

# ACCESS TO JUSTICE AND DISPUTE RESOLUTION ACROSS CULTURES

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## INTRODUCTION

There is a saying in the United States: the justice one receives is the justice one can afford. All too often, this saying proves true for both lower- and middle-class individuals. For the greatly impoverished, the access to justice crisis is twofold: part of the problem is knowing when to seek legal help and another is ensuring adequate delivery of legal assistance on request. Middle-class individuals face a different challenge, as they surpass the income threshold for free civil public legal aid but cannot afford the rising costs of conventional litigation. The problem persists across different cultures. This Article discusses the low-income community, mandatory arbitration consumers, the LGBTQ community, women, and the black community as communities of culture that typically do not have adequate access to justice.

## I. CULTURE AND ACCESS TO JUSTICE

Culture is complex and multifaceted. It changes over time. Within a culture are subcultures, and within subcultures are differences. Each culture has unique approaches to access to justice and it can be interpreted in different ways by members of each group. When access to justice in Asian nations is compared to access to justice in Western nations, one sees that culturally tailored ways of thinking and approaching life produce different conceptions of crime and justice.<sup>1</sup> “Whereas Westerners use an ‘analytical thinking mode’ to express values of individual rights, independence, and materialistic success, Asians operate with a ‘holistic thinking mode’ to encompass honor, harmony, and attachment.”<sup>2</sup> Hence, access to justice is distinctly impacted by what people perceive “justice” to be. In Western cultures, the concept of justice may mean procedural justice, where there are

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1. Jianhong Liu, *Asian Paradigm Theory and Access to Justice*, 32 J. CONTEMP. CRIM. JUST. 205, 211–17 (2016).

2. *See id.* at 213, 215–16.

retributive consequences to an individual's violation of a state-instituted law; in comparison, collectivist cultures view crime as harm done to social relations.<sup>3</sup>

In Latin American cultures, access to justice does not end when people gain entry to a legal system. Rather, it exists when equalized conditions, coupled with an ability to shape the landscape and contest their outcomes, are reached postentry.<sup>4</sup> The goal for some cultural groups is not to secure the same substantive notions of justice but to find the ones that reflect their own normative frameworks.<sup>5</sup> Is the problem solved when an indigenous community gains new legal rights, even if the rights are secured under a different justice system, or must the indigenous community also recognize the newly established rights and accept them as true?<sup>6</sup>

A robust study of Ukraine that analyzes access to justice for internally displaced persons (IDPs) illustrates a web of cultural factors.<sup>7</sup> The study provides six reasons that explain why access to justice is important for both Ukraine and for IDPs as a collective.<sup>8</sup> To reform the justice system, Kateryna Krakhmalova proposes access to justice through both professional legal representation (to assist in preparing evidence that meets IDP status standards) and programs aimed at sensitizing judges to the vulnerabilities and difficulties of legal procedures for IDPs.<sup>9</sup> Additionally, the author recommends improving conditions for bailiffs to improve conditions for vulnerable populations.<sup>10</sup> On a national scale in Ukraine, access to justice has been primarily focused on criminal and civil justice. There, the most pressing issue is constitutional justice because IDPs are granted particular rights under the constitution that are not being recognized.<sup>11</sup> Lastly, Krakhmalova notes that there is no one-size-fits-all approach to justice

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3. *Id.* at 212–13, 216–17.

4. See Daniel M. Brinks, *Access to What?: Legal Agency and Access to Justice for Indigenous Peoples in Latin America*, 55 J. DEV. STUD. 348, 348–65 (2019).

5. *Id.* at 350. Daniel Brinks notes that, for people bound by the same identity, this means expanding the reach of customary and indigenous legal systems. *Id.* In other words, finding access to different justice systems altogether is what may improve access to justice for some groups.

6. See Charles R. Hale, *Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America*, 28 POL. & LEGAL ANTHROPOLOGY REV. 10, 13 (2008). Charles Hale defines this tension as neoliberal multiculturalism, a “nightmare [that] settles in as indigenous organizations win important battles of cultural rights only to find themselves mired in the painstaking, technical, administrative and highly inequitable negotiations for resources and political power that follows.” *Id.*

7. See generally Kateryna Krakhmalova, *Internally Displaced Persons in Pursuit for Access to Justice: Ukraine*, INT’L MIGRATION, Oct. 2019, at 309.

8. *Id.* at 310–11. The six reasons that explain why access to justice is important for both Ukraine and IDPs are: (1) justice is deeply linked with a state’s legitimacy, sovereignty, and credibility; (2) gaps in access to justice for certain groups breed feelings of injustice and exclusion capable of driving conflict; (3) access to justice is a universal (United Nations–recognized) concept; (4) it is an empowerment tool; (5) it may contribute to poverty elimination; and (6) justice is needed to help IDPs rebuild their lives. *Id.* at 309–10.

9. *Id.* at 315.

10. *Id.* at 316.

