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# Of Grids and Gatekeepers: The Socioeconomics of Mediation

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# ARTICLES

## OF GRIDS AND GATEKEEPERS: THE SOCIOECONOMICS OF MEDIATION

*Robert Rubinson\**

### I. INTRODUCTION

Mediation scholars have long debated which mediator “style” or “model” is correct. The origin of the debate arises from a foundational piece of scholarship by Leonard Riskin. Riskin proposed a “grid” of mediator orientations comprised of what came to be known as “facilitative mediation” and “evaluative mediation.”<sup>1</sup> A more recent addition to the grid—and one that is almost universally recognized as a distinct model—is “transformative mediation.”<sup>2</sup> These three models are so embedded in the literature of mediation that they have been called “the big three.”<sup>3</sup>

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<sup>1</sup> Leonard Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994); Leonard Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Despite its extraordinary success, or perhaps because of it, Professor Riskin himself has subsequently expressed reservations about how his “grid” has come to be used. Leonard Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

<sup>2</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2004). There are other “named” approaches to mediation in the literature, and, while sometimes offering important perspectives, they have not become embedded in the professional consciousness as the three mentioned in the text. For examples of these others approaches, see KENNETH R. MELCHIN & CHERYL A. PICARD, *TRANSFORMING CONFLICT THROUGH INSIGHT* (2008); JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2001). There are substantial points of agreement among “Insight Mediation,” “Narrative Mediation,” and “Transformative Mediation,” albeit with different emphases in the roles mediators undertake. For a discussion of these commonalities, see Cheryl Picard & Janet Siltanen, *Exploring the Significance of Emotion for Mediation Practice*, 31 CONFLICT RESOL. Q. 31, 33–34 (2013).

<sup>3</sup> Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 195 (2009). While this Article adopts the almost universal distinctions among these approaches, some have noted that they simplify debates about what these approaches mean. Lorig Charkoudian et al., *Mediation by Any Other Name Would Smell as Sweet—Or Would It? The Struggle to Define Mediation and Its Various Approaches*, 26 CON-

The influence of Riskin's work cannot be overstated. It has resonated within the community of mediation scholars and practitioners, suffusing discussions about what constitutes best practices in the field,<sup>4</sup> scholarship,<sup>5</sup> and law school texts.<sup>6</sup> The debate is sometimes framed not as choices, but as what is "true" mediation.<sup>7</sup>

There is, however, a radical disconnect between the rhetoric and reality of mediation. This disconnect has to do with the nature of mediation "on the ground" in contrast to the way a "typical mediation" is presented through scholarship, texts, and trainings. The usual way of approaching mediation is that participants have adequate time to engage in mediation and to secure the mediator of their choice. Participants have resources aplenty, enabling mediators to practice at a leisurely pace and facilitating their ability to reap the benefits that mediation has to offer.<sup>8</sup> These techniques include, among others, transforming "positions" into "interests,"<sup>9</sup> enabling parties to engage in creative problem-solving,<sup>10</sup> crafting detailed agreements that are more flexible and finely tuned to the needs of participants than a judge could order,<sup>11</sup> and allowing par-

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FLICT RESOL. Q. 293, 313 (2009) (noting a lack of agreement as to defining "approaches to mediation").

<sup>4</sup> JOHN W. COLLEY, *THE MEDIATOR'S HANDBOOK* 31–34 (2d ed. 2006).

<sup>5</sup> *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 29–91 (Jay Folberg et al. eds., 2004). This anthology contains three articles that argue, respectively, that facilitative, transformative, and evaluative styles of mediation are best.

<sup>6</sup> A popular text used in both law school and non-law school contexts addresses the debate at some length. KIMBERLEE KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 46 (3d ed. 2004). For texts that do the same, although directed to primarily a law school audience, see DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 112–15 (2d ed. 2010); JAMES ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 140–48 (2d ed. 2006); LAURENCE J. BOULLE ET AL., *MEDIATION: SKILLS AND TECHNIQUES* 12–14 (2008). These texts have assumed particular importance as mediation has increasingly become an important part of law school curricula. See Michael B. Mushlin & Lisa Margaret Smith, *The Professor and the Judge: Introducing First-Year Students to the Law in Context*, 45 J. LEG. EDUC. 149, 167 (2014).

<sup>7</sup> Kimberlee Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 80 (1998) (characterizing evaluative mediation as "off the mediation map"); Lisa P. Gaynier, *Transformative Mediation: In Search of a Theory of Practice*, 22 CONFLICT RESOL. Q. 397 (2005). Some commentators, however, do reject such "purity" of models as misleadingly rigid and doctrinaire. See, e.g., Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247.

<sup>8</sup> See *infra* text accompanying notes 116–42.

<sup>9</sup> The text that established this distinction—and a text that has proven enormously influential in both mediation and negotiation literature—is ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (rev. ed. 2011).

<sup>10</sup> Jay FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1995); Riskin, *supra* note 1, at 111–14.

<sup>11</sup> Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 416 (1997).

ties to be in control of their own destiny.<sup>12</sup> These strategies, techniques, and conceptions, as proponents of mediation remind us, distinguish mediation from litigation not just in terms of emphasis, but, rather, in terms of the foundations of how to conceptualize, and thereby resolve, disputes.<sup>13</sup>

The irony, though, is that parties who are least in control of their own destinies to begin with—those with the fewest resources to command in a society where resources often define empowerment in civic and private life—are least likely to enjoy the fruits of mediation.<sup>14</sup> The mediation available to such individuals is the merest shadow—if that—of the promise of mediation.<sup>15</sup> With these institutional constraints, parties and mediators have little time for leisurely rounds of creative problem-solving. Particularly in court-annexed programs—the places where most mediations take place—time is short, resources are limited, and the choice of mediator is non-existent.<sup>16</sup> Moreover, the actuality or potential of retaining attorneys—often assumed—is meaningless for those who cannot retain private or legal services lawyers to begin with.<sup>17</sup> These litigants thus must enter mediation through one gate only, and what awaits them beyond that gate is out of their control.

These circumstances limit the application of the “models” debate. Facilitative and transformative models of mediation, or some combination thereof, might be the most effective mediation or the only type of mediation that deserves the name “mediation.”<sup>18</sup> Evaluative mediation, however, tends to be the most efficient, and efficiency is a primary goal of court-connected mediation, even if the rhetoric of such programs suggests otherwise.<sup>19</sup> The “best” mediation, then, is not, for many litigants, a possible one. The debate about best practices of mediation thus must be informed by an un-

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<sup>12</sup> This core value of mediation is usually framed as “self-determination.” The Joint Code—Standards of Conduct, the preeminent set of ethical norms in mediation, lists “self-determination” as its first “standard.” For an extensive discussion of “self-determination” and court-connected mediation programs, see Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

<sup>13</sup> See *infra* text accompanying notes 40–51.

<sup>14</sup> See *infra* text accompanying notes 52–115.

<sup>15</sup> This phrase is from an influential book that describes the idea of “transformative mediation.” BUSH, *supra* note 2.

<sup>16</sup> See *infra* text accompanying notes 64–105.

<sup>17</sup> See *infra* notes 164–69.

<sup>18</sup> See *infra* text accompanying notes 46–47.

<sup>19</sup> See *infra* text accompanying notes 80–91.

derstanding of the socioeconomic contexts in which many mediations take place.

These are troubling facts. Some existing literature does explore how mediation must be viewed both in terms of its social situatedness and the purposes for which it is undertaken<sup>20</sup> and there are critiques of the limitations of mediation among low-income participants,<sup>21</sup> but the crucial importance of the interaction of “models” with what many low-income participants must and do experience warrants far more scrutiny. While texts examine “specialized applications of mediation” in substantive areas, such as in agricultural disputes and sports,<sup>22</sup> and in different countries and cultures,<sup>23</sup> virtually no textbooks and few mediation trainings allude to mediation in court-annexed contexts except in passing. This situation at best betrays the promise of mediation and at worst damages those with the fewest resources and, paradoxically, the most to lose. This not only might create “bad mediation,” but also a means to intensify conflict and promote injustice.<sup>24</sup>

This Article will survey these issues in three parts. First, it will offer an overview of mediation models not so much with a view to assessing which is the “best,” but, rather, with a view to examining what assumptions about time and resources are embedded within each.<sup>25</sup> The Article will offer an overview of mediation as practiced in a binary universe: that of private mediation and that of court-annexed mediation. The Article will also examine the day-to-day life of low-income litigants, and how their lives call into question bedrock assumptions about mediation. The Article then comes full circle and returns to models of mediation. This time, however, the examination will be in light of the impact that the inequality of resources has on what model is most likely to be followed when resources are limited. The Article concludes with recommendations for how the realities of mediation “on the ground” can inform best practices of mediation.<sup>26</sup>

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<sup>20</sup> See *infra* text accompanying notes 118–19.

<sup>21</sup> See *infra* text accompanying notes 144–51.

<sup>22</sup> Many texts do discuss mediation in different substantive areas. KOVACH, *supra* note 6, at 479–505 (describing “specialized applications of mediation, “such as agricultural disputes, employment, religious institutions, and sports teams”); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 22–33 (3d ed. 2003) (same).

<sup>23</sup> MOORE, *supra* note 22, at 33–42 (describing mediation in Asia, Australia, New Zealand, Melanesia, Latin America, Africa, the Middle East, and Europe).

<sup>24</sup> BERNARD MAYER, *THE DYNAMICS OF CONFLICT* 16 (2d ed. 2012) (“time constraints” and “physical settings” might have an impact on the intensity of conflict).

<sup>25</sup> See *infra* text accompanying notes 35–51.

<sup>26</sup> See *infra* text accompanying notes 179–92.

## II. IDEALIZED MEDIATION

A. *How Is Mediation Defined?*

So how is mediation defined? There is no consensus,<sup>27</sup> although the following represents one effort:

[M]ediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between parties or terminate relationships in a manner that minimizes costs and psychological harm.<sup>28</sup>

A more succinct definition, found widely in the literature, is that mediation is a “process whereby a third party neutral (or two neutrals when there are co-mediators) acts as a facilitator to assist in resolving a dispute between two or more parties.”<sup>29</sup> State statutes offer variations of these themes.<sup>30</sup>

One notable aspect of these definitions is how general they are. They represent non-controversial premises which many mediators would agree on: mediation is a voluntary process through which participants can choose to reach a resolution or not;<sup>31</sup> a mediator is not a “decision-maker” who can impose outcomes on participants;<sup>32</sup> a mediator must be unbiased and free of conflicts of interest;<sup>33</sup> and a mediator may engage in a “private cau-

<sup>27</sup> Charkoudian, *supra* note 3, at 313.

