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Access to Justice in the United States with Massachusetts Examples: An Introduction

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**Access to Justice in the United States with Massachusetts Examples:
An Introduction**

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September 2016**

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The layperson's notion of justice fuses the concept of dispute resolution with standards of correctness or moral merit, as reflected by the definition of "justice" as "the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments."¹ Within the context of law, "justice" is understood as "the establishment or determination of rights according to the rules of law or equity."² The issue of access to justice accordingly embraces more than an interest in solving disagreements. It also incorporates a concern for obtaining ways to deal with grievances, complaints, wrongs, and injuries, such that "access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards" (USIP).

Preconditions for access to justice: the rule of law and public confidence in the justice system

According to international institutions like the Court of Justice of the European Communities and the European Court of Human Rights, the state is responsible for providing its citizens with access to justice (Davis & Turku, 2011). Establishing the rule of law³ and maintaining citizens' confidence that the justice system will apply the laws and preserve "the individual's right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection" (Francioni, 2012) constitute critical preconditions for access to justice (Davis & Turku, 2011). "There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system" (USIP).

Absent confidence in the justice system, citizens may well turn to their own devices to settle their grievances, which may include violence. Corruption of the legal system has been

¹ Merriam Webster on-line dictionary, available at <http://www.merriam-webster.com/dictionary/justice>

² *Ibid.*

³ "The Rule of Law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.""(Lintz, H., McGee, Y., Mohamed, O., Sajadi, S. Sawyer, S., Stratton, M., Wolfe, J, & Weissman, D. M. (2015, June). *A basic human right: Meaningful access to legal representation*. Human Right Policy Seminar, University of North Carolina School of Law, p. 4. Retrieved March 23, 2016, from <http://www.law.unc.edu/documents/academics/humanrights/malr.pdf>

identified as a problem in developing countries (Buscaglia, 2001, March). The perception of bias can also undermine public confidence even in well-established legal systems of developed countries. In the US, “Eighty percent think that “[i]n spite of its problems, the American justice system is still the best / in the world” (Rhode, 2001, pp. 1792-1793). Yet, in Ferguson, Missouri, for instance, community trust withered as the practices of local police and the municipal court to raise revenue for the city – by imposing fines and fees for minor municipal offenses like traffic stops and then issuing arrest warrants to compel payment – disproportionately burdened the city’s African-American population and displayed racial bias (Shapiro, 2014, August 25; United States Department of Justice Civil Rights Division, 2015, March 4). The consequent loss of community trust was considered a contributing factor in the riots that erupted in response to the police shooting of an 18-year old African-American man in 2014 (Shapiro, 2014, August 25).⁴

US commitment to providing access to justice

In the US, access to justice is effectively enshrined in the Constitution through the equal protection clause of the Fourteenth Amendment, which forbids states from denying “to any person within its jurisdiction the equal protection of the laws” (Amendment XIV, Section 1). The equal protection clause was framed in terms of equal justice under the law in various Supreme Court decisions (e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958)), and was subsequently considered to encompass, among other things, the right to equal access to the law (Rhode, 2001).

The struggle to gain access to justice proceeds on two fronts: substantive and procedural. Access to substantive justice – wherein liability is assigned and grievances are addressed, wrongs are remedied, rights are protected, and vindication is attained – depends not only on the development, application, and enforcement of laws but also upon access to procedural justice, which entails enabling interested parties to avail themselves of the legal processes needed for their pursuit of substantive justice. This paper provides an introduction to some of the issues surrounding access to procedural justice in the US, including state-based examples drawn from the situation in Massachusetts.

Obstacles to providing access to (procedural) justice – complexity and cost

While procedural justice does not guarantee substantive justice – “those who win in court may still lose in life” (Rhode, 2001, p. 1787) – impediments to procedural justice tend to obstruct substantive justice as well. As a result, tackling obstacles to gaining access to procedural justice is a priority for assuring access to justice in general.

⁴ In response to the 2015 report from the Department of Justice, a new municipal judge in Ferguson ordered the withdrawal of all pre-2015 arrest warrants and set up new procedures to deal with cases (Wagner, 2015, August 24).

Complexity and cost constitute major obstacles to access to justice qua procedure. Access to US justice involves navigating a legal system that is a complex web of rules, procedures, and practices, awash in specialized concepts and terms, in which laws, no less complicated and specialized, are applied by the court to claims brought before it. This complexity is exacerbated by the presence of “archaic jargon,” “unnecessary formalities,” and “cumbersome rituals” (Rhode, 2001, p. 1817). The very complexity and the associated reliance upon specialized knowledge which characterize the American legal system make it difficult for the average person to operate effectively within the system without expert assistance. As a legal system “designed by and for lawyers” (Rhode, 2001, p. 1804), the requisite expertise is provided by lawyers. Indeed, “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel” (*Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

The legal system’s complexity and accompanying need for erudition create financial hurdles for its use because legal expertise is costly. Apropos criminal cases, typical attorney costs for accused parties, cited by one commercial web-site, include a flat fee range of \$1,000 to \$5,000 for misdemeanors, \$3,000 to \$8,000 for felonies, and over \$10,000 for murder or other charges carrying life sentences.⁵ For civil cases, estimates of the median cost of litigation (based on 2009 numbers for attorney billable hours) ranged from \$43,000 to \$122,000 for different categories of claims that constituted 60% of civil cases filed in state court, excluding domestic relations claims (Hannaford-Agor & Waters, 2013). In particular, estimated costs amounted to \$43,000 for automobile torts, \$54,000 for premises liability, \$122,000 for professional malpractice, \$91,000 for breach of contract, \$88,000 for employment disputes, and \$66,000 for real property disputes. Discovery and trials generated most of the costs (Hannaford-Agor & Waters, 2013).

The legal system’s complexity and cost create a justice gap. The gap arises as differences in parties’ financial circumstances lead to inequalities in the justice attained: “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has” (*Griffin v. Illinois*, 351 U.S. 12, 19 (1956)) The gap is widened as the justice system’s complexity and cost – along with other factors – effectively render the legal system inaccessible to a large portion of US citizenry. “An estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet” (Rhode, 2009, p. 869).

⁵ Available at <http://www.legalmatch.com/law-library/article/how-much-will-a-criminal-defense-lawyer-cost.html>

Increasing access to justice

In response to the deficit in access to justice, a variety of measures have been instituted, and even more have been proposed, to close the justice gap.

Government-financed assistance of counsel in criminal cases: Important advances in broadening access to justice were made for parties facing criminal charges through implementation of Supreme Court decisions that extended government responsibility for the Sixth Amendment right to effective assistance of counsel for the indigent to states as well as the federal government. Consequently, defense attorney services in criminal cases are offered by diverse sources, including the government, non-profits, and private attorneys.

Government, at both federal and state levels, is responsible for assuring that parties receive assistance of counsel in criminal prosecutions. Assistance of counsel was made available to defendants in federal criminal cases as a constitutionally protected right under the Sixth Amendment (and Fifth Amendment). In 1963, the duty to implement the right to counsel was found to apply as well to the state for felony prosecutions pursuant to the Fourteenth Amendment (*Gideon v. Wainwright*, 372 U.S. 335 (1963)). Moreover, the right to representation by counsel was deemed to not be contingent upon the defendant's ability to pay, and federal and state governments were obliged to provide attorneys to indigent criminal defendants at government expense (*Gideon v. Wainwright*, 372 U.S. 335 (1963)). Ineffective assistance of counsel would violate this right (*Strickland v. Washington*, 466 U.S. 668 (1984)).⁶

Federal and state governments employ analogous approaches to meeting their Sixth Amendment responsibility towards indigent criminal defendants. In accordance with the Criminal Justice Act (1964), the federal government provides defense counsel in districts across the nation through the services of attorneys from federal public defender organizations or from community defender organizations, or from so-called panel attorneys (United States Courts). Attorneys at the federal public defender organizations are salaried federal employees while panel attorneys are private attorneys who accept assignments to criminal cases at hourly rates of \$129 for non-capital cases and \$183 for capital cases with a \$10,000 maximum for felonies, \$2,900 for misdemeanors, and \$7,200 for appeals. Community defender organizations are non-profits incorporated under state law and supported by federal grants to provide defense counsel (United States Courts). Defense counsel for federal prosecutions in Massachusetts is provided by the Federal Defender Office for Massachusetts, New Hampshire and Rhode Island.

⁶ See Cornell University Law School. Ineffective assistance of counsel. Retrieved March 25, 2016, from https://www.law.cornell.edu/wex/ineffective_assistance_of_counsel

At the state level and depending upon the jurisdiction, defense counsel is made available to indigent criminal defendants from publicly funded state- or county-based public defender offices, non-profit legal aid service organizations supported by a combination of public and private funding, or from private attorneys acting as assigned counsel – i.e., private attorneys who participate in a counsel system in which attorneys are assigned cases – or as contract attorneys – i.e., private attorneys who participate in a contract system in which they agree to represent a specific number of indigent clients (Langton & Farole, 2010, September). According to 2007 statistics, public defender offices (whether state-based or county-based) operate in 49 states and the District of Columbia. Based on reports from the 22 states with state-based public defender offices, almost 14% of state spending on judicial and legal functions in 2007 (or over \$830 million) was used to defend indigent defendants in a median of 73,000 cases at a median expenditure of \$510 per case. During the eight years from 1999 to 2007, criminal caseloads in the 17 states with a public defender program in 1999 increased overall by 20% while the number of state public defenders increased by only 4%. Massachusetts – whose public defender agency is the Committee for Public Counsel Services – was one of five states where the increase in cases exceeded increases in personnel or in spending. Caseload management methods used in 22 states involved imposing workload limits (by 11 states) or authorizing refusal of cases due to overload (by 8 states). Massachusetts was one of four states that employed both these caseload management methods while seven other states used neither method (Langton & Farole, 2010, September).

Optimal access to assistance of defense counsel has been thwarted to a major extent by shortfalls in funding. “The constitutional obligation to provide criminal defense for the poor has been endangered by funding problems across the country...” (Robertson, 2016, March 20). According to the National Legal Aid & Defender Association (2011), the demand for defense services outstrips supply in many jurisdictions, elevating the risk of miscarriages of justice and leading to such troubling outcomes as guilty pleas from unrepresented criminal defendants (e.g., 12,000 such pleas in one California county during 2002) or pre-trial imprisonment that exceeds a possible sentence because of delays in appointing counsel. Indeed, attorney felony caseloads are commonly three to five times the national standard of 150 felony cases per defender (NLADA, 2011). The situation in Louisiana, a “state with the highest incarceration rate,” is an alarming example (Robertson, 2016, March 20, p. A16). So many public defenders in Louisiana – responsible for defending over 80% of criminal defendants in the state – were laid off because of the state’s fiscal difficulties that the remaining defenders were left to handle hundreds of cases, cases were refused or put on a wait list (of, e.g., 2,300 names in the 15th judicial district alone), and “hundreds of those [criminally-charged individuals] without counsel are sitting in prison” (Robertson, 2016, March 20, p. A16).

Government-financed assistance of counsel in civil matters: The need for the assistance of counsel may be no less acute in civil cases than in criminal ones, yet access to counsel is much more limited in civil matters. The right to attorney assistance in civil proceedings gets no Sixth Amendment protection. Constitutional protection of the right to representation in civil proceedings arises, however, from the due process requirement of fundamental fairness in the limited circumstances where the physical liberty of an indigent party may be jeopardized by the proceeding (*In re Gault*, 387 U.S. 1 (1967); *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981)) Thus, the Supreme Court in *In re Gault* held that the right to government-funded assistance of counsel attached to juveniles in delinquency proceedings.