11. *Id.* at 314–15.

reform, and each step in the access to justice reform process must carefully take into account the circumstances of the targeted nation, people involved, and specific needs of disadvantaged groups.<sup>12</sup>

This Article looks to the specific needs of such diversified communities. It studies access to justice through their culturally percolated identities to conclude that the circumstances of each specific group of people must be considered in our mediation practices. It is by valuing cultural idiosyncrasies, recognizing situational barriers, and fostering an approach tailored to each group's needs that mediation is best positioned to become a positive contributor to narrowing the justice gap.

## II. ECONOMIC MEANS AND ACCESS TO JUSTICE

It should not come as a big surprise that access to justice varies for people with different economic means. In fact, cost has been the single biggest barrier to entry to the justice system.<sup>13</sup> While access to justice is a problem across the developed world, the middle class in America suffers more than the middle class in most other wealthy nations.<sup>14</sup> Frequently, low-income individuals have unmet legal needs in housing, immigration, and domestic violence issues. To put the degree of need into perspective, consider the 2018 ABA findings: approximately 71 percent of low-income individuals had at least one civil legal problem in the past year. Of that great majority, approximately 20 percent sought legal help, the bulk of which was in legal areas such as child custody and wills and estates, among others.<sup>15</sup>

Per the U.S. Department of Justice, of those who sought help from federally funded civil legal aid programs, more than half were turned away due to a lack of resources.<sup>16</sup> Such statistics create distrust. In a national study, only one-quarter of individuals with low income and a civil legal need sought legal help.<sup>17</sup> In the same study, most did not even consider taking the first step of getting legal help.<sup>18</sup>

Trust, availability of resources, and knowledge that such resources are available all play a role. Resistance to seeking legal help within lower-income communities is linked to the perception that pursuing public legal aid

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12. *Id.* at 314.

13. Liu, *supra* note 1, at 207.

14. *See generally* Benjamin H. Barton et al., *Middle Income Access to Justice*, 65 U. TORONTO L.J. 434 (2015) (book review).

15. Robert Grey Jr., *There Is No Justice as Long as Millions Lack Meaningful Access to It*, A.B.A. J. (Aug. 30, 2018, 6:05 AM), [http://www.abajournal.com/news/article/there\\_is\\_no\\_justice\\_as\\_long\\_as\\_millions\\_lack\\_meaningful\\_access\\_to\\_it](http://www.abajournal.com/news/article/there_is_no_justice_as_long_as_millions_lack_meaningful_access_to_it) [<https://perma.cc/7KCU-D9JM>].

16. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1270 (2016).

17. *See* AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 18 (1994), [https://www.wisbar.org/aboutus/membership/Documents/WisTAFApp\\_J\\_ABA\\_Legal\\_need\\_study.pdf](https://www.wisbar.org/aboutus/membership/Documents/WisTAFApp_J_ABA_Legal_need_study.pdf) [<https://perma.cc/X87H-F8EQ>].

18. *Id.*

is futile, as aid given free of charge is free of quality.<sup>19</sup> Despite a common misconception that individuals are entitled to a free public attorney for *any* problem, many feel that such resources are incapable of fixing the relevant problem and so do not seek legal aid at all.<sup>20</sup>

Past experiences and decisions about whether to pursue legal issues also impact an individual's decision-making as to whether she should pursue a legal remedy, even though there is no correlation between past experiences and the civil justice issue at hand.<sup>21</sup> This shows that people's thoughts about the law impact their behavior toward the law, as well as "the ways in which largely *unconscious* ideas about the law can affect decisions they make."<sup>22</sup>

### III. MANDATORY DISPUTE RESOLUTION AND ACCESS TO JUSTICE

As contracts and legal requirements permeate the daily lives of working-class Americans, the demand for legal interpretation and assistance grows. Consumers are being silently taken away from the lawsuit culture.<sup>23</sup> Mandatory arbitration clauses can take away our right to go to trial.<sup>24</sup> This may create a risk for the consumer if the agreement is unclear and may enable coercion by those writing the agreement who recognize an opportunity to take advantage.<sup>25</sup> From the consumer's perception, contract culture may promote an "overuse" effect whereby legally binding agreements appear less consequential. Generally, a relaxed approach to signing an everyday agreement comes without negative repercussions. However, when problems do arise, access to legal help becomes essential, and this is precisely where the justice gap lies.

Mandatory arbitration has been widely criticized as a practice that prohibits the distribution of justice. When an individual unknowingly opts into mandatory arbitration via contractual fine print, she loses her ability to access the conventional court system. Instead, if she elects to take action, it must be through an arbitral process with an arbitrator frequently handpicked by the very company associated with the problem.<sup>26</sup> Passed by

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19. Greene, *supra* note 16, at 1267. These perceptions manifest in a belief that, if one does not have the resources to pay for an expensive lawyer, one is unlikely to resolve the problem.

20. *Id.*

21. See generally Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112 (Pascoe Pleasence et al. eds., 2007).

22. See Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1058 (2000).

23. Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1795 (2016).

24. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

25. *Id.*

26. Beth Feldstein & Emma Janger, *Opinion, Forced Arbitration Is Cutting Off Access to Justice. Congress Can Stop It*, MORNING CONSULT (Sept. 19, 2019), <https://morningconsult.com/opinions/forced-arbitration-is-cutting-off-access-to-justice-congress-can-stop-it/> [<https://perma.cc/GFJ4-LH8D>].

the House of Representatives on September 20, 2019, the Forced Arbitration Injustice Repeal<sup>27</sup> (FAIR) Act brought national attention to this growing access to justice concern. The FAIR Act was written to nullify predispute arbitration agreements, restoring the right to use the court system.<sup>28</sup>

Being a working-class American entails subjecting oneself to rules and regulations governing terms and conditions of employment.<sup>29</sup> For middle-class individuals who run into conflict with such stipulations, seeking legal counsel becomes a frequent and often necessary means of resolution.<sup>30</sup> Indeed, employers are using arbitration clauses to make it difficult for employees to bring individual claims and “to eliminate the threat of class actions or even collective or group claims in both litigation and arbitration.”<sup>31</sup> When aid can neither be afforded nor provided through external services or governmental channels, justice is *denied*.<sup>32</sup> Thus, the question remains: what options exist for narrowing the gap?

Former American Bar Association President William Hubbard declared that addressing the disparity between wealth and justice was a top priority. Hubbard sought to “bring in people thinking outside the box, from across the country at the grassroots level . . . who [were] unconstrained by preconceptions of how the law ought to be practiced.”<sup>33</sup> This willingness to shift how law is practiced brings an opportunity to integrate alternative dispute resolution (ADR). When considering ADR within the context of broadening access to justice for the poor, a threshold for “economically disadvantaged” should be established. Does this mean extreme levels of poverty, or is the focus on those with modest means who simply cannot afford the high costs of litigation? For those who are both unable to afford a paid attorney and disinclined to seek public help for fear of low-quality results, it is unclear that approaches such as mediation offer a solution.

For an impact to be realized, the association between low cost services and poor results must be overturned. On the other hand, implementing cost-effective, locally based mediation may help to meet some of the demand for

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27. H.R. 1423, 116th Cong. (2019).

28. *See generally id.*

29. *See* Barton et al, *supra* note 14, at 434.

30. *Id.*

31. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1311 (2015).

32. Professor Jean Sternlight discusses the following reasons why employees covered by mandatory arbitration provisions almost never file arbitration claims:

(1) employees win less often and win less money in arbitration than in litigation; (2) attorneys are less willing to take employee claims that are headed to arbitration rather than litigation; (3) arbitration is not a hospitable venue for pro se employees; and (4) arbitration is being used to eradicate the class actions, collective actions, and even group litigation that are essential to many employees.

*Id.* at 1312.

33. James Podgers, *New ABA President William Hubbard Wants to Close Legal Services Delivery Gap for Poor*, A.B.A. J. (Sept. 1, 2014, 7:40 AM), [http://www.abajournal.com/magazine/article/new\\_aba\\_president\\_william\\_hubbard\\_wants\\_to\\_closing\\_the\\_gap\\_in\\_legal\\_service](http://www.abajournal.com/magazine/article/new_aba_president_william_hubbard_wants_to_closing_the_gap_in_legal_service) [<https://perma.cc/FP6R-3WM8>] (quoting Hubbard).

those facing backlogs in the civil courts, and it should not be discounted. For those whose primary drawback is the cost of legal action, ADR offers a legitimate solution.

From an implementation perspective, increasing access to justice (particularly for the middle class) is no light endeavor. To truly meet middle-class civil justice needs, most policy options fall into one or both of the following categories: (1) substantially increase government funds and (2) create a constitutional right to legal services for the middle socioeconomic bracket.<sup>34</sup> Through an economic and political lens, the expectation that either of these objectives could provide a sustainable means of access to justice is a nonstarter.<sup>35</sup> With regard to the first option, an increase in spending risks exposing the middle and lower classes to greater economic disadvantages because the burden of a tax to subsidize such programs may fall disproportionately on them.<sup>36</sup> In response to logistical and cost-based concerns, the introduction of digitally facilitated ADR has gained attention.<sup>37</sup> Though still in the developmental phase, online dispute resolution shows promise in helping parties to communicate and ensures that they have the correct documentation on record. Further, projected advancements anticipate integration of a neutral “fourth party,” which would permit a computerized program to manage adversarial relationships.<sup>38</sup>

#### IV. ACCESS TO JUSTICE AND THE LGBTQ COMMUNITY

Navigating the legal labyrinth surrounding LGBTQ identities makes access to justice elusive for this community. Differences in state and federal law, compounded by social stigma and nontraditional family structures, pose challenges to resolving legal conflicts for LGBTQ persons. Historically, the LGBTQ community has been viewed through a lens of suspicion that labeled LGBTQ individuals as deviant or criminal.<sup>39</sup> As this view has become less pervasive in American society, a new collection of concerns for LGBTQ access to justice has surfaced. One of the more complicated areas for members of the LGBTQ community is family law, which impacts married couples, nonmarried couples, and their children.

##### *A. Discrimination and Access to Justice*

Though public attitudes toward nonheterosexual people have experienced a positive shift, discrimination remains. Concerningly, this discrimination

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34. See Barton et al., *supra* note 14, at 436.

