Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick

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TEARING DOWN THE HOUSE: WEAKENING THE FOUNDATION OF DIVORCE MEDIATION BRICK BY BRICK*

Mediation is an attractive alternative to traditional litigation. In the last decade the use of mediation in family law has increased substantially. Mediation is particularly suited to family disputes when the parties voluntarily choose to use the process because it can help the parties resolve disputes and foster long-term relationships. Not all parties, however, are given a choice between mediation and more traditional adversarial justice. Currently, state legislation ranges from permitting mediation to mandating mediation. Mandatory mediation raises the issue of due process violations, especially in situations involving spousal abuse.

This Note analyzes the use of mediation in domestic relations cases and specifically looks at the use of mandatory mediation in situations involving abuse. The author suggests that when mediation is voluntary it can be a useful tool in resolving domestic disputes, including divorce and child custody issues. When mediation is mandated, however, it violates the participants' due process rights under the Fourteenth Amendment—especially in situations where one of the parties has been abused by the other. The author suggests that mediation should remain voluntary, that statutes should provide for mediation only when parties are willing to participate, and that mediators should screen for abuse and discontinue the mediation process if abuse is discovered.

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INTRODUCTION

Participants in the American legal system have options when deciding how to resolve conflicts. One option is to pursue conflict resolution in the traditional manner, through litigation. The adversarial system, however, is plagued with problems, including backlogged dockets from growing case-loads, cost-conscious initiatives, and reduced time for each case.¹ These

¹ See generally Andre G. Gagnon, Ending Mandatory Divorce Mediation for Battered Women, 15 HARV. WOMEN'S L.J. 272, 272 (1992) (discussing the problems of mandatory mediation in divorce); Douglas D. Knowlton & Tara Lea Muhlhauser, Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is It a Train on the Track?, 70 N.D. L. REV. 255, 255-58 (1994) (discussing the bene-
problems make alternatives to traditional litigation attractive to parties who wish to resolve their disputes in a more timely and cost-effective fashion.

Alternative dispute resolution (ADR)\(^2\) has become an attractive alternative to litigation and is often viewed as a means of alleviating some of the burdens of the traditional approach to resolving disputes.\(^3\) The most attractive attribute of ADR is that it can resolve disputes more quickly than litigation at a lower cost to the participants. For these reasons in particular, mediation has permeated many areas of civil and criminal law.

Mediation is a "voluntary dispute resolution process which involves: [a] third-party neutral who has no stake in the outcome."\(^4\) Both courts and private parties have turned to mediation for effective dispute resolution. The National Center for State Courts noted that over 200 court-connected mediation programs exist in the United States,\(^5\) with states’ use of mediation on the rise.\(^6\) In civil cases, the federal government and the states employ mediation in the following types of disputes: personal injury, construction, labor, commercial, environmental, complex multi-party anti-trust actions, and RICO claims.\(^7\) Thirty-eight states and the District of Columbia utilize mediation in custody and visitation disputes.\(^8\) Moreover, "[t]hirty-three states have statutes or court rules that mandate mediation in contested custody and visitation cases."\(^9\)

In the last decade, the use of mediation in the area of family law has risen,\(^10\) especially as an effort to resolve divorce, custody, and visitation disputes. Mediation is particularly suited to families because parties voluntarily work to resolve disputes and foster long-term relationships in the mediation process. Despite mediation’s beneficial goals, however, “its use in domestic abuse cases has generated considerable discussion among victim fits of mediation as “an alternative to traditional divorce proceedings”).

\(^2\) ADR includes mediation, negotiation, arbitration, and a variety of processes that combine these dispute resolution methods. See MARK D. BENNETT & MICHELE S. G. HERMANN, THE ART OF MEDIATION 8-9 (1996).


\(^4\) MAINE COURT MEDIATION SERVICE, STATE JUSTICE INSTITUTE, MEDIATION IN CASES OF DOMESTIC ABUSE: HELPFUL OPTION OR UNACCEPTABLE RISK? 5 (1992) [hereinafter MEDIATION IN CASES OF DOMESTIC ABUSE].


\(^7\) See ADR PRACTICE GUIDE, supra note 3, § 23:1, at 2.

\(^8\) Salem & Milne, supra note 5, at 34.

\(^9\) Id.

advocates, mediators, lawyers, judges, and others who work in the domestic relations, victim advocacy, and law-related fields.\textsuperscript{11}

Mediation may not be suited for divorce proceedings involving domestic violence or abuse. The basic elements of mediation are voluntary participation, roughly equal bargaining power, mediator neutrality, a non-binding outcome, and confidentiality.\textsuperscript{12} Although a principle tenet of mediation is voluntariness, several states have implemented mandatory mediation through the courts or by statute.\textsuperscript{13}

Improper implementation of the process can undermine the basic elements of mediation. First, voluntary participation becomes involuntary when mandated by a court or by statute.\textsuperscript{14} Second, the abused is not on equal footing with the abuser, so skewed bargaining power can affect the resolution of the dispute.\textsuperscript{15} Third, if the mediator remains neutral, she accepts and condones the abuser’s acts, which can disempower the abused and result in a coerced, rather than a bargained-for, resolution.\textsuperscript{16} Fourth, mandatory mediation often requires that the parties resolve the dispute, whereas non-binding mediation does not require a resolution.\textsuperscript{17} Fifth, some jurisdictions require mediators to report situations of abuse to protect the abused; however, if the jurisdiction does not require mediators to report abuse, mediation standards may not permit the mediator to breach his pledge of confidentiality.\textsuperscript{18}

Mediation advocates assert that mediation in the domestic violence context is “potentially unsafe and inherently unfair.”\textsuperscript{19} Victims argue that the “dynamics endemic to an abusive relationship preclude the possibility of collaborative decision making, even with a skilled mediator.”\textsuperscript{20}

This Note explores whether mandatory mediation and mediation in situations of abuse violate a participant’s due process rights. Part I lays the foundation of mediation, including the definition, requirements, and goals of mediation. It discusses the use of mediation in particular areas, compares the adversarial and mediation processes, and weighs the advantages of mediation over other forms of ADR as well as the adversarial system. Part II discusses what family law mediation entails, analyzes current statutes that

\begin{itemize}
\item \textsuperscript{11} Salem & Milne, \textit{supra} note 5, at 34.
\item \textsuperscript{12} See Gagnon, \textit{supra} note 1, at 274.
\item \textsuperscript{13} See infra notes 54-58 and accompanying text.
\item \textsuperscript{14} See discussion infra Part II.B.
\item \textsuperscript{15} See Salem & Milne, \textit{supra} note 5, at 36; see also Knowlton & Muhlhauser, \textit{supra} note 1, at 263.
\item \textsuperscript{16} See Knowlton & Muhlhauser, \textit{supra} note 1, at 265-68; see also Gagnon, \textit{supra} note 1, at 276.
\item \textsuperscript{17} See discussion infra Part II.B.
\item \textsuperscript{18} See John Murphy, \textit{Mediation and the Duty to Disclose, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER’S GUIDE} 87, 87-90 (American Bar Ass’n ed., 1985).
\item \textsuperscript{19} Salem & Milne, \textit{supra} note 5, at 34.
\item \textsuperscript{20} Id. at 36.
\end{itemize}
provide for some form of mediation, and addresses mediation in the context of divorce proceedings, with a focus on situations both of non-abuse and abuse. Part III concludes that in situations of abuse, mandatory mediation violates a participant’s due process rights under the Fourteenth Amendment, but voluntary mediation does not. Part IV recommends (1) that mediation remain voluntary because mandating it violates the foundational principles of mediation, (2) that statutes provide for mediation if parties are willing to participate, and (3) that programs that screen for abuse are necessary to prevent mediation from occurring and/or continuing in situations of abuse.

I.

A. Foundation of Mediation

Sources define mediation in many ways. It is described as “a method of settlement negotiation in which the parties to a dispute meet with an impartial third party, the mediator, and attempt to reach a mutually satisfactory resolution of their dispute,” a “process for conflict resolution or conflict management; an alternative to violence, self-help, or litigation, it is different from the processes of counseling, negotiation, and arbitration,” and “a voluntary dispute resolution process which involves: [a] third-party neutral who has no stake in the outcome [and] [d]isputants who jointly search for solutions that are creative and practical, that address the separate concerns and interests of the parties, and that are based on objective criteria.”