<sup>28</sup> MOORE, *supra* note 22, at 15.

<sup>29</sup> KOVACH, *supra* note 6, at 14.

<sup>30</sup> Virginia is a representative example: mediation is “a process in which a neutral facilitates communication between the parties, and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.” VA. CODE § 8.01-576.4 (2010).

<sup>31</sup> For example, the Model Standards of Conduct for Mediators—the preeminent code crafted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution—identifies “self-determination” as its first standard. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (A.B.A. ET AL., 2005) [hereinafter MODEL STANDARDS]. The Model Standards define “self-determination” as “the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.” Participants also have the power to withdraw from the process if they so choose. *Id.*; see also Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1247 (2009).

<sup>32</sup> This idea also relates to the idea of “self-determination.” *Id.*

<sup>33</sup> Model Standards, *supra* note 31, Standards II & III.

cus” in which the mediator meets separately and confidentially with individual mediation participants.<sup>34</sup> Thus, a mediator’s success emerges from the use of a range of techniques and not from the imposition of some externally granted authority.

### B. *Ideals of Models of Mediation*

A general definition, however, does not reflect the debate about how best to conceptualize and practice mediation. What follows is a brief overview of this “models” debate as well as an overview of these models’ similarities and differences.<sup>35</sup>

#### 1. Evaluative Mediation

Evaluative mediators take an active role in conducting mediation. One commentator describes the evaluative approach as “establish[ing] an expectation that the mediator will make assessments about the conflict as well as its resolution and communicate those assessments to the parties.”<sup>36</sup> While evaluative mediators often predict the strength of participants’ cases and anticipated outcomes in adjudication, evaluative mediation can involve freely offering other types of assessments, which might include whether agreements are “fair” in a non-legal sense<sup>37</sup> or whether agreements embody the most appropriate resolutions of different aspects of a conflict.<sup>38</sup>

That said, the premise of evaluative mediation is that participants should know what will likely happen in court. This model thus makes several assumptions. One is that a mediator is in a position to make meaningful assessments about the legal merits of different positions in the case. Another is that mediators are find-

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<sup>34</sup> For discussions of this common mediation technique, see MOORE, *supra* note 22, at 369–77; KOVACH, *supra* note 6.

<sup>35</sup> It is also noteworthy that the following discussion assumes a “purity” that few mediators approach in practice. In other words, it is common for mediators to be pragmatic, incorporating a range of “styles” consciously or subconsciously as circumstances warrant. See, e.g., Stempel, *supra* note 7.

<sup>36</sup> L. Randolph Lowry, *Evaluative Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 72 (Jay Folberg et al. eds., 2004).

<sup>37</sup> For a sustained defense of an evaluative approach, see Lowry, *supra* note 36.

<sup>38</sup> An interesting way of thinking through this issue is in Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 *HASTINGS L.J.* 703 (1997). Waldman proposes three models: “norm generated,” “norm educating,” and “norm advocating.” “Norm advocating,” in Waldman’s conception, is a mediator who acts as a “safeguarder of social norms and values” —a role that resonates with the transformative approach. *Id.* at 150.

ers of fact because predictions about the application of law presuppose establishing facts that would bring the law into play.

Proponents of evaluative mediation view this process as “efficient”: “evaluation expressed at the appropriate point shortens the time of dialogue and moves the mediation toward settlement.”<sup>39</sup> An evaluative mediator thus assumes an active role in order to promote settlement.

## 2. Facilitative Mediation

Facilitative mediators hold that participants, not mediators, should define and assess the nature of their own conflicts and how best to resolve them.<sup>40</sup> Such mediators facilitate the process, and, in doing so, argue that the assessments characteristic of evaluative mediation are inappropriate: evaluation of legal positions, crafting issue identification, or assessing fairness of proposed resolution are inconsistent with the role of a mediator.<sup>41</sup>

A specific characteristic that distinguishes facilitative mediation from evaluative mediation relates to its treatment of the past. Litigation is concerned with what has happened in order to apply legal rules, which, in turn, generates a result in accordance with law.<sup>42</sup> To put it somewhat differently, “fact finders” in litigation are historians, examining “evidence” to predict what happened.

In contrast, facilitative mediators encourage a forward-looking orientation. Sara Cobb and Janet Rifkin offer a compelling description of this process in terms of narrative theory: “[t]he mediator’s interest in the story is not in the past but in the present and the future; thus the story is an instrument through which mediators may shift attention from retrospective positions and accounts to prospective stories, effectively disconnecting the problem from its history, from its roots.”<sup>43</sup>

<sup>39</sup> Lowry, *supra* note 36, at 77.

<sup>40</sup> Leonard Riskin offers a succinct statement of this idea: A “mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. . . . [T]he facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.” Riskin, *supra* note 1, at 111–14.

<sup>41</sup> This would not extend to reporting of child abuse or other circumstances where disclosure is mandated or permitted by applicable rules of ethics.

<sup>42</sup> I have explored this idea in some detail in Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 843–46 (2004).

<sup>43</sup> Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 STUD. L. POL. & SOC’Y 69, 71 (1991). This, however, is not an absolute rule, and facilitative mediators freely acknowledge that exploration of the past, and the corresponding catharsis that might arise from that exploration, can be an



Moreover, facilitative mediation, quite explicitly, seeks to set aside the dominance of legal norms in conventional, litigation-based views of conflict resolution. An early and influential articulation of this was by Lon Fuller in 1971. Fuller viewed mediation as a means to liberate participants from the “encumbrance of rules”: it “accept[s], instead, a relationship of mutual respect, trust[,] and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.”<sup>44</sup>

Consider, then, the profound differences between evaluative and facilitative mediation. Facilitative mediation focuses on the future and thereby sets aside law—Fuller’s “formal prescriptions laid down in advance.” In contrast, evaluative mediators evaluate, and the crux of the evaluation is law—the “formal rules” that Fuller and others characterize as exactly what mediation is not. “Facts” are defined by mediation participants, and what facts are “relevant” is a decision made by participants whether or not they would be admissible under rules of evidence.<sup>45</sup>

Adherents of the “facilitative” model heatedly criticize evaluative mediation. In an article tellingly entitled “The Top Ten Reasons Why Mediators Should not Evaluate,” Lela P. Love argues, among other things, that evaluators engage in an adversarial process virtually indistinguishable from litigation and, thus, misleadingly label themselves mediators when they are not.<sup>46</sup> Moreover, facilitative mediators, unlike evaluative mediators, do not cite efficiency as a legitimate goal or benefit of mediation. Indeed, a crucial issue is how facilitative mediation—with its expansive, problem-solving orientation—can be done in a brief period of time—a topic to which this Article turns below.<sup>47</sup>

### 3. Transformative Mediation

Transformative mediators assume an even less active role than a facilitative mediator. Robert A. Baruch Bush and Joseph A. Fol-

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integral part of mediation. See, e.g., Moore, *supra* note 22, at 162–69; Kovach, *supra* note 6, at 48–49.

<sup>44</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325–26 (1971).

<sup>45</sup> For an extended discussion of this idea, see Robert Rubinson, *Mapping the World: Facts and Meaning in Adjudication and Mediation*, 63 ME. L. REV. 61, 78–82 (2010).

<sup>46</sup> Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 937–38 (1997). Love argues that an evaluative process needs to be “properly advertised” and “accurately labeled.” *Id.* at 948.

<sup>47</sup> See *infra* text accompanying notes 131–42.

ger, the founders of transformative mediation, characterize transformative mediation as follows:

The mediation process contains within it a unique potential for transforming conflict interaction and, as a result, changing the mindset of people who are involved in the process. The transformative potential stems from mediation's capacity to generate two important dynamic effects: empowerment and recognition. In simplest terms, *empowerment* means the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life's problems. *Recognition* means the evocation in individuals of acknowledgment, understanding, or empathy for the situation and views of the other . . . . [P]arties are helped to transform their conflict interaction—from destructive to constructive—and to experience the personal effects of such transformation.<sup>48</sup>

A critical characteristic of transformative mediation is that it is not settlement-driven. While settling conflict might be a byproduct of the process, Bush and Folger repeatedly note that the mediation process is about “empowerment” and “recognition” shifts, not the “settlement” of a particular dispute.<sup>49</sup>

There is another radical yet more subtle dimension of the transformative model. Its goal is not that the mediator or participants should develop or adhere to “rules” whether they are, in Fuller's conception, laid down “in advance” or not. Rather, the mediator only follows where participants want to go.<sup>50</sup> As opposed to facilitative mediators, transformative mediators do not encourage participants to look to the future, or to brainstorm, or to problem-solve, or to focus on “interests” rather than “positions.” Moreover, while a transformative mediation might lead to “settlement” or adherence to or development of “rules” of one kind or another, this is not the mediator's concern.<sup>51</sup> A “goal,” if it can even be characterized as such, is embedded in the name “transformative”: a hope, if it happens, that the quality of participants' interaction will be transformed in a positive way. Resolving a dispute, then, might happen, but it is not a goal of transformative mediation.

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<sup>48</sup> BUSH & FOLGER, *supra* note 2, at 22–23.

<sup>49</sup> *Id.* at 87.

<sup>50</sup> *Id.* at 68 (referring to a mediator's goal to “allow” movement rather than trying to “move parties forward”).

<sup>51</sup> *Id.* at 239–47 (critiquing “settlement-oriented mediators” and “practices”).

## III. THE SOCIOECONOMICS OF MEDIATION

Proponents of models of mediation—whichever those models might be—rarely describe them in the context of the minimal financial resources available to many mediation participants. In reality, there is a socioeconomic divide between those who can afford private mediators and those who must use court-connected mediation services that offer or mandate either free or lower cost mediation. What follows is a brief overview of these two contexts.

A. *Private Mediation*

Those who have resources need not rely on services available through courts or community organizations. Instead, they can and do buy mediation services privately whether or not a matter is pending in court. As with the legal profession, the world of private mediation ranges from solo or small groups of mediators to large firms.

