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### Exploring the Role of Mandatory Mediation in Civil Justice

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## EXPLORING THE ROLE OF MANDATORY MEDIATION IN CIVIL JUSTICE

NAYHA ACHARYA\*

*In this article, I offer a framing of the debates around mandatory mediation that rest on the premise that a legitimate civil justice process depends on unhindered access to an adjudicative system, which must be recognized as a procedural right. This is a keystone of the rule of law, and a valid legal system that deserves the authority that it asserts is contingent on this. My central thesis is that requiring mediation (which is independent of the rule of law) before allowing full access to adjudication compromises the procedural rights of legal subjects, and the rule of law principle. Such a mandate is, therefore, an improper exercise of legal authority. This does not, however, mean that mediation cannot have significant value in enhancing the civil justice commitment to human dignity. The benefits that abound in mediation should be widely accessible, especially because mediation can (when it functions well) offer autonomous, empowered decision-making. The analyses that I offer here pave the road for determining, pragmatically, how mediation should be incorporated into civil justice systems, such that individuals can have legal claims adjudicated in a system that centralizes the rule of law and may also choose an equitable and well-structured mediation system that is responsive to concerns raised by critical race and feminist scholars about informal dispute resolution.*

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### I. INTRODUCTION

As proponents have long held and demonstrated, mediation is a powerful dispute resolution process that can empower parties, transform relationships, and give effect to

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lasting, harmonious, conflict resolution. It also tends to operate much faster than adjudicative dispute resolution, and with access to justice being a significant concern in Canada, such efficiencies can be valuable.<sup>1</sup> Every Canadian jurisdiction now has some iteration of mediation integrated into its civil justice process.<sup>2</sup> Some jurisdictions have taken the step to mandate parties to mediate before full adjudication of a civil claim can occur. In Ontario, within 180 days of the statement of defence being filed,<sup>3</sup> parties must mediate either through a mediator from the roster prepared by the local mediation coordinator or their own.<sup>4</sup> Non-compliance can result in an action being dismissed, or the statement of defence being struck.<sup>5</sup> In Saskatchewan, parties must mediate some time after the close of pleadings.<sup>6</sup> A non-compliant party can have their pleadings struck.<sup>7</sup> Newfoundland and Labrador's legislation mandates private or court-annexed mediation following the filing of the statement of defence.<sup>8</sup> Sanctions for non-compliance are similar to the other jurisdictions. The Court may order costs, stay proceedings, and strike out filed documents.<sup>9</sup> In short, mandatory mediation involves rules that require parties to mediate at some point during the litigation process, and non-compliance can be met with striking the party's pleadings thereby ending their right to adjudication. Although such provisions contemplate exemptions, courts have not granted them easily.<sup>10</sup>

In this article, I seek primarily to assess the legitimacy of such mandatory mediation provisions, and secondarily to suggest, in general terms, how best to incorporate mediation into civil justice. My analysis has led me to a two-pronged thesis: (1) mandatory mediation requirements result in a problematic compromise with procedural rights; and (2) that the availability of good (voluntary) mediation programs would enhance the legitimacy of a civil justice system. Scholars across jurisdictions have engaged in the debates around mandatory

<sup>1</sup> Canadian judges and courts often make note of the efficacy value of mediation. For example, Chief Justice Joyal described Manitoba's family mediation program as "a system that's going to be considerably less complex, considerably less slow and, in the end, considerably less expensive": Steve Lambert, "Manitoba Aims to Speed Up Family Court, Reduce Emotional Toll: Chief Justice," *CTV News* and *The Canadian Press* (30 August 2018), online: <[www.ctvnews.ca/canada/manitoba-aims-to-speed-up-family-court-reduce-emotional-toll-chief-justice-1.4073754](http://www.ctvnews.ca/canada/manitoba-aims-to-speed-up-family-court-reduce-emotional-toll-chief-justice-1.4073754)>. The Nova Scotia Court of Appeal's mediation program website notes mediation "can bring more satisfaction to the parties in less time and at lower financial and emotional cost," after recognizing that the court system can be "a costly and time-consuming process": The Courts of Nova Scotia, "The Court of Appeal: Judicial Mediation Program," online: <[courts.ns.ca/Appeal\\_Court/NSCA\\_mediation\\_program.htm](http://courts.ns.ca/Appeal_Court/NSCA_mediation_program.htm)>; The Canadian Judicial Council says that Judges as mediators may "help both parties reach an agreement by suggesting a settlement," in order to resolve the dispute in a manner that is "much less rigid, less expensive and faster": Canadian Judicial Council, "Alternatives to Going to Court," online: <[cjc-ccm.ca/en/resources-center/know-your-judicial-system/alternative-going-court](http://cjc-ccm.ca/en/resources-center/know-your-judicial-system/alternative-going-court)>.

<sup>2</sup> For an accessible and brief summary of court-based mediation programs in Canada, see generally Joel Richler, "Court-Based Mediation in Canada" (2011) 50:3 *Judges' J* 14.

<sup>3</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, r 24.1.09(1).

<sup>4</sup> *Ibid*, r 24.1.08(2).

<sup>5</sup> *Ibid*, r 24.1.13(2). In addition, the Court may establish a timetable for the action, strike out any documents filed by a party, or order a payment of costs.

<sup>6</sup> *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 42(1).

<sup>7</sup> *Ibid*, s 42(5)(c).

<sup>8</sup> *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, ss 37A.03(1), (4).

<sup>9</sup> *Ibid*, s 37A.05(2).

<sup>10</sup> For example, in *O (G) v H (CD)* (2000), 50 OR (3d) 82 (Sup Ct J) [*O (G)*], where the victim of a sexual assault was denied an exemption from mandatory mediation, the Court notes at paras 12–18 that exemptions should be granted sparingly, and usually only when: (1) parties have already tried mediation; (2) when the central issue is one of public interest; (3) where the case has very little complexity and can likely be resolved without discoveries; (4) where one of the litigants is not readily available; and (5) where it is evident that the efficiency goals of the mediation program will not be met. See also Barbara Billingsley & Masood Ahmed, "Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada" (2016) 45:2-3 *Comm L World Rev* 186 at 201.

mediation from various angles, sometimes embracing mandatory mediation, and sometimes treading skeptically around mandatory mediation, similarly to me. Here, I offer a framing of this debate that rests on the premise that for the rule of law to be upheld, our substantive legal rights must be accompanied by a procedural right to have our claims adjudicated based on the existing law. Accordingly, unhindered access to an adjudicative system must be recognized as a procedural right. Disallowing a litigant to exercise that procedural right is an infringement on the rule of law principle generally, and on her basic autonomy and dignity — a legitimate legal system must not use its authority to infringe on these central values. On that basis, I add my voice to those who have called for caution when it comes to mandating mediation, but I maintain much hope for the tremendous value that non-mandatory mediation can bring to civil justice.

Mediation can have significant value in contributing to the legitimacy of a civil justice system by enhancing human autonomy and dignity. It does so when it maximizes its potential for holistic, co-operative, and most importantly, self-determined dispute resolution. Problematically, though, both theoretical and empirical evidence indicates that court-connected mediation is usually assessed on efficiency and settlement rate metrics rather than its ability to truly empower parties.<sup>11</sup> This emphasis on efficiency has been shown to be costly for parties in terms of fairness in both process and outcome because of being pressured to settle. Moreover, prioritizing fast settlement may prevent parties from experiencing the substantive values of mediation: like self-determination; co-operative problem-solving; and opportunities to give and receive empathetic understanding. Making matters worse, critical race and feminist scholars have shed light on the dangers of informal dispute resolution and have demonstrated that already marginalized community members are at greater risk of coercion in those settings.<sup>12</sup> Mandating a process with these inherent risks seems to be a significant over-prioritization of efficiency in the face of compromise to the autonomy and dignity of already less powerful groups, let alone the more fundamental problem that mandating mediation compromises a basic procedural right which gives effect to the rule of law, even if the mediation program operates ideally.