Irrespective of its many definitions, mediation fulfills many goals and objectives, including the following:

(1) creating win-win situations,
(2) empowering the parties,
(3) “reconcil[ing] the interests of the parties,”
(4) “creat[ing] a better atmosphere for further negotiation and developing options for mutual gain,”
(5) fostering relationships,

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23 MEDIATION IN CASES OF DOMESTIC ABUSE, supra note 4, at 5.
24 See Taylor, supra note 22, at 62.
25 See id. at 61.
26 ADR PRACTICE GUIDE, supra note 3, § 23:9, at 7.
27 Id. § 23:9.
28 See Taylor, supra note 22, at 62.
being “more cost-effective than traditional litigation,”

“reduce[ing] the anxiety and other negative effects of conflict by helping the participants reach consensual resolution,”

“reduce[ing], resolv[ing] and manag[ing] conflicts,”

“mak[ing] appropriate decisions,”

“prepar[ing] participants to accept the consequences of their decisions,”

“producing] an agreement or plan that the participants can accept, and with which they will comply,” and

“focus[ing] on the specifics of how participants will reduce and resolve the conflict, rather than what causal factors led to the conflict.”

These goals and objectives derive from the general characteristics of mediation. To preserve the fundamental characteristics of mediation that achieve the above goals, mediation must be an entirely voluntary and non-binding process, one which requires “rough parity in bargaining power between the parties to be successful.” Additionally, “[i]t is a finite process that produces specific outcomes, using the ‘values, norms, and principles of the participants’ rather than those of the neutral third-party mediator.”

Mediation participants include the two parties in dispute and a mediator,

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29 Id. § 24:5.
30 Taylor, supra note 22, at 61.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 See generally ADR PRACTICE GUIDE, supra note 3, §§ 23:4-10 (discussing the general characteristics of the mediation process).
38 Taylor, supra note 22, at 61.
39 See ADR PRACTICE GUIDE, supra note 3, §§ 26:11-12. The Task Force on Mediation set the following guidelines for mediators:

Standard I: “The mediator has a duty to define and describe the processes of mediation and its cost before the parties reach an agreement to mediate.” TASK FORCE ON MEDIATION, AMERICAN BAR ASSOCIATION, DIVORCE AND FAMILY MEDIATION, STANDARDS OF PRACTICE 1 (1984).

Standard II: “The mediator shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants.” Id. at 2.

Standard III: “The mediator has a duty to be impartial.” Id. at 3.
and possibly include attorneys and court personnel. In the mediation process, mediators have no power to render decisions. The mediation format includes joint meetings (fact exchanges) and private sessions (caucuses); and the process is confidential with regard to the proceedings.\footnote{Two models describe the phases of mediation. The first model includes three phases: information gathering, probing or playing devil’s advocate, and strategizing and negotiating. \textit{See ADR Practice Guide, supra} note 3, \S\ 23:15. The second model involves eight phases: "(1) introduction and orientation; (2) fact-finding and disclosure; (3) isolation and definition of issues; (4) exploration and negotiation of alternatives; (5) compromise and accommodation; (6) reaching tentative agreement; (7) review and processing settlement; [and] (8) finalization and implementation." Ann Milne & Jay Folberg, \textit{The Theory and Practice of Divorce Mediation: An Overview}, in \textit{Divorce Mediation} 3, 8-9 (Jay Folberg & Ann Milne eds., 1988).}

\section*{B. \textit{Comparison of Adversarial and Mediation Processes}}

In the case of a divorce, the ultimate goal of the adversarial system and mediation are identical: to "present the court with a settlement agreement."\footnote{See Stephen K. Erickson, \textit{The Legal Dimension of Divorce Mediation}, in \textit{Divorce Mediation}, \textit{supra} note 40, at 106.} In addition, the discovery stage in mediation, like the adversarial system, requires full disclosure, and mediators use similar methods "to ensure the truth of the information relied upon to reach settlement. Both systems make liberal use of experts. All the issues essential to a complete agreement that are normally raised by attorneys must also be raised by mediators."\footnote{Id.}

Why, then, is mediation more desirable than adversarial negotiations, which are used by the vast majority of the divorcing public? The answer lies in the different questions each process asks its participants, as well as in the way the processes define the issues involved.\footnote{See id.} In the adversarial system, a set of procedures governs the outcome, with the attorney acting as the interpreter of what to expect in court.\footnote{See id.} In contrast to the adversarial process, which requires that parties submit to what courts or legislators deem equita-
ble, the mediation process encourages parties to decide what is fair as a means of creating their own law of fairness.\(^{45}\)

Although both processes devise agreements, they arrive at those agreements differently. Mediators facilitate an agreement that the parties negotiate themselves; attorneys in the adversarial process “advise and negotiate a settlement on behalf of their clients.”\(^{46}\) The framing of issues is different between the two processes. In the adversarial process, “attorneys define the most common divorce issues in a way that reflects the basic assumptions inherent in the adversarial court process, in terms of competitive, win-lose outcomes. In contrast, mediators define divorce issues in mutual, cooperative terms that require a different effort to answer the questions.”\(^{47}\)

Mediation has several advantages over other forms of ADR and the adversarial system. Voluntary mediation is non-binding and promotes win-win situations by fostering long-term relationships.\(^{48}\) Additionally, mediation is concerned more with the present and future than with the past.\(^{49}\)

II.

A. What Family Law Mediation Encompasses

Mediation within the familial setting differs from other forms of mediation in that it involves conflict between individuals in close physical and emotional proximity. Accordingly, there is a potential for emotional outbursts and high tension levels.

Family law mediation\(^{50}\) is designed “to settle separation and divorce-related differences through agreement.”\(^{51}\) Mediation, unlike combative divorce litigation, “helps family members resolve their disputes in an informative and consensual manner.”\(^{52}\) Divorce mediation promotes effective communication, exploration of options, negotiation, and compromise, and “permits divorcing couples to address and resolve their own problems as competent adults.”\(^{53}\)

\(^{45}\) See id.

\(^{46}\) Id. at 107.

\(^{47}\) Id.

\(^{48}\) See Taylor, supra note 22, at 62.

\(^{49}\) See id.

\(^{50}\) See generally ADR PRACTICE GUIDE, supra note 3, § 31:2.

\(^{51}\) Id.

\(^{52}\) Task Force on Mediation, Divorce and Family Mediation Standards of Practice, 1986 A.B.A. SEC. FAM. L. 1, 9.

\(^{53}\) ADR PRACTICE GUIDE, supra note 3, § 31:2. Despite its empowering attributes, mediation is not a replacement for therapy. See MARGARET M. FOTH & ROBERT GARRITY, MEDIATION AND COMMUNICATION SKILLS, A MANUAL FOR TRAINING 3 (1994). Instead, mediation is an enabling process that empowers parties to create their
B. Current Statutory Landscape

The current statutory landscape ranges from permitting parties to enter into mediation to mandating mediation. There are five broad categories of statutes: (1) statutes in which a party may request to enter into mediation;54 (2) statutes in which participation in mediation is a prerequisite to a judicial hearing;55 (3) statutes permitting the court to order mediation;56 (4) statutes that advise against or prohibit the use of mediation in cases involving abuse or domestic violence;57 and (5) statutes that permit the use of media-

54 See ALASKA STAT. § 25.24.060 (Michie 1996) (allowing parties to request mediation, or the court to order mediation “if it determines that mediation may result in a more satisfactory settlement between the parties,” although parties may withdraw and the mediator may terminate, in which case “the divorce action shall proceed in the usual manner”); N.H. REV. STAT. ANN. § 458:15-a (1992) (allowing the court to suspend proceedings if both parties wish to enter into mediation, unless it appears “to either the court or the mediator, or when either party asserts that abuse ... has occurred”).

55 See CAL. CIV. CODE § 4607 (West 1983 & Supp. 1990) (repealed 1994); DEL. FAM. CT. C.R. (16)(a)(1); ME. REV. STAT. ANN. tit. 19-A, § 251(4) (West Supp. 1997) (“When agreement through mediation is not reached on an issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing.”); WIS. STAT. § 767.11(5) (West Supp. 1997) (“[I]n any action affecting the family ... the parties shall attend at least one session with a mediator ... [unless] the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties.”).

56 See IND. CODE ANN. § 31-1-24-5 (West 1996) (stating that “the court shall determine whether the proceeding should be referred to mediation”); OHIO REV. CODE ANN. § 3109.052(A) (Banks-Baldwin 1995) (“[T]he court may order mediation only if the court determines that it is in the best interests of the parties to order mediation and makes specific written findings of fact to support its determination.”); PA. STAT. ANN. tit. 23, § 3901(b) (West Supp. 1997) (“The court may order the parties to attend an orientation session to explain the mediation process. Thereafter, should the parties consent to mediation, the court may order them to mediate such issues as it may specify.”); R.I. GEN. LAWS § 15-5-29 (1996) (“[A]s to issues of custody and visitation [the court may] direct the parties to participate in mediation in an effort resolve their differences.”).