There are a number of well-recognized firms that offer mediation services. The American Arbitration Association offers an established mediation program with mediators who are “[f]ormer federal and state judges, attorneys with exceptional subject matter expertise, and business owners.”<sup>52</sup> The roster of mediators associated with another organization—JAMS—comprises of retired judges or “high-dollar commercial litigators.”<sup>53</sup> CDR Associates<sup>54</sup> provides services to “leaders and managers in the private sector, government, diverse organizations and public interest groups.”<sup>55</sup> CPR offers neutrals and membership comprised of “industry elite—in-house counsel, attorneys and neutrals handling the most

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<sup>52</sup> *Arbitrators & Mediators*, AM. ARB. ASS'N, [https://www.adr.org/aaa/faces/arbitratorsmediators?\\_afLoop=1381674035117554&\\_afWindowMode=0&\\_afWindowId=fmcttyw6k\\_93#%40%3F\\_afWindowId%3Dfmcttyw6k\\_93%26\\_afLoop%3D1381674035117554%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dfmcttyw6k\\_125](https://www.adr.org/aaa/faces/arbitratorsmediators?_afLoop=1381674035117554&_afWindowMode=0&_afWindowId=fmcttyw6k_93#%40%3F_afWindowId%3Dfmcttyw6k_93%26_afLoop%3D1381674035117554%26_afWindowMode%3D0%26_adf.ctrl-state%3Dfmcttyw6k_125) (last visited Jan. 3, 2016). See also Maurits Barendrecht & Christopher Honeyman, *Dispute Resolution: Existing Business Models and Looming Disruptions*, 20 *DISPUTE RESOL. MAG.* 17, 18 (2014).

<sup>53</sup> Barendrecht, *supra* note 52, at 18. The judge-as-neutral focus is reflected in the acronym “JAMS,” which stands for “Judicial Arbitration and Mediation Service.”

<sup>54</sup> “CDR” stands for “collaborative decision resources.” CDR ASSOCIATES, <http://cdrassociates.org/> (last visited Jan. 3, 2016).

<sup>55</sup> *Id.*

sophisticated commercial matters.”<sup>56</sup> Such organizations have well-developed processes for selecting and paying mediators.<sup>57</sup>

In addition to these large national firms, other groups of private mediators serve defined geographic areas.<sup>58</sup> There are solo private practitioners who mediate exclusively or combine private mediation with other types of professional activities, such as practicing law. Indeed, an increasing amount of literature focuses on how to pursue a mediation practice.<sup>59</sup>

While participants who retain private mediators may not have unlimited resources, they do have enough to accommodate the “leisurely style” of many private mediators,<sup>60</sup> although private mediators do allocate time in line with the ability of parties to pay.<sup>61</sup> There are also searchable websites for consumers who wish to find a private mediator, thus providing some competition among private mediators.<sup>62</sup>

In any event, there is nothing particularly surprising that most private mediators provide services to substantially resourced organizations and individuals: after all, the legal system is, in most re-

<sup>56</sup> *Members*, CPR, <http://www.cpradr.org/Membership/Members.aspx> (last visited Jan. 3, 2016).

<sup>57</sup> For a summary of how CDR, JAMS, and AAA, as well as NASD, handle these issues, see Kathleen M. Scanlon, *A Comparison Chart of Mediation Processes*, 17 ALTERNATIVES TO HIGH COST LITIG. 3 (1999).

<sup>58</sup> An example is the McCammon Group, which primarily serves Maryland, Virginia, and the District of Columbia. THE MCCAMMON GROUP, <http://www.mccammongroup.com/> (last visited Jan. 3, 2016). Fees range from a low of \$200 per hour to \$450 per hour depending on the amount in dispute and where the sessions will take place. *Civil Dispute Fee Schedule*, THE MCCAMMON GROUP, <http://www.mccammongroup.com/fees/civil-dispute-fee-schedule/> (last visited Jan. 3, 2016).

<sup>59</sup> See, e.g., Joseph H. Paulk, *So You Want To Be a Mediator? Realistic Considerations for Attorneys Considering Becoming Mediators*, 35 TULSA L.J. 325 (2000); Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257 (2009); David Plimpton, *The ADR Field and Marketplace: Evolution, Growth, Taking Stock, and Where to From Here*, 32 ALTERNATIVES TO HIGH COST LITIG. 69 (2014); Henry Seiden & Tracey Baker, *Define Yourself—Or Others Will . . . How To Get Started in the ADR Market*, ACRESOLUTION 2010 22.

<sup>60</sup> Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 249 (2002–03) (noting how “there is every reason to believe that private mediations will last significantly longer” than the ones in court).

<sup>61</sup> STACY LEE BURNS, *MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS* 131, 211 (2000).

<sup>62</sup> A prominent example is Mediate.com. MEDIATE.COM (last visited Jan. 3, 2016), <http://www.mediate.com/civil/>.

spects, defined in the same way, with increasing numbers of lawyers representing large businesses.<sup>63</sup>

### B. Court-Annexed Mediation

Increasingly, courts are turning to court-connected mediation as a means to resolve disputes.<sup>64</sup> All fifty states have some form of court-connected mediation<sup>65</sup> and a large percentage of mediations occur through such “public programs.”<sup>66</sup> As we will see, most of these programs are docket-clearing devices<sup>67</sup> in a time of shrinking resources. They have also been subject to scrutiny and critique.<sup>68</sup>

The characteristics of court-annexed programs are often distinct from one another, and there is a risk that an analysis can paint with too broad a brush given that some jurisdictions allocate minimal resources to mediation programs while others do have robust programs in terms of resources and implementation.<sup>69</sup> Nevertheless, there are commonalities, and what follows is an overview of the world of court-annexed mediation based on the socioeconomic status of litigants who participate in them.

<sup>63</sup> I have elsewhere detailed the stratification of the legal profession and its consequences for the administration of justice. Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2004–2005).

<sup>64</sup> SARAH COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* Appendix A (2013–14 ed. 2013); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2007–09 (1999).

<sup>65</sup> There is court-connected mediation in all fifty states (*Court ADR Across the U.S.*, RSI’s COURT ADR RESOURCE CENTER, <http://courtadr.org/court-adr-across-the-us/> (last visited Jan. 3, 2016)) and the federal government (Alternative Dispute Resolution Act of 1998 §§ 3–10, 28 U.S.C. §§ 651–58 (1998)). See also Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185–88 (2003).

<sup>66</sup> Specific statistics on this point are difficult to come by. What evidence there is, however, does suggest an extremely large number. Velikonja, *supra* note 59, at 270 (“a large percentage of disputes, perhaps as many as half, are mediated in free public programs”).

<sup>67</sup> Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQUETTE L. REV. 993 (2012).

<sup>68</sup> J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 226 (alluding to critiques of mediation as “second class” justice); Mordehai Mironi, *Mediation v. Case Settlement: The Unsettling Relations between Courts and Mediation—A Case Study*, 19 HARV. NEGOT. L. REV. 173 (2014); Engler, *supra* note 64, at 2031–2036 (1999); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN’S L. REV. 375 (1999).

<sup>69</sup> Deborah Thompson Eisenberg, *What We Know (and Need to Know) about Court-Annexed Dispute Resolution*, 67 S.C. L. REV. (forthcoming 2016) (describing a study by the American Bar Association regarding the success of court-annexed mediation in Maryland).

### 1. The Cases Low-Income People Mediate

Low-income people experience legal conflict repeatedly in their daily lives. As Stephen Wexler evocatively put it, “poor people are always bumping into sharp legal things.”<sup>70</sup> While some of these “sharp legal things” do not turn into formal judicial or administrative proceedings, many do. Scholars have examined the nature of these cases, often under the category of “access to justice.”<sup>71</sup> The nature of cases handled through court-annexed mediation programs track the types of cases low-income people confront more generally.<sup>72</sup> These include bankruptcy,<sup>73</sup> family law,<sup>74</sup> landlord-tenant,<sup>75</sup> debt collection,<sup>76</sup> and foreclosure.<sup>77</sup> There are also other types of mediated cases apart from these large categories.<sup>78</sup>

There are two ways to handle a large volume of cases. One is to have participants wait to participate with whatever limited number of mediators are available. One observer noticed such an example in Boston’s Housing Court: on one day there were seventy people waiting to mediate in five available rooms.<sup>79</sup> A more common way is to impose brief time frames in which to mediate—a

<sup>70</sup> Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1050 (1970).

<sup>71</sup> A well-known example by a leading scholar in the field is DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004). An earlier “classic” treatment is JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

<sup>72</sup> There have been important studies of court-annexed mediation that distinguish among different types of cases. See, e.g., John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant’s Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 815, 814–15 (1999) (distinguishing among “small claims, domestic relations, and civil”).

<sup>73</sup> Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 430–32 (2009).

<sup>74</sup> Carol J. King, *supra* note 68, at 379.

<sup>75</sup> Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. POVERTY LAW & POL’Y 181 (2003).

<sup>76</sup> These are sometimes called euphemistically “resolution conferences.” Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 27 LOY. CONSUMER L. REV. 179 (2014).

<sup>77</sup> This has been a particularly growing area for mediation. Lydia Nussbaum, *ADR’s Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889 (2013).

<sup>78</sup> See Kristen M. Blankley, *Adding By Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 660–61 (2013) (describing dispute resolution in a small personal injury matter).

<sup>79</sup> Zimmerman, *supra* note 75, at 196. An interesting analogy is lawyers and law firms that can only make a profit through a large “volume” business, which, inevitably, means lawyers can only devote a small amount of time to an individual case. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 117 (1974). For a description of a business model along these lines, see PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 46–66 (1988).

kind of speed mediation. Such a process reduces waiting times and increases the number of matters that are resolved.

## 2. A Primary Purpose for Court-Annexed Mediation: Clearing Dockets

A primary goal of court-annexed mediation is docket control.<sup>80</sup> This point has been made by judges,<sup>81</sup> scholars,<sup>82</sup> administrators,<sup>83</sup> and mediators themselves.<sup>84</sup> The virtues of mediation as a docket control device span a wide range of fora, from state to federal courts,<sup>85</sup> and extending even to courts in other countries.<sup>86</sup>

<sup>80</sup> Boyarin, *supra* note 67.

