that the judges and referees sent very difficult cases to them, in which

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425 See id. at 613.
426 Id. at 615.
427 See id.
428 See Kelly & Gigy, supra note 319, at 269.
429 See id. at 269–70. A more favorable view of one's spouse may encourage one to utilize mediation proceedings in order to terminate a marriage. See id.
430 See id. at 277. These couples would only remain in mediation for the preliminary stage of the process. See id.
the parents were seriously at odds about child custody. In spite of the level of difficulty, internal reports show that about half the cases referred to mediation resulted in settlement. Studies of other mediation programs show comparable and higher settlement rates.

These statistics also show that the "mediation success" glass is half empty, as well as half full. Of the cases referred to the program, 47.2% did not settle. Standard mediation alone is unlikely to serve the goals of society and the courts in resolving the most difficult, contentious cases. The cases that tend to fail to settle in mediation are the same high conflict divorces and separations that frustrate the system, draining court time and en-

431 See Descriptive Study of Children, supra note 50, at 9.
432 See Memorandum from Paul J. Langevin to Michelle MacFarlane, Judge Galvin, and Judge Yarbrough (Jan. 15, 1992) (on file with author). Of 125 closed cases handled from April 1990 to December 1991, 51 reached full agreement (40.8%) and 10 reached partial agreement (8%). Fifty-nine did not reach agreement (47.2%). The status of the remaining 4% was unsure or services were refused. An earlier study of 99 cases found over 75% of those responding to a survey felt mediation was beneficial. See Memorandum from Paul J. Langevin to Michelle MacFarlane, Judge Galvin, and Judge Yarbrough (July 29, 1991) (on file with author).
433 See RENEGOTIATING FAMILY RELATIONSHIPS, supra note 8, at 178-79 (reporting that in the Charlottesville Mediation Project, 77% of the families in mediation reached a settlement, whereas only 28% of the families in the litigation track reached a settlement); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 271-73 (1992) (noting that nearly all high conflict cases were resolved through negotiations, some of which were a result of court-annexed mediation); Charlene E. Depner et al., Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Models, 32 FAM. & CONCILIATION CTS. REV. 306, 308 (1994) (noting that mediation outcomes vary from agreement to impasse but that most clients are satisfied with their sessions either way); Mary Duryee, Mandatory Court Mediation, Demographic Summary and Consumer Evaluation of One Court Service: Executive Summary, 30 FAM. & CONCILIATION CTS. REV. 260, 261 (1992) (stating that in a study done in California in which an average of one-third of all couples filing for dissolution were referred to a mediation program, 76% came to full or partial agreement; the families usually took part in two to three sessions); Joan B. Kelly, A Decade of Divorce Mediation Research: Some Answers and Questions, 34 FAM. & CONCILIATION CTS. REV. 373, 375 (1996) (noting that, according to studies, mediations result in agreement 50% to 85% of the time) (citations omitted); Kelly & Gigy, in MEDIATION RESEARCH, supra note 319, at 273 (reporting a 57% success rate for mediation in the North Carolina mediation study and mentioning that mediation success usually ranges between 40% to 70%, according to studies); Alan Slater et al., Client Satisfaction Survey: A Consumer Evaluation of Mediation and Investigative Services: Executive Summary, 30 FAM. & CONCILIATION CTS. REV. 252, 254-55 (1992) (discussing clients' generally positive evaluations of mediation services).
44 See Michael E. Lamb et al., The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment, 35 FAM. & CONCILIATION CTS. REV. 398, 396 (1997) (discussing high-conflict parents who take up excessive
Prior research indicates that the high conflict divorcing subgroup consists of couples who often have great ambivalence about separation. Many suffer from personality disorders or psychopathology. These parents are not well-equipped to protect their children from the emotional fallout of divorce. The adults are too involved in their conflict to be objective or rational in their interpersonal dealings or perceptions of each other. They spend a great deal of energy defending themselves against actual or perceived attacks by the other, both emotional and physical. Distrust is severe. The parents struggle to meet their own emotional needs and are often unable to separate their own needs from the needs of their children. The negative characteristics of the former partner are exaggerated and the positive aspects go unrecognized. This is often due to a need to vilify the other to justify and lessen the pain of the breakup. The psychological dynamics contributing to high conflict divorces are not amenable to correction by attorney negotiation or through a trial. Traditional mediation is also less likely to be successful with these cases.

Despite these obstacles, society and the court system need to devote significant efforts and resources to help high conflict parents resolve their deep-seated problems. Some of the motives for helping high conflict families are altruistic, while others are more self-serving. They include the desire to rescue parents and children from a very difficult situation, as well as the hope that the public will experience collateral financial benefits in the long run. Children caught in high conflict situations have difficulty

judicial and social resources).