The contribution that I hope to make through this article is to show that the ideal civil justice system includes unobstructed access to adjudication, along with available and desirable court-annexed mediation programs. In Part II, I explain more fully why unimpeded access to adjudication matters, why it is centrally aligned with protecting human autonomy and dignity by assuring the rule of law, and why mandating mediation runs counter to a legal process that respects the rule of law. Then, I offer my responses to counter-arguments of proponents who may hold otherwise. In that section, my basic point is that although mediation has many potential benefits, these do not justify mandating it, especially considering that it has potential detriments too. This leads me, in Part III, to engage in a risk-based analysis where I weigh the potential risks and benefits that would accompany mandatory mediation and arrive at the conclusion that avoiding the risks associated with mandatory mediation best aligns with the values of a good legal system. Still, the benefits

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<sup>11</sup> See generally Brooke D Coleman, “The Efficiency Norm” (2015) 56:5 Boston College L Rev 1777, for a discussion on the problematic prevalence of the efficiency norm and its equation with “cheaper” in civil justice contexts.

<sup>12</sup> See Part III below.

that abound in mediation are worth fighting for and making accessible, especially because mediation can (when it functions well) offer autonomous, empowered decision-making.

Ultimately, the framing of the mandatory mediation debate and the analyses that I offer here pave the road for determining, pragmatically, how mediation should be incorporated into civil justice systems. So, in the last Part, I offer reflections on how to give effect to a holistic civil justice enterprise that maintains and enhances its commitment to human autonomy and dignity. This is achieved by assuring that legal subjects can have legal claims adjudicated in a process that centralizes the rule of law and may also choose an equitable and well-structured mediation system. The pathway towards such a civil justice system includes designing lawyer, judge, and mediator training and public education that aligns with the ideal, and committing to continual empirical assessment of mediation programs, not just assessing their efficiency, but assessing their ability to maximize the substantive values of mediation.

## II. MANDATORY MEDIATION: PROCEDURAL ENHANCEMENT OR PROCEDURALLY PROBLEMATIC?

### A. UNDERSTANDING PROCEDURAL RIGHTS AND WHY UNHINDERED ACCESS TO THE ADJUDICATIVE PROCESS MATTERS

Often, mediation is presented as an overdue response to the characteristic slowness, expense, complexity,<sup>13</sup> and rough adversarial nature of the adjudicative system.<sup>14</sup> Through these lenses, and particularly considering the increasingly prohibitive cost of litigation, there is an understandable drive towards mandating mediation, which is typically cheaper and faster than court decisions.<sup>15</sup> The demand that parties must mediate at some point in the litigation process before the case can proceed is understandably seen by many (noted below)

<sup>13</sup> While holding that the adversarial system remains key to civil justice, the Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) at 11 noted that “many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand”; combating inefficiency via mediation is evidence in other instances, including, for example, *Rules of the Supreme Court*, *supra* note 8, s 37A.02: “The purpose of this rule is to establish a mechanism to provide mandatory mediation under a Court order in individual cases so as to reduce cost and delay in litigation and to facilitate the early and fair resolution of disputes.”

<sup>14</sup> Carrie Menkel-Meadow, “The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us” (1985) 1985 J Disp Resol 25 at 31. See also William LF Felstiner, Richard L Abel & Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming” (1980–81) 15:3/4 Law & Soc’y Rev 631. See also Carrie Menkel-Meadow, Lela Love & Andrea Schneider, *Mediation: Practice, Policy, and Ethics*, 3rd ed (Frederick: Aspen, 2020) at 65: there are “many shortcomings of litigation: prohibitive expense, heart-breaking delay, a lack of party participation and control of the process, unsatisfactory outcomes, and an adversarial orientation that alienates parties from one another. Mediation — when properly conducted — can address each of these shortcomings.” For an Australian perspective: Judy Gutman, “Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR” (2011) 14:1 Leg Ethics 1 at 1:

[O]ver the last 20 years, dissatisfaction with the adjudication model has been voiced by many, including litigants, legal practitioners, the judiciary, government agencies and policy-makers. Determinative processes are increasingly criticised for their associated costs, stress, delays and unsatisfactory outcomes. The growing criticisms have led to the emergence and rapid rise of alternative dispute resolution (ADR).

<sup>15</sup> See generally Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) for an excellent discussion of the risks associated with the trend towards privatization of dispute resolution via mandatory mediation and other alternative dispute resolution mechanisms on the basis of their perceived efficiency.

as a positive development.<sup>16</sup> The qualities of being cumbersome, expensive, and sometimes even hurtful are valid descriptors of the adjudicative process, and all of them, particularly financial inaccessibility, must be addressed. Increasing the use of mediation in civil justice may have an ancillary beneficial impact on the efficacy of civil justice systems, generally. However, defining the adjudicative process only by these shortcomings can lead to a dangerous undervaluing of the values that it, and only it, protects, and may cause a failure to recognize what we lose when we constrain access to it via mandatory mediation. A better approach to determining how best to include mediation in the court system may be to start by considering that an adjudicative system is essential to maintaining the legitimacy of the legal system because it embodies a procedural right that is foundational to maintaining the rule of law. From that starting point, it is possible to determine how mediation can best complement the civil justice system, such that the legitimacy of the legal enterprise is not only maintained, but also enhanced.

Adjudication is the procedural mechanism for administration and enforcement of legal rights. It ensures (albeit imperfectly) that the laws that we as a community agree to will authoritatively govern. Without such a process, legal rights and protections would not have pragmatic meaning or value. To have meaning, legal rights must be accompanied by procedural rights — the right to have our substantive legal rights administered authoritatively.<sup>17</sup> Without such procedural rights, the rule of law (in the sense of applicable laws being applied when and as appropriate) cannot be enabled. Imagine a society in which laws exist, but there is no authentic and independent mechanism dedicated to enforcing them. In such a legal system, the rule of law would be non-functional, and as a result, the legal system would be normatively illegitimate. Take for instance the tort law principle of negligence that governs our private interactions. If I am injured by the negligence of another person, then I am entitled in law to full compensation for my injuries. Without a process that is devoted to ensuring that this legal principle is applied, my entitlement to compensation has little meaning because I would have no way of enforcing the law of negligence in my dispute with the person who injured me. If this were the case, the basic societal stability that arises when the rule of law is effectual is unlikely to ensue. Adjudication should then be understood as containing the requisite procedural rights that must accompany our substantive legal rights for the rule of law principle to have pragmatic effect.<sup>18</sup>

Normatively, this element of the rule of law, which depends on an adjudicative system, is the mechanism by which the inherent equality, autonomy, and dignity of legal subjects is recognized.<sup>19</sup> Adherence to the rule of law ideal constitutes a commitment to treating people

<sup>16</sup> *Supra* note 14.

<sup>17</sup> See generally Ronald Dworkin, “Principle, Policy, Procedure” in Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) 72 for a nuanced and detailed explanation of the necessity to recognize procedural rights; I have also discussed this piece in Nayha Acharya, “Deciding, ‘What Happened?’ When We Don’t Really Know: Finding Theoretical Grounding for Legitimate Judicial Fact-Finding” (2020) 33:1 Can JL & Jur 1.

<sup>18</sup> See generally Jeremy Waldron, “The Rule of Law and the Importance of Procedure” in James E Fleming, ed, *Getting to the Rule of Law* (New York: New York University Press, 2011) 3 outlining that the impartial hearings and safeguards that inhere in court systems are an essential feature of rule of law.

<sup>19</sup> I have discussed my take on the underpinning values of the rule of law in more depth in Nayha Acharya, “Mediation, the Rule of Law, and Dialogue” (2020) 46:1 Queen’s LJ 69. My conception of rule of law aligns best with theorists who maintain a prominent theme of human dignity as a central virtue in legal legitimacy: Lon L Fuller, *The Morality of Law* (Fredericksburg, Va: Yale University Press, 1964); Joseph Raz, “The Rule of Law and its Virtue” in Joseph Raz, ed, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) 210; Jeremy Waldron, “The Concept and the

non-arbitrarily — everyone is equally entitled to the protections of the law and is equally subjected to its obligations.<sup>20</sup> That guarantee enables individuals to live autonomous, dignified lives within the confines of an authoritative legal system, in which legal rights and obligations have meaning that will be predictably protected and enforced, and in which legal authority is generally respected by community members.<sup>21</sup>

To be very clear, it is not the case that adjudicative systems invariably *succeed* in securing these values for all who encounter it. Without a doubt, the adjudicative system is wrought with problems. It can and does cause dignitary harm to anyone who falls victim to its inordinate delays, cost-based barriers, and potential coercion through misuse of its extensive processes, especially discovery processes.<sup>22</sup> It certainly results in specific harm to the dignity, autonomy, and well-being of those who are systemically not heard, appreciated, or understood in the court system.<sup>23</sup> These issues must be addressed to give effect to a legal system that truly operationalizes its theoretical ideals of the rule of law and the values that inhere in it. These problems constitute reasons to put much effort into improving the legal system, including effecting improvement through available, voluntary mediation. But they are not valid reasons to propound mandatory mediation.