<sup>81</sup> *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (“[d]iverting cases to mediation would provide a faster and less expensive resolution for the parties and, by reducing the number of cases that go to trial, would permit courts to process cases more efficiently, conserve judicial resources, and allow judge to give more attention to cases requiring their expertise in resolving legal issues”).

<sup>82</sup> See, e.g., Will Pryor, *What’s Wrong with Mediation These Days, and How Can We Fix It?*, 32 ALTERNATIVES TO HIGH COST LITIG. 71 (2014) (“some courts have become addicted to mediation referral as a means of docket control”); Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate “Path,”* 17 OHIO ST. J. ON DISP. RESOL. 379, 413 (2002) (federal “circuit courts are managing their dockets in part by using court mediation programs”); Louise Phipps-Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 335 (2003) (“as more and more courts have embraced mediation, they have done so primarily based on the promise of increased efficiency: the promise that mediation would reduce court dockets, increase settlement rates, and speed up case processing”). This is not a new observation. Owen Fiss, in a well-known article, noted that “settlement”—which he defines as including both ADR and mediation—constitutes a “problematic technique for streamlining dockets.” Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

<sup>83</sup> *How To Prevent Mediation from Running Aground*, 23 ALTERNATIVES TO HIGH COST LITIG. 3, 7 (2005) (quoting a “senior settlement attorney” for the Fifth Circuit Court of Appeals as saying that “appeals court mediation programs exist for docket control purposes”).

<sup>84</sup> Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 378 (2009) (quoting a mediator in court-connected mediation who describes the “expectations of their workplace” are to deliver settlements in a “fraction of the time required to effectively do so”).

<sup>85</sup> Christopher Fugarino, *Mandating Mediation for Cases before the U.S. Court of Appeals for Veterans Claims Can Improve the Efficiency of the Court and the Experience of the Parties*, 16 FED. CIR. B.J. 379, 384 (2007) (“[m]andatory mediation . . . may benefit the [Court] by increasing settlements and reducing the docket”). This goal has even been undertaken in ostensibly unlikely settings, such as criminal courts. Maureen E. Laflin, *Criminal Mediation Has Taken Root in Idaho’s Courts*, 56 THE ADVOCATE 37 (2013) (an Idaho Rule providing for mediation in criminal cases “focuses primarily on case management mediation or facilitated plea bargaining, which are settlement driven in order to save counties money and reduce burgeoning dockets”). An important set of guidelines entitled the National Standards for Court-Connected Programs is also candid in noting in its introduction that a value of mediation is that it “usually requires less time and fewer resources than trials and produces earlier settlements.” NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (CTR. FOR DISP. SETTLEMENT & INST. OF JUD. ADMIN. 1999).

Some sources frame the goal slightly differently by comparing mediation to “settlement conferences.”<sup>87</sup> Empirical studies have examined the degree to which mediation “frees” court time<sup>88</sup> and success in this regard is cited as a means to assess the value of court-annexed programs.<sup>89</sup>

### 3. The Background of the Mediators

Apart from the time limitations under which court-connected mediators operate, the quality of the mediators in court-annexed programs can be wildly variable.<sup>90</sup> Mediators might be placed on court rosters through connections to the bench and bar or in order to *gain* experience, not to *use* their experience.<sup>91</sup> While some mediators are skilled and do their best given the constraints of the programs in which they mediate, others are “experienced” only in court-annexed mediation and are not fully or even partially versed

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<sup>86</sup> Mironi, *supra* note 68, 176 (2014) (in Israel, “under mounting criticism of court inefficiency and excessive delays in litigation, the courts adopted a strategic goal of docket-clearing, which meant expanding and upgrading the courts’ own case settlement services through in-court . . . mediation substitutes”); Connie Reeve, *The Quandary of Setting Standards for Mediators: Where Are We Headed?*, 23 QUEEN’S L.J. 441, 468 (1998) (in Canada, mediation used to “remove cases from the court docket”).

<sup>87</sup> Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 375 (2001) (in Nevada, “mediation sessions employ experienced settlement judges to help reduce the court’s overcrowded docket”); Nancy A. Welsh, *supra* note 12, at 25 (2001) (mediation can in certain cases “bear an uncanny resemblance to the judicially hosted settlement conference”).

<sup>88</sup> Judge Charles E. Clawson, *The Use of Mediation in the 20th District*, 40 ARK. LAW. 26 (2005) (calculating that “mediation assisted settlement” succeeds in freeing “12 days” to handle other cases in the court’s docket).

<sup>89</sup> Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. DISP. RESOL. 241, 249 (2006) (noting how court-annexed mediation “can reduce cost or delay for a significant percentage of litigants”); Engler, *supra* notes 64, at 2031-32 (“reports of high settlement rates . . . provide justification for, and added momentum to, the call for more court-connected mediation”); Judith V. Caprez & Micki A. Armstrong, *A Study of Domestic Mediation Outcomes with Indigent Parents*, 39 FAM. CT. REV. 415, 425 (2001) (assessing success of court-annexed mediation through the number of settlements).

<sup>90</sup> James Alfini et al., *What Happens When Mediation Is Institutionalized: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 312 (1994) (quoting Carol Liebman that “[i]t is difficult to maintain quality when you have mediators . . . who are doing a number of [mediations] every day, with little or no supervision,” and without “the input and check of a co-mediator”).

<sup>91</sup> Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts among Dispute Professionals*, 44 UCLA L. REV. 1871, 1925 (1997) (referring to court mediators who “have extensive training” and mediators who “are generally untrained and placed on a court roster because of their litigation experience or activity in bench or bar activities”).



in the basic—let alone the more sophisticated—techniques of quality mediation.<sup>92</sup>

Moreover, unlike litigants who have resources to investigate—usually through attorneys—the quality, background, and orientation of a mediator before retaining the mediator, low-income litigants have no such choice.<sup>93</sup> There is no “market” for court-annexed mediators: low-income litigants have no power to choose a superior “product.” “Bad” mediators can thus continue in court-annexed programs with little or no scrutiny, especially given that the confidentiality of mediation insulates mediators from observation by the court or others.<sup>94</sup> Moreover, low-income litigants have little or no understanding of what mediation is or should be and do not have lawyers to make that assessment for them. Such litigants, then, rarely articulate concerns about the quality of the mediation because they have no frame of reference as to what constitutes “quality” to begin with.

#### 4. The Lack of Attorneys for Low-Income Mediation Participants

Mediation, even given its different premises from litigation, is still conducted “in the shadow of the law.”<sup>95</sup> Low-income litigants, however, cannot afford lawyers, and the need for lawyers far outstrips the availability of legal services or pro bono attorneys to re-

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<sup>92</sup> This problem flows into the larger questions of what qualifications a mediator should have in order to mediate. There is no consensus as to such qualifications. Timothy Lohmar et al., Student Project, *A Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm*, 1998 J. DISP. RESOL. 217 (1998); W. Lee Dobbins, *The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL’Y 95 (1995).

<sup>93</sup> Nancy A. Welsh, *Stepping Back through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 603–04 (2004) (individual litigants do not have power to choose the model a mediator adheres to).

<sup>94</sup> A good example of this point is the difficulty that mediation participants face when seeking to establish through a judicial proceeding that a mediator has engaged in wrongdoing. For an extended discussion of a troubling mediation and the narrator’s efforts to seek redress, see Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994). See also Welsh, *supra* note 12, at 86 (alluding to “the difficulty of protecting the confidentiality of communications and conduct occurring during a mediation session when the court must determine whether a mediator . . . engaged in undue influence”).

<sup>95</sup> Sharon Press, *Mediator Ethical Breaches: Implications for Public Policy*, 6 PENN ST. Y.B. ON ARB. & MED. 107, 136 (2014); James J. Affini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171 (2001). The phrase originally comes from Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950 (1979).

present them.<sup>96</sup> This is not a matter of a litigant who “doesn’t have an attorney and refuses to get one” or an exercise of “autonomy”: rather, it is a matter of a litigant who wants an attorney but cannot afford one.<sup>97</sup>

The lack of an attorney compromises the value of mediation in a number of ways. Without an attorney, litigants do not know what to expect in mediation, which inhibits their ability to engage fully in it.<sup>98</sup> Indeed, what little empirical evidence there is suggests that retaining counsel enhances the quality of the mediation<sup>99</sup> or is at worst inconclusive.<sup>100</sup> Conversely, pro se litigants are often not versed in potential legal rights or remedies available to them. Without an attorney, there is no one to explain that what might seem “fair” in mediation would entail waiving rights or remedies.<sup>101</sup> This is why litigants who can afford lawyers usually retain them, which is itself proof of the importance of representation.

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<sup>96</sup> One study found that “nearly one million cases . . . were rejected by legal aid programs owing to insufficient resources.” BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 170–71 (2012) (“nearly a million cases (one out of every two seeking representation. See also DEBORAH L. RHODE, *ACCESS TO JUST.* 5 (2004) (“[i]n most family, housing, bankruptcy, and small claims court, the majority of litigants lack legal representation”); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed Counsel Funding and Pro Se Access to Justice*, 160 U. PA. REV. 967, 972 (2012).

<sup>97</sup> ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 14 (2011). Perhaps through lack of experience in litigation involving low-income clients, some commentators and courts assume that proceeding pro se is a matter of choice as opposed to necessity. Carolyn Clark Camp, *Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases*, 26 BYU J. PUB. L. 187, 207 (2012) (“[w]hile some parties remain pro se, most who enter litigation feel compelled to hire attorneys to guide them through the process”); *Fleck v. Fleck*, 337 N.W.2d 786, 791 (N.D. 1983) (a settlement is appropriate so long as “a party was aware that he or she had the right to consult with an attorney”).

<sup>98</sup> Blankley, *supra* note 78, at 670–71 (2013) (noting that “pro se litigants are less likely to understand” mediation).

<sup>99</sup> The most recent and most sustained examination of this issue is Jean Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381 (2010). Another article that points to the value and importance of representation in mediation is Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

<sup>100</sup> Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419 (2010) (noting how “existing research . . . is too limited in several respects to be able to conclude that lawyers either play an essential role in mediation or are not needed, or that they are particularly helpful or detrimental to the mediation process”).