In civil cases where physical liberty is not under threat, the *Lassiter* court set forth a three-factor balancing test for the trial court to apply in order to determine whether due process required that counsel be provided at government expense in the case before it. The private interests at stake, the government's interest, and the risk of erroneous deprivation arising from the proceeding were to be balanced against one another and then weighed against the presumption of no right to government-financed counsel. In *Lassiter*, the court applied this balancing test to a case involving the termination of parental rights and concluded that the denial of the assistance of state-appointed counsel to the indigent parent did not violate due process because the presumption of no right to counsel had not been overcome. The potential of the *Lassiter* balancing test to broaden access to assistance of counsel in civil proceedings as a matter of due process has yet to be fully realized since “many lower courts have incorrectly cited *Lassiter* for the proposition that there can never be a federal due process right to counsel except where physical liberty is at stake, ignoring the Court's mandate to apply a balancing test” (Pollock, 2010, Summer, p. 6).

Besides its constitutional basis, a federal right to assistance of counsel has a statutory basis for certain types of cases. For instance, a federal right to counsel in housing cases is provided under the Civil Asset Forfeiture Reform Act of 2000 when the homeowner is low-income and is facing civil forfeiture of a primary residence (Abel & Livingston, 2008). States are compelled under federal law to provide counsel to Native American parents in child abuse, neglect, and parental rights termination proceedings and to active military who are plaintiffs, but have not appeared, in a civil suit (Indian Child Welfare Act, 25 U.S.C. § 1912 and Servicemembers Civil Relief Act, 50 U.S.C. App. § 521(b)(2), cited by Abel & Livingston, 2008).

A number of states have taken on the mantle of providing assistance of counsel through legislation and court decisions in specific categories of cases such as family, dependency, and civil commitment (See Figure 1). Massachusetts, for instance, provides legal representation to lower-income individuals in cases involving delinquency, child welfare, mental health, sexually

dangerous person, and sex offender registry cases through staff attorneys in its public defender agency as well as private attorneys certified for appointment (Committee for Public Counsel Services). Generally speaking, by 2013, all states mandated legal representation in civil commitment cases. However, despite the threat to personal liberty, the right to counsel to individuals facing imprisonment for contempt of the court's order to pay debts, including child support, was provided by only 11 states. Over three-fourths of states granted the right to attorney assistance to parents in parental rights termination cases brought by the state, to parents in abuse/neglect/dependency proceedings related to their child, and to the proposed ward in an adult guardianship/conservatorship proceeding. Between half to three-fifths of states guaranteed legal assistance to the minor in a proceeding to bypass parental consent to an abortion, to the child in proceedings dealing with abuse/neglect/dependency or state-initiated parental rights termination, or to the party facing quarantine/sterilization/inoculation. The right to counsel was guaranteed to birth parents in proceedings to terminate their parental rights brought by private parties, to individuals facing designation as a sexually dangerous/violent persons, and to proposed wards in adult protective proceedings, by a sizable minority of states (between 16 to 24 states).

Figure 1. Number of states granting categorical right to counsel by subject area, including Massachusetts as of 2013.⁷

Subject area	# states granting categorical right to counsel	Categorical right to counsel granted by Massachusetts
Abuse/neglect/dependency-parents	41	Yes
Abuse/neglect/dependency-children	28	Yes
Adult protective proceedings-proposed ward	16	Yes
Bypass parental input to abortion-minor	30	Yes
CHINS-child	2	No
Civil commitment (petition subject)	50	Yes
Debtor's prison (includes child support contempt)	11	No
Custody disputes-parents	1	No
Custody disputes-child	1	No
Domestic violence-alleged victim	1	No
Domestic violence-accused	1	No
Guardianship/conservatorship (adult)-proposed ward	42	Yes
Involuntary medical treatment	6	No
Paternity-defendant/respondent	8	No
Paternity-petitioner/child	6	No

⁷ Information is from NCCRC at <http://www.civilrighttocounsel.org/map>

Quarantine/sterilization/inoculation	27	Yes
Sexually dangerous/violent persons	20	Yes
Termination parental rights (private)-child	5	Yes
Termination parental rights (state)-child	25	Yes
Termination parental rights (private)-birth parents	24	Yes
Termination parental rights (state)-parents	45	Yes

Access to counsel is not guaranteed in legal challenges to any number of important needs experienced by parties. As of 2013, no state has mandated the appointment of attorneys to assist with such high stakes matters as government benefits, education, employment discrimination, health care access, housing, or immigration.⁸ However, steps have been taken in various jurisdictions to broaden the scope of cases in which access to counsel is guaranteed. For instance, pilot projects that provided counsel were initiated in San Francisco for housing cases and in Washington, D.C. and Massachusetts for eviction cases (NCCRC). Moreover, a bill (HB 1560) that provided indigent parties in eviction proceedings with a right to counsel was filed in 2016 in the Massachusetts legislature (NCCRC).

The quality of legal services provided by appointed counsel is too often undermined by the inadequacy of the compensation given to appointed attorneys for their services. The financial pressures experienced by appointed counsel in the first decade of this century persist in this, the second decade. Many of the statutes that do specify how much counsel should be paid provide for an hourly rate of between \$50 and \$75, which is far below what most attorneys in private practice receive. Moreover, the fees are often capped at an extremely low rate. Other statutes expressly permit or require courts to appoint uncompensated counsel (Abel & Livingston, 2008). In order to earn a living, many of these attorneys shoulder excessively large caseloads to the detriment of the quality of their representation (Abel & Livingston, 2008). Increasing attorney fees for assisting parties who could not otherwise afford legal representation would not only lessen the need for overlarge caseloads, but might also attract additional competent attorneys to furnish their services in cases where there is a right to counsel. In any event, there is some evidence that investing in attorney fees for representing indigent parties can yield social benefits. For example, “several studies have found that every dollar spent on preventing eviction through legal assistance ends up saving taxpayers substantial amounts in shelter costs and related social services” (Rhode, 2009, p. 874).

Legal aid: Legal aid organizations augment access to justice by providing legal assistance – in the form of representation at court or administrative proceedings as well as furnishing advice and information about the legal implications of the problem under

⁸ *Ibid.*

consideration, the rights and responsibilities of the individual, and available resources – to low-income individuals from legal service non-profits, clinics, or programs embedded in social service agencies. These organizations are usually sustained by funding from sources that may include federal, state, and local governments, philanthropic foundations, private donors, businesses, the private bar, and IOLTA (Interest on Lawyer Trust Accounts), among others. The types of civil cases commonly addressed through legal aid encompass such areas as family, housing, employment, government benefits, and immigration.

The federal government provides the largest amount of funding support for civil legal aid for low-income Americans through grants distributed by The Legal Services Corporation (LSC), a 501(c)(3) non-profit corporation established by Congress in 1974, mostly to non-profit legal service providers.⁹ The LSC is supported by congressional appropriations in amounts that vary with political winds. Most recently, \$375 million was appropriated for LSC for Fiscal Year 2015, a \$10 million increase over the previous year. One hundred thirty-four legal aid non-profits with 800 offices across the country received LSC grants. These LSC grants, however, came with restrictions on the activities and the population to be served by grant recipients. Prohibited activities included lobbying, litigating class actions, political organizing, etc. Excluded populations consisted of non-citizens, prisoners, and public housing tenants facing eviction for illegal drug sales, among others.¹⁰ Notwithstanding these constraints, in 2013, 1.8 million people, 70% of whom were women, received legal aid from LSC-funded legal aid organizations for family law matters (33% of closed cases), housing and foreclosure cases, consumer issues (11% of closed cases), employment and income maintenance cases (e.g., employer and government benefits) (15% of cases), and others.¹¹

State governments have become important funding sources for civil legal aid. Since 2005, legislative funding for such aid increased by 63%, and as of 2009, only two states failed to provide such funding (Legal Services Corporation, 2009, September). In Massachusetts, the Massachusetts Legal Assistance Corporation (MLAC), which was established by the Commonwealth and is a major funder of 14 civil legal aid programs providing legal services to low-income individuals in the state, receives most of its revenue from state appropriations.¹² In

⁹ LSC. Who we are. Available at <http://www.lsc.gov/about-lsc/who-we-are>

¹⁰ LSC. About Statutory Restrictions on LSC-funded Programs. Available at <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs>

¹¹ LSC, *op. cit.*, *supra* note 9.

¹² See Massachusetts Legal Assistance Corporation, available at <http://mlac.org/>

fiscal year 2015, for instance, \$14.7 million was appropriated for MLAC. IOLTA funds accounted for the next largest portion of MLAC revenue. The efforts of these MLAC-funded legal aid programs yielded \$5.2 million from successful federal disability benefits appeals, \$182,962 in Medicare coverage appeals, and \$760,966 from federal tax appeals. Low-income clients of these programs received a total of \$9.9 million as tenants in evictions, homeowners in foreclosure cases, and recipients of child support orders and unemployment insurance benefits.¹³ The work of these programs in preventing evictions and domestic violence and acquiring custody orders for unaccompanied immigrant children saved the state \$11.6 million that would otherwise have been spent on shelter, medical and health care, and foster care.¹⁴ To improve the financial situation of legal aid in Massachusetts, the Massachusetts Access to Justice Commission – first appointed by the Supreme Judicial Court in 2005 to pursue equal justice for all, in particular by “improving access to justice for those unable to afford counsel”¹⁵ – succeeded in convincing the Supreme Judicial Court to introduce two revenue streams for the state’s IOLTA Committee. The imposition of an “Access to Justice Fee,” attached to the annual attorney registration fee as a voluntary contribution to the state’s IOLTA Committee, and of a *pro hac vice* fee for appearances by out-of-state lawyers generated an approximate total of \$1.4 million (Massachusetts Access to Justice Commission, 2015, April).

The need for civil legal aid services has outstripped supply. The experience of one Massachusetts legal aid office, Greater Boston Legal Services (GBLS), is typical.¹⁶ In 2015, the organization provided legal aid in 32 cities and towns of Greater Boston in more than 12,000 legal issues for over 10,000 low-income people in cases involving housing, immigration, individual rights, health and disability, family, employment, welfare, and other. At the same time, GBLS reported that “three ou[t] of five clients with legitimate claims are turned away due to a lack of staffing resources. These people, with meritorious legal claims, have nowhere else to turn to seek justice.” The problem of unmet legal needs persists on a national scale. Since 2007, the growth in people eligible for LSC-funded legal aid was such that by 2012 one in five Americans was so qualified.¹⁷ At the same time, there was no commensurate increase in the availability of legal aid services, with one legal aid attorney for every 6,415 low-income individuals compared to one private attorney for 429 people generally, and legal aid

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Massachusetts Access to Justice Commission. (2015, March 1). Mission Statement. Retrieved March 16, 2016, from <http://www.massaj.org/a2jwp/>

¹⁶ See Greater Boston Legal Services. Available at <http://www.gbls.org/about>

¹⁷ See LSC, *op. cit.*, *supra* note 9.

organizations turning away more than half of potential clients. These numbers do not take into account the legal needs of middle income people who are also unable to afford attorney services.

Pro bono publico service: The legal profession has taken upon itself the ethical duty to extend access to legal assistance to the indigent through lawyers' volunteer efforts. Lawyers are considered to have a professional responsibility to provide free legal services to low-income persons (ABA Model Rule 6.1).¹⁸ The national association of legal professionals – the American Bar Association or ABA – recommends at least 50 hours of volunteer legal services per attorney. State and local bar associations may differ in their expectations for the extent of pro bono services. For example, Rule 3:07 of the Massachusetts Rules of Professional Conduct urges (using the terminology of “should”) lawyers to volunteer at least 25 hours of uncompensated pro bono publico legal services or to contribute from \$250 to 1% of their professional taxable income to legal assistance organizations serving low-income people.¹⁹ Most, if not all, of the organizations of legal professionals stop short of mandating pro bono services from their members.