Mediation process and outcomes are not contingent on the rule of law. Mandating mediation before a party can fully pursue adjudication compromises the validity of the legal system because doing so uses the law's authority to hinder the party's procedural right to access the full adjudicative process that gives effect to the rule of law.<sup>24</sup> This denies legal subjects of the normative values that underpin the rule of law, particularly, the protection of human dignity through the law, which demands that procedural rights are acknowledged and available, and that autonomous choice of process is maintained. Any legal mandate that compromises these values should not be part of the accepted legal ordering.

## 1. COUNTERARGUMENTS AND RESPONSES

One important counter view, which has been a significant driver for the increased acceptance of mandating mediation, hovers around access to justice concerns.<sup>25</sup> Rising costs of litigation and the resultant barrier to litigation has clearly harmful impacts on the rule of

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Rule of Law" (2008) 43:1 Ga L Rev 1 [Waldron, "Concept"]. Of course, there are many interpretations of rule of law and its value, but what I offer in the text above rests on what I perceive as its basic, uncontroversial elements.

<sup>20</sup> *Ibid.*

<sup>21</sup> Waldron, "Concept," *supra* note 19 at 40–41.

<sup>22</sup> John H Beisner, "Discovering a Better Way: The Need for Effective Civil Litigation Reform" (2010) 60:3 Duke LJ 547 at 551.

<sup>23</sup> For an empirical articulation of this point, see Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2016) 101:4 Iowa L Rev 1263.

<sup>24</sup> Here, I agree with Richard Ingleby, "Court Sponsored Mediation: The Case Against Mandatory Participation" (1993) 56:3 Mod L Rev 441 at 450: "To mandate referral to a process which does not treat the parties' legal entitlements as the most important consideration is to officially privilege one party. The legitimacy of litigation is its relationship with the rule of law. The alternatives ... have no such claims"; Archie Zariski, "The Multi-Door Courthouse at Middle Age: Life in Canada" (2019) 38:1 CJK 44 at 49, has gestured towards an argument that mandatory mediation may compromise constitutionally protected due process rights. See also Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (London, UK: Judiciary of England and Wales, 2016), where he rejects compulsory mediation on the basis that it undermines the constitutional right to access the courts.

<sup>25</sup> Adam Noakes, "Mandatory Early Mediation: A Vision for Civil Lawsuits Worldwide" (2020) 36:3 Ohio St J Disp Resol 409 at 410.

law and individual autonomy and dignity. Proponents argue that mandating mediation may alleviate that harm by providing a more cost-effective process through which parties can resolve their disputes.<sup>26</sup> The premise of this argument — that the inaccessibility of the legal system is a harmful reality that may delegitimize the system itself — is valid. Moreover, it is true that if mediation results in a resolution, it is likely to have done so at a lower cost than adjudication.<sup>27</sup> This justifies increasing resources for mediation programs that litigants can choose to make use of. But claiming that mandating mediation addresses the inaccessibility of the litigation process is dangerous because introducing a mandate to mediate does not respond to the problem that the adjudicative process, which protects the rule of law, would remain inaccessible to those who wish to use it. For a person who feels that they have suffered a legal wrong and who is entitled to legal remedy through courts but cannot afford to litigate, the inaccessibility of their procedural right to adjudication is not alleviated through the existence of mandatory mediation, and in fact, may be hindered even more by it. A better approach to using mediation as a means of responding to the access to justice problem is to ensure that mediation is available and encouraged, and parties are aware of its benefits, not only in terms of cost-savings, but also its additional advantages, like self-determination and consensual decision-making.<sup>28</sup>

This leads to the second counterpoint that revolves around the benefits of mediation. I have noted above that since mediation is not the mechanism through which the rule of law is maintained, it should not be mandated. Yet the fact that mediation is not bound by legal norms is, in many instances, precisely its advantage.<sup>29</sup> And, although mediation does not promise to uphold the rule of law, it makes other valuable offerings that align with the values of the rule of law — as a process, it has tremendous potential to enhance human dignity by enabling autonomous, self-determined conflict resolution, all the while resulting in more flexible and cost-effective resolutions.<sup>30</sup>

On the basis of these benefits, proponents of mandatory mediation note, sometimes on the powerful basis of their lived experience, that forcing parties into a mediation who would not have otherwise attended often has positive results.<sup>31</sup> Experienced mediators have moving stories of litigious parties who would have refused mediation if given the choice, but end up coming to a better understanding of one another and arriving at a shared, mutually beneficial

<sup>26</sup> See e.g. The Honourable Warren K Winkler, “Access to Justice, Mediation: Panacea or Pariah?” (2007) 16:1 *Can Arbitration & Mediation* J 5, online: *Court of Appeal for Ontario* <[www.ontariocourts.ca/coa/about-the-court/archives/access/](http://www.ontariocourts.ca/coa/about-the-court/archives/access/)>.

<sup>27</sup> *Ibid* at 5–6.

<sup>28</sup> See Part III below for an outline of the many benefits that mediation offers.

<sup>29</sup> See generally Carrie Menkel-Meadow, “Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)” (1995) 83:7 *Geo LJ* 2663 at 2676.

<sup>30</sup> As Jacqueline M Nolan-Haley remarks in “Court Mediation and the Search for Justice through Law” (1996) 74:1 *Wash ULQ* 47 at 49 [footnotes omitted], “[t]he trend toward court mediation is remarkable because our civil justice system has traditionally promised justice through law. The promise of mediation is different: Justice is derived, not through the operation of law, but through autonomy and self-determination.” See also Robert A Baruch Bush & Peter F Miller, “Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency” (2020) 35:5 *Ohio St J Disp Resol* 591.

<sup>31</sup> The Alberta Court of Queen’s Bench maintained this position in *IBM Canada Limited v Kossovan*, 2011 ABQB 621 at paras 27–28:

Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship.... Making the alternate dispute resolution process mandatory is an attempt to ensure that parties to litigation are exposed to its proven benefits.



outcome, and, achieving that resolution far faster than a court process would have enabled.<sup>32</sup> Undoubtedly, there is the possibility that parties who would have refused mediation, but participated by mandate, experience the autonomous, self-determined, and ultimately voluntary decision-making that characterizes (or should characterize) good mediation.<sup>33</sup> Moreover, the reluctant parties to a successful mediation may save costs for themselves, and contribute to systemic efficacy by freeing up court resources (though some studies show that empirically studied voluntary mediation programs seem to fair better in terms of longitudinal efficiency).<sup>34</sup>

Proponents point out that at its core, mediation should enable parties to arrive at a self-determined conclusion rather than having an authoritative outcome imposed on them.<sup>35</sup> It also values a humanization of the conflict resolution process by prioritizing mutual understanding and exploration of one another's interests, perspectives, and needs.<sup>36</sup> Lon Fuller, one of the first theorists of mediation, noted that its central feature is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>37</sup> As such, mediation contains tremendous potential to promote and enhance autonomy and dignity, which, as I have noted above, are central to law's legitimacy.<sup>38</sup> On these bases, it may seem that mandating mediation should be seen as a procedural enhancement because it creates the possibility of availing avoidant parties with these benefits, which brings additional systemic benefits as well. But is this possibility enough to justify mandating mediation?<sup>39</sup>

The possible benefits of mediation, and in particular its potential to offer a process wherein parties are empowered to self-determine a resolution that best suits them, is precisely the reason why much effort and resource can justifiably be spent on ensuring that good mediation programs are developed and their use is strongly encouraged. However, there

<sup>32</sup> John Lande, "Charting a Middle Course for Court-Connected Mediation" (2022) 2022:1 J Disp Resol 63 at 65.