<sup>101</sup> See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 835–36 (1999) (discussing the importance of pro se litigants knowing their “legal entitlements”); Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room*, 51 FAM. CT. REV. 87, 89–90 (2013). One way to conceptualize this issue is through the idea of “BATNA,” which stands for “best alternative to a negotiated agreement.” ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*

Moreover, the lack of an attorney can be damaging, if not catastrophic, should there be a power differential in the mediation.<sup>102</sup> Power differentials come in many forms: a tenant has less power than landlord, as does a debtor against a creditor, or a homeowner against a lender.<sup>103</sup> Another power differential is when one participant has an attorney and another participant does not.<sup>104</sup> An even more controversial issue arises when a victim of domestic violence could or does participate in mediation. While there is an ongoing debate about whether mediation is ever appropriate in such circumstances, an attorney representing the victim is, at a minimum, in an excellent position to identify whether there is domestic violence, and, if there is, to ameliorate the power differential often inherent in such a mediation.<sup>105</sup>

#### IV. THE REALITIES OF PARTICIPATING IN MEDIATION FOR LOW-INCOME PARTICIPANTS

The disjunction between discussion of mediation in the abstract and its realities “on the ground” is critical.<sup>106</sup> It is not unusual to assume that, as one scholar has put it, “parties in a mediation generally plan for the process, are accompanied by their lawyers, and travel to the courthouse or office building.”<sup>107</sup> The

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97–106 (2d ed. 1991). It is difficult to assess BATNA without understanding the litigation alternative.

<sup>102</sup> Many scholars have examined how “power differentials” can render mediation inappropriate or dangerous. See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 15–16 (“power differentials may mean that mediation is simply an inappropriate forum for some subset of cases in which the potential for party coercion dictates that individual rights cannot be adequately protected”).

<sup>103</sup> As noted *supra* at 71–79, these are common areas where low-income litigants participate in court-annexed mediation.

<sup>104</sup> Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 47 (2011).

<sup>105</sup> For two examples in this voluminous literature, see Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003); Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005). E. Patrick McDermott & Ruth Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 107 (2004).

<sup>106</sup> Welsh, *supra* note 93, at 576–77 (the mediation “process generally has adapted to respond to the needs, expectations, and constraints of the environments in which it is found”).

<sup>107</sup> Welsh, *supra* note 12, at 89. Welsh, however, does note that the travel is not necessarily voluntary. *Id.* at 90.

day-to-day realities of low-income mediation participants, however, are not so smooth. While minimal resources might not appear to have a direct impact on mediation, they, in fact, do, and at a profound level.

To illustrate this point, consider limitations on participating in mediation that are not a function of the forum itself, but of logistics. These furnish a bedrock context which is integral to how effective mediation can be for the low-income population.<sup>108</sup>

The most basic hurdle that must be faced before mediation participants can participate in mediation is getting and staying at the place where the mediation is going to happen. This is not a trivial concern for many. Consider the interlocking challenges low-income people face in their day to day lives:<sup>109</sup>

- Child Care. Child care can be expensive, and few child care providers can accommodate the non-standard working hours that are a hallmark of low-wage work.<sup>110</sup> Moreover, children in low-income households experience more health issues than others, thus intensifying the challenges of finding adequate and affordable child care.
- Nonstandard Work Hours. Given the pressing need to work to support themselves and their families, low-wage workers often must work varying shifts over which they have little or no control.<sup>111</sup> This is, in many ways, a defining characteristic of low-wage work.
- Reliance on Mass Transportation. A car is expensive to buy and maintain. As a result, many low-income individuals, especially

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<sup>108</sup> While focusing on urban populations, the succeeding discussion also applies in many respects to residents of low-income communities. Francesca Devaney Callan & Elizabeth M. Dolan, *Parenting Constraints and Supports of Young Low-Income Mothers in Rural United States*, 44 J. COMP. FAM. STUD. 157 (2013).

<sup>109</sup> The information that follows is drawn from Rhonda Smith, *Work and Family: Workers with Nonstandard Hours Face Child Care, Transit Obstacles*, BLOOMBERG BNA (Oct. 13, 2013), <http://www.bna.com/workers-nonstandard-hours-n17179875800/>.

<sup>110</sup> *Id.*

<sup>111</sup> This has become a substantial problem as more low-wage work has become part-time work. Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 450 (2012) (“[n]early half of low-wage hourly workers cannot control their work schedule, choose starting and quitting times, or decide when to take breaks”); Steven Greenhouse, *A Part-Time Life, as Hours Shrink and Shift*, N.Y. TIMES (OCT. 27, 2012), <http://www.nytimes.com/2012/10/28/business/a-part-time-life-as-hours-shrink-and-shift-for-american-workers.html>. See also Jeounghee Kim, *Barriers to Work among Poor Families: Health Limitations, Family Structure, and Lack of Job Opportunities*, 8 J. POL'Y PRAC. 317, 325 (2009). For a compelling narrative about the struggles of low-wage work, including the variability of hours, see BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

in urban areas, must rely on mass transportation, often buses, to travel to the location of a mediation.<sup>112</sup> Bus passengers are at the mercy of schedules, which vary given the time of day and pick up and destinations. Moreover, travelers using buses must face the vagaries of breakdowns, congestion, and shifts in scheduling due to holidays and weather. Moreover, even the seemingly modest expense of public transportation is meaningful to a person whose wages are minimal.

- **Hourly Wages.** Salaried workers often have personal days available or flexibility to work off-site without losing pay. Most low-income wage-earners, however, are hourly workers, and hourly workers do not get paid if they do not work.<sup>113</sup> A longer mediation means less pay, as does an extended commute to a mediation session.
- **Fear of Job Loss.** In the world of low-wage work, missing time risks losing a job. This has potentially catastrophic consequences for wage-earners' ability to provide for themselves or their families,<sup>114</sup> and leads to the uncertainty of looking for another job.<sup>115</sup>

The confluence of these factors demonstrates that not only are courts able to devote limited resources to court-connected programs, but time and money constrain participants themselves in how long they can participate in mediation.

## V. PRICING DIFFERENT MODELS

Thus far, this Article has offered an overview of “models” of mediation, the economics of the mediation available to those who may or must participate in mediation, the lack of representation

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<sup>112</sup> A compelling, life-and-death example of this difference involved Hurricane Katrina, when New Orleans residents with resources had flown or driven away from the City, while the lower-income population were left to ride on unreliable buses which only went to the chaotic and dangerous Super Dome. L. Darnell Weeden, *The Black Eye of Hurricane Katrina's Post Jim Crow Syndrome is a Basic Human Dignity Challenge for America*, 37 *CAP. U. L. REV.* 93, 106 (2008).

<sup>113</sup> The hourly wage is the norm for low-paid work, as the debate for a minimum hourly wage demonstrates. There is no debate for a minimum yearly wage because such a debate has no relevance for the vast majority of work available to low-wage workers.

<sup>114</sup> An irony in family mediation in particular is that risk of losing wages or a job has an impact on the ability to pay child support, which, in turn, adds or creates arrearages. For a discussion of this vicious circle and misleading stereotypes about “deadbeat dads,” see Daniel L. Hatcher, *Forgotten Fathers*, 93 *B.U. L. REV.* 897 (2013).

<sup>115</sup> See Runge, *supra* note 111, at 450 (for low-income hourly wage earners, “missing a single day or work or work for any reason . . . could lead to job loss”).

available to low-income participants, and the logistical burdens that confront low-income litigants. This Article will now revisit the “models” debate with this background in mind.<sup>116</sup>

At first glance, the prior discussion of mediation models,<sup>117</sup> and discussions of models generally, appear decontextualized. This, however, is not true. Everything has a context: the absence of a specific context only means that the context is unspoken.<sup>118</sup> Carrie Menkel-Meadow has observed that mediation “in all of its forms [is] not neutral [but] designed and implemented by parties, court administrators or governments with substantive agendas.”<sup>119</sup>

Those who adhere to leading “models” of mediation call for universal application of their particular model.<sup>120</sup> This is, understandably, based on strongly-held views of the benefits of their conception of what mediation should be. “Conceptions,” however, can only go so far in taking into account messy realities. The issue then becomes what models mean “as applied” in a world of limited resources, not “as applied” in the context of unlimited resources—something that is often presupposed in discussions of what model is best.

What follows, then, is another discussion of each of the models, but with a difference: it surfaces otherwise hidden contexts. The end result is that one model—the evaluative model—must become the predominant model in a world of scarce resources for mediation.

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<sup>116</sup> For the initial summary of different models of mediation, see *supra* notes 35–51.

<sup>117</sup> See *supra* text accompanying notes 35–51.

<sup>118</sup> A compelling explanation of this idea is in an interdisciplinary study by James C. Scott. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998). Scott elucidates the idea that a description of anything must exclude what it does not view as significant. Such an exclusion thereby becomes invisible, yet it defines what is being examined. This insight also informs the foundation of critical theory: critical race theory, for example, critiques law as inherently racist even when it appears to be “neutral” or “logical.” The most famous elucidation of this idea is Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>119</sup> Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 11 (2000). Menkel-Meadow notes that anthropologist Laura Nader was an important innovator in this regard. For an example of Laura Nader’s work in this area, see Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

<sup>120</sup> Bush, *supra* note 2, at 2.

A. *Transformative Mediation*

The transformative model offers participants an opportunity to experience “empowerment and recognition.”<sup>121</sup> In providing a space for participants to experience these shifts, the transformative mediator follows the lead of participants and does not influence the direction in which they wish to go during the mediation. As a result, transformative mediation requires, as Bush and Folger note, “great patience.” Patience, however, cannot flourish in a world where speed and efficiency rule. Indeed, Bush and Folger criticize the settlement-driven, docket-clearing goals of court-annexed or mandated programs.<sup>122</sup> A question, then, is the degree to which transformative mediation can ever be achieved in a setting in which there is little time for participants to follow their own path or for the mediator to follow them along it.