See id.

See id. (noting that high-conflict couples often have an affinity toward anger and distrust, verbal or physical aggression, and confusing their children's needs with their own).

See id.

See JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 89–90 (1988) (discussing the reactions of confused spouses to divorce, and mentioning that these spouses seek revenge and protection from the other party).

See id. at 91 ("Some parents need to protect their children from what they perceive the spouse as having done to them during the separation."). Parents project their own helplessness onto their children. See id.

See id. at 90–91 (describing parents who try to portray their partners as dangerous and project their anger onto them).
later in life in forming healthy, stable future relationships. These children also have greater chances of developing serious emotional and behavioral problems than do other children, requiring more mental health and other school and community resources. If parents were helped to resolve the issues fueling the conflict, the drain on society and the courts could be lessened.

Intensive therapeutic, problem solving mediation-type interventions have had encouraging results in handling highly conflicted separations. These kinds of interventions take a fair amount of professional time, averaging from seventeen to twenty-seven hours, depending on the program structure. Follow-up studies show high—up to 80%—rates of agreement and good follow-up with greatly reduced rates of relitigation. Given these benefits, the investment seems well worth the cost.

Research concerning the effectiveness of various models of dispute resolution processes for different types of cases is now substantial enough to permit us to effectively direct public resources and services toward these models. A two-stage court-annexed mediation model, using both traditional mediation and intensive intervention for intractable conflicts, is a viable option that holds benefits for the parties, the children, and the court system.

Many divorce and custody cases are resolved through an agreement by the parties or through simple attorney negotia-

\[441\] See Lamb et al., supra note 434, at 396 (noting that, considering the stress, it is remarkable that the children do not show even more severe psychopathological symptoms).

\[442\] See id. (noting that children required a disproportionate share of mental health resources).

\[443\] See Johnston & Campbell, supra note 438, at 198 (stating that a combination of counseling and mediation are most effective for high-conflict families when they are carried out simultaneously rather than separately).

\[444\] See Pearson & Thoennes, in Mediation Research, supra note 5, at 18 (stating that nearly 80% of child support cases in a Delaware study resulted in settlement; this was the highest agreement rate; other studies showed 40% agreement rates). Evidence on compliance and relitigation was mixed. See id. at 21. In the Custody Mediation Project, 80% of the couples reported compliance with the agreement by their spouse. See id. Only 60% of those who had litigated in court reported similar compliance. See id. In the Divorce Mediation Research Project, results were along the same lines, although the difference in compliance was not as sharp. See id. With respect to relitigation, it was less common among successful mediation clients than litigating clients in the Custody Mediation Project. See id. Results differed in the Divorce Mediation Research Project, however, where relitigation was prevalent amongst both groups. See id. at 21–22.
tions. These cases take little court time and give rise to minimal concern about the need to protect the children, as the parents can normally be presumed to be capable of attending to their children's distress and their needs. Disputes that are not easily resolved could be referred to traditional mediation early in the life of the case. Most cases should be sent to mediation, since blanket exclusion based on case characteristics cannot be supported by the evidence to date. Program rules should allow easy, inexpensive opt-out provisions for parties who feel endangered by participation.\footnote{See McEwen et al., supra note 30, at 1375–94 (advocating the position that lawyers' presence in mediation proceedings would lead to optimal legal consequences for all those involved).} Attorneys for the parties should be permitted to attend mediation as an additional safeguard of fairness.\footnote{Situations in which parties live far apart could be excluded or handled by telephone or electronic mediation proceedings.}

Mediation sessions should be confidential. Allowing mediator reports to be made to the court increases settlement pressure without justification. In addition, mediators do not gather sufficient factual information on which to base an opinion regarding relative custodial fitness. Mediation involves only one party's unsubstantiated word against the other's. The mediator does not interview witnesses or gather facts or information needed to make an intelligent, informed recommendation as to the outcome. If mediation remains a consensual, non-pressured process, it should prove to be a helpful intervention for many of the cases that do not resolve in the initial stages.

Using volunteer mediators, or mediators who agree to charge very low fees and grant fee waivers to those who cannot afford to pay, will allow open access to the mediation program. A volunteer program avoids the risk of bureaucratization and quality control limitations faced by programs hiring full-time mediators. Mediator satisfaction advances quality control. If a volunteer ceases to find mediation rewarding, he or she is far more likely to quit the program than is an employee who needs the pay and benefits. In addition, using volunteers minimizes the cost to the courts of establishing a dispute resolution program.