The extent to which attorneys fulfill their pro bono responsibility is not generally tracked. As of 2009, reporting requirements for pro bono services are imposed in only seven states, and “based on such reports, a lawyer's average pro bono contribution is estimated at less than half a dollar a day and half an hour a week, and much of this assistance does not go to individuals of limited means or to organizations that assist them” (Rhode, 2009, p. 887). To encourage legal pro bono work initiatives, LSC established a Pro Bono Innovation Fund, initially funded with an appropriation of \$2.5 million in FY 2014, which was subsequently increased by \$1.5 million in FY 2015.²⁰ In Massachusetts, the Massachusetts Access to Justice Commission helped establish a program to encourage retired lawyers to volunteer at pro bono projects, with the result that nearly 21,600 hours of pro bono legal services were provided during a three-year period on projects that ranged from “helping veterans in our Veterans Treatment Courts resolve their civil legal issues, to establishing a lawyer for the day program in District Court, and to providing governance advice to nonprofits” (Massachusetts Access to Justice Commission, 2015, April).

Law school clinics: A large number of law schools provide their students with the opportunity to gain practical legal experience in clinical courses that frequently provide legal

¹⁸ ABA Model Rule 6.1. Available at http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html

¹⁹ Mass.gov. Rule 3:07, Massachusetts Rules of Professional Conduct. Available at <http://www.mass.gov/obcbbbo/rpc6.htm#Rule%206.1>

²⁰ See LSC, LSC funding. Available at <http://www.lsc.gov/lsc-funding>

services to underserved groups (Rhode, 2009). In Massachusetts,²¹ for instance, legal assistance on immigrant matters is offered by law school clinics at Suffolk University and the University of Massachusetts. Individuals with civil legal problems can turn to legal services clinics at Boston College and Harvard University law schools.

Class actions: Class action is a form of litigation procedure that enables “individuals who suffer harms but cannot sue ... [to] otherwise vindicate their rights” (Subrin, Minow, Brodin, & Main, 2000, p. 965). As provided by Federal Rules of Civil Procedure Rule 23, named parties can pursue adjudication of some controverted matter on behalf of other, unnamed, parties with similar claims in a class action provided that certain criteria are met. Besides satisfying the four prerequisites of numerosity (affected parties are too numerous for their claims to be adjudicated through an alternative legal procedure), commonality (a common question of law or fact is involved by the claims), typicality (the named plaintiffs have claims or defenses that are typical of those of the class), and representativeness (the named plaintiffs fairly and adequately protect the interests of the class); the class action must conform to an enumerated type. Civil rights and environmental actions are usually pursued as the type of class action where the basis for the defendant’s actions applies to the entire class, making injunctive or declaratory relief appropriate for the class. Consumer issues tend to be litigated as a class action in which the common question of law or fact predominates over questions concerning individual class members, and the class action is the best way to settle the controversy (Subrin et al., 2000). State class action rules, like Massachusetts Civil Procedure Rule 23, are modeled on the federal rule, with adjustments tailored to individual state circumstances.

Critics of class actions point to the costs of defending against a class action suit and the relatively small amount of monetary relief gained by plaintiffs. On the other hand, the class action option broadens access to justice since it is “a way to provide legal representation and relief to hundreds or thousands of individuals who cannot afford lawyers or may not even be aware of their legal rights. *** it may be the only way to attract good lawyers to engage in expensive and time-consuming litigation” (Subrin et al., 2000, p. 981). Even so, courts have approved arbitration clauses in consumer and employment contracts which curtail the right to participate in a class action.

Pro se: Attorney assistance is not required to gain access to the justice system. A party can decide to navigate the system on his or her own. The right to do without assistance of

²¹ See Massachusetts Trial Court Law Libraries. (2015, October 29). Legal service clinics in Massachusetts law schools. Retrieved September 1, 2016, from <https://blog.mass.gov/masslawlib/legal-topics/legal-service-clinics-in-massachusetts-law-schools/>

counsel and represent oneself – to proceed pro se – is available in both civil and criminal court proceedings. For criminal defendants, this right is protected under the Sixth Amendment (*Faretta v. California*, 422 U.S. 806 (1975), cited by Gardner, 2000). Federal and state laws provide for self-representation in civil cases, with some exceptions. Typically, attorney representation is required for incorporated businesses (see, e.g., instructions for pro se appeals for the Court of Appeals of the Second Circuit²²) and for class representatives in class actions (see, e.g. notice to pro se parties of the District Court of the Southern District of NY²³), among other exceptions, depending upon jurisdiction.

The decision to participate in legal proceedings on one’s own is sometimes taken for strategic reasons, such as gaining sympathy from judge and jury. More often, cost and futility (i.e., “would not help”) motivated most low-income individuals to forego legal assistance for a legal need while futility, preference for handling the problem oneself, and minimization of the problem were dominant reasons that moderate-income individuals did not look for legal help (American Bar Association, 1994). More recent – post-2005 – data confirm the importance of cost to parties’ decision to proceed pro se: “the vast majority of people who appear without representation do so because they are unable to afford an attorney, and ... a large percentage of these are low-income people who qualify for legal aid” (Legal Services Corporation, 2009, September, p. 24).

Whatever the reasons for acting pro se, the facts on the ground indicate rising use of the pro se option: “... data from some court systems shows extremely high numbers, often clustered in those courts in which low-income people are particularly likely to appear, such as family and housing courts” (Legal Services Corporation, 2009, September, p. 25). The 2008 situation in Massachusetts courts is illustrative. Approximately 100,000 parties in civil proceedings were pro se, a number that resulted, in part, from nearly 80% of Probate and Family Court cases and the large majority of tenants in housing court cases (Legal Services Corporation, 2009, September).

Courts vary in their reaction to this influx of unrepresented parties. Some judges try to accommodate the lack of expertise of pro se parties in the interest of justice while others are intolerant of the burden they impose on the system (Rhode, 2001). Only a small minority of courts (under 10% of surveyed courts) have policies to guide them in dealing with pro se parties, and few courts have programs to help such parties navigate court protocols (Rhode, 2009). The

²² Available at

http://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/pro_se/how_to_appeal_as_a_pro_se_party.html

²³ Available at http://www.nysd.uscourts.gov/courtrules_prose.php

legal consequences for unrepresented parties tend to be unfortunate. “There is a growing body of research indicating that outcomes for unrepresented litigants are often less favorable than those for represented litigants” (Legal Services Corporation, 2009, September, p. 26).

Assorted measures have been proposed to make the justice system more user-friendly and level the playing field for pro se parties (Rhode, 2001; Rhode, 2009). They include the systematic and widespread streamlining and simplification of court procedures and documents, supplying translation services, providing guidance and information about court operations and requirements through workshops, hotlines, court advisors, and the like, to mention a few. The Massachusetts Trial Court, for one, has undertaken comparable initiatives to help pro se parties make more effective use of the court system, including the development of a more user-friendly court website, a small claims video, an information sheet about litigation processes and contact information for additional resources, and through the establishment of court service centers (Massachusetts Access to Justice Commission, 2015, April). Enabling experienced non-lawyers (lay specialists) to assist parties with routine legal matters is a controversial recommendation. Although routine non-lawyer legal services have been shown by research to be effective, they are opposed by the legal bar as unauthorized practice of law that can harm the public (Rhode, 2001; Rhode, 2009).

Increasing access to justice through alternatives to litigation for dispute resolution

In order to lessen the volume of cases burdening the court as well as the cost in time and money of litigating disputes which encumbers parties, methods of resolving disputes that avoid court intervention, collectively known as alternative dispute resolution or ADR, have become available. By the 1990s, the use of ADR techniques had become increasingly common, serving “parties in disputes both large and small, from international conflicts to neighborhood arguments, . . . [taking place] in such everyday settings as schools, churches, and workplaces,” and gaining acceptance by the court system and a number of administrative government agencies (Plapinger & Stienstra, 1996, p. 3; Stipanowich, 2010). For example, one federal agency, the Internal Revenue Service, implemented an on-line mediation and case resolution program to deal with taxpayer disputes (Stipanowich, 2010).

In the late 1990s, federal policy favoring the use of ADR in the federal court system was formulated, based upon congressional findings about the potential of ADR to promote party satisfaction, to provide for innovation and efficiency in settling disputes, and to reduce court caseloads through ADR processes like mediation, early neutral evaluation, mini-trials, and voluntary arbitration (Public Law 105-315 § 2).²⁴ ADR techniques of arbitration, mediation,

²⁴ Available at <http://www.adr.gov/ADR%20ACT%201998.pdf>

early neutral evaluation, settlement week, case valuation, and summary jury trials had been in use in a few federal courts since the 1970s (Plapinger & Stienstra, 1996). By the late 1990s, all federal district courts were required to authorize the use of ADR in civil actions pursuant to the Alternative Dispute Resolution Act of 1998 (28 U.S.C. § 651). Furthermore, early neutral evaluation, mediation, mini-trial, and arbitration were cited as examples of pertinent ADR processes that involved the participation of a neutral third party (other than the presiding judge) in helping to resolve disputed issues (28 U.S.C. § 651 (a), (b)). Arbitration and mediation became the most prevalent of ADR processes in use in the court system. Mediation and neutral evaluation are among the more extensively studied ADR methods.

Settlement: Disputing parties can circumvent litigating their dispute over a civil matter by reaching a settlement, i.e., “an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other (*Black’s Law Dictionary*, 1990), where the plaintiff receives some form of compensation from the defendant and litigation is terminated. Settlements may be produced through informal negotiations or through court-connected conference discussions and can occur at any stage of litigation, including after the conclusion of a trial or during an appeal (Eisenberg & Landers, 2009). Court support for settlement is widespread. In the federal court system, court-annexed settlement assistance is provided by district courts in the form of judicial settlement conferences where a judge (not the presiding judge) evaluates the case and facilitates parties’ settlement negotiations, often by employing mediation techniques (Plapinger & Stienstra, 1996). Under the Local Rules of the US District Court of the District of Massachusetts, judges are required to “inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances” (Local Rule 16.4 of the United States District Court of the District of Massachusetts, effective October 1, 1992), federal judges are required to “inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance may be appropriate in the circumstances” (Local Rules, 2008).

Most civil lawsuits culminate in settlement (Eisenberg & Landers, 2009). An overall settlement rate of about 66% was found for civil cases in research conducted by Eisenberg and Landers (2009), based upon an examination of plaintiff success in nearly 3,300 federal civil cases filed and terminated in two districts (Pennsylvania and Georgia). When disaggregated according to case types, the highest settlement rate occurred in tort cases at 81.6%, followed by a rate of 67.6% in contract cases, 67.2% in employment discrimination cases, and a low of 39.3% in constitutional tort cases. The attorney fee structure (e.g., the presence of contingency fees or fee shifting) and the types of parties (e.g., natural persons, government entities, organizations) were likely factors influencing this variability in settlement rates (Eisenberg & Landers, 2009).

Arbitration: As commonly understood, arbitration is a process in which parties to a dispute make their case in an informal adversarial proceeding, where procedural and evidentiary rules tend to be more relaxed than in court, and before some person – the arbitrator – who is the designated decision-maker in the dispute (American Bar Association, 2006). Arbitration is not statutorily defined in federal law, but some courts have proceeded under the view that “central to any conception of classic arbitration is that the disputants empowered a third party to render a decision settling their dispute” (*Evanston Insurance Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012), cited by Lopatin, 2014, June 16). Arbitration is employed most often by agreement of the disputing parties, who also determine whether the arbitration decision is binding.