Given that transformative mediation requires space and time, meaningful discussions of transformative mediation must assume the same. The extended example Bush and Folger employ to illustrate their transformative model—the “Purple House” mediation—sets forth a representative circumstance necessary for their model to operate.<sup>123</sup> The Purple House Mediation involves a dispute between homeowners in which one homeowner—the Chair of the development’s “architectural control committee”—objects to the color that another homeowner has painted her house. A racial dimension is embedded in the problem: the Chair is white and the homeowner is black. Consider elements of this situation:

- The mediation is not court-connected.
- The homeowners live in an “exclusive (and expensive) housing development.”<sup>124</sup>
- The homeowners have lawyers.<sup>125</sup>
- The mediator is a “private practitioner” retained by the parties.<sup>126</sup>

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<sup>121</sup> BUSH & FOLGER, *supra* note 2, at 68.

<sup>122</sup> Some have noted, however, that Bush and Folger’s critique is broader, and aimed at a range of settings apart from courts. Lisa P. Gaynier, *Transformative Mediation: In Search of a Theory of Practice*, 22 CONFLICT RESOL. Q. 397, 401 (2005).

<sup>123</sup> The name of the Chapter in which the example appears says so explicitly: “Putting Transformative Theory into Practice.” BUSH, *supra* note 2, at 131.

<sup>124</sup> *Id.* at 132.

<sup>125</sup> *Id.* at 133.

<sup>126</sup> *Id.* There is, however, no mention of how much the mediator charges or how payment of these fees will be allocated. For a discussion of the cost of private mediation, see *infra* text accompanying notes 52–63.

- The mediator has contacted the parties prior to the actual mediation in order to explain what mediation is.<sup>127</sup>
- Time appears not to be an issue: “the mediator remains ready to follow the parties wherever they may decide to go next.”<sup>128</sup>
- There is no judge waiting for a report on what has or has not been accomplished in the mediation.

This setting offers Bush and Folger an excellent means to explore the nuances of their model. Over the course of over fifty pages, Bush and Folger provide a verbatim text of what is said in this simulated mediation, and they pause after four “segments” of the transcript to provide detailed commentary on what is happening.<sup>129</sup>

The Purple House Mediation, however, is set in a specific socioeconomic context in which the participants have ample resources available to them. Perhaps the most crucial resource of all is a great deal of time. This is almost certainly a necessity: such a setting affords a means to effectively explore, explain, and, by extension, practice transformative mediation.

How, then, might a comparable mediation operate if each of these characteristics were answered differently? Consider re-characterizing the Purple House mediation in a low-resourced context:

- The mediation is court-connected through an in-house program.
- The participants live in public housing.
- The participants cannot afford lawyers and have not been able to secure lawyers because of the limited availability of legal services.
- The mediator is from a court roster and is provided by the Court with no input from the parties.
- The mediator has never met or spoken to the parties prior to the mediation.
- Given court schedules and the availability of court personnel, the mediation must conclude by the middle of the afternoon and can only extend for one session. In light of these time constraints, a break for lunch is a luxury that the participants cannot afford.

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<sup>127</sup> BUSH & FOLGER, *supra* note 2, at 133.

<sup>128</sup> *Id.* at 184.

<sup>129</sup> *Id.* at 133–84.



- A judge awaits to learn whether the case has been successfully settled or not, and, if not, the court will either conduct a trial that day or set the case down for trial whenever the next available trial date is available which, given the nature of overwhelmed dockets, will not be for months.

It is impossible to see how anything deserving the name transformative mediation could operate in this context. After all, how can a mediator “follow the parties wherever they may decide to go next”<sup>130</sup> if there is barely enough time to even begin to make the trip?

### B. *Facilitative Mediation*

As with transformative mediation, the benefits of facilitative mediation do not come cheaply. In fact, the invisible context of discussion of facilitative mediation is integral to the ability of the model to function as it is intended to do so.

Consider a text by Christopher Moore that presents the facilitative model.<sup>131</sup> The book is well-known and for good reason: Moore offers effective conceptualizations of the causes of conflict and appropriate interventions,<sup>132</sup> with perhaps the most detailed and sophisticated exploration of “stages of mediator moves” in the mediation literature.<sup>133</sup> In over 650 pages, Moore offers a comprehensive discussion of the mediation process. There is, however, one thing Moore’s work does not address: mediation involving low-income participants with substantial resource limitations.

Moore employs an example comparable to Bush and Folger’s Purple House Mediation—what he calls the “Singson and Whitamore Dispute.” He draws upon this example in some detail in his first chapter<sup>134</sup> and then alludes to it from time to time throughout the text.<sup>135</sup> The dispute involves three physicians and the enforcement of a covenant not to compete.<sup>136</sup> As with the Purple House Mediation, there is nothing wrong with Moore’s example.

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<sup>130</sup> See *supra* text accompanying note 50.

<sup>131</sup> MOORE, *supra* note 22. Moore does not explicitly self-identify as a facilitative mediator, but his facilitative, settlement-driven approach leaves no doubt that he is one.

<sup>132</sup> *Id.* at 64–65.

<sup>133</sup> Moore lists 12 “stages.” *Id.* at 68–69.

<sup>134</sup> *Id.* at 4–14.

<sup>135</sup> See *id.* at 72–74, 264–65, 356–57.

<sup>136</sup> *Id.* at 4–5.

He uses it effectively to illustrate his ideas. Moore does not specify his assumptions, but they are there nevertheless:

- The participants do not have financial limitations.
- The mediation is not court-annexed.
- It appears that participants have legal counsel because they assess the value of a “judicial approach” to resolving their dispute.”<sup>137</sup>

Moore’s omissions are telling, however. Consider, for example, payment of fees. The only time Moore mentions fees is in the last chapter of the book, when he notes: “[i]ntermediaries are expected to disclose to the parties at the beginning of any intervention the ‘bases of compensation, fees, and charges.’ Where appropriate, they should provide *pro bono* services.”<sup>138</sup>

Note that even this passing reference is about giving *notice* to participants of fees: it is not about the ability of parties to afford any or all of the fees and the impact this might have on the conduct of the mediation.<sup>139</sup> The mention of *pro bono* services implies that there is a need for them, but there is nothing further about the degree to which such services are available.

Moore does devote one paragraph to court-annexed mediation.<sup>140</sup> The paragraph is in the context of a general discussion about the growth of mediation.<sup>141</sup> The paragraph does not offer a discussion of issues related to court-annexed mediation explored in this Article, including resource limitations. To the contrary, the only qualitative assessment of these programs is a general reference to how these programs “have a record of success.”<sup>142</sup>

### C. *Evaluative Mediation*

If transformative and facilitative mediation, at least in their “pure” forms, require time and resources, evaluative mediation—

<sup>137</sup> MOORE, *supra* note 22, at 10.

<sup>138</sup> *Id.* at 449 (emphasis in original). The quote is from The Association of Conflict Resolution Ethical Standards of Professional Responsibility.

<sup>139</sup> Moore himself began CDR Associates, a prominent firm that primarily serves governmental entities and large businesses. CDR ASSOCIATES, <http://cdrassociates.org/> (last visited Jan. 3, 2016).

<sup>140</sup> *See supra* note 22, at 29.

<sup>141</sup> *See supra* note 22, at 22–33.

<sup>142</sup> *Id.* at 29.

the last of the “big three”<sup>143</sup> models—remains. In fact, low-income people are far more likely to encounter evaluative mediators in court-annexed settings.<sup>144</sup> The most fundamental reason is that courts in which low-income litigants encounter litigation are overwhelmed.<sup>145</sup> A docket-control regime must value “efficiency” above all. The more cases removed from dockets, the fewer cases a court needs to devote substantial time to, which, in turn, means that a court can make do with fewer resources—a kind of feedback loop.<sup>146</sup> This generates more evaluation because, as noted above, a characteristic cited by proponents of evaluative mediation is its efficiency.<sup>147</sup>

Efficiency, however, leads to troubling consequences: as one commentator has noted, there is “immense” pressure on courts to send cases to mediation and, unsurprisingly, “immense . . . pressures on mediators to obtain settlements.”<sup>148</sup> Notions of voluntariness and self-determination become compromised.<sup>149</sup> This is so even though there is evidence suggesting the value of at least incorporating facilitative techniques.<sup>150</sup> Consider the following summary of the experience of mediators in court-connected mediation programs:

[M]any court-connected mediators acknowledge that they cannot conduct a facilitative mediation process if they are to meet the expectations of their workplace. They express enormous frustration at being caught between a rock and a hard place as they are asked to deliver high quality mediation services in what they know to be a fraction of the time required to effectively do

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<sup>143</sup> See *supra* text accompanying notes 1–4.

<sup>144</sup> Bobbi McAadoo & Nancy A. Welsh, *Look before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 *NEV. L.J.* 399, 418 (2004) (“even though court-connected mediation is often described as a ‘facilitative’ process[,] . . . the process is often characterized by evaluative interventions similar to interventions used traditionally by judges in settlement conferences”).

<sup>145</sup> See *supra* text accompanying note 79.

<sup>146</sup> Rubinson, *supra* note 62, at 104–06 (discussing how courts are “reactive institutions” that must provide additional resources to the extent that users of courts demand it).

<sup>147</sup> See *supra* text accompanying note 39.

<sup>148</sup> Engler, *supra* note 64, at 2010; Alfini, *supra* note 90, at 310 (referring to judicial pressure on mediators “to push” and “cajole” to promote settlement).

<sup>149</sup> King, *supra* note 68, at 467 (“docket reduction” takes “precedence over mediation’s values for free party choice of settlement” and, if so, “many of mediation’s benefits will be compromised”).