35. See *id.*

36. See *id.*

37. *Expanding Access to Justice Through Online Dispute Resolution*, YALE L. NEWS (Apr. 16, 2019), <https://law.yale.edu/yls-today/news/expanding-access-justice-through-online-dispute-resolution> [https://perma.cc/8R6L-57GY].

38. *Id.*

39. Carrie L. Buist & Codie Stone, *Transgender Victims and Offenders: Failures of the United States Criminal Justice System and the Necessity of Queer Criminology*, 22 CRITICAL CRIMINOLOGY 35, 35–36 (2013).

continues to permeate the workforce and housing market.<sup>40</sup> UCLA School of Law's Williams Institute found that, compared to their heterosexual peers, LGBTQ identifyees were both more likely to be fired or denied a job and prevented from moving into or buying a house or apartment.<sup>41</sup> From a legal perspective, this discrepancy leads us to a question: what protections are available to LGBTQ persons to prevent unequal treatment?

Nondiscrimination statutes are broadly interpreted and vary by state. At the federal level, Title VII of the Civil Rights Act of 1964<sup>42</sup> prohibits discrimination based on race, color, religion, sex, or national origin. Though some states have decided that "sex" should include sexual orientation and gender identity, sex discrimination is more commonly understood as discrimination based on whether one is biologically male or female. Hence, in most states, sexual orientation and gender identity are not explicitly protected under the law.<sup>43</sup> Of the estimated 8.1 million LGBTQ workers in the United States, 51 percent reside in states that do not have statutes prohibiting discrimination based on sexual orientation or gender identity.<sup>44</sup> It is worth noting that, compared to other marginalized groups in the access to justice conversation, the absence of legal protection as a group is unique to the LGBTQ community. Therefore, establishing true access to justice should first mean that it is legally unjust to discriminate on the basis of sexual orientation or gender identity.

For LGBTQ youth, discrimination can have serious consequences. Alarmingly, LGBTQ youth are at a higher risk of "prosecution under statutory rape and other laws regulating sex between minors."<sup>45</sup> For example, in Texas, "sexual contact with a minor under the age of 17 is a felony, unless the parties involved are no more than three years apart in age, each party is older than 14, and the sexual contact is consensual, and *they are of the opposite sex*."<sup>46</sup> Sometimes called a "Romeo and Juliet" law, this is designed to protect young people from falling into the same criminal bucket as older offenders charged with statutory rape. If the only difference between two people in consensual, age-appropriate sexual relationships is the sex of the partner with whom they are involved and one person is committing a felony by virtue of the relationship but the other is not, then it stands to reason

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40. Ilan H. Meyer, *Experiences of Discrimination Among Lesbian, Gay and Bisexual People in the US*, UCLA SCH. L. WILLIAMS INST. (Apr. 2019), <https://williamsinstitute.law.ucla.edu/publications/lgb-discrimination-experiences/> [<https://perma.cc/A7TE-BPSF>].

41. *Id.*

42. 42 U.S.C. §§ 2000e–2000e-17 (2018).

43. Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, UCLA SCH. L. WILLIAMS INST. (Apr. 2019), <https://web.archive.org/web/20190701204348/https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf> [<https://perma.cc/J9ME-2QUG>].

44. *Id.*

45. CTR. FOR AM. PROGRESS ET AL., UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBTQ YOUTH 12 (2016), <http://www.lgbtmap.org/criminal-justice-youth> [<https://perma.cc/T67D-R76W>].

46. *Id.*

that an unequal (and thus unjust) legal process exists. Ergo, access to justice efforts on behalf of LGBTQ individuals are best supplemented by the pursuit of equality under the law.

### *B. Mediation and Family Law*

Discrimination and lack of legal protections pose additional barriers for LGBTQ persons to access justice when it comes to family law. LGBTQ persons are frequently disinclined to use court resources because they are afraid that homophobia will influence outcomes.<sup>47</sup> This phenomenon is not unlike the challenge that advocates for access to justice among the black community have witnessed: when there is a general distrust in the legal system or a perception of discrimination, people avoid using it. This problem is amplified for LGBTQ parents with child custody concerns. Historically, courts have prevented LGBTQ parents from obtaining custody of a child out of various fears ranging from “mental illness” on behalf of the parent to worries about the child becoming gay via exposure.<sup>48</sup> Presently, concern lies in obtaining custody for a parental figure who is neither biologically related to the child nor a legal guardian yet has played a significant role in childrearing.<sup>49</sup> From a relational standpoint, a person in this position is a parent, yet legal separation/divorce may position them to lose their child unless a formal adoption takes place. Further, the complexity of legal marriage status for LGBTQ persons poses a challenge in the court system. For couples that have long cohabited without a marriage license, assigning marital assets upon separation brings a host of complications not easily remedied by formal procedure.<sup>50</sup>

Because there are a multitude of issues that LGBTQ persons face that are not properly addressed under conventional law, mediation is well equipped to be a legitimate means of conflict resolution.<sup>51</sup> Creating an environment through the mediation process whereby personal stories and concerns may be openly addressed without fear of discrimination puts the parties at ease and makes justice more accessible. Additionally, the flexibility afforded by mediation reduces the possibility that settlements will be based on heterosexual divorce precedent, which may not be fitting for LGBTQ relationships.<sup>52</sup> Though it is important for a mediator to treat the parties in an LGBTQ case with the same respect they would afford a heterosexual

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47. Mark Hanson, *Moving Forward Together: The LGBT Community and the Family Mediation Field*, 6 PEPP. DISP. RESOL. L.J. 295, 297 (2006).