When agreeing to non-binding arbitration, parties retain the option to decline the arbitration decision and turn to the court to resolve their dispute (Yates, 2007). Non-binding arbitration is second only to mediation in the number of federal courts that authorize it as a court-annexed dispute resolution alternative (Plapinger & Stienstra, 1996). In binding arbitration, parties are constrained by the arbitrator’s decision, which can be overturned by the court only under limited, specified circumstances (Yates, 2007). The use of binding arbitration by parties embroiled in commercial disputes received the imprimatur of the government through legislation and judicial decisions. In some jurisdictions, statutes prescribe the use of binding arbitration to resolve certain kinds of disputes, e.g., challenges to the dismissal of public school teachers in Massachusetts (see M.G.L. c.71, § 42).

Public policy underlying federal law and a number of state laws favors the use of binding arbitration to resolve commercial disputes. The Federal Arbitration Act, originally intended for disagreements between businesses, was subsequently applied, with judicial approval, to disputes between businesses and their customers and employees (Silver-Greenberg & Gebeloff, 2015, October 31). Under this Act, an agreement to arbitrate precludes recourse to the courts to resolve disputes. Not only are arbitration awards enforceable in court, such awards may not be subjected to judicial review on substantive grounds, such as the accuracy of fact finding or application of law. Rather, the grounds for overturning an award are limited to the involvement of corruption, fraud, or undue means in reaching the award; partiality or corruption on the part of arbitrators; misbehavior of arbitrators in conducting the arbitration; or the arbitrator exceeding or imperfectly executing his or her powers (9 U.S. Code § 10).

Various states have arbitration laws modeled on the Federal Arbitration Act. In Massachusetts, for instance, the state’s Uniform Arbitration Act for Commercial Disputes (M.G.L. c. 251) provides that an agreement to arbitrate is enforceable and irrevocable, except in the case of collecting bargaining agreements (M.G.L. c. 251, §1). Reasons for vacating an award are similar to the federal statute with one additional ground – the absence of an agreement to

arbitrate (M.G.L. c. 251, §12). In effect, in Massachusetts, “the strong public policy favoring arbitration requires [the Court] to uphold an arbitrator’s decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous” (Henn, 2011, p. 8, quoting *City of Lynn v. Thompson*, 435 Mass. 54, 61 (2001)).

The impact of arbitration on expanding access to justice has been mixed. Devoid of such litigation procedures as full discovery, motion practice, and comprehensive judicial review, and closed to the public, arbitration gained acceptance in the business community as a confidential and less expensive and time-consuming way to achieve finality in settling disputes when compared to litigation (Stipanowich, 2010). “During the past 30 years, use of arbitration has expanded both as to the quantity and the nature of the disputes subjected to it.” (Stipanowich, 2010, fn. 18, p. 5, quoting Matthews, 2005). In order to minimize the risks of litigation, “corporations began using / standardized arbitration agreements in consumer and employment contracts” (Stipanowich, 2010, pp. 36 -37).

Although the business community embraced arbitration, few middle- and low-income people initiated an arbitration process. Instead, the participation of these individuals in arbitration was usually compelled by the mandatory arbitration clause in contracts that were a condition of their employment or of their purchase of goods and services as various as credit cards, pre-paid cards, online shopping, cell phone use, cable and internet service, automobile rentals and sales, nursing home admission, obstetric services, banking services, private schools, non-union employment contracts, etc. (Silver-Greenberg & Gebeloff, 2015, October 31). To illustrate, 99.6% of over 34,000 credit card cases were brought to arbitration by credit card companies while the remaining 0.4% were initiated by credit card holders (Public Citizen, 2007, September). The ubiquity of arbitration clauses meant that “from birth to death, the use of arbitration has crept into nearly every corner of Americans’ lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home” (Silver-Greenberg & Corkery, 2015, November 1). Although, some contracts included provisions for opting-out or going to small claims court (where dollar amounts of claims are capped) as alternatives to arbitration, these options were little used since individual consumers and employees were often unaware of either the existence or the consequences of the arbitration clause (Silver-Greenberg & Gebeloff, 2015, October 31). Meanwhile, class action waivers, authorized in *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), were commonly attached to the arbitration clause in contracts (Silver-Greenberg & Gebeloff, 2015, October 31).

Developments in the practice of arbitration led to doubts about the value of this process in settling disputes. The gains in money and time savings expected from arbitration diminished as a growing number of arbitration proceedings incorporated litigation procedures such as discovery, prehearing motion practice, and extended hearings (Stipanowich, 2010). At the same time, evidence of a negative impact upon individuals pressed into binding arbitration mounted.

The number of consumers and employees satisfied with the expeditiousness and professionalism of their arbitration experience was greatly outnumbered by those disadvantaged by the partiality towards business that was built into arbitration (Silver-Greenberg & Corkery, 2015, November 1). Conflicts of interest are not specifically banned by arbitration rules so “companies can steer cases to friendly arbitrators.” Moreover, unlike the publicly-funded decision-making apparatus of the court system (i.e., the judge and jury), arbitration is a business enterprise where services from arbitrators – the designated decision-makers – are paid for by disputing parties, “and arbitrators have an economic reason to decide in favor of the repeat players [viz., businesses]” (Silver-Greenberg & Corkery, 2015, November 1). As a result, business interests tend to be advantaged over consumer interests in arbitration. Tellingly, in one analysis of credit card cases arbitrated by a single arbitration company in California, 94% of over 19,000 cases were decided in favor of business (Public Citizen, 2007, September).

The inclusion of pre-dispute arbitration clauses and class action waivers in standardized employee and consumer contracts has triggered controversy about the distortion of the interests of justice purportedly brought about through arbitration. Since these contracts, like adhesion contracts, typically involve agreements between parties of unequal bargaining power, doubts have been raised about whether the weaker party, i.e., the prospective consumer or employee, can really provide voluntary, informed consent to using arbitration as a way to vindicate his or her rights when accepting the contract offers the only reasonable way to acquire the subject matter in question. Furthermore, the adequacy of arbitration in protecting statutory rights has been called into question since the scope of judicial review of arbitration decisions excludes consideration of the accuracy of the arbitrator’s factual findings or interpretation of law (Aronovsky, 2012). When the arbitration clause also precludes class actions, parties are effectively denied an admittedly important avenue for recovering modest monetary claims and seeking compensation for and remediation of illegal practices (Liptak, 2015, December 14; Silver-Greenberg & Gebeloff, 2015, October 31). Only consider the *New York Times* investigation of consumer claims for losses, which revealed that the denial of access to class actions led most people to abandon their claim with the result that “from 2010 to 2014, only 505 consumers went to arbitration over a dispute of \$2,500 or less” (Liptak, 2015, December 14).

Despite such fairness concerns, arbitration agreements, including class action waivers, are considered enforceable (Aronovsky, 2012, citing *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011); *Mitsubishi Motors Corp v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985) and *Gilmer v. Interstate Johnson Lane Corporation*, 500 U.S. 20 (1991), among others). Changes to the arbitration process have been proposed to address these concerns.

Attempts to expand the scope of judicial review through litigation have encountered judicial disapproval at the federal level and met with mixed success at the state level. In 2008, the Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), rejected

the view that additional grounds of judicial review of arbitration awards were permitted under the Federal Arbitration Act and held that such review was limited to the grounds for vacatur expressly articulated in the Act (Aronovsky, 2012). However, the *Hall Street* Court was careful to confine its holding to federal judicial review and exclude judicial review based on state statutory or common law. In Massachusetts, the state's highest court took a similarly strict view of judicial review of arbitration decisions under the Massachusetts Uniform Arbitration Act for Commercial Disputes, M.G.L. c. 251, holding in *Katz, Nannis & Solomon, P.C., et al. v. Levine, et al.* (2016) that contractual language which expanded the scope of judicial review of arbitration decisions was unenforceable (the contractual language at issue referred to material, gross, and flagrant error by the arbitrator) (Qualters, 2016, March 28). By contrast, in California, the state supreme court ruled that parties could specify in their contract the scope of judicial review for those arbitration awards that were enforceable under California state law by the state court (*Cable Connection, Inc., v. Directv, Inc.*, 190 P.3d 586, 589 (Cal. 2008)).²⁵

Meanwhile, various attempts to amend the Federal Arbitration Act have stalled. One effort, the Arbitration Fairness Act of 2007, which, among other things, denied validity and enforceability to pre-dispute arbitration agreements about disputes over employment, consumer, franchise, civil rights, or contracts between parties of unequal bargaining power, failed to pass.²⁶ Likewise, no action was taken on the Arbitration Fairness Act of 2013, introduced by Senator Al Franken, which declared pre-dispute arbitration agreements for employment, consumer, antitrust, and civil rights disputes as invalid and unenforceable, but did not restrict arbitration agreements made after the occurrence of the dispute.²⁷ Re-introduced in 2015 with 16 sponsors, the bill is awaiting action by the Senate Judiciary Committee (Spencer, 2015, November 3). Changes in the legal landscape of mandatory arbitration clauses, however, are imminent by way of the rule-making authority of federal agencies. In May 2016, the Consumer Financial Protection Bureau proposed a rule banning the use of mandatory arbitration clauses that prohibit class actions in consumer contracts with financial institutions for financial products such as loans with banks, credit card companies, and other lending institutions (Silver-Greenberg & Corkery, 2016, May 5). Employment contracts are not within the scope of this rule. Finalization of the rule is anticipated following a 90-day comment period. Then, effective by November 2016, the Centers for Medicare and Medicaid Services issued a rule prohibiting nursing homes that receive federal

²⁵ Pre-emption by federal law might be a limiting condition of this ruling in some cases.

²⁶ See text of the Arbitration Fairness Act of 2007, available at <https://www.govtrack.us/congress/bills/110/s1782/text>

²⁷ See the Arbitration Fairness Act of 2013, available at <https://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf>

funds from demanding arbitration waivers from patients.²⁸ As a result, patterns of harmful nursing home practices will no longer be concealed by the secrecy of arbitration.

Mediation: The waning enthusiasm for using arbitration instead of litigation to resolve civil disputes has been offset by the continuing growth in popularity of mediation, an ADR process that does not rely on the decision-making authority of a third party (Stipanowich, 2010). In fact, federal courts were urged by Congress to include mediation in their alternative dispute resolution programs.²⁹ The 1990s saw mediation emerge as the dominant form of ADR in the federal district court system (Plapinger & Stienstra, 1996). At least a dozen states provide some type of funding for mediation programs – viz., Maryland, Ohio, California, Michigan, Minnesota, Nebraska, New York, North Carolina, Oregon, Texas, Virginia, and Massachusetts (Wilkinson, 2001).

Defining mediation: Mediation is a confidential, voluntary and consensual process in which disputants discuss their issues and explore options for a mutually acceptable agreement with the assistance of a neutral third party, the mediator (Wilkinson, 2001, citing NAFCM). In facilitative mediation – the standard model of mediation – the role of the mediator is to help parties engage in a productive discussion while in evaluative mediation, the mediator also provides an evaluation of the possible legal outcomes of the case (Plapinger & Stienstra, 1996). Ultimately, decision-making remains in the hands of the disputing parties (American Bar Association Section of Dispute Resolution, 2006). Parties lose none of their legal rights by engaging in mediation, and bringing the dispute to court remains an option. Mediated agreements may be enforceable as contracts.

Access to mediation services: Disputants may gain access to mediation services through court referrals, referrals from other organizations or community groups, or they can engage a mediator on their own, with mediation services available from court staff, private practitioners, or practitioners operating within private ADR provider organizations (Yates, 2007). Community mediation centers (also known as community mediation programs) are a subset of external mediation organizations, distinguished by a service delivery model designed to broaden access to justice by making dispute resolution services available to all (Hardin, 2004). As non-profits or government entities, these centers provide free or affordable mediation services from trained volunteer mediators to the public irrespective of ability to pay (Wilkinson, 2001). The centers make their services available to the public through community venues as well as the court system. However, courts tend to be a major source of centers' mediation referrals. Indeed, by

²⁸ Silver-Greenberg, J. & Corkery, M. (2016, September 29). U.S. to bar arbitration clauses in nursing home contracts. *The New York Times*, A1, B2.