<sup>33</sup> See generally Menkel-Meadows, Love & Schneider, *supra* note 14 at 65–68, for an accessible and thorough discussion of the general benefits of mediation.

<sup>34</sup> Shahla F Ali, "Civil Mediation Reform: Balancing the Scales of Procedural and Substantive Justice" (2019) 38:1 CJQ 1 at 9.

<sup>35</sup> See e.g. Jacqueline M Nolan-Haley, "Court Mediation and the Search for Justice Through Law" (1996) 74:1 Wash ULQ 47 at 49, noting that while justice in the adjudicative system is rooted in consistency with law, justice in the mediation context hangs on the value of self-determination. See also Robert A Baruch Bush & Joseph P Folger, "Mediation and Social Justice: Risks and Opportunities" (2012) 27:1 Ohio St J Disp Resol 1 at 33–49 [Bush & Folger, "Risks and Opportunities"], highlighting the values of self-determination and inter-party understanding. See similarly, Menkel-Meadow, Love & Schneider, *supra* note 14 at 66:

A fundamental lack of control — or self-determination — can be the price of obtaining a third-party decision. Similarly, remedies in adjudicative processes are those prescribed by the law, rather than remedies tailored by the parties. Mediators promote party empowerment and self-determination by carving out space and time for each side to tell their stories and be heard in a meaningful way.

<sup>36</sup> The importance of exploring interests and perspectives was made widespread by the famous book: Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 3rd ed (New York: Penguin Books, 2011).

<sup>37</sup> Lon L Fuller, "Mediation – Its Forms and Functions" (1971) 44 S Cal L Rev 305 at 325.

<sup>38</sup> Nancy A Welsh, "Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation" (2017) 70:3 SMU L Rev 721 at 726: "For those of us who believe in the dignity and capacity of every human being, there is some degree of magic in this concept of self-determination."

<sup>39</sup> Close to 40 years ago, Carrie Menkel-Meadow engaged in this debate in her piece, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33:2 UCLA L Rev 485.

are several reasons for why mandatory mediation is nonetheless unjustified. A series of concrete examples may assist in appreciating these reasons.

Imagine a situation of a patient visiting a dentist and suffering a serious allergic reaction after the visit. Adjudication of a dispute arising from this situation would involve much argument over whether the dentist was negligent at all, whether that negligence caused the damages sustained, what the present damages are, and what the future damages may be. Establishing these facts through adjudication would involve a cumbersome and expensive process — voluminous documentary exchange would be required, experts would be invoked, procedural arguments would be swapped over issues like the qualifications of experts, the admissibility of documents, along with substantive arguments about the standard of care, causation, and damages. If, in the end, the evidence falls short of establishing on a balance of probabilities that the dentist was negligent or that the negligence caused the damages sustained, then the correct adjudicative outcome is to dismiss the claim entirely. Conversely, if all the elements of the tort are established, then the dentist will be liable to compensate the plaintiff in full. These would be legitimate outcomes in accordance with procedural and substantive law.

In a mediation, however, parties are free to maintain flexibility in the process and the outcomes. Perhaps over the course of the mediation process, the dentist may accept some responsibility for the plight of the patient, the patient may recognize the inevitability of some human-error, and that they contributed to the damage they sustained by failing to attend follow-up appointments. The patient may conclude that they do not want the dentist to lose their professional reputation. Parties may come up with a compromised solution that is not ‘winner take all,’ and that works for their circumstance. Perhaps the dentist will agree to a payment plan, along with commitments to review their pre-procedure consultation, and the patient may agree to maintaining confidentiality about the incident. Such an outcome could be considered a better one than the all-or-nothing outcome available through the adjudicative system. Parties would have saved time and money, and would have come up with a cooperative, self-determined resolution. This is an example of the “magic” that can occur through mediation.<sup>40</sup> It is on the basis of this potential magic that mandatory mediation is often presented as a positive procedural feature.

But now imagine if the dentist routinely bullies patients and pressures them to undergo various treatments. Then, when an injury occurs, concerned with their reputation, the dentist desires a private mediation process and settlement. The patient in this scenario may feel that they have a right in law (that is, the right to be compensated when injured through someone else’s negligence) that has been violated. Concurrently, they also have an accompanying procedural right to have their claim ascertained by a court based on their legal right. It does not seem appropriate to force the patient to engage in a mediation process with a bully medical provider who has an informational and likely financial advantage, where the aim of the process is not fundamentally to have the relevant legal right protected, and neither the process nor the outcome will be subject to any public scrutiny. Dictating engagement in a process that does not centrally demand governance by the rule of law before access to the

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<sup>40</sup> Welsh, *supra* note 38; Albie M Davis, “The Logic Behind the Magic of Mediation” (1989) 5:1 *Negotiation J* 17.

adjudicative process (which does demand governance by the rule of law) is allowed, or forcing a party to seek permission to pursue adjudication directly and to prove their entitlement to do so, constitutes a denial of their procedural right. In doing so, the plaintiff's autonomy and dignity are compromised because she is effectively forced into a process which she may not want to pursue. It revokes her choice to pursue her procedural right to adjudicate, without which the substantive right has little meaning. Conceivably, a mediation process has a chance of transforming the bully dentist, and she may mend her ways as a result. But bargaining for this chance against an infringement of a party's procedural rights is a risky wager, and one that should not be forced.

A stark example that encompasses this concern is the case of an Ontarian victim of a sexual assault who was denied an exemption from mandatory mediation in her civil case, even though she was afraid to be in the same room as the Defendant. The Judge held that a skilled mediator could address those concerns and getting an "early and fair resolution" was the overriding concern.<sup>41</sup> This was the holding, despite the Defendant's sworn statements that:

9. I am advised by my solicitor that this action is subject to mandatory mediation which requires my presence in the same room as the Plaintiff. I know that the Plaintiff will attempt to intimidate me and I am fearful of being in the same room as him.

10. I am now making some progress in getting over my psychological trauma but I am afraid that the experience of being in the same room with the Plaintiff will cause a setback.

11. My solicitor has advised me of the mediation process and I do not believe that I would be able to participate productively in a mediation with the [P]laintiff present.<sup>42</sup>

This, I suggest, demonstrates an illegitimate use of legal authority given that it constitutes a barrier to the rule of law for the Defendant and denies her the basic dignity and autonomy of choice of process. The Defendant in this case should have had her right to choose adjudication, and only adjudication, protected. This is the case even if, hypothetically, mandating a mediation could have resulted in the victim and perpetrator coming to a better understanding of each other and undergoing personal transformations.<sup>43</sup>

The key point is that the benefits of mediation are potentialities, and these potentialities cannot outweigh the actuality of infringing a person's procedural right to choose only adjudication where their legal right is at stake. What's more, researchers have long warned that while mediation can and does, at times, offer a valuable process that enables self-determination, mutual understanding, and tailored outcomes, these benefits may not always be actualized, especially in court-connected mediation programs, and there are significant concerns about unfairness in mediation due to coercion between parties and mediator influence and bias, discussed below. As such, mandating mediation does not necessarily mean mandating all the benefits that mediation may offer, and it may mean mandating a

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<sup>41</sup> *O (G)*, *supra* note 10 at para 19.

<sup>42</sup> *Ibid* at para 5.

<sup>43</sup> See also Billingsley & Ahmed, *supra* note 10 at 201 for a catalogue of cases where exemptions to mandatory mediation were not allowed.

process that could be unfair to some parties. Below, I outline the potential risks that inhere in mediation, and take up a competing risks analysis to show that although mediation may bring significant benefits to parties who may not otherwise have used it, it should not be mandated.