<sup>150</sup> Eisenberg, *supra* note 69, (describing a study in Maryland that recommends that “mediators should spend more time listening, reflecting emotions, values, and issues, and asking the parties how they want to resolve the case—rather than telling them what to do . . . or directing them to something”).

so, often with cases that are not appropriate for mediation. According to one veteran court mediator who requested anonymity, “In recent years, encouraging families toward self-determination and private ordering have taken a back seat. Mediation services, which are mandated, are adversely affected because administrators move their workforce toward evaluation services.” Another mediator and court services supervisor referring to the common practice of recommending settlements said, “The process is called mediation and we settle cases, but it certainly isn’t real mediation.”<sup>151</sup>

In some instances, there is a process at which many a facilitative mediator would cringe.<sup>152</sup> These are called, in the vernacular, “trashing and bashing” by a “mediator” who does everything in her power to belittle the merits of each party’s case (the “trash”) as a means to make any decision not to settle irrational (the “bash”).<sup>153</sup>

While, as some have noted, court-annexed mediation in and of itself lends mediation a more “legalistic” bend which, in turn, promotes a greater tendency to evaluate,<sup>154</sup> evaluative mediation still tends to more easily operate within limited time than any other model of mediation. And, as noted above,<sup>155</sup> many scholars who focus on mediation are, at best, dubious that evaluative mediation is mediation at all instead of a settlement conference or negotiation—the adversary system merely dressed up as mediation. An irony, then, is that among low-income populations, sophisticated, nuanced alternatives to litigation, developed with the promise of self-determination, voluntariness, and empowerment, have now be-

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<sup>151</sup> Salem, *supra* note 84, at 378. See also Welsh, *supra* note 93, at 589 (“court-connected mediators are unlikely to act as wholly disinterested parties who view their role as purely facilitative”); Alfini, *supra* note 90, at 310 (quoting Robert Baruch Bush as noting how a “directive model of practice [in court-connected contexts] seems quite predominant”. . .). Interestingly, some jurisdictions have felt the need to explicitly give evaluative mediation its imprimatur as an appropriate form of mediation. Welsh, *supra* note 93, at 591 (“[m]any courts have promulgated ethics codes for court-connected mediation that permit mediators to engage in . . . evaluative functions”).

<sup>152</sup> Some commentators are more measured. They claim that evaluative mediation may, at times, be appropriate in the court-annexed context. Boyarin, *supra* note 67 (in some instances, “evaluative mediation . . . may be precisely what the parties want” even though, in other circumstances, it may “undermine self-determination”).

<sup>153</sup> Reeve, *supra* note 87, at 468; James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991).

<sup>154</sup> See, e.g., KOVACH, *supra* note 6, at 24 (as the “ADR universe has become integrated into the legal system, it has become ‘legalized’”).

<sup>155</sup> See *supra* text accompanying notes 46.

come yet another means to dispense mass justice—the process mediation was meant to supplant.<sup>156</sup>

In the end, then, the issue is not so much which model is “best,” but, rather, how institutionalized mediation constrains mediators to either exclusively or primarily evaluate.<sup>157</sup> This is so even if a mediator is self-identified as “facilitative” or if the mediator employs, as many mediators do, an “eclectic approach” based upon evolving circumstances in a specific mediation.<sup>158</sup> Thus, often in institutionalized contexts, a mediator has no choice but to be evaluative: the process demands it.

## VI. BACK TO THE GRID: REVISITING LAWYERS AND MEDIATION

Given that realities must limit or even make it impossible to implement two models of mediation, the “models” debate needs to be reconceptualized. There have been repeated calls to enhance resources and thereby enable mediation to fulfill its promise.<sup>159</sup> This is, of course, a right answer, but the proposal is virtually impossible to implement: additional funding for mediation programs at a time of budget austerity is unlikely.<sup>160</sup> Even if it should happen, it might simply lead to more efficient docket control, which does not answer the problems identified in this Article. Moreover, redirection of judicial budgets to mediation programs is also unlikely because budgets for the judiciary in virtually every jurisdiction are stretched.<sup>161</sup> Should that even happen, reducing resources

<sup>156</sup> WALDMAN, *supra* note 97, at 118.

<sup>157</sup> It is also telling that jurisdictions have explicitly adopted “self-determination” as the ultimate goal of mediation even though brief mediations in an evaluative style compromise self-determination. For an overview, see Welsh, *supra* note 12, at 33–59. Welsh examines two states in detail—Florida and Minnesota—and finds that while both accept evaluative mediation as acceptable in their court-connected programs, both feel the need to “tame” them because of the risks associated with it. *Id.* at 34. This is the mediation equivalent of protesting too much and, by doing so, there is a recognition of the risk of compromising self-determination in many court-connected programs. Welsh, *supra* note 12, at 33–59.

<sup>158</sup> Some have explicitly argued for the value of such a hybrid approach. See, e.g., John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 327 (2000) (advocating the integration of different approaches to mediation”).

<sup>159</sup> See, e.g., King, *supra* note 68.

<sup>160</sup> McCrory, *supra* note 72, at 828 (“[i]t is unlikely that legislatures will be willing to, or courts will be able to, fully fund high quality court-mandated programs”).

<sup>161</sup> Chief Justice Roberts has spoken on this address as to the federal system. Adam Liptak, *Budget Cuts Imperil Federal Court System*, *Roberts Says*, N.Y. TIMES (Dec. 31, 2013), <http://www.nytimes.com/2014/01/01/us/politics/budget-cuts-imperil-court-system-chief-justice-says.html>.

from other segments of the judiciary will likely intensify the “docket control” problem by having fewer resources available for litigating cases, which then turns resource allocation into a zero sum game.<sup>162</sup>

The question, then, is to consider ways to sidestep the “more funding for mediation programs” solution and consider more plausible options. One way to do so is to circle back to the seemingly unsolvable issue of the substantial undersupply of lawyers for low-income litigants.<sup>163</sup> It is possible that greater involvement of lawyers in mediation can serve to draw upon the non-adversarial conception of mediation as embodied in facilitative and transformative models.

The value of this idea is embedded in how discussions of models of mediation assume that participants are or have the option to be represented, and thereby recognize that legal representation both is and should be the norm.<sup>164</sup> The value of representation is sometimes stated explicitly in law. A remarkable example is what is known as the “four legals” in Virginia<sup>165</sup>—a set of statements that all Virginia mediators must communicate to mediation participants. The “four legals” are:

- (i) The neutral does not provide legal advice,
- (ii) Any mediated agreement may affect the legal rights of the parties,
- (iii) Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and

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Virtually every state court system faces comparable challenges. For examples, see *Infocus: Judicial Branch Budget Crisis*, CALIF. JUD. BRANCH, <http://www.courts.ca.gov/partners/courtsbudget.htm> (last visited Jan. 3, 2016); Associated Press, *Alabama Judges Warn of Impacts from Proposed Budget Cuts*, WASH. TIMES (April 18, 2015), <http://www.washingtontimes.com/news/2015/apr/18/alabama-judges-warn-of-impacts-from-proposed-budge/>; NYCLA, *COURTS IN CRISIS* (2013).

<sup>162</sup> For an extended discussion of the dynamics of the distribution of judicial resources, see Rubinson, *supra* note 62.

<sup>163</sup> See *supra* text accompanying notes 96–97.

<sup>164</sup> See *supra* text accompanying notes 125, 137.

<sup>165</sup> Paula M. Young, *Teaching the Ethical Values Governing Mediator Impartiality Using Short Lectures, Buzz Group Discussions, Video Clips, A Defining Features Matrix, Games, and an Exercise Based on Grievances Filed against Florida Mediators*, 11 PEPP. DISP. RESOL. L.J. 309, 333 n. 131 (2011).

- (iv) Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.<sup>166</sup>

This statute perfectly captures a fundamental disconnect: parties should be given an “opportunity” to retain counsel and “should” have an agreement reviewed by counsel. The problem is “opportunity” is a sham if a party cannot take advantage of the “opportunity.”<sup>167</sup> Some articulations go even further and articulate a “right” to counsel,<sup>168</sup> but “rights,” while carrying rhetorical power, are meaningless if participants have no resources to exercise them.<sup>169</sup>

The rest of this Article will now explore the possibilities and challenges of implementing programs that include lawyers as an integral element of the mediation process.

### A. *The Challenges*

For many mediators—especially non-lawyers—attorneys representing participants in mediation is not a good thing. The fear is that attorneys will transform a collaborative process into an adversarial one.<sup>170</sup> While this view is not universal,<sup>171</sup> it remains a common point of view.

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<sup>166</sup> VA CODE ANN. § 8.01-576.12 (West 2015). A mediator’s failure to state the “four legals” is ground for vacating any orders or agreements reached as a result of the mediation. *Id.*

<sup>167</sup> See Nolan-Haley, *supra* note 101, at 832 (noting that a “requirement” that “unrepresented parties consult with attorney before signing any agreements . . . is not particularly helpful given the pervasive problem in inability to afford counsel”).

<sup>168</sup> Felix Steffek et al., *Guide for Regulating Dispute Resolution (GRDR): Principles 5*, in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS (Felix Steffek et al. eds., 2013) (providing a model statute that “parties should have the right to be accompanied and advised by counsel”). It is noteworthy that at least one country—Belgium—goes further and provides “that legal assistance for mediation is provided.” Ivan Verougstraete, *Regulation of Dispute Resolution in Belgium: Workable Solutions*, in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 93, 107.

<sup>169</sup> Virginia is not the only state that expresses the disconnect between advising mediation participants of the importance of counsel while providing many of them no means to obtain legal services. Illinois, for example, holds that mediators should “ensure that the parties have been advised to obtain legal counsel.” PROF. STANDARDS OF PRACTICE FOR MEDIATORS § VI (MEDIATION COUNCIL ILL. 2003).

<sup>170</sup> See Jean Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 315 (1999) (proposing strategies to insure attorneys are a positive force in mediation); Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 57–59 (1982). Another concern is that

A second and related point is the unfortunate reality that many lawyers do not understand mediation.<sup>172</sup> Some of this might be attributable to concern that lawyers co-opt mediation because of a fear it will impinge on the legal profession's monopoly on dispute resolution,<sup>173</sup> but the issue runs deeper. The stock in trade of lawyers is to view conflict through the lens of adversarial litigation, which, by definition, only includes facts deemed "relevant" by rules of law and excludes all others.<sup>174</sup> In contrast, as Lon Fuller said as noted above, mediation is all about jettisoning "formal prescriptions laid down in advance,"<sup>175</sup> of which law is the prime example. Lawyers operating without law is an oxymoron and thus, some argue, lawyers inevitably subvert the essence of mediation.<sup>176</sup>

## B. *The Possibilities*

### 1. The Spread of Mediation Within the Legal Profession

While concerns about whether attorneys contribute to or diminish the value of mediation, there is cause for optimism. There are two reasons why this is the case.

The first is a spreading conception that lawyers are problem-solvers rather than problem intensifiers. The trend is the result of a confluence of a number of ideas that have been percolating and coalescing over time: "problem solving negotiation" first articu-

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lawyers or retired judges acting as mediators bring a litigation mindset to mediation, thereby portending "the end of good mediation." Alfini, *supra* note 153, at 50.