²⁹ *Op. cit.*, *supra* note 22.

2000, the courts provided more than half the referrals to almost half the community mediation centers belonging to NAFCM, a national organization of community mediation centers (Bradley & Smith, 2000).

Spectrum of disputes addressed by mediation: Few categories of disputes are considered prima facie inimical to mediation. Community mediation centers alone have a collective experience with at least 37 categories of disputes, the most frequent of which concern neighborhood disputes, interpersonal issues, and conflicts in families, in schools, in the workplace and between landlords and tenants, between merchants and consumers, and between parent and child (Hardin, 2004). The commitment of community mediation centers to mediate at any phase of a dispute and at all levels of conflict intensity furthers the de-escalation, even the prevention, of disputes, and allows disputes that escape the attention of the legal system to be addressed. This opportunity for a proactive approach to conflict provided by mediation contrasts with other institutional interventions where “it is only after a law has been alleged to be violated, an injury documented, or a social need established that police, courts, or social service agencies may intervene. From this perspective, nearly all formal institutional interventions are, by the constitutional manner in which their service is organized, after the fact and not prevention oriented” (Shonholtz, 2000, p. 335).

However, not every dispute is considered suitable for mediation. All courts put certain types of disputes out of bounds for mediation, with the types of excluded disputes varying by jurisdiction (Plapinger & Stienstra, 1996). Administrative appeals, prisoner civil rights cases, prisoner appeals, social security claims, declaratory relief, medical malpractice, and writs have been excluded by various courts at federal or state levels (Plapinger & Stienstra, 1996; Wissel, 2004). From the perspective of practitioners, mediation may be contraindicated in situations where there are impediments to a party’s informed consent or participation is involuntary.³⁰ Moreover, there is an on-going debate in the mediation profession over the advisability of mediating disputes involving a power imbalance in circumstances of aggression and intimidation, such as bullying and domestic violence (Englander, 2005; Gerencser, 1995; Perry, 1994).

Advantages of mediation: The voluntariness of the mediation process, the vesting of decision-making authority in the disputing parties, and the focus on productive communication and discussion in pursuit of a mutually acceptable solution combine to offer advantages that make mediation an attractive alternative to litigation for dispute resolution. The promised benefits

³⁰ JAMS. Mediators Ethics Guidelines. (2016). Retrieved April 28, 2016, from <http://www.jamsadr.com/mediators-ethics/>

include the likelihood of a mutually acceptable resolution of the dispute, flexibility in devising a solution of the dispute, process satisfaction, mitigation of damage to between-party relationships, and greater efficiency.

Agreements generated by mediation: The effectiveness of mediation in resolving disputes has been demonstrated by overall agreement rates that exceed 66% (Gazley, Chang, & Bingham, 2006). These rates cover both court-connected disputes and community (non-court based) disputes. A review of studies examining court-connected mediation found that reported agreement rates ranged from 47% to 78% for small claims cases, 27% to 63% for general jurisdiction cases, and from 29% to 47% in appellate cases (Wissler, 2004). Six studies of appellate cases found a 10% to 20% greater likelihood of agreement for mediated cases than for non-mediated ones even though a seventh study discerned no difference (Wissler, 2004).

Flexibility about issues and outcomes in mediation: In mediation, parties can deal with any number of contentious issues without being limited to those within the scope of litigation. Likewise, parties gain the opportunity for greater flexibility in devising solutions, constrained only by the requirements of mutual acceptability and lawfulness. So, for instance, parties may decide that an apology is needed, not just monetary damages, to effectively resolve their dispute (Davis & Turku, 2011). Evidence of customized solutions in mediated agreements is provided by five studies, which compared mediation to adjudication with respect to small claims case outcomes and revealed that non-monetary arrangements formed part of mediation agreements more often than court decisions (Wissler, 2004).

Party satisfaction: Satisfaction with mediation, both the process and the outcome, tends to be typical of mediation participants (Maiman, 1997, McGillis, 1997, Wilkinson, 2000). Surveys of mediation participants in three states that provided state funding for mediation services – Maryland, Oregon, and Virginia – yielded satisfaction rates that ranged from 86% to 90%.³¹ Most parties in seven studies of small claims cases and sixteen studies of general jurisdiction cases were positive about mediation, deeming the process fair and the mediator neutral. Similarly, a majority of mediation participants affirmed the fairness of the resulting mediation agreement (Wissler, 2004). When mediation and adjudication were compared with respect to party satisfaction in small claims cases, the mediation process met with approval more frequently than did adjudication (in four studies) and the mediation agreement was assessed by most as fairer than the adjudication decision (four studies) (Wissler, 2004). Willingness to use

³¹ See <http://www.courts.state.md.us/macro/pdfs/2008macroadrlegislativevreport.pdf>; <http://courtadr.org/library/view.php?ID=5084>; and <https://alternativedisputeresolution.nmcourts.gov/index.php/admin/publications/1197-virginia-court-connected-adr/Virginia%20Court-Connected%20ADR.pdf>

mediation again was expressed by 95% of participating parties in mediation studies across the US (Wilkinson, 2001).

Impact of mediation on party relationships: The damage to the parties' relationship that can be inflicted by the adversarial stance of litigation may be avoidable in mediation (Moses, 2009). Evidence for the realization of mediation's potential for protecting party relationships, however, is mixed. While one study, cited in a review of mediated and adjudicated small claims cases, reportedly found that parties were less upset and angry at the conclusion of mediation than at the end of trial (McEwen & Maiman, 1981, cited by Wissler, 2004), a second study indicated that mediation participants were as likely as not to regard their relationships improved by mediation (Maiman, 1997, cited by Wissler, 2004). A third study of mediated and adjudicated small claims cases revealed that successful mediations (agreement reached) positively affected party relationships unlike either unsuccessful mediations (no agreement) or adjudication (Wissler, 1995). In this study, parties' negative ratings of their opponents were significantly lower in successful mediations, were unchanged in adjudicated cases, and were higher in unsuccessful mediations (Wissler, 1995). As for general jurisdiction cases, the evidence for mediation's positive impact on party relationships is weaker. Mediation had no influence on their relationships according to most parties in two studies while only a minority of parties (between 5% and 43%) in four studies considered their relationship improved by mediation (Wissler, 2004).

Potential for increased efficiency through mediation: Unencumbered by the strictures of the court calendar and litigation procedures, mediation offers opportunities for savings in cost and time for the courts and for parties. Determining whether these potential savings get realized, however, involves a complex calculation concerning the interactions among a number of factors. Accordingly, the time and money saved to the court from the decreased staff labor associated with a reduction in the volume of court cases attributable to successful mediation may well be offset by the time and money spent by the court on managing its mediation programs (Yates, 2007). The evidence for a net gain in savings to the court from mediation is promising though. According to one estimation, at least \$3 million in court costs was saved through the mediation of 3,660 juvenile cases in Massachusetts during 1991 (Crime & Justice Foundation, 1992, cited by Cratsley, 2000). Projections calculated by three studies of the mediation of appellate cases determined "that the mediation program resolved a number of cases equal to the caseload of one to two judges and their staff" (Wissler, 2004, p. 74, citing Eaglin, 1990; Hanson & Becker, 2002; and Partridge & Lind, 1983).

Whether mediation decreases the cost of dispute resolution for parties compared to litigation will be influenced by the size of mediator fees, the extent of continued attorney assistance, the loss of parties' work time, and parties' transportation costs. On the one hand,

three studies revealed that attorney involvement was lessened in mediation. Thus, a 1992 study demonstrated a 25% reduction in attorney hours for mediated cases compared to litigated cases, and a second study in 1997 showed that the saving of 431 trial days due to mediation led to \$4 million worth of avoided attorney hours (Cratsley, 20001). A third study found that attorney fees in successfully mediated small claims cases were lower than in litigated cases (Clark & Gordon, 1997, cited by Wissler, 2004). On the other hand, three studies of general jurisdiction cases and one study of appellate cases found no difference between mediated and non-mediated cases with respect to attorney work hours, fees, or litigation costs (Wissler, 2004). It is noteworthy that party costs are more likely to be lower when mediation services are obtained from community mediation centers due to the latter's commitment to free or affordable services as well as their readiness to accommodate parties' scheduling needs (Massachusetts Office of Public Collaboration, 2015).

Released from the pace of court processes, the pursuit of dispute resolution through mediation has the potential to proceed at a more rapid rate. Again, research into the efficiency of mediation has yielded mixed results. Mediated general jurisdiction cases were completed earlier than were non-mediated cases according to five studies (Wissler, 2004). In five other studies, mediated appellate cases reached the disposition stage from one to three months sooner than did non-mediated cases (Wissler, 2004). And permanency placements in Michigan were achieved an average of 12.5 months sooner in mediated child protection cases than in non-mediated ones (Anderson & Whalen, 2004, June). By contrast, one study which examined general jurisdiction cases found longer disposition times for mediated cases than for non-mediated ones while no difference in disposition times between mediated and non-mediated cases was found by four studies of general jurisdiction cases and one study of appellate cases (Wissler, 2004). Moreover, court-ordered mediation of workers' compensation cases in Baltimore, MD did not significantly decrease the time to disposition (compared to non-mediated cases) at the 5% level of significance (Mandell & Marshall, 2002, June).

Practical problems facing mediation: The use of mediation as an alternative to the legal system for handling disputes has been criticized on practical grounds for problems that create impediments to increasing access to procedural justice through mediation. Plausible solutions are at hand for these problems.

The efficacy of mediation in expanding access to dispute resolution for impoverished and lower-income individuals is hampered by the limited availability of free mediation services. A survey of legal services providers and mediators in Illinois, which generated 48 responses from across the state, identified cost as the major hurdle to using or recommending mediation, in particular the inability to afford a mediator (56% of survey responses) and a shortage of free mediators (54% of survey responses) (Yates, 2007). To the extent that the survey findings can be

generalized to other circumstances, increased funding for mediation programs like community mediation centers, which offer free mediation services, would go a long way to overcoming the obstacle posed by mediation costs to increasing access to justice through mediation. “Only with sufficient program funding will poor and low-income disputants be able to use mediation as a path to resolve their conflicts...” (Yates, 2007, p. 55).

The prospect of mediation may generate tactical concerns that could dissuade parties from mediating their issues. Parties may worry that sharing information during the course of mediation discussions would put them at risk of exposure to the detriment of their case. Parties may be reassured to learn that the risk of publicity is probably lower in mediation than in litigation. Litigation’s discovery process involves the exchange of information between parties, which, unencumbered by the requirement of confidentiality (as imposed by mediation), can also be subjected to public scrutiny during trial.

Parties may also worry that turning to mediation as a litigation substitute would signal weakness or a lack of confidence in their case. These concerns may be allayed when mediation is mandated or recommended by respected third party, such as the court or the party’s attorney.³² It should be noted that research has not generally shown a harmful effect from mandating entry into mediation. According to four out of six studies of mediated court-connected cases, agreement rates did not significantly vary with whether entry in mediation was mandatory or voluntary (Wissler, 2004). Moreover, no significant association between the voluntariness of entering into mediation and such mediation factors as party satisfaction, size and nature of outcomes, compliance, and party relationship was found by one of the studies (Wissler, 1995). However, the remaining two studies did indicate that agreement rates in mediated general jurisdiction cases were lower for mandated than for voluntary mediation.

Early neutral evaluation: Like mediation, early neutral evaluation is a non-binding ADR process, in which parties retain decision-making authority and a third-party neutral assists parties with settling their disagreement. The use of early neutral evaluation to address a wide variety of civil disputes has grown since the early 1990s. In the federal judicial system alone, the number of courts adopting early neutral evaluation increased seven-fold – from two to fourteen – in the space of five years during the 1990s (Plapinger & Stienstra, 1996).