57 See COLO. REV. ST. ANN. § 13-22-311 (West 1997) (requiring a party to claim physical or psychological abuse to be exempt from mediation; otherwise, the court may order mediation); DEL. CODE ANN. tit. 13, § 711A (Supp. 1996) (preventing mediation if a court finds that one party committed domestic violence on the other party or if a civil protection order is in effect); IOWA CODE ANN. § 598.7A (West Supp. 1997) (stating that “the court shall determine ... whether the parties to the proceeding shall participate in mediation to attempt to resolve differences” unless the court “determines that a history of abuse exists”); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1998) (providing that the court may “refer to mediation all or any part of a filed civil action” unless the court “finds there has been a history of domestic violence that would compromise
tion when reasonable screening has occurred.\textsuperscript{58}

1. \textit{Mediation in Divorce Proceedings}

Several issues arise in the context of divorce mediation: power balancing, family court conciliation versus private mediation, screening, and confidentiality. These concepts must be explored briefly to determine whether mandatory mediation in divorce disputes or mediation in cases of abuse violate one or both participants' due process rights under the Fourteenth Amendment.

\textsuperscript{58} See \textit{Cal. Fam. Code} § 3181(a) (West 1997) (permitting separate mediation once a written declaration of domestic violence is filed); \textit{Idaho R. Civ. P.} 16(j) (allowing the court discretionary power to order mediation unless inappropriate); \textit{Tex. Civ. Prac. \\& Rem. Code Ann.} § 154.022 (West 1997) (requiring that the court find a reasonable basis for an objection to mediation before the referral is prohibited); \textit{Utah Code Ann.} § 30-3-21 (1996) (repealed 1997) (establishing a pilot program that provides for mandatory mediation in divorce regarding custody/visitation; court can direct parties to mediation while issuing necessary protective orders); \textit{cf. Neb. Rev. Stat.} § 43-2904(2) (Supp. 1996) (requiring training for mediators to enable them to recognize domestic violence before parties begin mediation; implementing screening guidelines and safety procedures).
a. Power Balancing

Parties must have roughly equal bargaining power to effectively resolve a divorce dispute through mediation. In fact, one of the requirements of mediation is that the parties possess equivalent power. Parties' positions are not necessarily balanced in divorce mediation; however, their “ability to participate equally in a negotiation” is crucial to a just outcome.

In general, divorce mediators endeavor to balance the power between the parties, which “tends to produce agreements that are more fair and voluntary, rather than coerced.” The balancing is not intended to reduce a more powerful position, but only to equalize the parties’ ability to participate. If parties have roughly equal bargaining power, it is more likely that the decision the parties reach will have lasting effect.

b. Family Court Conciliation v. Private Mediation

Local tax revenues fund family court conciliation or any other type of court-sponsored mediation. A court can either refer parties to, or require them to utilize, court-annexed mediation.

Private mediation can provide advantages not offered by court-ordered mediation. For example, in private mediation all issues related to the divorce can be mediated together. Unlike court officials, who are restricted in what they can offer the parties, private mediators have the ability to be creative in fashioning solutions. Private mediation may be more successful because parties who pay for mediation may be more willing to compromise. Finally, parties may be more forthcoming with their thoughts and feelings with a private mediator than they would be with a court official.

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59 See Gagnon, supra note 1, at 274.
60 ADR PRACTICE GUIDE, supra note 3, § 31:5.
61 Id.
62 See id.
63 See Knowlton & Muhlhauser, supra note 1, at 255.
64 See Milne & Folberg, supra note 40, at 12.
65 See ADR PRACTICE GUIDE, supra note 3, § 31:12.
66 See id.
67 See id.
68 See id.; see also id. § 24:5 (“The mediator’s fee is usually hourly, ranging from $125-600 per hour depending on experience and ability. It is usually split among the parties so it is typically a small additional expense.”).
c. **Screening**

Screening processes are crucial in both court-sponsored and private mediation to determine the appropriateness of mediation in a given case. Screening should be used to determine if domestic violence or abuse occurred in the relationship. If domestic violence or abuse has occurred, the mediation process is undermined, because one basic principle of mediation—that the parties have roughly equal bargaining power—is absent. If equal bargaining power is not present, the mediation should not continue.  

The Mediation Center of Kentucky advised rejecting a case set for mediation if one or more of the following conditions are present:

a. There have been two or more hitting incidents during the last year or hitting incidents in the past, which cause the victim to still be in fear—For the purposes of this policy, hitting will also include: slapping, punching, kicking, biting, or striking with objects or throwing objects at the person in such a way as to put them in danger of injury.

b. There has been one incident where the victim has been injured to the point of requiring medical attention within the last year, or some incident in the past that causes the victim to be in fear.

c. The spouse has made serious threats to injure the victim or has threatened to commit suicide within the past six months.  

If any of the above conditions exist, the mediator sends a memorandum to both the court and the parties stating that the case is not acceptable for mediation. The mediator does not need to give any further explanation of the rejection.  

Standards like these are essential. It can be difficult, however, to implement them. One problem with implementing such standards is the education and training of mediators. Mediators must be trained specifically for domestic abuse cases.  

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69 Many authors agree that, along with the other basic elements of mediation, "equality or rough parity of bargaining power" is necessary for successful mediation. Gagnon, *supra* note 1, at 274; see also Milne & Folberg, *supra* note 40, at 3-8.


71 See *id*.

72 See Trigoboff, *supra* note 6, at 32.
lence might proceed unknowingly with a case in which abuse has occurred. A mediator must be able to recognize the signs of domestic abuse and to know whether to terminate the process, or to continue while protecting the interests of the disadvantaged party.\textsuperscript{73}

d. Confidentiality

Mediation is a form of settlement negotiation in which confidentiality plays an important role.\textsuperscript{74} To ensure complete disclosure of information, parties must be assured that confidentiality will be protected in two ways: "first, that what is disclosed during the private caucus sessions will not be revealed to the opponent during the mediation, and second, that what transpires during the mediation [will] not be disclosed in any subsequent proceeding."\textsuperscript{75}

Problems arise, however, in situations of abuse. Some states require mediators to report family abuse.\textsuperscript{76} As a result, a statutory duty to report would override the confidentiality a mediator normally guarantees. Not all states, however, have this duty. Without a statutory duty to report or a statute exempting cases involving abuse from court-ordered mediation, in a situation of abuse, a mediator may not be able to terminate the mediation or legally breach confidentiality. As a result, an abused party may be forced into court-ordered mediation by a statute that does not have an exemption for abuse. Such a result places the abused in a tenuous position.

e. Situations of Abuse

Situations of abuse give rise to questions concerning whether mediation is appropriate. The Domestic Abuse and Mediation Project provides an excellent framework within which to evaluate the usefulness and appropriateness of mediation in situations of abuse.

The study, based on Maine's current Court Mediation Service, endeavors to formulate procedures and policies for mediation.\textsuperscript{77} The project defined

\textsuperscript{73} Although many scholars agree that mediation should not continue when a situation of abuse becomes evident to the mediator, some argue that mediation can still continue and be successful. See Stephen Erickson & Marilyn McNight, \textit{Mediating Spousal Abuse Divorces}, 7 \textit{Mediation Q.} 377, 378 (1990) (promoting the idea that "mediation sessions with both spouses present can reduce the likelihood of future abuse"); Alison E. Gerencser, \textit{Family Mediation: Screening for Domestic Abuse}, 23 \textit{Fla. St. U. L. Rev.} 43, 55-59 (1995) (stating that once screening has uncovered abuse, the mediation should not continue); Linda K. Girdner, \textit{Mediation Triage: Screening for Spouse Abuse in Divorce Mediation}, 7 \textit{Mediation Q.} 365, 365-66 (1990) (agreeing that mediation should not continue in situations of abuse).

\textsuperscript{74} See ADR PRACTICE GUIDE, supra note 3, § 27:1.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} See MASS. GEN. LAWS ch. 112, § 12A (1996).