<sup>171</sup> McEwen, *supra* note 99. Interestingly, there is some consensus internationally about the importance of representation in ADR, including mediation. Steffek, *supra* note 168 (alluding to the importance of "legal aid" for ADR).

<sup>172</sup> It is also notable that not all attorneys effectively represent clients in mediation. See Allen v. Leal, 27 F. Supp. 2d 945, 949 (S.D. Tex. 1998) (noting that the court is "concerned that counsel . . . failed to advise his clients of the seriousness and finality of signing a settlement agreement"); Bryan, *supra* note 94 (presenting a detailed first-person narrative of an attorney who coerces a vulnerable mediation participant into a settlement in the presence of a power differential).

<sup>173</sup> Jacqueline Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002) ("[l]awyers have a longstanding monopoly on the law business and do not look favorably on sharing their power with non-lawyers").

<sup>174</sup> Rubinson, *supra* note 45, at 75–76.

<sup>175</sup> Fuller, *supra* note 44.

<sup>176</sup> Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel"*, 12 MEDIATION Q. 17, 26 (1986) ("[f]or outside counsel to advocate a client's interests contradicts the very essence of mediation").



lated in Roger Fisher and William Ury's "Getting to Yes";<sup>177</sup> "client-centered lawyering";<sup>178</sup> and "therapeutic jurisprudence."<sup>179</sup> These trends have both informed mediation and have been informed by it.<sup>180</sup>

Another trend is that the legal profession is embracing mediation as a core competency for modern law practice. There are calls for incorporating mediation into law school curricula<sup>181</sup> and there are increasing numbers of mediation clinics in law schools.<sup>182</sup> Some of these include students acting as lawyers in representing clients in mediation.<sup>183</sup> The American Bar Association sponsors a "Representation in Mediation Competition" for law students.<sup>184</sup> Law school texts have appeared on representing clients in media-

<sup>177</sup> The leading text is *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*. FISHER, *supra* note 9.

<sup>178</sup> The leading text on these ideas, which have been particularly influential in clinical legal education, is DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 1991).

<sup>179</sup> Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997). Winick defines therapeutic jurisprudence as exploring "ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the therapist or therapeutic agent." The notion is that the application of "law" has the potential to promote healthy, therapeutic outcomes. *Id.*

<sup>180</sup> F. Peter Phillips, "There Is a World Elsewhere": *Preliminary Studies on Alternatives to Interest-Based Bargaining*, 13 CARDOZO J. CONFLICT RESOL. 413, 414 ("[t]he modern American process is classically stated in the influential book "Getting to Yes"); Collette R. Brunschwig, *Multisensory Law and Therapeutic Jurisprudence: How Family Mediators Can Better Communicate with Their Clients*, 5 PHOENIX L. REV. 705 (2012).

<sup>181</sup> Mary Dunnewold & Mary Trevor, *Escaping the Appellate Litigation Straitjacket: Incorporating an Alternative Dispute Resolution Simulation into a First-Year Legal Writing Class*, 18 LEGAL WRITING: J LEGAL WRITING INST. 209 (2012); C. Michael Bryce, *ADR Education from a Litigator/Educator Perspective*, 81 ST. JOHN'S L. REV. 337 (2007).

<sup>182</sup> Cynthia A. Savage, *Recommendations Regarding Establishment of a Mediation Clinic*, 11 CARDOZO J. CONFLICT RESOL. 511, 513 n. 4 (2010) (referring to the "growing numbers of law school mediation clinical programs").

<sup>183</sup> Kristen Blankley identifies Loyol University Chicago Law School, DePaul University College of Law, Hamline Law School, the University of San Francisco, and Washing University School of Law. Blankley, *supra* note 78, at n. 170. For a detailed description of one such program called the "Pro Bono Mediation Project," see Robert Rubinson, *The Pro Bono Mediation Project: Providing Free Representation to Self-Represented Litigants in Child Access Cases*, in *INNOVATIONS FOR SELF REPRESENTED LITIGANTS* 77 (Bonnie Rose Hough & Pamela Cardullo Ortiz eds., 2011).

<sup>184</sup> *Law Student National Representation in Mediation Competition*, AM. BAR ASS'N, [http://www.americanbar.org/groups/dispute\\_resolution/awards\\_competitions/law\\_student\\_national\\_representation\\_in\\_mediation\\_competition.html](http://www.americanbar.org/groups/dispute_resolution/awards_competitions/law_student_national_representation_in_mediation_competition.html) (last visited Jan. 4, 2016). The competition began in 2006. *Id.*

tion.<sup>185</sup> Practitioners have also recognized the importance of representation of clients in mediation: both practitioner-oriented texts<sup>186</sup> and continuing legal education programs<sup>187</sup> address the topic.

## 2. Harnessing Increasing Attorney Expertise

It appears, then, that as time passes, attorneys will understand mediation in a way that is more sophisticated than viewing it as a settlement conference or an assessment of potential success in litigation.<sup>188</sup> Should this be the case, a question arises as to how to attract attorneys who have gained this expertise to represent low-income mediation participants.

One idea proposed by Kristen M. Blankley is to offer attorneys an opportunity to represent clients in mediation through “limited scope agreements.”<sup>189</sup> A concern of pro bono attorneys is that litigation is often messy and unpredictable. Commitment to client representation imports such messiness and unpredictability. Limited representation has the virtue of attracting practitioners to pro bono work by limiting the scope of representation, thereby minimizing the risk of an open-ended time commitment.<sup>190</sup> The American Bar Association itself has taken action to promote the use of such limited representation by relaxing the need for conflicts checks when attorneys participate in a “nonprofit and court-anne- xed limited legal services” program.<sup>191</sup>

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<sup>185</sup> HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE* (2d ed. 2010); GOLANN, *supra* note 6.

<sup>186</sup> SPENCER PUNNETT, *REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS* (2013). At least one book focuses on the economic advantages of representing clients in mediation and other “early negotiation” processes. JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2012).

<sup>187</sup> *Mediation Advocacy: Effective Legal Representation in Mediation*, UPCHURCH WATSON WHITE & MAX, <http://www.uww-adr.com/seminar/florida-mediators-discuss-effective-legal-representation> (last visited Jan. 4, 2016); *Effective Representation in Negotiation and Mediation*, LAWLINE, <http://www.lawline.com/cle/course/effective-representation-in-mediation-and-negotiation> (last visited Jan. 4, 2016).

<sup>188</sup> James K.L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425 (1999).

<sup>189</sup> Blankley, *supra* note 78.

<sup>190</sup> A possible issue is that this is a zero sum game insofar as pro bono attorneys representing clients in mediation will be less likely to perform pro bono work in other cases. This might not be the case, however, if pro bono work through limited representation attracted attorneys who otherwise would not perform pro bono work at all.

<sup>191</sup> MODEL RULES OF PROF. CONDUCT R. 6.5 (ABA 2013) (imposes a need for conflicts checks when a “lawyer provides short-term limited legal services to a client” when participating in “a program sponsored by a nonprofit organization of a court” unless the attorney has actual knowledge of a conflict). At least one jurisdiction—Maryland—explicitly notes that the rule

Another possibility is to promote even more the development of law school clinics in which students act both as mediators and represent clients in mediation. The continuing adoption and refinement of such courses enhance the quality and practice of future lawyers whether they act as mediators or not. They would then be better situated to not only provide quality representation in mediation, but also to participate in programs that provide pro bono representation in mediation. Moreover, students would directly provide legal services to pro se mediation participants. While this will have at best, a modest impact on the extraordinary need for representation, any additional resources are useful. These students would also most likely be supervised by faculty who know and understand the more sophisticated, non-adversarial forms of mediation.

Even a modest corps of attorneys who become involved in mediation can be a force for good. There would be a built-in corrective to “bad” mediators who, in a confidential process, can act in a way that subverts the promise of mediation. Attorneys can ameliorate power differentials, including identifying instances of domestic violence that a mediator or judicial screening protocols do not catch. Attorneys can enhance fair results, not just fair process, by insuring participants with an otherwise limited familiarity of legal norms will not be taken advantage of.

The possibility of attracting more lawyers to represent clients in mediation, however, must be tempered with the lack of success in encouraging greater attorney representation in civil cases. These calls are high on rhetoric and drama, but strikingly short on success.<sup>192</sup> That said, the appeal of mediation both to law students and the profession at large is an exciting development, and mediation proponents—and those who administer court-annexed programs—can seek to harness enthusiasm into participation. There also might well be pushback from efficiency-minded courts, but perhaps courts will recognize that participation by attorneys facilitates the crafting of appropriate settlement agreements that are not only fair, but also durable. And that contributes to efficiency, albeit not with the immediacy of a case speedily crossed off a docket.

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encompasses “programs in which lawyers represent clients on a pro bono basis for the purposes of mediation only.” *Id.* at R. 6.5 cmt. [1]. Some thirty-nine states have adopted some form of Rule 6.5.

<sup>192</sup> For a discussion of the underlying dynamic that makes redressing access to justice so difficult, see Rubinson, *supra* note 62.

## VII. CONCLUSION

Mediation has been called “an essential positive force in constituting human identity and shared meaning”<sup>193</sup> and a means to “continue to survive and evolve as a species.”<sup>194</sup> Such aspirations, while hyperbolic, still assume a process with ample resources and with practitioners possessing skills of the highest order. They embody an ideal, however, that reflects only a limited percentage of mediations that actually occur.

A description of any activity must, necessarily, simplify it.<sup>195</sup> Nevertheless, it is inappropriate to approach mediation, with its emphasis on being a party-driven process, without recognizing that the process is wildly variable. This variability is based on the inequality of resources that are available to those who engage in the process. This, ultimately, does not reach the issue on whether mediation is a good thing or not for low-income individuals. However, viewing mediation as disembodied without limitations of time, space, or legal representation only teaches part of the story, and a misleading one at that.

The key, then, is to avoid idealizing mediation. It is situated in the real world, and what makes mediation successful must, similarly, be assessed based on what happens “on the ground.” Context is key. Without context, debates about models and grids do not get at what the impact of this extraordinarily process has on those with the least power and the greatest stakes.

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<sup>193</sup> BUSH, *supra* note 2, at 258.

<sup>194</sup> Love, *supra* note 46, at 945.

<sup>195</sup> See *supra* text accompanying note 118.