In early neutral evaluation, a third-party neutral – usually an attorney, sometimes a judge – with expertise in the disputed matter not only encourages parties’ communication and

³² The importance of attorney support for party participation in mediation should not be underestimated: “individuals [in divorce disputes] whose attorneys are ambivalent or opposed to mediation are very reluctant to try it” (Pearson, J., & Thoennes, N. (1988). Divorce mediation research results. In J. Folberg and A. Milne. (Eds.). *Divorce Mediation*. New York: The Guilford Press, 429-452, 448).

examination of positions and options, but also appraises the strength of the case and offers a prediction as to the likely outcome of a trial in order to promote agreement during the beginning stages of a case (American Bar Association, 2006; Plapinger & Stienstra, 1996; Wissler, 2004). Early neutral evaluation is akin to evaluative mediation (Plapinger & Stienstra, 1996). Indeed, the distinction between these two ADR processes may only be nominal. Tellingly, one of the first federal court adopters of early neutral evaluation, the District of Columbia district court, eliminated its early neutral evaluation program as superfluous to its mediation program (Plapinger & Stienstra, 1996).

The results of early neutral evaluation tend to roughly parallel those of mediation. Four studies of early neutral evaluation of general jurisdiction cases found agreement rates that ranged from 23% to 51% (Wissler, 2004). For the most part, participant approval of the process was high according to three studies, and in one study, most participants were positive about the evaluator's performance, including the accuracy of analysis and degree of expertise. Over 85% of participating attorneys were fairly divided between viewing party relationships as improved or as unaffected by neutral evaluation. Savings in time to disposition and attorney costs were not significantly different between neutral evaluation cases and non-neutral evaluation cases. Finally, a comparison of neutral evaluation and mediation outcomes in a single court found no significant differences with respect to reaching agreement, attorney perceptions of fairness of procedure, time or money savings, and amount of discovery or of filings. These comparison findings may bear further investigation in light of three other studies into mediator approaches which showed a greater likelihood of agreement when mediators evaluated the strength of the case, the value of settlement, and the probable trial outcome (Wissler, 2004).

Mitigating the shortcomings of non-adversarial, party-centered decision-making ADR as a litigation substitute: ADR strategies confer advantages because of their function as non-litigation, non-adjudicatory dispute resolution processes. They are put forward as replacements for litigation or adjudication based on their settlement prospects and potential efficiencies in time and cost. The replacement value of non-adversarial, party-centered decision-making processes like mediation, settlements, and neutral evaluation for litigation and adjudication is further enhanced by such benefits as flexibility in addressing issues and in devising outcomes, protection of party relationships, and party satisfaction. Despite these advantages, these non-adversarial, party-centered decision-making processes – to be henceforth known here as “party-centered ADR” – have been criticized from a structural perspective for falling short as litigation substitutes due to the exclusion of three important adjudicatory functions, namely, setting legal precedents, determining rights, and identifying wrongdoers or winners and losers. These shortcomings give rise to concerns that increasing access to procedural justice through ADR may come at the price of substantive justice as well as unintended negative social consequences.

The US judicial system operates under the tenet of *stare decisis*, whereby “it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation” (*Black’s Law Dictionary*, 1990). Thus, a case that is submitted for adjudication may be decided on the basis of precedent or it may change the legal landscape for some issue by setting precedent – that is to say, “furnish[ing] a basis for determining later cases involving similar facts or issues” (*Black’s Law Dictionary*, 1990). Mediation and other party-centered ADR strategies that are external to adjudicatory processes remove disputes from the system of legal precedents so that they are “neither to be governed by a precedent nor to set one” (Riskin, 1982, p. 34). Without precedential value, agreements generated by mediated or neutrally evaluated cases or settlements have no institutional role in guiding the future actions of others.

The focus of adjudication on “determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule” is not inherent to party-centered ADR (Riskin, 1982, p. 34). Rather, these processes are designed to create circumstances that encourage parties to reach a mutually acceptable settlement of their dispute. The standard of mutuality employed in mediation and other party-centered ADR means that neither vindication nor the protection of legal rights is necessarily built into mediation. A mediation agreement, for instance, that avoids identifying wrongdoing or vindicating legal rights will still be a legitimate outcome so long as it proves satisfactory to both sides of the dispute.

The absence of precedent-setting conjoined with the lack of emphasis on questions of right and wrong and the protection of legal rights prevent party-centered ADR from having a positive societal impact in deterring prospective problematic behavior by others. Party-centered ADR like mediation would not be effective for “holding employers accountable for unsafe farm working conditions, or making landlords liable for violations of housing codes and eviction procedures[,which] can provide a crucial deterrent against future abuse” (Rhode, 2001, p. 1795).

In brief, a major structural drawback of party-centered ADR strategies is their function as non-adjudicatory processes for resolving disputes. Notwithstanding this downside, concern that disputants may be shortchanged in resolving their disputes through party-centered ADR may be alleviated by empowering parties with knowledge. Out of respect for party autonomy, implementation of the informed consent requirement could include explicit information about the trade-offs between any ADR strategy and adjudication. If care be taken to advance parties’ understanding of what is gained from using ADR and what is lost from refraining from adjudication, parties might be able to make better informed decisions not only about using ADR, but also in sorting out their priorities and interests regarding outcomes.

The importance of greater transparency about the consequences of using ADR instead of litigation is heightened in light of the breadth of party control over issues and outcomes in party-centered ADR processes. There is nothing in these processes which *ab initio* precludes agreements that address legal rights or questions of wrongdoing and liability, or that identify winners and losers. Parties may devise any agreement that is to their mutual liking as long as it is lawful, and such agreements can include attributions of liability, protection of rights, and identification of winners and losers. Moreover, provisions regarding parties' future actions may also be part of the agreement reached. The likelihood of agreements that address these matters is dependent in part on the array of options available for party consideration, which, in turn, depends upon parties' knowledge, including their knowledge about their legal rights. Arguably, supplementing the ADR process with party access to legal advice may be an effective way to insure that ADR implementation enables full consideration of party options, including their legal rights, even as the constraints on available options are acknowledged.³³ Knowing what rights are at stake, parties may seek to have them preserved in the ADR agreement. Upon learning that ADR agreements are not precedent-setting and that these agreements will not influence the future behavior of others because the agreements of party-centered ADR processes are only enforceable against the agreeing parties and cannot dictate the actions of non-parties, parties may choose to revisit their priorities about initiating social change versus reaping the benefits of party-centered ADR.

ADR in Massachusetts: The commitment to supporting access to justice through ADR has persisted in Massachusetts to varying degrees since at least the 1970s when Massachusetts was a pioneer in the community mediation movement (Massachusetts Office of Public Collaboration, 2011, November). In the years that followed, the fortunes of ADR in Massachusetts waxed and waned, affected by changes in the economic conditions and competing priorities of the state and of the nation.

ADR in the United States District Court of the District of Massachusetts: The federal court system operating in Massachusetts officially embraced the use of ADR in response to the congressional mandate in the Alternative Dispute Resolution Act of 1998 for courts to authorize the appropriate use of ADR in civil actions. The United States District Court of the District of Massachusetts adopted Local Rule 16.4, enjoining judges to encourage litigants to use ADR to resolve civil disputes, and subsequently developed a plan in 2000 to set up court-annexed programs offering ADR services, including early neutral evaluation, mediation, settlement conferences, and several varieties of alternative trials, such as mini-trials and summary jury or bench trials (Local Rules, 2008; United States District Court - District of Massachusetts, 2000,

³³ See Riskin (1982) for a discussion of the role of lawyers in mediation.

June 1). These services would be provided at no cost to parties and their results would be non-binding.

In the neutral evaluation and mediation programs, an attorney or a judge would function as the neutral evaluator or mediator. Settlement conferences would be conducted by a judge, who, besides facilitating party communication, could also provide case assessment and suggest settlement options. In a mini-trial presided over by a neutral advisor, attorneys for each side would present their case to the decision-makers from each side, who would then proceed to try to negotiate an agreement. In summary jury or bench trials, parties would present their case to an advisory jury or to a judge, respectively, who would issue a non-binding decision about the case. Any judge involved in an ADR process would not be the same as the one presiding over the case. An attorney would be chosen to act as evaluator or mediator from a panel of experienced volunteers recruited with the help of the Boston Bar Association.

Under Local Rule 16.4, parties would be allowed to obtain private ADR services, whether from practitioners or from organizations, at their own expense. The Local Rule referenced the Massachusetts Trial Court's list of approved ADR programs as a resource for finding an ADR service provider.

ADR services provided under the auspices of the Commonwealth of Massachusetts: In the years following the economic crisis of the 2000s, the Massachusetts state government supported initiatives to supply its citizenry with access to justice through ADR in the state court system, the operation of the state's office of dispute resolution, and agency-administered ADR programs.

ADR programs and the state courts: Within the context of the Massachusetts state court system, ADR is viewed as an alternative to litigation that consists of processes in which a neutral third person assists parties to settle their case and avoid trial. The Trial Court's aim is to make court-connected ADR available to the public irrespective of ability to pay.³⁴

Court-connected ADR is governed by the Uniform Rules on Dispute Resolution, adopted by the Massachusetts Supreme Judicial Court and effective as of 1999. In order to promote litigant use of ADR, court clerks are required to make information about ADR available to attorneys and to pro se parties early in a case, and attorneys are obliged to share that information

³⁴ Massachusetts Court System. Alternative dispute resolution. Retrieved March 16, 2016, from <http://www.mass.gov/courts/programs/adr/alternative-dispute-resolution.html>

with their clients.³⁵ To assure the quality of ADR services, the Uniform Rules also set standards for the training, continuing education, and ethical practice of neutrals and imposed conditions to be met by ADR service provider programs for approval as recipients of court referrals. The Rules provide for seven ADR processes – mediation, case evaluation, mini-trial, summary jury trial, arbitration, conciliation, and dispute intervention. With the exception of conciliation and dispute intervention, the descriptions of these processes align with those articulated in the Local Rules of the federal district court. As explained in the Uniform Rules, conciliation is a process whereby a neutral party – the conciliator, possessing specified legal credentials and experience – assists the attorneys in the case with clarifying issues, evaluating the strengths of each side’s claims, and, in the event of failure to reach agreement, exploring measures for trial preparation. In dispute intervention, court employees meet with parties and their attorneys, not only to identify disputed issues and explore solutions, but also to “provide accurate and relevant information and recommendations as requested or ordered by the court.”³⁶ As in the federal court system, mediation is the most widely used ADR intervention.

The operation of court-connected ADR is overseen by the Coordinator of Alternative Dispute Resolution Service in the Executive Office of the Trial Court, with the Trial Court Standing Committee on Dispute Resolution advising on ADR implementation and administration. In practice, ADR services are offered by the courts either in-house or through approved ADR programs. In-house services are available, for example, at the Superior and the Housing Courts. The Superior Court has an attorney on staff to conduct free mediation services for pro se cases and refers appropriate cases to a retired judge to act as a mediator and discovery master. Litigants at the Housing Court can turn to staff Housing Specialists for free mediation and dispute intervention services.³⁷ These Specialists provide assistance with disputes over landlord-tenant issues, code enforcement actions, zoning board decision appeals, receivership applications to allow municipalities to make abandoned property habitable, and homelessness prevention for the disabled, among others, and have achieved a 79% agreement rate in landlord-tenant disputes (Qualters, 2016, April 4). Otherwise, the seven Trial Court Departments refer litigants to ADR services from 53 approved ADR service provider programs, determined to have

³⁵ Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution. *A guide to court-connected alternative dispute resolution services*. Retrieved March 16, 2016, from <http://www.mass.gov/courts/docs/admin/planning/ccadr0601large.pdf>

³⁶ *Ibid.*, pp. 6-7.