\textsuperscript{77} See MEDICATION IN CASES OF DOMESTIC ABUSE, supra note 4. As the title sug-
several terms, which are particularly useful in delineating what may be an appropriate or inappropriate case for mediation. Domestic relations is defined as "disputes over parental rights and responsibilities, child support, parent/child contact, the division of marital property, and spousal support (alimony)."\textsuperscript{78} This deals with long-term, permanent arrangements for families. Domestic abuse refers to "acts of intimidation, harassment, coercion, and violence perpetrated by an abuser against a former or current intimate partner.... Th[e] acts serve to maintain the abuser's power and control over the abused person."\textsuperscript{79} Non-physical acts "include, but are not limited to, emotional abuse, isolation, threats and the use of male privilege."\textsuperscript{80} Physical acts "include, but are not limited to, pushing, shoving, choking, slapping, hitting, using weapons, and physically detaining."\textsuperscript{81} These definitions help distinguish the often confusing terms used in abuse discussions.\textsuperscript{82}

One foundational principle of mediation is that parties entering into mediation should have roughly equal bargaining power. Abuse affects that power, which can be defined as:

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the ability of each disputant to get what each wants, to stop the other from getting what he/she wants or of obtaining outcomes both want, regardless of the support or opposition of the other . . . . The potential power of each disputant is a function of the resources each party brings with them to mediation.\textsuperscript{83}
\end{quote}

A party's power can be affected in many ways. The Domestic Abuse Intervention Project determined how power affects an abused person in her bid for equal bargaining power.\textsuperscript{84} The Project's "Power and Control

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gests, the project that the Maine Court Mediation Service discusses addressed the use of mediation in protection-from-abuse and domestic abuse cases. The overall question posed was: Can mediation be a helpful option, or is it an unacceptable risk? The project studied protection-from-abuse cases, which stem from judicial directives based on factual determinations that abuse occurred. The court orders issued in such cases protect an abused from an abuser. This Note addresses the use of mediation only in domestic abuse cases and subsequent divorce actions.
\end{quote}

\textsuperscript{78} Id. at 6.
\textsuperscript{79} Id. at 5.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 7.
\textsuperscript{84} This study, like the others noted, used feminine pronouns because of the overwhelming percentage of abused women compared to abused men in the United States.
Wheel\textsuperscript{85} illustrates the means by which an abuser can exert power and control over the abused. This control carries over into the mediation process.\textsuperscript{86} Abuse can take many forms that may not fall within the traditional notion of physical violence.

2. \textit{Mediation in Custody and Visitation Disputes}

In many states that permit some form of mediation in divorce proceedings, the laws inextricably tie mediation to proceedings involving custody or visitation disputes.\textsuperscript{87} The policy underlying these statutes stems from the

The use of “she” or “her,” however, should be read to encompass both men and women who have been victims of abuse.

\textsuperscript{85} \textit{MEDIATION IN CASES OF DOMESTIC ABUSE}, supra note 4, at 47 (utilized by the Domestic Abuse Intervention Project).

\textsuperscript{86} See id. Types of power or control include:

Using Economic Abuse: [p]reventing her from getting or keeping a job; making her ask for money; giving her an allowance; taking her money; not letting her know about or have access to family income.

Using Male Privilege: [t]reating her like a servant; making all the big decisions; acting like the “master of the castle”; being the one to define men’s and women’s roles.

Using Children: [m]aking her feel guilty about the children; using the children to relay messages; using visitation to harass her; threatening to take the children away.

Minimizing, Denying and Blaming: [m]aking light of the abuse and not taking her concerns about it seriously; saying the abuse didn’t happen; shifting responsibility for abusive behavior; saying she caused it.

Using Isolation: [c]ontrolling what she does, who she sees and talks to, what she reads, where she goes; limiting her outside involvement; using jealousy to justify actions.

Using Emotional Abuse: [p]utting her down; making her feel bad about herself; calling her names; making her think she’s crazy; playing mind games; humiliating her; making her feel guilty.

Using Intimidation: [m]aking her afraid by using looks, actions, gestures; smashing things; destroying her property; abusing pets; displaying weapons.

Using Coercion and Threats: [m]aking and/or carrying out threats to do something to hurt her; threatening to leave her, to commit suicide, to report her to welfare; making her drop charges; making her do illegal things.

\textit{Id.}

\textsuperscript{87} See, e.g., KAN. STAT. ANN. § 23-602 (1996) (permitting the court to order mediation in custody and visitation issues); OR. REV. STAT. §§ 107.179, 107.765 (1996) (providing for mediation when joint custody is disputed); S.D. CODIFIED LAWS ANN. § 25-4-56 (1996) (allowing the court to order mediation in any custody or visitation dispute); VA. CODE ANN. § 20-124.4 (Michie 1996) (stating that “in assessing the appropriateness of a referral, the court shall ascertain upon motion of party whether there is a history of family abuse” in custody and visitation cases).
The adversarial nature of custody and visitation disputes and the negative impact that such disputes can have on children. Because of the underlying themes of mediation, the results achieved through mediation are much more conducive to protecting children than is exposing them to a court battle.

Utah, for example, established a pilot program that required courts to refer domestic cases to mediation. The Utah statute, however, advised against continuing the mediation in a situation of abuse. The pertinent portion of the statute states that:

[i]f it appears to the court on the face of the complaint or at any time during the divorce proceedings prior to the entry of the initial divorce decree that issues of custody or visitation of a child or children are contested, the court shall refer the matter for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing.

The statute had a specific provision for waiver of the mandatory mediation requirement. Waiver could occur through several means, including objection by a party or a finding that "attendance at a mediation session would cause undue hardship to or threaten the mental or physical health or safety of either of the parties or the child or children of the parties." By including an escape hatch mechanism, the statute did not force a party who could be harmed by mandatory mediation to proceed with the process.

A Kansas statute also permits court-ordered mediation. Kansas permits a court to "order mediation of any contested child custody issue or visitation at any time, upon the motion of a party or on the court's own motion." The statute does not provide for an escape from mediation. The statute in-

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89 The pilot program was a mandatory mediation program that implemented divorce mediation if the parties disputed custody or visitation. This program lasted from January 1, 1993, to March 1, 1995, in the fourth judicial district.


91 See id. § 30-6-4.6 (1996) ("In any case brought under the provisions of this chapter, the court may not order the parties into mediation for resolution of the issue in a petition for an order for protection.").

92 Id. § 30-3-21(2) (1996) (repealed 1997).

93 Id.

94 Cf. Gagnon, *supra* note 1, at 274-82 (explaining the problems of mediation in divorce cases).

stead focuses on the requirements for mediators in an effort to prevent the introduction into the system of mediator bias or incompetence.

Statutes differ regarding the burden a party must overcome to convince a court that mediation is not appropriate. The burdens range from a relatively high burden, in which a party must convince the court of abuse,96 to an exemption if either the mediator discovers or a party asserts family violence.97 These burdens deny a party her constitutional right to due process in mandatory mediation situations.98

III.

The Fourteenth Amendment of the United States Constitution provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."99

The Fourteenth Amendment does not apply to private deprivation of individual rights. It applies only to state deprivation of individual rights.100 If, however, a party can show state involvement, a court may find that a party’s constitutional rights were violated. State involvement is not an easy burden to satisfy; the Fourteenth Amendment “can be violated only by conduct that may fairly be characterized as ‘state action.’”101

To find state action, a court need not determine that the state was directly involved. The state may be a removed actor and still act to abridge a party’s due process rights.102 In Lugar v. Edmondson Oil Co.,103 the Supreme Court devised a two-part test to determine if state action occurred. “First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.”104 Second, “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”105 A person can be a state actor if: (1) the person is “a state official,” (2) the person “has acted together with or has obtained significant aid

96 See COLO. REV. STAT. ANN. § 13-22-311 (West. Supp. 1996) (requiring that the party show physical or psychological abuse to be exempt from mediation).
97 See HAW. REV. STAT. ANN. § 580-41.5(b) (Michie 1996).
98 See discussion infra Part III.
99 U.S. CONST. amend. XIV.
104 Id. at 937.
105 Id.
from state officials,” or (3) the person’s conduct is “otherwise chargeable to the state.” 106

Depending on the administration of and access to divorce mediation, implementing the process can violate a party’s due process rights. 107 The first prong of the Lugar test, “the rule of conduct imposed by the state,” 108 is key in assessing whether mediation violates a party’s due process rights.

When parties voluntarily choose mediation there is no violation of due process. Two private individuals seeking the help of a private mediator to assist in the divorce context does not constitute any form of state action. A case involving voluntary mediation would not even reach the threshold question of state action because the Fourteenth Amendment does not apply to the private deprivation of individual rights. A party engaged in voluntary mediation is not likely to raise the issue that she was coerced into using this particular form of dispute resolution. The state did not impose the mediation; rather, the couple freely chose it as an alternative to the adversarial system. If a party is unhappy with the solution created in mediation, she may decline to sign the mediation agreement and choose instead to pursue a court-imposed solution.

In court-ordered mediation, however, the mediation occurs because a magistrate or district judge requires a couple to mediate their differences, such as in divorce, custody, and visitation. 109 A couple in this situation goes to the court to resolve their divorce dispute, and the court makes a determination, whether by statute or by discretion, 110 to impose mediation on the parties. Whether the magistrate or district judge’s act is compulsory or discretionary is irrelevant. 111 The issue is simply that the decision “is

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106 Id.
107 One author addressed the due process argument with respect to battered women: The due process argument which can be made on behalf of battered women in regard to mediation is as follows: When battered women are ordered by the court to go to the neighborhood justice center they are deprived of their liberty and property in the form of a right of access to the court, a right to remain in their home, and a right to personal security. In order to support this argument four elements must be proven: 1) that there was state action; 2) that the battered woman has a liberty or property right at stake; 3) that mediation deprives her of that right; and 4) that the process which led to the deprivation of her right was not adequate.
Rowe, supra note 102, at 887.