48. *Id.*

49. Cynthia D. Wright, “Wedlocked”: Using Mediation for Same-Sex Divorce, *LGBT B.* (Sept. 17, 2019), <https://lgbtbar.org/bar-news/wedlocked-using-mediation-for-same-sex-divorce/> [<https://perma.cc/G8QU-89NB>].

50. *Id.*

51. See generally Maria Federica Moscati, *Understanding LGBTQ Unions and Divorces*, DISP. RESOL. MAG., Spring 2019, at 30 (reviewing LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE (Abbie Goldberg & Adam Romero, eds. 2019)).

52. Wright, *supra* note 49.



family case, it is essential to recognize that same-sex mediation will have a different social and legal dynamic. Thus, it is prudent for mediators to be trained in handling same-sex cases.<sup>53</sup> The larger family mediation field has been criticized for a lack of literature on LGBTQ-specific mediations,<sup>54</sup> so access to justice advocacy may benefit from an increase in resources. A recently published book, *LGBTQ Divorce and Relationship Dissolution*<sup>55</sup> addresses many of these issues. This is an important step.

### C. Diversifying Mediators

With a need to understand LGBTQ issues comes an opportunity to diversify mediator pools. In a paper on ADR boundaries to practice, Professor Lela Love writes that many LGBTQ clients prefer to have a mediator who also identifies as LGBTQ.<sup>56</sup> For this reason, shared experiences may help to strengthen the trust between the parties and the mediator. On the flip side, training heterosexual mediators should not be discounted, as not belonging to the LGBTQ community may offer a valuable sense of objectivity.<sup>57</sup>

Frederick Way, a gay mediator based in the United Kingdom, shared his perspective in a personal article. He states that his decision to publicize his experience was spurred by a lack of LGBTQ mediator groups, no discussion of mediators who are LGBTQ, and minimal research on the subject.<sup>58</sup> Notably, he points out that being gay comes with the possibility to hide one's belonging to a group in a way that other minorities cannot. For this reason, he has experienced a push to abandon his identity for the sake of workplace professionalism.<sup>59</sup> While this may sound trivial, Way points to the impact this can have on the mediator's authenticity and ultimately on the mediation's effectiveness. He feels that his ability to build rapport and show empathy to clients is diluted when he must pretend to be someone he is not.<sup>60</sup> Thus, this dilemma extends beyond access to justice—it borders on an issue of access to *identity*.

Lastly, LGBTQ persons are frequently members of other diverse groups (ethnic, socioeconomic, etc.). When approaching access to justice, it is important to consider the many groups that a single individual might belong to and how these groups impact the legal process.<sup>61</sup>

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53. Hanson, *supra* note 47, at 304–05.

54. *Id.* at 309.

55. LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE (Abbie E. Goldberg & Adam P. Romero eds., 2019).

56. Christopher Honeyman & Lela P. Love, *New York Moveable Feast: Boundaries to Practice*, 5 CARDOZO J. CONFLICT RESOL. 147, 150 (2004).

57. See Hanson, *supra* note 47, at 310–11.

58. Frederick Way, *Celebrating Pride—Reflections on Being a Gay Mediator*, MEDIATE (July 2019), <https://www.mediate.com/articles/way-celebrating-pride.cfm> [<https://perma.cc/D9Q3-6442>].

59. *Id.*

60. *Id.*

61. See generally Hanson, *supra* note 47.

## V. ACCESS TO JUSTICE FOR WOMEN

For women across the globe, access to justice is a legitimate and nuanced issue influenced by a multitude of economic, social, and structural factors. Though the present discourse is largely focused on women in developing and impoverished nations, the need for access to justice for women in the United States remains unmet. Addressing this predicament necessitates an examination of the areas of law where women are most disadvantaged. Further, it requires an understanding of current legal practices, which, whether directly or indirectly, make achieving certain judicial *outcomes* increasingly difficult.