### III. A COMPETING RISKS ANALYSIS

#### A. THE COMPETING RISKS

First, when it comes to court-annexed mediation, whether mandatory or not, efficiency seems to be the central driving force for policy-makers and legal players. The Ontario mandatory mediation program was “designed to help parties involved in civil litigation and estates matters attempt to settle their cases before they get to trial, thereby saving both time and money.”<sup>44</sup> This is understandable because of the relationship between efficiency and access to justice. But, the emphasis on efficiency diminishes the other ways that mediation can add value to civil dispute resolution. One of the clearest and most encompassing articulations of this problem is offered by Lola Akin Okelabi:

Issues in court-connected mediation arise from the conduct of various stakeholders. Institutions, who focus on achieving efficiency rather than humanising dispute resolution, addressing underlying issues, including systemic and public interest matters; mediators, who focus on achieving settlement thereby pressuring parties to settle; parties, who may lack the capability to participate effectively; repeat players, who create power imbalance; and legal representatives whose interests may be at odds with their clients’ interests. These make self-determination in court-connected mediation a myth rather than reality.<sup>45</sup>

Many researchers have similarly argued that the emphasis on efficiency in court-annexed mediation has been problematic. Detailing the institutionalization of mediation in the 1990s, Robert Bush makes note of how institutionalization correlated with increased coercion in mediation.<sup>46</sup> James Cohen and Penelope Harley similarly reminisce that, “[e]arly mediation advocates were concerned with community empowerment and social harmony, not simply

<sup>44</sup> Canadian Forum on Civil Justice, “Inventory of Reforms: Ontario Mandatory Mediation Program (Rules 24.1 and 75.1), online: <[cfjc-fcjc.org/inventory-of-reforms/ontario-mandatory-mediation-program-rules-24-1-and-75-1/](http://cfjc-fcjc.org/inventory-of-reforms/ontario-mandatory-mediation-program-rules-24-1-and-75-1/)>. Making an argument for mandatory mediation, Megan Marrie, “Alternative Dispute Resolution in Administrative Litigation: A Call for Mandatory Mediation” (2010) 37:2 Adv Q 149 notes at 161: “[I]t is concluded that implementing a mandatory mediation program for matters in administrative litigation would be successful in, at a minimum, reducing the delay and costs that would otherwise be experienced were the matter to proceed through to an adjudicative hearing.” See generally Randy A Pepper, “Mandatory Mediation: Ontario’s Unfortunate Experiment in Court-Annexed ADR” (1998) 20:4 Adv Q 403, for early critiques of Ontario’s mandatory mediation pilot project. The author argues that the program offers an inappropriately rigid, user-pay system of non-evaluative dispute resolution which may not work well for every party; Gary Smith, “Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not” (1998) 36:4 Osgoode Hall LJ 847, where the author argues that mandatory mediation may not fulfill its promise of efficiency and is theoretically antithetical to mediation.

<sup>45</sup> Lola Akin Okelabi, “Ethical Issues in Court-Connected Mediation” (2019) 38:1 CQJ 61 at 71. This sentiment is also expressed in Welsh, *supra* note 38 at 723. See also Catherine Morris, “How Legal Culture & Traditions Shape Systems and Practices of Mediation & Conciliation: Lessons from Canada’s Judicial System” (Presentation delivered at the Seminar for Judges and Mediators of the Intellectual Property and International Trade Court Bangkok, Thailand, 12 November 2015), Peacemakers Trust, online: <[www.peacemakers.ca/publications/ADRThailandJudgesNov2015FINAL.pdf](http://www.peacemakers.ca/publications/ADRThailandJudgesNov2015FINAL.pdf)> [unpublished].

<sup>46</sup> Robert A Baruch Bush, “Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades” (2008) 84:3 NDJ Rev 705 at 727–30.

settlement of disputes and closing of legal files.”<sup>47</sup> Along similar lines, Bobbi McAdoo and Nancy Welsh has pointed out that as mediation became institutionalized, reducing costs and delay were the guiding principles as opposed to self-determination, naturally resulting in tactics primarily designed to secure settlements.<sup>48</sup> For instance, shuttle diplomacy and individual party private caucusing became increasingly preferred, rather than focusing on communicative exchange between the parties themselves.<sup>49</sup> Studies indicate that lawyers display an emphasis on fast, adversarial, rights-based settlement when it comes to mediation, rather than the key principles of self-determination and dialogue among parties.<sup>50</sup>

Intensifying the problem that institutionalized mediation may not retain the benefits of mediation that are often referred to by proponents of mandatory mediation is the evidence that parties who are marginalized are disproportionately compromising or accepting of worse outcomes than they may have secured through formal processes. Owen Fiss raised this point in his much-studied piece “Against Settlement,” noting that where one party has more power than another, mediation could lead to grave injustice.<sup>51</sup> Since then, feminist and critical race scholars have raised similar concerns.

In her well-known article, “The Mediation Alternative: Process Dangers for Women,” for instance, Trina Grillo sets out to determine if mandatory mediation fulfils its promises of offering a distinct process that enables parties to use their voices and arrive at self-determined outcomes. Based on social science studies highlighting women’s experiences, and her personal experience as a mediator, she concludes that:

Mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises. In particular, quite apart from whether an acceptable result is reached, mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties’ speaking with their authentic voices.<sup>52</sup>

<sup>47</sup> James Coben & Penelope Harley, “Intentional Conversations About Restorative Justice, Mediation and the Practice of Law” (2004) 25:2 *Hamline J Pub L & Pol’y* 235 at 249–50.

<sup>48</sup> Bobbi McAdoo & Nancy A Welsh, “Look Before You Leap and Keep on Looking: Lessons From the Institutionalization of Court-Connected Mediation” (Winter 2004/05) 5 *Nevada LJ* 399 at 426.

<sup>49</sup> Welsh, *supra* note 38 at 727. See also Joseph P Folger, “‘Mediation Goes Mainstream’ – Taking the Conference Theme Challenge” (2002) 3:1 *Pepperdine Dispute Resolution LJ* 1 at 2–5, noting that the institutionalization of mediation has incentivized understanding mediation as an evaluative process oriented towards achieving settlement.

<sup>50</sup> See e.g. Olivia Rundle, “Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases” (2008) 8:1 *Queensland U Technology L & Justice J* 77; Kathy Douglas & Becky Batagol, “The Role of Lawyers in Mediation: Insights from Mediators at Victoria’s Civil and Administrative Tribunal” (2014) 40:3 *Monash UL Rev* 758 at 765; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge, Mass: Cambridge University Press, 2009).

<sup>51</sup> Owen M Fiss first raised this warning in, “Against Settlement” (1984) 93:6 *Yale LJ* 1073 — that where one party has more power than another, mediation could lead to grave injustice.

<sup>52</sup> Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100:6 *Yale LJ* 1545 at 1549–50 [footnotes omitted].

As Carol Pauli notes, three decades after Grillo's precautionary piece was published, social science research has found evidence supporting her skepticism.<sup>53</sup> For instance, Carol Izumi has shown that unconscious and implicit biases can result in exacerbating the dangers that Grillo describes.<sup>54</sup> Amy Dewitt McArdle has argued that studies comparing male and female reasoning tend to suggest that women, as a group, are more likely to operate through an "ethics of care" and place greater value on relationship preservation, resulting in their being more likely to accept agreements that may not serve their direct interests.<sup>55</sup>

Scholars of critical race theory have offered parallel critiques. One of the most prominent of these critiques came from Richard Delgado in the mid 1980s.<sup>56</sup> He hypothesized that the inequities that plague society generally find space to re-manifest in the informal, non-public setting of alternative dispute resolution systems, and that minorities are better off resolving disputes in formal contexts, where civil rights movements made their prominent gains.<sup>57</sup> Isabelle Gunning added nuance in 1995 by explaining how cultural myths that negatively impact marginalized populations can contribute to bias and disadvantage in mediation.<sup>58</sup> More recently, in 2017, Delgado again questioned whether the formal court systems offer much better protection for minorities, and maintained that informal dispute resolution systems are dangerous.<sup>59</sup> That same year, Welsh published an influential piece highlighting studies that show that a person's societal status and role influences their perceptions of justice.<sup>60</sup> She points to the *Metrocourt Project* which showed that Hispanic-Americans were more likely to be satisfied with their mediated outcomes, even though their outcomes were less likely to be favourable when compared to White Americans.<sup>61</sup>

<sup>53</sup> Carol Pauli, "Trina Grillo: Productive Rage" in Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole, eds, *Discussions in Dispute Resolution: The Foundational Articles* (New York: Oxford University Press, 2021) 157 at 157–60. See also Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton: Princeton University Press, 2003); Penelope E Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40:2 *Buff L Rev* 441. See for comparison, Daniel Del Gobbo, "The Feminist Negotiator's Dilemma" (2018) 33:1 *Ohio St J Disp Resol* 1. There, the author catalogues the research done on gender difference in negotiation and challenges the narrative that there is a typically female manner of negotiating that tends to disadvantage women.