One main difference between battered women seeking protection from abuse and women seeking divorces is that the women seeking divorces are attempting to procure a legal right, while the women seeking protection from abuse are attempting to prevent further violations of their rights.
108 Lugar, 457 U.S. at 937.
109 See discussion supra Part II.B.
110 See discussion supra Part II.B.
111 See Rowe, supra note 102, at 888.
supported by the legal mechanism through which the rule of conduct is enforced."\textsuperscript{112} As a result, the state imposes the rule of conduct and thus fulfills the first prong of the test.

Under the second prong of the \textit{Lugar} test, a party’s allegation that she was deprived of her due process rights must be supported by a finding that the accused was a state actor.\textsuperscript{113} A magistrate or district judge who mandates mediation is a state actor—she is a member of the judicial branch acting in the capacity of a state representative. Additionally, any person or organization providing mandatory mediation services is considered to have “obtained significant aid from state officials.”\textsuperscript{114} Those who provide court-annexed mediation services, therefore, can be considered state actors.

Once the state action and state actor thresholds are met, the party asserting a due process claim must show that the state action deprived her of her due process rights.\textsuperscript{115} To prove such a deprivation, the party must show that the state action deprived her of either a property or liberty interest.\textsuperscript{116}

Proving deprivation of property is a difficult, if not impossible, burden to carry because the marriage has not yet been dissolved. As a result, standing also might be problematic because a party may not be able to show injury-in-fact.\textsuperscript{117} An unfair proceeding in the form of mandatory mediation, however, could, and in fact will, deprive a party of property. A divorce

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{See Lugar}, 457 U.S. at 937.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{See Lugar}, 457 U.S. at 937 (“[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.”).

\textsuperscript{116} \textit{See U.S. CONST. amend. XIV. Due process includes life, liberty, and property. Id.} A claim of deprivation of life without due process of law cannot arise out of mediation because mediation does not involve the type of state action to which due process regarding life is applicable.

\textsuperscript{117} \textit{See} \textit{Lujan v. National Wildlife Fed’n}, 497 U.S. 871, 883 (1990); \textit{Valley Forge Christian College v. Americans United for Separation of Church and State}, 454 U.S. 464, 471-472 (1982). If a party cannot show injury-in-fact, the analysis does not reach the additional elements of whether the party was adversely affected and whether redressibility is possible. A party must have a significant stake in the controversy to be a party to the litigation and must show standing. The three elements of standing are the following: (1) injury-in-fact, (2) causation by the challenged action, and (3) redressibility. The most pertinent is the first element—the injury must be concrete and particularized. A party in mediation may have reduced bargaining power, which may affect the outcome of property or other asset division. The harm, however, is speculative because it has not yet happened; the party, therefore, cannot fulfill the burden of a concrete and particularized injury. Until an unfavorable outcome occurs, no injury exists. This puts the party in a Catch-22; constitutionally, she cannot meet the burden of showing injury, but she also cannot prevent the potential injury if she is required to mediate.
decree includes a division of marital assets. If a party is not heard in an
adversarial proceeding and is forced to mediate instead, the party may be
deprieved of her share of marital property if she does not possess roughly
equal bargaining power.\textsuperscript{118} Such a deprivation of property as a result of
mandatory mediation is a violation of the party’s due process rights.

The potential for the violation of a party’s due process rights must be
considered in both mandatory mediation that does not involve abuse and
mandatory mediation in which an abusive situation exists (or existed) in the
relationship. When a court imposes mediation, unequal bargaining power
may affect the division of property.\textsuperscript{119} Unequal bargaining power most fre-
quently arises when abuse has occurred in the relationship.\textsuperscript{120} A party may
be fearful of asserting her right to property because, as the “Power and
Control Wheel”\textsuperscript{121} suggests, the abuser may have exerted economic abuse,
coercion and threats, or intimidation.\textsuperscript{122} At a mediation session an abused
party is unlikely to have the courage to assert her property interest. She may
fear for her physical safety or for her children’s safety.

Proving a deprivation of liberty is the key to proving a deprivation of
due process. The Supreme Court held that in determining whether a “deci-
sion of the State implicates an interest within the protection of the Four-
teenth Amendment . . . [and] whether due process requirements apply in the
first place, [the Court] must look not to the ‘weight’ but to the nature of the
interest at stake.”\textsuperscript{123} The Court recognized that liberty included the right
“generally to enjoy those privileges long recognized at common law as es-
tential to the orderly pursuit of happiness by free men.”\textsuperscript{124} The nature of
that privilege in the context of mediation is the individual’s right to choose
her forum for litigation—in sum, having access to the courts.

\textsuperscript{118} Admittedly, the party may not be satisfied with the division of property under the
adversarial process, but at a minimum, the party has chosen the means of dispute reso-
lution.

\textsuperscript{119} See Rowe, \textit{supra} note 102, at 890-93.

\textsuperscript{120} See \textit{Mediation in Cases of Domestic Abuse}, \textit{supra} note 4, at 29-31.

An abused person who displays characteristics such as the following may be un-
able to mediate: \{f\}ear that she will be harmed by the abuser; \{f\}ear of retribu-
tion if she does not make concessions or compromises; \{e\}xpressions of defeat-
ism and subjugation; \{a\}n unwillingness or inability to express her own interests,
needs, and wants as separate from his; \{a\}n inclination to promote the
abuser’s interests over her own.

\textit{Id.} at 29-30.

\textsuperscript{121} \textit{Id.} at 47.

\textsuperscript{122} See \textit{id}.

\textsuperscript{123} Ingraham v. Wright, 430 U.S. 651, 672 (1972) (citation omitted).

\textsuperscript{124} Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted).
A. Recent Case Law

Mandatory participation in ADR is an issue that some courts have considered. For example, according to two federal courts of appeal, it is beyond the court’s scope to require participation in the context of a summary jury trial, although several lower courts have determined that a court may issue participation orders in that type of proceeding. Some courts have held that requiring parties to participate in less formal ADR proceedings, such as mediation, is constitutional.

Although few cases discuss the mandatory use of mediation, the courts’ opinions are consistent. In Decker v. Lindsay, the litigants sought relief against a judge who had ordered mediation in a personal injury suit. The Texas Civil Practice and Remedies Code “expresses the general policy that ‘peaceable resolution of disputes’ is to be encouraged through ‘voluntary settlement procedures.’” The court determined that the Code section was “consistent with a scheme where a court refers a dispute to an ADR procedure, requiring the parties to come together in court-ordered ADR procedures, but no one can compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so.” The court held that the judge’s order not only required the parties to negotiate, but also required them to attempt to reach a settlement—which expressly contradicted the statutory scheme.

In Decker, the court articulated a standard that seems theoretically useful, but the standard is not practical in the context of divorce mediation when abuse has occurred. The court stated that the Texas Code “contemplates mandatory referral only, not mandatory negotiation.” Although this standard may be useful in certain types of mediation, such as commer-

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125 See In re NLO Inc., 5 F.3d 154, 157 (6th Cir. 1993); Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987).
129 Decker, 824 S.W.2d at 250 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon Supp. 1992)).
130 Id. at 251 (emphasis added).
131 See id.
132 Id.
cial or medical malpractice, the standard is not applicable to divorce and custody mediation.\textsuperscript{133}

The Texas Code enables the trial court to refer a dispute to ADR sua sponte unless a party objects and there is a reasonable basis for the objection.\textsuperscript{134} The corollary to this provision is "a court may refer the dispute to an ADR procedure if it finds there is no reasonable basis for the objection."\textsuperscript{135} Although the litigants in \textit{Decker} objected to the order on constitutional grounds of due process, the court dismissed the challenge as "without argument or authorit[y]."\textsuperscript{136}