A. *Women and Mandatory Mediation*

ADR is well established within the family court system. Importantly, mediation has deep roots as a method of preserving self-determination for families dealing with divorce and child custody.<sup>62</sup> Arguments for using mediation are intuitive: parents know the interests of their children and mediation offers opportunities for reconciliation, benefiting long-term co-parenting relationships.<sup>63</sup> Success with mediation in family law has led some states to adopt mandatory practices for cases concerning custody and visitation. California began the trend with a 1981 statute establishing mandatory participation in mediation for divorcing parents.<sup>64</sup> Following this statute, close to one-half of states afforded local courts or judges the discretion to implement mandatory mediation while thirteen states enacted family mediation laws.<sup>65</sup>

Arguments for mandatory mediation are backed by empirical research. In a study on the use of mediation in family disputes, women reported that the process afforded them an opportunity to express their opinions and values in a way that positively influenced the mediation's outcome.<sup>66</sup> However, despite its merits, mandatory mediation is not without criticism. Those in opposition note that power imbalances between men and women may complicate the process for several reasons. Most notably, it poses a risk for women who have been victims of domestic abuse and may feel threatened in the negotiating process.<sup>67</sup> In the same light, mediation may not be best for families with complicated histories of parental substance abuse, high conflict, and child welfare issues.<sup>68</sup> Power imbalances often have a financial

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62. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 371–72 (2009).

63. Susan Yates & Peter Salem, *Family Court ADR: Decades of Cultivating Innovation*, DISP. RESOL. MAG., Fall 2013, at 4, 4.

64. *Id.* at 5.

65. *Id.* at 7.

66. Rachael M. Field, *Using the Feminist Critique of Mediation to Explore “the Good, the Bad and the Ugly” Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia*, 20 AUSTL. J. FAM. L. 45, 45–78 (2006).

67. Marsha Lichtenstein, *Mediation and Feminism: Common Values and Challenges*, 18 MEDIATION Q. 19, 20–21 (2000).

68. See generally Yates & Salem, *supra* note 63.

element in divorce cases. As Rachael Field writes, “[b]eing more financially vulnerable, poorer, than the person you are negotiating with significantly reduces a woman’s capacity to be self-determining or empowered in a mediation.”<sup>69</sup>

All too often, men in married relationships make more money than women, which may leave women economically vulnerable at the mediation table. If a woman knows she cannot afford the high costs of litigation if a decision is not reached, she may feel pressured into a compromise she does not fully agree to.<sup>70</sup> Ultimately, this power imbalance may lead to an unequal assignment of marital assets to men.<sup>71</sup>

The most common outcome of a family mediation is establishing joint custody.<sup>72</sup> At the far end of the opposition spectrum, some argue that joint custody compromises a woman’s autonomy. Because co-parenting involves an ongoing relationship, women may be subject to continued control by the male figure.<sup>73</sup> While this may be a legitimate concern in some situations (namely abuse cases), this claim has troubling implications if applied universally. First, this view promotes the assumption that a woman has a greater interest in, or right to, parenthood than her male counterpart. Parent-child relationships are highly interpersonal and the decision to take custody from the male parent should not be taken lightly. Additionally, defaulting custody to the mother is playing into deeply gendered rhetoric that assigns the female the role of the caretaker and the male the role of the provider. If *access to justice* for women is to be pursued, it must not come at the *restriction of justice* for men.

An alternative to mandatory mediation is the triage model. Under this system, cases undergo an initial assessment to determine what method of conflict resolution is most appropriate.<sup>74</sup> Those in favor of triage processes draw attention to both logistical benefits and attributes that empower women over mandatory mediation. Whereas the mandatory system has struggled to meet the demand for mediation, a triage system may reduce the overload by directing some cases to be resolved elsewhere.<sup>75</sup> Additionally, a triage system offers a partial remedy for complex cases of physical or sexual abuse where a woman might feel pressured into compliance.<sup>76</sup>

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69. Field, *supra* note 66, at 15.

70. *Id.*

71. Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 239 (1992).

72. Lichtenstein, *supra* note 67, at 20.

73. *Id.*

74. Salem, *supra* note 62, at 380.

75. *Id.* at 381–82.

76. *Id.*

### B. Access to Justice for Women Across Cultures

The UN Entity for Gender Equality and the Empowerment of Women has labeled family law justice as the most critical need for women in poverty.<sup>77</sup> On an international scale, women have minimal agency and remain at the poorest levels of society.<sup>78</sup> In societies with strict gender divides, some women are at the disposal of legal systems that subject them to constant male authority via guardianship and effectively remove access to justice entirely. In other systems, women risk being denied financial support if they are unable to prove the infidelity of a man in divorce cases, which is notoriously more difficult to do for men than women.<sup>79</sup>

An article published in conjunction with the European Union and Council of Europe states, “ADR when applied to cases of domestic violence is based on the misconception that the perpetrator and the victim are equally at fault for the violence, and that both need to moderate their behavior to resolve the issue.”<sup>80</sup> Though mediation may not be the best option for cases concerning domestic violence, this statement is problematic and may detract from the legitimacy of mediation in other cases where women find it genuinely helpful. Approaching a conflict from a neutral position and working with parties to reach an agreement does not imply that both parties are at fault. If anything, it removes the concept of “fault” from the equation to focus on reaching justice and compromise for those involved.

### C. Mandatory Arbitration

Concerns regarding access to justice for women in the United States have surfaced as the use of mandatory arbitration in the workforce has grown. In circumstances where women have signed away their rights to the court system yet encounter sexual harassment in the workplace, their ability to take action to attain justice is limited.<sup>81</sup> Troublingly, when a company has the ability to select the arbitrator responsible for determining an outcome, women are placed at a greater disadvantage. The rise of the #MeToo movement has sparked resistance to this practice, leading some major law firms to abandon mandatory arbitration practices in employment agreements.<sup>82</sup>

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77. *Fact Sheet on the Importance of Women’s Access to Justice and Family Law*, UN WOMEN, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf> [https://perma.cc/CB58-282G] (last visited Apr. 12, 2020).