³⁷ Massachusetts Court System. (2016). Alternative dispute resolution and mediation. Retrieved May 17, 2016, from <http://www.mass.gov/courts/programs/adr/>

met “a recognized threshold of quality” and “ongoing adherence to the ethical rules.”³⁸ No fees can be charged by participating ADR programs without the approval of the applicable court department, and the financial situation of indigent and low-income parties have to be accommodated through fee-waivers or fee-reductions. The District Court Department, in particular, has approved programs that offer free mediation services for small claims, summary process and minor criminal cases. Overall, court-connected ADR has proven successful in resolving a broad range of cases, e.g., landlord-tenant issues, contract disputes, personal injury claims, divorce cases, employment issues, neighborhood conflicts, discrimination claims, minor criminal matters, and complex civil litigation. However, cases involving abuse prevention or “novel issues of statutory or constitution interpretation” are not deemed suitable for ADR intervention.³⁹

The state office of dispute resolution: One of the first state dispute resolution offices, piloted by Massachusetts in 1985, was officially authorized as a Massachusetts state agency, known as the “Massachusetts Office of Dispute Resolution,” in 1990. Following cutbacks in state spending in 2003, the agency downsized and relocated its operations to the University of Massachusetts in 2005 pursuant to M.G.L. Ch. 75, § 46 (Massachusetts of Dispute Resolution, 2005) to function as an applied research center of the McCormack Graduate School at the University of Massachusetts Boston as well as the statutory state dispute resolution agency. The mission of this agency, now referred to as the “Massachusetts Office of Public Collaboration” or “MOPC,” has remained constant. Funded by legislative appropriations, fees-for-services, and grants, MOPC provides dispute resolution assistance to government entities in the three branches of state government as well as to other public entities, such as municipalities, public authorities and political subdivisions of the Commonwealth. MOPC also functions as a resource for collaborative problem-solving and consensus-building by stakeholders on issues of public concern.

MOPC typically “works with government agencies, courts, businesses, nonprofits, and citizen groups to address complex issues related to economic development, environmental resource management, land use, agriculture, transportation, housing, health care, and other important community objectives.”⁴⁰ Some past projects that involved MOPC intervention had an

³⁸ Trial Court list of court-connected approved programs for alternative dispute resolution services, effective 1/1/13 to 12/31/15, p. 2. Retrieved May 12, 2016, from <http://www.mass.gov/courts/docs/admin/planning/adr-program-list.pdf>

³⁹ *Op. cit.*, *supra* note 34, p. 13.

⁴⁰ Massachusetts Office of Public Collaboration. Retrieved May 12, 2016, from https://www.umb.edu/mopc/about_us

impact on policy as well as practice. In 2008, for example, the problem of increasing environmental damage and personal injuries from the recreational use of off-highway vehicles led the Massachusetts Executive Office of Energy and Environmental Affairs and the Department of Conservation and Recreation to set up a working group of off-highway vehicle enthusiasts, law enforcement, land managers, and park advocates to examine ways to protect the environment and promote user safety in off-highway vehicle use.⁴¹ MOPC furthered the efforts of the group, using its skills in collaborative problem-solving, consensus-building, and public engagement to promote productive discussions among members with disparate, even competing interests. The group's deliberations eventually led to more forest trails for off-highway vehicle use and legislative changes in recreational vehicle laws. The following year, in 2009, MOPC facilitated a working group process, involving stakeholders such as scientists, sports enthusiasts, and representatives from state agencies and from boating and lake associations, to deal with the infestation of waterways by an invasive species, the zebra mussel.⁴² As a result of this group's efforts, boat monitoring to prevent the spread of the infestation was instituted at eight locations, and legislation authorizing an aquatic nuisance control program under the Department of Conservation and Recreation was enacted. That same year, the Department of Conservation and Recreation convened a visioning process to address controversy over the role of timber production in its management of state forests and criticism of the department's relations with the public.⁴³ The process, designed and facilitated by MOPC, led to a vision for the stewardship of state forests that included science-based, long-term forest management strategies as well as plans to promote public involvement in forestry issues.

The development of dispute resolution programs has been an ongoing feature of MOPC's statutory mission. For example, in 2012, the combined efforts of MOPC, local conflict resolution centers, and legislative champions culminated in a program – the Community Mediation Center Grant Program – to furnish government support for state-wide access to community mediation. At present, in 2016, MOPC is working on initiatives to address youth violence, prisoner re-entry, and the need of municipalities for additional strategies to more effectively manage public conflict, among others.

The Community Mediation Center Grant Program: The Community Mediation Center Grant Program was established in 2012 in order to “promote the broad use of community mediation in all regions of the state” (G.L. Ch. 75, §47(b)) by awarding operating grants to

⁴¹ See <https://www.umb.edu/mopc/projects/ohv>

⁴² See https://www.umb.edu/mopc/projects/zebra_mussels

⁴³ See <https://www.umb.edu/mopc/projects/ffvp>

eligible community mediation centers. The impetus for this program was the critical loss in funding faced by the community mediation centers operating throughout Massachusetts when, in response to institutional financial difficulties, mediation contracts were canceled by the Trial Court in 2008, followed by the 2009 cancellation of peer mediation contracts in the Student Conflict Resolution Experts Program by the Attorney General (Massachusetts Office of Public Collaboration, 2011). The Grant Program, administered by MOPC, was the outcome of the advocacy efforts by a partnership between MOPC and an informal alliance of affected community mediation centers, the Coalition of Community Mediation Centers of Massachusetts.

Fifteen of the 16 Massachusetts community mediation centers have, at one time or another, received grants from the Grant Program. Grants are awarded to centers on the basis of the amount of mediation services provided and centers' compliance with twelve criteria of community mediation excellence related to service to the community, providing accessible services, providing quality services, and reflecting community diversity (Massachusetts Office of Public Collaboration, 2015). According to the program evaluation report for fiscal year 2015, 13 centers, serving every county in the state, were awarded a total of \$585,500 in grants out of a \$750,000 appropriation for fiscal year 2015 (Massachusetts Office of Public Collaboration, 2015). These grants proved critical to the sustainability of these centers, constituting 30% of their collective cash income for the year. In return for this state investment, over 8,100 people, many of whom were lower-income, received mediation services from the funded centers, totaling 5,429 intakes and 3,784 mediations. A 73% agreement rate, resulting from the achievement of 2,668 full agreements and 96 partial agreements, were achieved through centers' services. As approved ADR service provider programs for the Trial Court, the funded centers served, at no cost to the state court system, six of the seven Court Departments and 74 out of the 110 divisions within the Departments. The cost savings achieved by the thirteen community mediation centers supported by the Community Mediation Center Grant Program were estimated at \$7.1 million with an additional estimated \$4.7 million worth of leveraged resources (Massachusetts Office of Public Collaboration, 2015). The value of the Community Mediation Center Grant Program in providing access to justice through mediation was re-affirmed when \$750,000 was appropriated by the legislature for fiscal year 2016.

Face-to-Face Mediation Programs: The support of consumer mediation is an important cornerstone of the Attorney General's Office (AGO) consumer protection mandate.⁴⁴ Since the Face-to-Face Mediation Program was established by the AGO in 1983, mediation services for resolving consumer and landlord-tenant disputes outside the court system have been made

⁴⁴ See Attorney General of Massachusetts. (2016). Face-to-Face Mediation Programs. Retrieved May 20, 2016, from <http://www.mass.gov/ago/consumer-resources/consumer-assistance/mediation-services/face-to-face-mediation.html>

available at no charge to parties. Although participation in mediation provided under the auspices of the Face-to-Face Program is voluntary, merchant participation is significant.

Mediation services under Face-to-Face Program auspices are provided by participating mediation service provider organizations. Consumer and landlord-tenant cases are referred for mediation by the AGO, the courts, community agencies, and local consumer programs. During fiscal year 2015, 15 community mediation centers received funding to participate in the AGO's program and serve over two-thirds of Massachusetts municipalities and towns and 49 District Courts. Out of the 15 participating mediation centers, 12 were FY 2015 Community Mediation Center Grant Program grant recipients (Massachusetts Office of Public Collaboration, 2015). These 12 centers received \$436,000 from the AGO and proceeded to mediate agreements that resulted in \$4,135,893.66 returned to consumers, a nine-fold increase in the AGO's original investment. As a result of the resolution of disputes achieved through the mediation services provided under the Face-to-Face Program, the Massachusetts market place may run more smoothly, and the courts' caseload is lessened.

Additional government-supported ADR programs in Massachusetts: There are other government-sponsored programs that offer ADR services in other sectors in Massachusetts. MOPC, for one, administers the USDA-supported Agricultural Mediation Program, which helps with disputes over agricultural matters, and the Parent Mediation Program, which offers mediation services to separating or divorcing parents to resolve parenting issues.⁴⁵ Furthermore, disputes over government services may be handled through ADR strategies at state agencies. For example, mediation is one of the options offered to participants in the Early Intervention Program who seek to challenge or complain about decisions or actions taken by that program.⁴⁶

Despite their contribution to resolving disputes for Massachusetts citizenry, the various state-supported ADR service providers in Massachusetts, like those in the rest of the nation, have not fully recovered from the financial setbacks of the last recession. To take just one instance, where participating community mediation centers each received an average of \$56,900 in court funding in 2007, in 2015, they received no court payments and only an average of \$45,000 in grant monies under the Community Mediation Center Grant Program. Altogether, state-supported ADR services have proven their value as avenues to justice through the resolution of

⁴⁵ See Agricultural Mediation Program, available at https://www.umb.edu/mopc/projects/agricultural_mediation_program and Parent Mediation Program, available at https://www.umb.edu/mopc/projects/parent_mediation_program

⁴⁶ See Massachusetts Early Intervention and you, available at <http://www.mass.gov/eohhs/docs/dph/health/early-childhood/family-rights-notice.pdf>

disputes. Additional state funding for such services would further expand access to justice in the Commonwealth.

In sum:

On the whole, measures of all sorts, be they methods that enable people to navigate the justice system or alternative strategies for dispute resolution, have been instituted to address the challenge of providing access to procedural justice for all. The operation of these measures in the world of controverted issues has had, to varying degrees, a positive impact on increasing access to justice. At the same time, as these measures have been field tested by reality, the constraints on their effectiveness produced by inadequate funding have become more obvious and the need for additional government support more pressing.

References

Abel, L. K. & Livingston, L. J. (2008). The existing civil right to counsel infrastructure. *The Judges' Journal*, 47:4, _____. Retrieved April 1, 2016, from <https://www.brennancenter.org/analysis/existing-civil-right-counsel-infrastructure>

American Bar Association. (2006). What you need to know about dispute resolution: The guide to dispute resolution processes. ABA Section of Dispute Resolution. Retrieved March 15, 2016, from http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftbrochure.authcheckdam.pdf

American Bar Association. (1994). *Legal needs and civil justice: A survey of Americans, major findings from the comprehensive legal needs study*. Consortium on Legal Services and the Public of the American Bar Association. Retrieved April 4, 2016, from <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/Permanency%20Planning%20Mediation%20Pilot%20Program.pdf>

Anderson, G. R. & Whalen, P. (2004, June). *Permanency planning mediation pilot program – Evaluation final report*. Michigan Courts. Retrieved May 2, 2016, from <http://courts.michigan.gov/scao/resources/publications/reports/PPMPEvaluation2004.pdf>

Aronovsky, R. G. (2012). The Supreme Court and the future of arbitration: Towards a preemptive federal arbitration procedural paradigm? *Southwestern Law Review*, 42, 131-185. Retrieved April 12, 2016, from http://www.swlaw.edu/pdfs/lr/42_1aronovsky.pdf

Bradley, S. & Smith, M. (2000). Community mediation: Reflections on a quarter century of practice. *Mediation Quarterly*, 17:4, 315-320.