One of our protected historic liberties is the "right to be free from and to obtain judicial relief, for unjustified intrusions on personal security."\textsuperscript{137} Certainly access to the courts is within this liberty interest.\textsuperscript{138} Courts, however, have stated that mandatory mediation does not deny access to the courts. As the District Court of Appeals of Florida in \textit{Kurtz v. Kurtz}\textsuperscript{139} found, a referral to mediation does not deny a party her rights to be heard in court; rather, it "merely defers ruling on [her] motion until after family mediation."\textsuperscript{140} In \textit{Kurtz}, the court denied a husband's motion for contempt and a visitation schedule and refused to hear it until the parties attempted family mediation.\textsuperscript{141} The court stated that under Florida Rule of Civil Procedure 1.740, the court is "expressly authorize[d] . . . to refer parental responsibility issues to family mediators."\textsuperscript{142} The court held that claims of

\begin{itemize}
\item \textsuperscript{133} \textit{See id.}
\item \textsuperscript{135} \textit{Decker}, 824 S.W.2d at 250.
\item \textsuperscript{136} \textit{Id.} at 251.
\item \textsuperscript{137} \textit{Ingraham v. Wright}, 430 U.S. 651, 673 (1977).
\item \textsuperscript{139} 538 So. 2d 892 (Fla. Dist. Ct. App. 1989); \textit{see also} \textit{Carter v. Sparkman}, 335 So. 2d 802, 807 (Fla. 1976) (stating that "it has never been a constitutional ‘privilege’ to file a lawsuit in a judicial tribunal in the first instance").
\item \textsuperscript{140} \textit{Kurtz}, 538 So. 2d at 894.
\item \textsuperscript{141} \textit{See id.} at 893.
\item \textsuperscript{142} \textit{Id.} at 894. Additionally, the court found that two Administrative Orders supported its decision. One stated: "All domestic post-judgment matters involving custody or visitation disputes shall be referred to the family mediation program prior to scheduling any hearings before the judge to whom the matter is assigned." \textit{Id.} (quoting Administrative Order 2.03.15). The other stated: "As soon as it becomes apparent that the primary residence, custody or visitation will be contested, the parties shall apply to the presiding judge for immediate referral to such matters for mediation . . . . The presiding judge may make such referral at any time on the court’s own motion." \textit{Id.} (quoting Adminis-
constitutional due process violations were without merit because the party, at most, "will suffer a temporary delay of court proceedings in the interest of a mediated settlement." 143 The court also found that "[m]ediation is not a binding court proceeding. If it is unsuccessful, the parties return to court for further proceedings. This distinguishes the process from matters involving general or special matters, in which nonjudicial officers make findings of fact, conclusions of law and recommended dispositions." 144

In another jurisdiction, the court did not permit a delay of court proceedings. In Department of Transportation v. City of Atlanta, 145 the Supreme Court of Georgia agreed with the Texas Court of Appeals in Decker "that parties may not be ordered to settle their dispute." 146 The court recognized that an important benefit of mediation is the breaking of a standstill in negotiations. 147 Unlike the District Court of Appeals in Kurtz, however, the court assured litigants access to the courts by holding that referrals to mediation "shall be done in a way not to interfere with nor delay the right of the parties to litigate the issues." 148

The most recent case regarding mandatory mediation fits the context discussed earlier: a situation in which abuse occurred in a marriage. 149 In In re Mechtel, 150 the Minnesota Court of Appeals addressed whether "the issuance of an ex parte order should also be treated as an implicit finding of probable cause of physical abuse." 151 The applicable statute states that if the court determines there is probable cause that abuse occurred, "the court shall not require or refer the parties to mediation or any other process that requires the parties to meet and confer without counsel." 152 The policy underlying the rule, as the court affirmed, was that "a victim should not be required to go through mediation with an abusive spouse." 153 The court found that the wife was improperly required to participate in mediation. 154

As the preceding cases indicate, courts find ways to uphold the constitutionality of mandatory mediation without applying the due process test. One

143 Id.
144 Id. at 894-95.
146 Id. at 267.
147 See id.
148 Id. The court stated that "[i]f the trial court does refer the parties to mediation, and either party determines that none of the issues can be resolved by mediation, litigation will proceed according to the schedule set by the trial court." Id. at 268.
149 See supra text accompanying notes 77-86.
150 528 N.W.2d 916 (Minn. App. 1995).
151 Id. at 919.
152 Id. at 918 (citing MINN. STAT. § 518.619 (1992)).
153 Id. at 919.
154 See id.
reason for this approach may be that by issuing a decision that does not entail a due process analysis, the courts are attempting to assist the party, because the party challenging a statute bears the burden of proving its unconstitutionality. This is a tough burden to sustain. More than likely, however, the reason is the courts' unwillingness to find that access to the courts is a fundamental right deserving of heightened scrutiny.155

Courts must reassess their approach to divorce mediation because unique issues arise in this form of ADR. For example, personal security in mandatory mediation is most crucial when the relationship includes abuse. Personal security can encompass emotional, economic, physical, and familial aspects. For example, an abused party may feel her personal security is compromised if the abuser makes her feel guilty for the abuse, prevents her from having access to the family income, destroys property, hits her, threatens to take the children away or uses visitation to harass her.156 The very process of mediation places an abused in confrontation with the abuser. If a mediator does not discover abuse through a screening mechanism,157 then the legal system has imposed a duty upon the abused to attain legal help in a manner that may be detrimental to both the abused party and the outcome.

The Washington Supreme Court attempted to protect parties from being forced into dispute resolution mechanisms they do not choose. In *Carter v. University of Washington*,158 although later overruled, the court held that a provision of the Washington state constitution guaranteed access to the courts and thereby made the right fundamental. The state statute limiting action, therefore, was subject to the strict scrutiny test, regardless of the underlying substantive right asserted.159 The importance of the court's holding is paramount. If other courts reevaluate *Carter* and recognize that a provision in a state constitution creates a fundamental right, courts can make it more difficult for mandatory mediation legislation to survive constitutional scrutiny. If access to the courts is deemed fundamental, a state must meet the heavier burden of strict scrutiny to maintain mandatory mediation legislation. If access to the courts is not deemed fundamental, then a state can easily satisfy the rational relation test. The court in *Carter* reached the right

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155 See Martin M. Loring, Note, *Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts*, 45 Mo. L. Rev. 316, 321 (1980) ("While most state constitutions specifically guarantee the right of access to the courts, the United States Constitution does not. Thus, the . . . argument that access to the courts is a fundamental right in and of itself is not as readily available to the United States Supreme Court.") (footnotes omitted).

156 Such tactics of the abuser are part of the "Power and Control Wheel." See *supra* note 86.

157 See *supra* Part II.B.1.c.

158 536 P.2d 618 (Wash. 1975), overruled by Housing Auth. of King County v. Saylor, 557 P.2d 321 (Wash. 1976).

159 See *id.* at 623.
decision. Other courts must reassess constitutional provisions regarding access to the courts and how mandatory mediation legislation impedes a party's right to resolve a dispute in the manner of her choosing.

Proponents of mediation claim that its use, especially in family disputes, decreases the size of the court docket and reduces costs in the judicial system. They claim that mediation provides lasting solutions to long-term problems, especially because many divorces involve custody and visitation disputes, which require long-term solutions. The dissolution of a marriage does not end the contact parties have with one another if children are involved. The effectiveness of mediation, with its goal of producing an agreement with which both parties will comply, necessarily does not end when the parties sign the mediation agreement.

In *Boddie v. Connecticut*, the Supreme Court held that the allocation of scarce resources was an insufficient state interest to justify denying citizens access to the courts. Mandatory mediation denies access to the court system in the purest sense: a statutory or judicial determination that mediation must be conducted denies access to the courts. As the Court found in *Boddie*, the process at issue was so burdensome that it tended to place an individual's exercise of due process rights beyond the individual's reach.

A fundamental question in due process analysis revolves around the degree of process to which a party is entitled. In *Ingraham v. Wright*, the Court identified a balancing test to judge "whether a procedure constitutes due process in [a] particular context." The factors include: "[f]irst, the private interest that will be affected ...; second, the risk of an erroneous deprivation of such an interest ... and, finally, the state interest." The private interest of the party is paramount to determining whether a procedure constitutes due process. Mediation presupposes that a roughly equivalent power balance exists between the parties. Mandatory mediation in a situation of domestic violence or abuse, however, does not have this equality. This unequal bargaining power diminishes the abused party's ability to defend her liberty and property interests, and thus creates an atmosphere that severely favors the state and the abuser.

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160 See Gerencser, *supra* note 73, at 49.
161 See *id*.
163 See *id*. at 381.
164 *See id.*; Rowe, *supra* note 102, at 892 (referring to the payment of court filing fees to initiate divorce proceedings).
166 Rowe, *supra* note 102, at 894 (citing *Ingraham*, 430 U.S. at 675).
167 *Id*.
168 *See supra* text accompanying notes 116-22.
The effect of a due process violation can be disastrous in situations of divorce and domestic violence. The inability of the abused to "have her day in court" based on a statute or judge's discretion denies her the formality of the adversarial proceeding and all the rules that ensure a fair and impartial hearing (and ideally, a fair outcome). Mediation, in contrast, is what the parties make it. A party with greater bargaining power, therefore, can get more out of mediation than he might obtain in court.\(^{169}\) Such an imbalance denies the party with less power the ability to achieve a result as preferable as one that may stem from an adversarial proceeding.

The state interest in requiring mediation is weak. As discussed earlier, the Supreme Court refused to recognize the "allocation of scarce resources" as a sufficient reason for denying citizens access to the courts.\(^{170}\) Other potential state interests include: reducing a backlogged docket, promoting long-term relationships between parties (which is a goal of mediation), and leaving the parties to work out the details of what is ostensibly within the penumbra of the First Amendment and the right to privacy.\(^{171}\) A party's right to due process may outweigh those interests.