78. *Id.*

79. *Id.*

80. SHAZIA CHOUDHRY, *WOMEN’S ACCESS TO JUSTICE: A GUIDE FOR LEGAL PRACTITIONERS* 31 (2018), <https://rm.coe.int/factsheet-womens-access-to-justice/16808ff44e> [https://perma.cc/HA36-ZYPJ].

81. See Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 OHIO ST. J. ON DISP. RESOL. 303, 320, 323 (2018).

82. *Id.* at 328 n.58.

#### D. Other Considerations

Women are underrepresented in the legal profession.<sup>83</sup> With this underrepresentation comes an opportunity to diversify the ADR field. If women were to comprise a greater proportion of ADR mediators, it may help to offset the apparent power imbalance between males and females. Further, female mediators may be more perceptive to the needs and challenges that female clients face in emotionally charged situations. Though it may appear contrary to a position of impartiality, mediators have more control than anyone else during a mediation.<sup>84</sup> The position to steer the dialogue and set the tone of a mediation is powerful. This duty of the mediator should not be discounted when approaching mediations between women and men.

Lastly, women in the U.S. military are perhaps at the greatest disadvantage when it comes to accessing justice. Gender divisions and power dynamics are amplified in a military environment. Sexual assault impacts one in four servicewomen; the nature of military law makes it increasingly difficult to report incidents and the majority of cases go unrecorded. In some respects, the challenges military women face parallel challenges civilians face during mandatory arbitration. For servicewomen, options for reporting sexual assault or misconduct are limited to either telling a superior or making an anonymous tip. If an anonymous tip is made, there is little that can be done to investigate. Decisions are made within a chain of command and enforcement is wholly ambiguous. Thus, when the perpetrator *is* the higher-up or when the chain of command prefers to sweep the incident under the rug, women are denied justice. The military does have its own system of ADR,<sup>85</sup> though it does not function to address such cases.

#### VI. ACCESS TO JUSTICE FOR THE BLACK COMMUNITY IN THE UNITED STATES

Unfortunately, existing research about racial differences in civil justice utilization is “less developed than research about socioeconomic differences; it is essentially nonexistent.”<sup>86</sup> The literature on access to justice across race primarily focuses on the black community while addressing other minority groups in comparison to their white counterparts. For the purpose of this topic, access to justice is best defined in terms of legal outcomes achieved and not strictly entry into the civil court system. Frequent concerns with respect to outcome involve bias, which contributes to inequality within the criminal justice system. Such bias may be implicit or built into the judicial framework, though the two are largely entangled as bias within individuals has arguably contributed to larger-scale, systemic bias. Barriers to entry include general distrust in legal institutions, the cultural value of self-

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83. Choudhry, *supra* note 80, at 6.

84. *See generally* Neumann, *supra* note 71.

85. Clint Dallas Wood, *Mediation in the United States Armed Forces*, 7 AM. J. MEDIATION 12, 19 (2013–2014).

86. *See generally* John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982).

sufficiency, and a causal link between perceived injustices in the criminal system and views of legitimacy within the civil system.

Statistics point to an alarming overrepresentation of black persons in the criminal justice system. Despite constituting approximately 12 percent of the overall American population, 40 percent of those incarcerated are black.<sup>87</sup> While certain attempts to explain this differential have claimed that black persons simply commit a greater proportion of crimes, there is evidence that disproves this argument. For example, consider drug-related offenses: between 1980 and 2000, the arrest rate for blacks increased by a multiple of four while remaining constant for whites, even though black and white Americans sell and consume illicit drugs at similar rates.<sup>88</sup> This phenomenon undoubtedly reflects bias within the system.

A study by Cornell law professor Sheri Johnson found that the “race of the defendant significantly and directly affect[ed] the determination of guilt.”<sup>89</sup> White jurors were more likely to find a black defendant guilty than a white defendant, and black jurors were more likely to find a white defendant guilty than a black defendant.<sup>90</sup> An explanation for this tendency is found in implicit associations: subconscious tendencies to group people into categories through learned observation. Whereas cultural stereotypes have historically been ascribed to black persons within white communities, continuous exposure to such rhetoric contributes to the cognitive internalization of implicit bias.<sup>91</sup>

The theme of implicit association is not exclusive to the criminal system and is crucial to understand when considering access to justice. Because the black community has experienced a substantial history of injustice from the criminal side, an association has been formed that labels the civil side as equally unjust. This deters black Americans in need of legal help from pursuing justice through the civil courts.<sup>92</sup> Black Americans also seem to value self-sufficiency as a means of resolving problems without resorting to untrusted legal institutions.<sup>93</sup> Therefore, seeking legal assistance is viewed as both an admission of failure to be independent and implicit support of a system that has contributed to discrimination of the black community.