<sup>54</sup> Carol Izumi, "Implicit Bias and the Illusion of Mediator Neutrality" (2010) 34 *Wash UJL & Pol'y* 71.

<sup>55</sup> Amy DeWitt McArdle, "Patriarchal Protection v. Matriarchal Mediation: Feminism in Alternative Dispute Resolution" (2014) 4:3 *Resolved: J Alternative Dispute Resolution* 17 at 17–24. See also Douglas N Frenkel, "The Grillo Effect at Thirty" in Hinshaw, Schneider & Cole, *supra* note 53, 165 who points to some empirical studies conducted in California that may not support the claim that women are or feel oppressed in mediation settings. Though he notes also that these studies may not yet have the necessary rigor to support generalizations (at 166). Moreover, studies that show that women feel satisfied after a mediation may not lead to the inference that the outcomes they secured are objectively just. See generally Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24:1 *CJWL* 207, for an interesting piece on the dangers of mandatory mediation in family contexts, the value that the critiques have had on adjusting mediation programs in response to feminist concerns, and the problem of informal settlement pressure especially where there is a risk of power imbalance.

<sup>56</sup> Richard Delgado et al, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] 1985:6 *Wis L Rev* 1359 at 1413.

<sup>57</sup> *Ibid*; Isabelle R Gunning, "Diversity Issues in Mediation: Controlling Negative Cultural Myths" [1995] 1995:1 *J Disp Resol* 55 at 67 — also says courts might provide better protection of equality. See also Harry T Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99:3 *Harv L Rev* 668; Eric K Yamamoto, "Efficiency's Threat to the Value of Accessible Courts for Minorities" (1990) 25:2 *Harv CR-CLL Rev* 341.

<sup>58</sup> Gunning, *ibid*.

<sup>59</sup> Richard Delgado, "Alternative Dispute Resolution: A Critical Reconsideration" (2017) 70:3 *SMU L Rev* 595. In that piece, Delgado also catalogues empirical evidence supporting this claim at 598–99. See also Welsh, *supra* note 38 at 721.

<sup>60</sup> Welsh, *ibid*.

<sup>61</sup> *Ibid* at 738–39.

Though there is indication of disadvantage to marginalized groups in mediation contexts, empirical evidence seeking to test the hypotheses that informal dispute resolution yields prejudicial outcomes or feelings of oppression are inconclusive, in part because of the challenge of measuring such subjectivities and replicating results, and the relative dearth of such experimental study.<sup>62</sup> Nonetheless, the risks of the dangers that were witnessed and cautioned about by feminist and critical race critics, as well as the generalized risks of power imbalance and coercion remain relevant. For some, acknowledging these risks would lead to a conclusion about mandatory mediation as offered forcefully by Laura Nader:

Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view. The situation is much like that in psychotherapy, little regulation and little accountability. Mind control activities operate best in isolation, and those who have read the literature on influence understand that people in life crises are vulnerable to coercive influence.<sup>63</sup>

Yet simultaneously, the potential benefits of mediation should not be ignored. As Gunning has noted, even though the critiques have merit, there is hope that mediation may hold the potential to improve self-determination, especially for groups that tend to be disadvantaged and who need space to express their voices and experiences.<sup>64</sup>

Mediation, then, has dual potentialities: (1) tremendous possibility of benefit, both specific to parties and systemic; as well as (2) serious potential for danger in terms of procedural and outcome unfairness. As such, the question of mandating mediation can be understood as an analysis of competing risks. If mediation is not mandated, there is a risk that parties who would have benefited from it do not make use of it and pursue litigation. This has potential detrimental impacts. First, the parties may lose out on a potentially empowering, transformative, and relational process. Second, pursuing litigation instead of mediation may result in unnecessary expenditure of time and money for the parties and for the adjudicative system, generally. On the other hand, if mediation is mandated, in addition to infringing on basic procedural rights, there is a risk that a party who is forced into the mediation process suffers the above noted concerns about coercion and bias, and such error is likely disproportionately borne by marginalized groups. This is the category of errors that can occur via mandatory mediation.<sup>65</sup> A principled approach to determining which of these errors is more important to avoid should be grounded in the question of the requisite features of a justifiable legal system. I turn to this analysis below.

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<sup>62</sup> See e.g. Gilat J Bachar & Deborah R Hensler, “Does Alternative Dispute Resolution Facilitate Prejudice and Bias?: We Still Don’t Know” (2017) 70:4 SMU L Rev 817 at 836, which concluded that the efforts to test the hypothesis that informal dispute resolution would produce biased outcomes remains inconclusive to date.

<sup>63</sup> Laura Nader, “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology” (1993) 9:1 Ohio St J Disp Resol 1 at 12–13.

<sup>64</sup> Gunning, *supra* note 57 at 67.

<sup>65</sup> There is also the additional concern that forcing unwilling parties into mediation may result in “box-ticking,” where parties simply meet for short periods of time to meet their mediation obligation and go on to pursue traditional litigation. This type of undermining of the mediation process can end up wasting additional time and expense, and can contribute to a culture of perceiving mediation as unhelpful. Dr. Julie Macfarlane made note of this in her piece, “Culture Change?: A Tale of Two Cities and Mandatory Court-Connected Mediation” (2002) 2002:2 J Disp Resol 241 at 281, which discussed an empirical study of Ontario lawyers’ perceptions of mandatory mediation and its impact on their litigation strategy.

## B. MAKING THE FULL CIRCLE BACK TO PROCEDURAL RIGHTS AND THE RULE OF LAW

The central thesis of this article is that mandatory mediation is difficult to justify because it denies the procedural right to an adjudicative process that administers legal rights. A mandatory mediation policy amounts to using legal authority to force a party into a process that does not prioritize the rule of law and hinders access to the process that does. This constitutes a denial of the basic autonomy and dignity of the parties by denying the choice to pursue adjudication, where legal rights and obligations govern. In my view, this tips the balance in favour of prioritizing the avoidance of the risks associated with mandatory mediation, which outweigh the risk of losing its benefits for avoidant parties. It may seem that the problem of hindering access to adjudication is over-stated because the right to adjudication does not disappear in situations of mandatory mediation since parties forced into mediation are not forced to settle. If they cannot reach a settlement, they are still permitted to turn back to the adjudicative system.<sup>66</sup> But this background, lingering availability of adjudication does not resolve the issue because mandatory mediation means requiring participation in a process whose legitimacy (either procedural or substantive) is not dependent on the rule of law. Using the law to demand participation in such a process cannot be considered appropriate.<sup>67</sup> Rather, it must be seen as an overstep of legitimate legal authority. The fact that mediation may give rise to a process that enhances self-determination and may lead to better understanding between parties and flexible outcomes does not justify imposing a legal mandate requiring individuals to undergo a process that is not designed to protect their legal rights. Using a legal mandate to deny or hinder the procedural right to choosing to have one's legal rights adjudicated in court compromises the legal process.

Put in terms of the competing risks of mandatory mediation versus non-mandatory: if mediation is not mandated, the detrimental risk will manifest when a party exercises their autonomous choice to lose out on a potentially wonderful process and outcome. They may unwittingly suffer higher costs, emotional tolls, and a potentially unsatisfactory outcome, and they may impose those potential detriments on the other party if the other party was desirous of mediation.<sup>68</sup> These are important risks which should be mitigated by spending resources

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<sup>66</sup> For research on the choice of ADR processes in an Australian context, see for example Tania Sourdin, *Alternative Dispute Resolution*, 5th ed (Sydney: Thomson Reuters (Professional) Australia, 2016) at 296–97.

<sup>67</sup> See generally McAdoo & Welsh, *supra* note 48 at 427, advocating that parties should be allowed to opt out of mandatory mediation at will, without any requirements other than their will.