Balancing the three factors devised in *Ingraham*,\(^{172}\) a court reviewing the constitutionality of mandatory mediation probably will look in which group of statutes a specific provision at issue is located. The outcome of a due process analysis will depend upon the particular statute analyzed. In other words, whether a statute violates a party's due process rights depends upon the nature of the statute itself.

B. Statutes Permitting Party-Recommended Mediation

New Hampshire has a provision in its statutes entitled "Voluntary Marital Mediation."\(^{173}\) The pertinent part of it states that "the court shall suspend proceedings if both parties state that voluntary marital mediation will be attempted in order to reach a mutually agreeable arrangement."\(^{174}\) Simply put, this marital mediation is a voluntary action, requiring consent by both parties, to resolve their differences outside of an adversarial proceeding. No due process violation can exist because of the voluntariness of the parties' actions. Under the *Lugar* test, no state action occurs. The "rule of

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169 See discussion *supra* Part I.A.
171 See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (upholding a couple's right to privacy within their marital bedroom).
172 See *Ingraham*, 430 U.S. 651, 675 (1977); *supra* note 167 and accompanying text.
173 N.H. REV. STAT. ANN. § 458:15-a (1995); see also *supra* note 54 (listing similar statutory provisions in other states).
conduct" is self-imposed, not state-imposed.\textsuperscript{175}

The New Hampshire statute comports with the goals of mediation by keeping the process voluntary. The voluntary aspect allows a party to determine which dispute resolution process—adversarial or ADR—works best for that party. By permitting choice, an individual can exercise her option to pursue mediation or to access the courts.

C. Statutes Requiring Mediation as a Prerequisite to a Judicial Hearing

In Maine, the legislature passed a statute that empowers the court to "refer the parties to mediation on any issue."\textsuperscript{176} This power is not unlike powers other state legislatures have given their courts. The Maine legislature, however, went one step further. If the parties do not reach an agreement through mediation, "the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing."\textsuperscript{177} If the court makes a finding that the parties did not make a good faith effort to mediate, "the court may order the parties to submit to mediation, may dismiss the action or a part of the action, may render a decision or judgment by default, may assess attorney's fees and costs or may impose any other sanction that is appropriate in the circumstances."\textsuperscript{178}

The Maine statute is problematic, both in accomplishing the goals of mediation and comporting with due process. First, if the courts impose the process the parties are less likely to attain the goals of mediation because the parties' participation is not voluntary—one of the major premises of mediation. Second, the statute interferes with due process. Under the \textit{Lugar} test, state action occurs when the court mandates mediation because the state imposes a rule of conduct that may cause a deprivation, and the judge may be charged as a state actor.\textsuperscript{179} Once the court determines that state action has occurred, a court may use the balancing test devised in \textit{Ingraham} to determine whether the mandatory mediation constitutes due process in that particular context.\textsuperscript{180} The private interest each party holds is the right to access the courts. In jurisdictions in which the state constitution guarantees access to the courts,\textsuperscript{181} the party has a right to access the courts, regardless of whether the courts construe this right as fundamental. A party's right to

\textsuperscript{176} ME. REV. STAT. ANN. tit. 19-A, § 251(1) (West Supp. 1997); see also supra note 55 (listing other statutes requiring mediation as a prerequisite to a judicial hearing).
\textsuperscript{177} Id. § 251(4).
\textsuperscript{178} Id.
\textsuperscript{179} See supra text accompanying notes 103-14.
\textsuperscript{180} See supra text accompanying notes 165-72 (discussing the \textit{Ingraham} test).
\textsuperscript{181} See supra note 138.
access the courts, and the deprivation thereof, must be balanced against the state's interests.

The risk of depriving a person of the right to pursue a judicial decision is great. An abused party may mediate and reach a decision in an effort to avoid further confrontation with the abuser, especially if a judge returned the parties to mediation for failure to mediate in good faith. The state's interest in requiring mediation is most likely one of alleviating the pressure on its docket by encouraging the parties to devise their own solution through mediation.\footnote{See Gerencser, \textit{supra} note 73, at 49.} In \textit{Bennett v. Bennett},\footnote{587 A.2d 463 (Me. 1991) (holding that in a divorce action, a wife could not be compelled to sign an alleged mediation agreement because the mediation process is to encourage, not force, parties to settle issues without the court's intervention).} the Supreme Judicial Court of Maine took the first step toward preventing the deprivation of parties' due process rights by not forcing the parties to mediate an agreement. By preserving the opportunity for the court to resolve the dispute by order, the court maintained a party's opportunity to choose as her forum either the mediation table or the courtroom. The court, however, did not take the second step of determining that the statute should not impose mediation.

Imposing mediation and requiring the parties to mediate in good faith ignores the possibility that a party may not be able to mediate at all, or even to mediate in good faith. If an abused party is required to mediate, the party is at a disadvantage,\footnote{See discussion \textit{supra} Part II.B.1.e.} and the mediator may not be able to correct the resulting power imbalance. A statute like Maine's does not take abuse cases into account when empowering the courts to refer parties to mediation "in any case under this Title [mediation]."\footnote{ME. REV. STAT. ANN. tit. 19-A, § 251(1) (West Supp. 1997).} As the Power and Control Wheel\footnote{See \textit{supra} note 86.} suggests, an abusive spouse uses several measures to exert power and exercise control over the abused spouse. By referring to mediation a divorce case in which abuse occurred, the court is licensing a dispute resolution mechanism in which the scales of bargaining power are tipped decidedly in the abuser's favor. Certainly the state's interests in decreasing the size of its docket and encouraging parties to settle disputes on their own does not outweigh the abused party's right to seek the perceived safety of court proceedings in which the abused does not have to confront or negotiate with the abuser. Additionally, the court's power to sanction parties or take other actions, such as resubmitting the parties to mediation, truly denies a party her right to pursue the dispute through traditional adversarial measures. An abused party may agree to a mediated decision in an effort to not have to repeat the resolution process either in mediation or in court. The power an
abuser wields over the abused is significant. An abused party may not be willing to resubmit continually to that power and thus may agree to a mediated agreement in lieu of pursuing a court decision. In this type of situation, a statute that mandates mediation as a prerequisite to a judicial hearing effectively denies, not delays, a party’s access to the court.

D. Statutes Permitting Court-Ordered Mediation

Both Pennsylvania and Rhode Island have statutes involving the court’s discretionary power to involve mediation in divorce actions. Under the Pennsylvania statute, a court may establish mediation for divorce or custody actions. If the court establishes such a program, “the court may order the parties to attend an orientation session to explain the mediation process.” One crucial difference exists between this statute and the Maine statute—Pennsylvania courts may not order mediation beyond the initial orientation session, whereas the Maine courts can impose a good faith attempt at mediation as a prerequisite to a judicial hearing. By giving parties either the option to choose mediation or to proceed with the dispute in court (the forum originally chosen), the Pennsylvania legislature permits the parties access to the courts. In Pennsylvania, the state constitution guarantees access to the courts. Unlike the Maine legislature, which permits a judge’s order of good-faith mediation to have the effect (even if unintended) of stripping parties of their right to obtain judicial relief, the Pennsylvania legislature has not stripped parties of their right to pursue justice in court.

When parties have the option either to pursue or to decline the invitation to mediate once they attend the orientation session, no due process violation exists because mediation is implemented in its intended manner: voluntarily. The state forces neither mediation nor litigation upon either party. This

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187 See supra note 86.
188 PA. STAT. ANN. tit. 23, § 3901 (1996); R.I. GEN. LAWS § 15-5-29 (1996); see also supra note 56.
190 Id. § 3901(b).
191 See discussion supra Part III.C.
192 Compare PA. STAT. ANN. tit. 23, § 3901(b) (1996) (stating that “should the parties consent to mediation, the court may order them to mediate such issues as it may specify”), with ME. REV. STAT. ANN. tit. 19-A, § 251(1), 251(3) (West Supp. 1997):

The court may, in any case under this Title, at any time refer the parties to mediation on any issues . . . . When agreement through mediation is not reached on an issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing.
193 See PA. CONST. art. I, § 11.
194 See supra text accompanying notes 184-87.
statute achieves the same result as the New Hampshire statute.\textsuperscript{195}

The result under the Maine statute is similar to the result reached under the Rhode Island statute,\textsuperscript{196} which provides that the court may, in any divorce petition involving custody or visitation, "direct the parties to participate in mediation in an effort to resolve their differences, [and] . . . may order the participation in mediation in a program established by the court."\textsuperscript{197} The Rhode Island legislature, while not mandating mediation as a prerequisite to a judicial hearing, vests the judicial branch with the power to determine a party's right of access to the courts.