Buscaglia, E. (2001, March). *Judicial corruption in developing countries: Its causes and economic consequences*. Vienna: United Nations Office for Drug Control and Crime Prevention.

Committee for Public Counsel Services. Retrieved March 30, 2016, from <https://www.publiccounsel.net/>

Cratsley, J.C. (2000). *Funding court-connected ADR: Helping people resolve conflicts*. Boston, MA: Supreme Judicial Court-Trial Court Standing Committee on Alternative Dispute Resolution.

Davis, W. & Turku, H. (2011). Access to Justice and alternative dispute resolution. *Journal of Dispute Resolution*, 1,47-64. Available at: <http://scholarship.law.missouri.edu/jdr/vol2011/iss1/4>

Eisenberg, T. & Lanvers, C. (2009). What is the settlement rate and why should we care? *Journal of Empirical Legal Studies*, 6:1, 111-146. Retrieved April 14, 2016, from <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1202&context=facpub>

Englander, E. K. (2005). Feature article: When should you hesitate to mediate? *Models of Respecting Everyone*, 1:1, 2-3. Retrieved April 28, 2016, from <https://webhost.bridgew.edu/marc/should%20you%20hesitate%20to%20mediate.pdf>

Francioni, F. (2012). Access to justice, denial of justice and international investment law. *European Journal of International Law*, 20:3, 729-747.

Gardner, M. R. (2000). The Sixth Amendment right to counsel and its underlying values: Defining the scope of privacy protection. *Journal of Criminal Law and Criminology*, 90:2, 397-465. Retrieved March 25, 2016, from <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7044&context=jclc>

Gazley, B, Chang, W.K., & Bingham, L.B. (2006). Collaboration and citizen participation in community mediation centers. *Review of Policy Research*, 23:4, 843-868.

Gerencser, A. E. (1995). Family mediation: Screening for domestic abuse. *Florida State University Law Review*, 43-69.

- Hannaford-Agor, P. & Waters, N. L. (2013). Estimating the cost of civil litigation. *Court Statistics Project.20:1*. Retrieved March 23, 2016, from http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx
- Hardin, A. (2004). *The state of community mediation report on 2004 data*, National Association for Community Mediation. Washington, DC: NAFCM Press.
- Henn, J. H. (2011). Judicial involvement in arbitrations and in the review of arbitration awards. *Massachusetts Law Review, 94:1*, 8-19.
- Langton, L. & Farole, Jr., D. (2010, September). State public defender programs, 2007. Bureau of Justice Statistics, U. S. Department of Justice. Retrieved March 29, 2016, from <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>
- Legal Services Corporation. (2009, September). *Documenting the justice gap in America*. Washington, DC: Legal Services Corporation. Retrieved April 3, 2016, from <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf>
- Liptak, A. (2015, December 14). Supreme Court upholds arbitration in DirecTV case. *New York Times*. Retrieved March 9, 2016, from http://www.nytimes.com/2015/12/15/us/politics/supreme-court-upholds-arbitration-in-directtv-case.html?_r=0
- Local Rules for the United States District Court for the District of Massachusetts. (1990, September 1; 2008, April 1). Retrieved May 16, 2016, from <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>
- Lopatin, A. (2014, June 16). What constitutes arbitration for Federal Arbitration Act purposes? American Bar Association. Retrieved April 5, 2016, from <http://apps.americanbar.org/litigation/committees/adr/articles/spring2014-0614-federal-arbitration-act.html>
- Maiman, J. (1997, May). *An evaluation of selected mediation programs in the Massachusetts trial court*. Study prepared for the Standing Committee on Dispute Resolution of the Massachusetts Supreme Judicial Court/Trial Court.
- Mandell, M. B. & Marshall, A. (2002, June). *The effects of court-ordered mediation in workers' compensation cases filed in Circuit Court: Results from an experiment conducted in the Circuit Court for Baltimore City*. Baltimore, MD: MACRO & Circuit Court for Baltimore City.

Retrieved May 2, 2016, from

<http://www.courts.state.md.us/macro/pdfs/reports/baltcityworkercompreportfinal.pdf>

Massachusetts Access to Justice Commission. (2015, April). *Final report of the second Massachusetts Access to Justice Commission*. Retrieved March 16, 2016, from

<http://www.massa2j.org/a2jwp/wp-content/uploads/2013/07/FinalReportofSecondATJCommission.pdf>

Massachusetts Court System. Alternative dispute resolution. Retrieved March 16, 2016, from

<http://www.mass.gov/courts/programs/adr/alternative-dispute-resolution.html>

Massachusetts Office of Public Collaboration. (2011, November). *Legislative study: A framework to strengthen Massachusetts community mediation as a cost-effective public service*. Boston, MA: Massachusetts Office of Public Collaboration, University of Massachusetts Boston.

Massachusetts Office of Public Collaboration. (2015). *Massachusetts Community Mediation Center Grant Program: Fiscal year 2015 report & evaluation*. Boston, MA: Massachusetts Office of Public Collaboration, University of Massachusetts Boston. Retrieved May 5, 2016, from http://scholarworks.umb.edu/mopc_pubs/12

Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution in cooperation with the SJC Public Information Office. *A guide to court-connected alternative dispute resolution services*. Retrieved March 16, 2016, from

<http://www.mass.gov/courts/docs/admin/planning/ccadr0601large.pdf>

McGillis, D. (1997, July). *Community mediation programs: Developments and challenges*. Washington, DC: National Institute of Justice, US Department of Justice.

Moses, J. (2009). *Parenting with a plan: How TANF can support positive parenting relationships and foster father involvement*. Washington, DC: Center for American Progress. See www.americanprogress.org

NCCRC (National Coalition for a Civil Right to Counsel). Featured NCCRC work. Retrieved March 30, 2016, from http://www.civilrighttocounsel.org/highlighted_work

NLADA (National Legal Aid & Defender Association). (2011). Five problems facing public defense on the 40th anniversary of *Gideon v. Wainwright*. Retrieved March 29, 2016, from http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems

Perry, L. (1994). Mediation and wife abuse: A review of the literature. *Conflict Resolution Quarterly*, 11:4, 313-327.

Plapinger, E. & Stienstra, D. (1996). *ADR and Settlement in the Federal District Courts: A sourcebook for judges & lawyers*. Federal Judicial Center & CPR Institute for Dispute Resolution. Retrieved April 18, 2016, from

[http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/\\$File/adrsrbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adrsrbk.pdf/$File/adrsrbk.pdf)

Pollock, J. (2010, Summer). Walking before running: Implementation of a right to counsel in civil cases. *Management Information Exchange Journal*. Retrieved March 31, 2016, from http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccesstojusticechairs/ls_sclaid_atj_civil_right_to_counsel.authcheckdam.pdf

Public Citizen. (2007, September). *How credit card companies ensnare consumers*. Retrieved April 11, 2016, from <http://www.citizen.org/documents/ArbitrationTrap.pdf>

Qualters, S. (2016, March 28). Bar: in ruling on arbitration contracts, SJC ‘spells it out.’ *Massachusetts Lawyers Weekly*, 1, 37.

Qualters, S. (2016, April 4). Housing Court expansion plan gaining political momentum. *Massachusetts Lawyers Weekly*, 45:14, 1, 37.

Rhode, D. L. (2001). Access to Justice. *Fordham Law Review*, 69, 1785-1819. Retrieved March 3, 2016, from <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3709&context=flr>

Rhode, D. L. (2009). Whatever happened to access to justice. *Loyola of Los Angeles Law Review*, 42, 869-911. Retrieved March 3, 2016, from <http://digitalcommons.lmu.edu/lr/vol42/iss4/2>

Riskin, L. L. (1982). Mediation and lawyers. *Ohio State Law Journal*, 43:29, 29-60. Retrieved May 3, 2016, from https://www.researchgate.net/profile/Leonard_Riskin/publication/228326683_Mediation_and_Lawyers/links/53fde0e10cf2364ccc09217c.pdf

Robertson, C. (2016, March 20). In Louisiana, the poor lack legal defense. *New York Times*, A1, A16.

Shapiro, J. (2014, August 25). In Ferguson, court fines and fees fuel anger. National Public Radio (NPR). Retrieved March 22, 2015, from <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>

Shonholtz, R. (2000). Community mediation centers: Renewing the civic mission for the twenty-first century. *Mediation Quarterly*, 17:4, 331-340. United States Courts. Defender services. Retrieved March 28, 2016, from <http://www.uscourts.gov/services-forms/defender-services>

Silver-Greenberg, J. & Corkery, M. (2015, November 1). In arbitration, a ‘privatization of the justice system: Part II. *The New York Times*. Retrieved April 11, 2016, from <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>

Silver-Greenberg, J. & Gebeloff, R. (2015, October 31). Arbitration everywhere, stacking the deck of justice: Part I. *The New York Times*. Retrieved on April 11, 2016, from http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0

Silver-Greenberg, J. & Corkery, M. (2016, May 5). Bank customers likely to regain access to courts. *The New York Times*, A1, B3. On-line version available at http://www.nytimes.com/2016/05/05/business/dealbook/consumer-agency-moves-to-assert-bank-customers-right-to-sue.html?_r=0

Spencer, J. (2015, November 3). Franken stumps to end “forced arbitration”. *Star Tribune*. Retrieved April 12, 2016, from <http://www.startribune.com/franken-stumps-to-end-forced-arbitration/339674972/>

Stipanowich, T. J. (2010). Arbitration: The “new litigation.” *University of Illinois Law Review*. 2010:2, 1-59. Retrieved April 7, 2016, from <http://www.illinoislawreview.org/wp-content/ilr-content/articles/2010/1/Stipanowich.pdf>

Subrin, S. N., Minow, M. L., Brodin, M. S., & Main, T. O. (2000). *Civil procedure: Doctrine, practice, and context*. Gaithersburg, MD: Aspen Publishers.

United States Department of Justice Civil Rights Division. (2015, March 4). *Investigation of the Ferguson Police Department*. Retrieved March 23, 2016, from https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

United States District Court – District of Massachusetts. (2000, June 1). Alternative dispute resolution plan. Retrieved May 16, 2016, from <http://www.mad.uscourts.gov/resources/pdf/adr.pdf>

United States Institute of Peace (USIP). Necessary Condition: Access to Justice. usip.org. Retrieved March 8, 2016, from <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice>

Wagner, L. (2015, August 24). New Ferguson judge overhauls municipal courts. NPR. Retrieved March 23, 2016, from <http://www.npr.org/sections/thetwo-way/2015/08/24/434384095/new-ferguson-judge-overhauls-municipal-courts>

Wilkinson, J. (August 2001). *A study of Virginia and ten states: Final report and recommendations*. For the Virginia Association for Community Conflict Resolution (VACCR) by Institute for Environmental Negotiation, University of Virginia

Wissler, R. L. (1995). Mediation and adjudication in the Small Claims Court: The effects of process and case characteristics. *Law & Society Review*, 29:2, 323-358.

Wissler, R. L. (2004). The effectiveness of court-connected dispute resolution in civil cases. *Conflict Resolution Quarterly*, 22:1-2, 55-88.

Yates, S. M. (2007). *Accessing justice through mediation: Pathways for poor and low-income disputants*. Chicago, IL: Center for Analysis of Alternative Dispute Resolution Systems.

Retrieved March 15, 2016, from

<http://poseidon01.ssrn.com/delivery.php?ID=198103020022122078088103012077070122042048077048056085078020004029082017117121082105061019106057060060051030094099070070117019023021012013031099069123007112124025048010023103127009094103072020120076113071086097005103085086002077114113079025085066003&EXT=pdf>