<sup>68</sup> It is worth making note of the problematic situation where one party genuinely wants to try mediation, but the other party refuses, thus divesting them of the choice to give mediation a try. In that instance, one party is forced to pursue adjudication by the other. This is undeniably a frustrating situation, but it still does not constitute a legitimate reason to mandate mediation. After all, a plaintiff always has the ability to force a defendant into the litigation process, rooted in the concept of party autonomy. There may be other helpful responses in this situation. One involves effecting culture shifts in the legal profession and the general public away from adversarial dispute resolution, discussed further below. Another possibility with more teeth is using cost consequences to disincentivize unreasonable refusal to participate in mediation. Fully examining the propriety of cost consequences to incentivize mediation is beyond the scope here, but discretion for imposing cost consequences for failure has been considered by Canadian judges. As noted in Billingsley & Ahmed, *supra* note 10 at 203 [footnotes omitted], in *Roscoe v Halifax (Regional Municipality)*, Muise J of the Nova Scotia Supreme Court held that 'in the absence of ... statutorily mandated settlement steps, accompanied by costs sanctions for failing to take them, the failure to make all reasonable attempts to resolve a claim does not, by itself, warrant augmented costs.' In *Michiels v Kinneer*, however, the plaintiff's unreasonable refusal to mediate was listed among several factors considered by Power J of the Ontario Supreme Court in determining an appropriate costs award against the unsuccessful plaintiff. This suggests



on making well-structured mediation programs available within civil justice systems and strongly encouraging their voluntary use. But the detrimental risks of mediation including coercion, pressure, the emotional damage of having to participate in a communal process before being allowed to fully adjudicate a claim, and most importantly, the legal damage of hindering a procedural right, would arise out of a legal mandate.<sup>69</sup> From the perspective of what constitutes justifiable use of legal authority, the balance of risks favours voluntary mediation. And voluntary mediation must have a significant role in civil justice.

Given that mediation, at its best, offers flexibility in terms of both process and outcome, a commitment to non-adversarial, consensual decision-making which has transformative potential for individuals and relationships, and most importantly, has great potential to offer parties more autonomy and self-determination than an adjudicative process, means that the civil justice system would be enhanced by making good mediation programs available and well-used.<sup>70</sup> Ideally, a civil justice system would ensure that access to the adjudicative process is unhindered, but most litigants would choose to try mediation.<sup>71</sup> This would mitigate against the risks of losing out on the potential benefits of mediation for reluctant parties without a mandate, and would best align with protecting the procedural right to adjudicate, thereby maintaining the autonomy and dignity of those governed by the legal system. Actualizing this ideal requires that mediation programs are structured in a way that is responsive to its potential dangers, that maximizes its benefits, that are easily accessible, and that are recognized as valuable by legal players as well as the general public. In the next section, I offer some brief reflections on how the legal institutions can contribute to this goal.

#### IV. IMPLICATIONS FOR THE WAY FORWARD

Practically, there are several levels of institutional engagement (law schools, courts, judicial institutes, bar associations, and research institutes) that would need to be invoked to give effect to the vision of a holistic legal enterprise that includes effective adjudication and respect for the rule of law in addition to well-structured mediation that is recognized for its central value of self-determination rather than efficiency alone. The precise steps to take requires further dialogue and bold innovation. Here, I offer some preliminary ideas on what

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that, while Canadian courts are reluctant to use their discretion to award costs against a party as a direct punishment for failing to voluntarily engage in ADR, the Canadian judiciary has not fully closed the door on taking a party's unwillingness to mediate into account when considering an overall costs award.

<sup>69</sup> Jeffrey W Stempel, "Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role" (1997) 24:4 Fla St UL Rev 949 at 973. Stempel has articulated the danger as follows: "[T]he courts have a duty to ensure that court-sponsored ADR does not impose more unfairness than would exist in the absence of judicially imposed ADR. If the courts force parties to mediate and force the mediator to blithely facilitate unfair case resolutions, the system becomes an active wrongdoer."

<sup>70</sup> In this sense, I am not in the camp of early critics of alternative dispute resolution, like Judith Resnik or Owen M Fiss, who may suggest that adjudication is a preferred process for disputes. I agree with the critics, though, that proponents of ADR processes must demonstrate and prove their validity. See Fiss, *supra* note 51 at 1073; Owen M Fiss, "Out of Eden" (1985) 94:7 Yale LJ 1669; Judith Resnik, "Managerial Judges" (1982) 96:2 Harv L Rev 374.

<sup>71</sup> Here, I agree with John Lande, *supra* note 32 at 7-8:

My recommended approach is intended to make mediation attractive so that parties would willingly choose to use it. Even when courts order parties to mediate, courts can operate programs that make parties want to take advantage of it. The more that parties and lawyers believe that mediation satisfies their interests, the more that they will use it without compulsion.

the conceptual analysis in this article implies in terms of valuable institutional goals that would best align with the values that secure the legitimacy of civil justice systems.

### A. LAW SCHOOLS AND BAR ASSOCIATIONS

Lawyers are uniquely positioned to ensure the legitimate operation of justice processes,<sup>72</sup> and their ability to do so depends on proper education. Law schools and bar associations, who regulate entry into the profession and require continuing professional development of their members, must ensure opportunities to develop conceptual clarity regarding what makes a legal system legitimate, and about the lawyer's role in maintaining its legitimacy. This must include a deep understanding that a well-functioning, accessible adjudication system is a necessary feature of a rule of law-based society. Lawyers must appreciate their unique responsibility in upholding the rule of law, which requires proficiency in substantive and procedural law so that clients are availed of their substantive and procedural rights. While law schools and bar associations likely place their emphases here, lawyer education must also be balanced by making it plain that turning to legal norms and traditional legal processes is not the only, nor necessarily the best, approach to resolving disputes. This, I suspect, is significantly underemphasized in most law school and bar association curricula. But the goal of making mediation available and effective depends on lawyers appreciating its central norms of autonomous, dignified, self-determined, non-adversarial decision-making, and on their being able to assist clients in engaging authentically in this process. Since lawyers are usually the primary source of education about legal processes for their clients, they must be prepared to educate their clients on the potential benefits of mediation, and they should be trained to ensure that those benefits are indeed abound. In short, if the ideal civil justice system includes not only a robust adjudicative process, but also an authentic orientation towards non-adversarial, co-operative, dialogic problem solving via mediation, then law schools and bar associations need to reflect that same ideal. Otherwise, voluntary mediation programs will not be used enough, and when they are, they will be reduced to adversarial bargaining.

As such, the Canadian legal academy and bar associations should convene to discuss how to train lawyers to be effective in assisting clients in mediation contexts which centre on client self-determination and are not contingent on adversarial, legalistic frameworks.<sup>73</sup> Such training should include teaching lawyers how to help clients express their voice and maximizing their self-determination in mediation contexts. How these skills should be taught must be rigorously examined, but there are excellent resources available already. For instance, Michaela Keet and Teresa Salamone have provided practical and accessible

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<sup>72</sup> Michaela Keet, "The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation" (2005) 68:2 Sask L Rev 313.

<sup>73</sup> For an insightful series of contributions on alternative dispute resolution in American legal education, see John Lande, ed, *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (University of Missouri School of Law, 2020), online (pdf): <ssrn.com/abstract=3533324>. In addition to providing education and training to law students, Jennifer W Reynolds in "Luck v. Justice: Consent Intervenes, but for Whom?" (2014) 14:2 Pepperdine Dispute Resolution LJ 245 at 306–307, has called for law schools to have a role in providing public education aimed to assist people in their negotiation and mediation skills.

guidance on how lawyers can transition to mediation advocacy.<sup>74</sup> In addition, the bar association may even issue practice notes encouraging lawyers to discuss ADR options with clients and provide focused training on helping clients make an informed choice of process. For an exceptional resource in this respect, see Michaela Keet, Heather Heavin, and John Lande's 2020 book outlining a method of helping clients make good procedural and substantive decisions through analysing various risks, including emotional tolls, at different parts of the legal process. It provides practical guidance for approaching both litigation as well as negotiation and mediation.<sup>75</sup> I would recommend this handbook to any lawyer, law student, or mediator, and even any member of the public who has a legal claim, and I have introduced its principles into my Alternative Dispute Resolution course.