The money saved by recruiting volunteers to provide initial mediations can be redirected to establish intense, therapeutic
services combining mediation with evaluation. Unlike standard mediation, confidentiality would not necessarily be guaranteed in the intense mediation/evaluation model. The parents and children would initially be evaluated to clarify the sources of the unrelenting conflict. Counseling would be provided as necessary, followed by problem solving discussions. If an agreement were reached, the results could be presented to the court and confidentiality would not have to be breached.

If no resolution resulted from therapeutic mediation, the case must be adjudicated. Custody evaluation could continue, drawing on the information gathered about the family previously and adding new information as needed. The recommendations flowing from the evaluation would be made available to the parties, their attorneys, and the court. The evaluators could be called as witnesses and would be subject to cross-examination.

Most courts already have custody investigation and evaluation components. Reworking the service-delivery and training models to produce a different type of program, focused far more on problem-solving than on choosing one parent over the other, does not necessarily have to be substantially more expensive. There are no easy answers to the dilemmas faced by our family courts on a daily basis. The current system is costly for both the courts and the litigants. Court investigations and independent evaluations are expensive. Guardians ad litem for the children are often appointed in custody battles at public expense for the indigent. If we foster new approaches, including traditional and therapeutic mediation, we may find that money is invested for little or no return, particularly in the most difficult cases. Even so, new ideas are worth trying, and preliminary findings are encouraging. The worst that can happen is that cases will not be resolved any more effectively and that as a society we will end up right where we started. Improvement, however, is a worthy goal. If we do not invest time, money, and resources in experimenting with change, we remain doomed to continue with "business as usual"—a scenario that is far from ideal.

**CONCLUSION**

The American legal system has historically valued the ideal
of access to justice for all members of society. Until recently, court adjudication was recognized as the primary model for dispensing justice. Within approximately the last twenty years, the use of mediation has been advanced as a different alternative for fair, satisfactory resolution of disputes through a participatory process leading to a consensual outcome.

Courts have encouraged greater use of mediation with hopes of controlling dockets and reducing the delays and costs of modern litigation. Domestic relations courts also aspired to reduce the negative impact of bitterly fought divorce and custody disputes on children by diverting cases to a forum seen as more capable of resolving the underlying conflicts between parents than traditional adjudication or attorney negotiation.

Totally voluntary mediation programs did not handle a sufficient volume of cases to have any significant impact on the court system's goals. Mandatory mediation became more appealing, especially as research showed continued participant satisfaction even when mediation was involuntary.

Unfortunately, as courts have demonstrated increased interest in adding mediation to the range of available dispute resolution services, money for funding new programs has become less readily available. Funding problems have led to the passage of statutes and rules allowing courts to require parties to use and pay for mediation as a prerequisite to having their cases heard in court. An increasing number of litigants, both in general civil and family law cases, have been compelled to pay for mediation in addition to the other costs of litigation.

In the civil case context, this practice may be more expedient than wise. In the domestic relations case context, it raises serious concerns about functional denial of the due process guarantee of access to the courts where parties cannot afford both mediation and litigation. In addition, the practical reality of the significant financial constraints facing most divorcing parties makes a party payment approach punitive. It clearly places the interests of the court in case diversion ahead of the litigants' needs and interest in free choice of dispute resolution options. The weight of argument and preliminary research favor publicly funded divorce mediation as the best way to guarantee equal access to both alternative dispute resolution and the courts.

To date, empirical research has not provided guidance for screening cases ahead of time for suitability for mediation. In
fact, using case characteristics such as conflict level or the presence of domestic violence, which have been widely adopted as criteria for excluding cases from mediation, is not supported by the evidence. Mediation also compares favorably with attorney negotiation on measures of participant satisfaction. The research results further support public policies encouraging broad access to free or easily affordable court-annexed divorce mediation.

Policy makers have not fully explored the feasibility of recruiting volunteers as divorce mediators. Some evidence lends support to the workability of this approach. If courts can find inexpensive ways of providing family mediation, funds could be diverted to explore the efficacy of specialized programs designed to maximize the chances of attaining resolution of the difficult, highly acrimonious cases. These matters tax the resources of the courts and the patience of the judges, yet they are seldom truly resolved by court decrees. Such programs would likely require additional resources, but could be supported in part by funds currently used to provide custody investigation and evaluation services. Cases that cannot be resolved and are not fit for non-adversarial settlement can proceed to trial instead.

The recent increase in divorce rates has strained the ability of courts to deal with the negative sequelae of shattered families, both with respect to the volume of work and the quality of outcomes. No one is naïve enough to suggest that the many complex problems engendered by massive social change are susceptible to easy resolution. But new approaches are worth trying, for the benefit not only of the court system, but of the litigants as well—regardless of their ability to pay.