Similar to the Maine legislature, by shifting the choice to the judicial branch, the Rhode Island legislature denies a party her right to seek redress in the forum of her choice. The Rhode Island statute, however, does not bar the party to the same degree. It does not impose upon the parties a burden to mediate in good faith. Instead, the court has three options:

(1) Order mediation under this section prior to trial and postpone trial of the case pending the outcome of the mediation . . . ;
(2) Order mediation under this section prior to trial and proceed to try the case as to issues other than custody and visitation while the parties are at the same time engaged in the mediation . . . ;
(3) Complete the trial of the case on all issues and order mediation under this section upon the conclusion of the trial, postponing entry of the decree pending outcome of the mediation.\textsuperscript{198}

These options still restrict a party's right to due process, although not to the same extent as does the Maine statute. The Maine statute acts as a bar to a judicial proceeding unless the parties show that in good faith they attempted mediation, but the mediation nonetheless failed. In contrast, the Rhode Island statute provides the judge with options regarding how she may exercise her authority to order mediation. The Rhode Island statute, however, may still result in the denial of due process regardless of the degree. Under the \textit{Ingraham} test,\textsuperscript{199} the affected private interest is a party's ability to pursue redress in the courts. The risk of an erroneous deprivation of a party's due process rights is the risk that an abused party will be forced to mediate, agree to a solution obtained under unequal bargaining power, and thereby

\textsuperscript{196} R.I. GEN. LAWS § 15-5-29 (1996).
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} See supra notes 165-67.
forego the opportunity to have her day in court. Although mediation can be an empowering process,200 divorce is a highly contentious issue. The parties often seek closure. Forcing the parties to mediate may encourage them to settle a dispute in a forum they otherwise would not have chosen. When balancing the parties’ interests against the state’s interest of reducing the size of the docket, it appears the scales should tip in favor of the party who sought to resolve her problem in court. A substitute method—mandatory mediation—is unacceptable in this situation because the state’s interest does not outweigh that of the individual.

E. Statutes Advising Against or Prohibiting Mediation When Abuse or Domestic Violence Has Occurred

State legislatures are aware of the problem of mediating when abuse has occurred. As a result, several states have enacted legislation prohibiting mediation when abuse has occurred.201 Three jurisdictions in particular—Colorado,202 Florida,203 and Hawaii204—have drafted statutes that exempt abused parties from mandatory mediation.

Colorado and Hawaii have lower standards for exemption. In Colorado,

the court shall not refer the case to mediation services or dispute resolution programs where one of the parties claims that she has been the victim of physical or psychological abuse by the other party and states that she is thereby unwilling to enter into mediation services or dispute resolution programs.205

Hawaii provides a similar means of obtaining exemption, stating that “where there are allegations of spousal abuse, the court shall not require a party alleging the spousal abuse to participate in any component of any mediation program against the wishes of that party.”206

Both statutory provisions protect an abused party from being strong-armed into resolving her dispute in a manner inconsistent with her wishes. The party has the option to remove herself from any mediation proceeding simply by “alleging” or “claiming” abuse. This is a simple showing that permits an abused party to gain relief.

200 See discussion supra Part I.A.
201 See supra notes 57-58.
203 FLA. STAT. ANN. § 44.102(2)(b) (West 1997).
204 HAW. REV. STAT. § 580-41.5 (1996).
Although it too provides relief, the Florida statute imposes a stricter burden on a party wishing to receive an exemption from mandatory mediation. In Florida, a court: "[m]ay refer to mediation all or any part of a filed civil action . . . . A court shall not refer any case to mediation if it finds there has been a significant history of domestic abuse that would compromise the mediation process."\textsuperscript{207} That the court must make a finding infers that a party must overcome a stricter burden to receive exemption from mediation. Unlike the Colorado or Hawaii statutes that require only that an abused party make a claim or allegation of abuse, the Florida statute shifts the ultimate decision to the court by allowing the court to decide whether the parties' circumstances meet the requirements of the statutory exemption. Florida's requirement of a "significant history" of domestic abuse also is a greater burden than the burdens imposed by the Colorado and Hawaii statutes.

In all three statutes, the legislatures appear to preserve the right of an abused party not to be forced into mediation, a situation in which an unequal power balance results when abuse has occurred. By permitting an abused party an exemption, her due process rights remain intact.\textsuperscript{208} In the eyes of these three legislatures, under Ingraham an abused's rights and the danger of deprivation apparently outweigh a state's interest in reducing the size of the docket.

IV.

Mediation should always be a voluntary process, as its several definitions suggest.\textsuperscript{209} When parties voluntarily enter into mediation, constitutional concerns do not arise. Systemic concerns, however, do surface. Mediation presupposes roughly equal bargaining power and a non-binding process. Mediators must be well-trained to ensure that the basic principles upon which the foundation of mediation is built are met.\textsuperscript{210} In traditional litigation, a court can impose a judgment on a party based on the norms of the

\textsuperscript{207} FLA. STAT. ANN. § 44.102(2)(a), (b) (West 1997).

\textsuperscript{208} These statutes, however, address exemptions only for parties who "allegedly" have suffered abuse. A party who does not wish to mediate must still do so if mediation was court-ordered and the party has not suffered abuse. A cynic might argue that a prudent party should "claim" or "allege" abuse under the Colorado or Hawaii statutes to secure an exemption from the court order if the party does not want to mediate. Notably, though, such a party would have a more difficult time under the Florida statute, which requires the court to make a finding that the abuse occurred. Although this distinction between abused and non-abused parties may constitute a deprivation of the non-abused's due process right to access the courts, it is beyond the scope of this Note to further explore this matter.

\textsuperscript{209} See discussion supra Part I.A.

\textsuperscript{210} See supra text accompanying note 12.
court's experience. In mediation, the parties devise their own outcome. The resulting agreement is even more powerful when the parties freely choose to be bound by it.

When courts or statutes impose mediation, they strip mediation of a crucial element: voluntary participation. As a result, the outcome of the mediation is imposed to the same degree as an adjudicated outcome. The outcome is simply imposed in a different forum. To retain the crucial element of voluntariness, the furthest courts or statutes should go is to suggest mediation to resolve issues in a divorce proceeding. If a court imposes mediation, due process concerns arise because a party’s liberty interest is impeded. By providing court-annexed mediation, the court makes an attempt to offer parties a potentially more satisfactory means of resolving their dispute without intruding upon the parties' due process rights. If the parties are willing, courts can and should provide for court-annexed mediation services to assist the parties in the divorce proceeding. Voluntary court-annexed mediation may reduce both the size of dockets and costs, as well as expedite divorce proceedings.

State legislatures should repeal mandatory mediation statutes and statutes that grant courts discretionary powers regarding mediation, because of the constitutional issues mandatory mediation raises. When a party’s right to a trial is taken away, the party’s right to due process is violated. To avoid potential constitutional violations, courts and statutes should take the approach of informing the parties of their right to mediate without mandating that option.

The courts’ and statutes’ responsibilities may not end with a non-mandatory referral to mediation. Screening procedures must be erected to ensure that parties’ rights are not violated if a proceeding goes to court-annexed mediation. If a relationship contains some domestic violence or abuse, a court-annexed mediation program may fall within the “state actor” category and may result in the deprivation of a party’s due process rights. If a particular mediation program fails the Lugar test, the court may be violating a party’s due process interests, albeit unwittingly.

CONCLUSION

Voluntary participation, roughly equal bargaining power, and a non-binding outcome are the cornerstones of the foundation of mediation. Mediation provides many benefits for parties who choose to avail themselves of the advantages. These benefits, however, are not automatic. If legislatures or courts misuse mediation by making it mandatory, it ceases to be a useful tool. In fact, when courts or legislatures impose mediation on parties who want to resolve their dispute in court, mediation can become a bar to the enjoyment of the constitutional guarantee of due process.

Mediation can be useful for many reasons. It creates win-win situations, reconciles interests of parties, creates a better atmosphere for further negoti-
ating and developing options for mutual gain, fosters an opportunity for a continuing relationship, empowers the parties, and is more cost-effective than traditional litigation. These options can be attractive to parties who voluntarily choose this method of dispute resolution.

Not all parties have the choice between mediation and traditional adversarial justice. Currently, legislation spans the spectrum from simply providing mediation services to mandating mediation without exception. Mandatory mediation runs the danger of violating parties’ due process rights because it prevents parties from enjoying their rights to liberty and property guaranteed in the Fourteenth Amendment. Although a party’s property interest might be difficult to establish, the liberty interest a party can assert passes the Supreme Court’s current test regarding due process.

To ensure that statutes and courts do not run afoul of the fundamental right to due process, mediation can never be mandatory. It must always be voluntary—otherwise, it is a contradiction in terms. The very premise of mediation is its voluntary nature, which in theory makes the parties more willing to reach an agreement. The traditional adversarial system, with its mandate that parties choose a position and stick to it, is not necessarily conducive to reaching an agreement in divorce disputes, particularly those in which custody and visitation are at issue. Mediation is an excellent option when it is truly an option. When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws.

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