## B. COURTS AND JUDICIAL INSTITUTES

No legal institution is more central to a discussion about civil justice, the rule of law, and court-annexed mediation, than the courts. The analyses presented above suggest several propositions for the role of the courts in the question of how mediation can properly be a part of civil justice. First, maintaining accessibility to the judicial process is crucial, and resolving the access to justice crisis should be central to reform agendas. But, courts should resist resting on mandating mediation as a response to access to justice crises, as explained above. They should, however, embrace and invest in mediation programs that are available and well-run, and that the public is aware of. Courts should invest in public education, improving how parties understand the mediation process. This would help parties make informed choices about whether to pursue mediation. Such public education can be affected through written guides<sup>76</sup> or even in-person and online information sessions. It may even be feasible to mandate participation in informational sessions about mediation.<sup>77</sup> The better the public understands mediation, the more they have a true choice of process.

As outlined above, however, there are potential problems of coercion and bias in mediation, and courts and judicial institutes must work to mitigate such risks. Courts and judicial institutes should invest in mediator training programs that emphasize that efficiency goals are not the primary markers of successful mediation. Rather, mediation is successful when parties are availed of its substantive benefits — like the ability to participate fully and make a self-determined decision on how to proceed with their conflict, which could include

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<sup>74</sup> Michaela Keet & Teresa B Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64:1 Sask L Rev 57, see especially Part 2.

<sup>75</sup> Michaela Keet, Heather Heavin & John Lande, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* (Chicago: American Bar Association, 2020).

<sup>76</sup> For a sample mediation guide from the American Bar Association see: American Bar Association, "Preparing for Mediation" (2012), online: *American Bar Association* <[indisputably.org/wp-content/uploads/ABA-Mediation-Guide-general.pdf](https://www.americanbar.org/content/uploads/ABA-Mediation-Guide-general.pdf)>. For family: American Bar Association, "Preparing for Family Mediation" (2012), online: *American Bar Association* <[indisputably.org/wp-content/uploads/ABA-Mediation-Guide-family.pdf](https://www.americanbar.org/content/uploads/ABA-Mediation-Guide-family.pdf)>. See also American Bar Association, "Preparing for Complex Civil Mediation" (2012), online: *American Bar Association | Dispute Resolution* <[indisputably.org/wp-content/uploads/ABA-Mediation-Guide-complex-civil.pdf](https://www.americanbar.org/content/uploads/ABA-Mediation-Guide-complex-civil.pdf)>.

<sup>77</sup> See Nancy A Welsh & Andrea Kupfer Schneider, "The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration" (2013) 18 Harv Negot L Rev 71 at 134–35 for their endorsement of this approach.

a refusal to settle and pursuing adjudication.<sup>78</sup> Such recognition on the part of mediators would help to prevent incentivizing settlement pressure and may better empower parties to the mediation. In addition, calls to ensure bias training<sup>79</sup> and increasing the diversity of the pool of mediators<sup>80</sup> should be heeded, and investment into training to help mediators respond to inter-party coercion is essential.

Finally, in order to ensure their continual evaluation and assessment, courts must engage in empirical studies of mediation programs through post-mediation questionnaires and interviews of participants, as Welsh has long urged.<sup>81</sup> Courts should also allow independent researchers to engage in qualitative and quantitative studies of court-connected mediation, which leads to the next point.

### C. RESEARCHERS AND RESEARCH INSTITUTES

One of the reasons that mediation can be a dangerous process is because it is necessarily confidential in nature. This makes it difficult to assess whether mediation programs are living up to their ideals, and truly enabling autonomous, empowered, dispute resolution. Of course, party privacy in mediations must remain protected, but mediation programs generally can and should be empirically assessed.<sup>82</sup> Empirical assessment should be structured to provide insights into what the parties are experiencing<sup>83</sup> and what problems they perceive. For instance, mediator unpreparedness or undue influence, coercion between parties, or lawyer interference, among other things.<sup>84</sup>

In addition to empirical study, researchers must also undertake critical conceptual analyses that would inform mediation and civil justice policy as well as training and education of mediators and lawyers. Such analyses may include building on a variety of cross-disciplinary

<sup>78</sup> Bush & Folger, "Risks and Opportunities," *supra* note 35 at 43. In this piece, Bush and Folger discuss the importance of mediators supporting a party's right to withdraw from a mediation as a method of power balancing.

<sup>79</sup> Phyllis E Bernard, "What Some Theories Say; What Some Mediators Know" (2009) 15:3 *Dispute Resolution Magazine* 6, showing the effects of reflection on the role of gender, race, and socioeconomic class on mediators. See also Welsh, *supra* note 38 at 760–61 section titled "Empowering Mediators to Avoid Unconscionable Unfairness or Coercion."

<sup>80</sup> See e.g. Maria R Volpe et al, "Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field" (2008) 35:1 *Fordham Urb LJ* 119; F Peter Phillips, "ADR Continental Drift: It Remains a White, Male Game," *The National Law Journal* (27 November 2006); Marvin E Johnson & Maria R Volpe, "The Color of Money: Compensation Opportunities and Barriers" (2017) 23:4 *Dispute Resolution Magazine* 14 at 14.

<sup>81</sup> See e.g. Bobbi McAdoo & Nancy Welsh, "Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice" in Donna Stienstra & Susan M Yates, eds, *ADR Handbook for Judges* (Washington, DC: American Bar Association Section of Dispute Resolution, 2004) 1; Nancy A Welsh, "Magistrate Judges, Settlement, and Procedural Justice" (2016) 16:3 *Nevada LJ* 983 at 990.

<sup>82</sup> Dr. Julie MacFarlane, "ADR and the Courts: Renewing Our Commitment to Innovation" (2012) 95:3 *Marq L Rev* 927 at 929, notes that given the constant emergence of new information about conflict dynamics, process design, and so on, those interested in civil justice reform must commit to continually assessing and re-assessing dispute resolution programs.

<sup>83</sup> Here, I agree with Donna Shestowsky, "Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little" (2008) 23:3 *Ohio St J Disp Resol* 549, where she argues that knowing disputant preferences can enable better design of dispute resolution processes.

<sup>84</sup> For a critical review of empirical assessments that have been undertaken, see Carrie J Menkel-Meadow, "Dispute Resolution" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (New York: Oxford University Press, 2010) 596.

research topics. Examples that peak my interest include: collaborating with sociologists or anthropologists to understand the social dimensions of conflict or variance in cultural approaches to conflict and how to recognize and accommodate those within a mediation context; working with conflict and peace theorists and analysts to better appreciate how to uncover the underlying causes and transformative potential of conflict and determining how to maximize that within mediation programs; teaming up with education scholars to bring increasing nuance to mediator and lawyer training, as well as creating educational opportunities about conflict resolution for the general public and in schools; and drawing on Indigenous and other Eastern wisdom traditions to inform our conflict resolution system design, which may also help us recognize our Eurocentricity and refrain from imposing it unduly in mediation contexts. The possibilities of conceptual research that would contribute to mediation and civil justice process discourse in Canada is vast and exciting.

## V. FINAL COMMENTS

This article has been about the proper role of mediation within civil justice systems. The analysis has depended on maintaining conceptual clarity on the value and necessity of unhindered access to the adjudicative process in order to respect the rule of law, and on the true contribution that mediation can make beyond efficient dispute resolution. On the basis that the rule of law depends on an adjudicative system that centralizes legal rights, I have argued against mandatory mediation. In a society that functions through the rule of law, the ability to choose an adjudicative remedy in the instance of a legal breach must be understood as a procedural right that accompanies substantive rights. Mandating mediation hinders that choice, and that results in an affront to the dignity and autonomy of all legal subjects. Yet mediation must be understood as a valid and important element of civil justice precisely on the basis of those same normative values. Available and well-structured mediation programs would provide a valuable choice to litigants — the ability to choose a process that enables self-determined, autonomous, dialogical dispute resolution. So, a civil justice system operates at its best when dependable adjudication is invariably available and accessible, and so is trustworthy mediation. My hope is that our collective striving will be oriented towards manifesting this ideal.