A potential solution to providing access to justice for those who genuinely need it is to embed legal resources in existing institutions deemed trustworthy, such as schools or community centers.<sup>94</sup> This may be an appropriate place to integrate ADR procedure while also serving as an

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87. John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 690 (2014).

88. *Id.* at 691.

89. Sheri Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985).

90. *Id.* at 1628.

91. *See generally* Clemons, *supra* note 87.

92. *See generally* Greene, *supra* note 16.

93. *See id.*

94. *Id.*

opportunity to increase the diversity of mediators and arbitrators within the field. Whereas one side of the access to justice movement fears that necessary access cannot be provided without improved entry into civil courts, the degree of separation between ADR and the conventional court system should be acknowledged as a strength for race-influenced reconciliation. If a person who is untrusting of the legal system is able to get the help they require outside the system to which they are ideologically resistant, it becomes a step further toward the goal of increasing access to justice and may contribute to shifting the public mindset toward ADR as a positive, legitimate method of resolving legal conflict.

## VII. ACCESS TO JUSTICE: CULTURE AND ADR

Existing literature on access to justice is rooted in a concern for upholding human rights within the context of both formal and informal justice systems. The issue primarily impacts impoverished and disadvantaged groups who lack the knowledge, resources, and ability to obtain assistance for legal matters. Defining justice involves questions of enforceability and legitimacy. Those adhering to a rigid definition assert that justice is access to an established legal system and may go as far as to say that ADR-based approaches are insufficient as they do not improve the pathways to existing court systems.<sup>95</sup> On the contrary, others take a more abstract stance on the term, using it to broadly classify fair and proper treatment of persons.

The United States Institute of Peace defines access to justice 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.”<sup>96</sup> Under this definition, a rigid approach to justice is not taken, as informal institutions (i.e., NGOs) are viewed as legitimate means of accessing justice. The United Nations Development Programme calls the term a basic principle of the rule of law that must be impartial and nondiscriminatory.<sup>97</sup> The United Nations also emphasizes the importance of access to justice in poverty reduction and strengthening democratic governance.

The notions of autonomy, informed consent, and respect are also highlighted as essential elements of justice. While scholars assert that the term allows for a great deal of subjectivity, there is a consensus that it cannot occur in the absence of informed decision-making.<sup>98</sup>

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95. Shirli Kirschner, *Access to Justice and ADR*, *MEDIATE* (Aug. 2017), <https://www.mediate.com/articles/kirschnerSbl20170818.cfm> [<https://perma.cc/CH5X-WCPH>].

96. *Necessary Condition: Access to Justice*, U.S. INST. PEACE, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> [<https://perma.cc/T3LE-4U8Z>] (last visited Apr. 12, 2020).

97. *Access to Justice Executive Summary*, UNITED NATIONS DEV. PROGRAMME (Sept. 3, 2004), [https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) [<https://perma.cc/DED5-XTEM>].

98. Deason et al., *supra* note 81, at 310.

*A. Barriers*

While barriers to accessing justice vary greatly between nations of differing levels of development, common factors include financial, geographic, linguistic, logistical, and gender-specific obstacles.<sup>99</sup> Those in rural areas where there are few formal justice systems, as well as those who do not speak the native language or lack the monetary resources to seek aid, may be at a disadvantage. Further, individuals may not know that their problem is more substantial than bad luck or an unfortunate community matter. The World Justice Project found that fewer than one in three people (29 percent) understood their issue to be legal in nature.<sup>100</sup> This means that part of the solution is not simply providing access to justice (however it may be defined) but also creating an information infrastructure to educate those who are unaware that they can pursue a legal remedy.

Other barriers to accessing justice lie in structural complications of the legal system. For example, overlapping regulations between the local, national, and international levels do not point to a distinctive “correct” course of legal action.<sup>101</sup> In situations where individuals are able to access the justice system, the decision rendered may not be in either party’s best interest.<sup>102</sup>

It must be considered that access to justice does not necessarily mean access to *quality* justice. To have quality justice means having a properly trained justice administration, as well as systems in place to ensure legal decisions remain valid and are upheld. In seeking to expand access to justice, maintaining the quality of the justice made available is essential.

*B. Arguments for ADR and Access to Justice*

The use of ADR comes as the “third wave” of access to justice—one that promises improved efficiency, cost effectiveness, and promotion of a culture based on dialogue and compromise. Due to the nature of mediation, legal rules emphasizing its voluntary use can impose barriers to entry; while a party can force another to respond to a lawsuit, one cannot force a party to negotiate a settlement.<sup>103</sup> Mediation values a pragmatic approach over an enforcement of strict legal rights, which can be either a benefit or a detriment depending on the specific case and parties involved.<sup>104</sup> Further, mandatory mediation purportedly reduces the burden on courts with a high volume of

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99. See *supra* note 96 and accompanying text.

100. WORLD JUSTICE PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE (2019), <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> [<https://perma.cc/49X9-5MSF>].

101. See generally Anna Nylund, *Access to Justice: Is ADR a Help or Hindrance?*, in *THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES* 325 (Laura Ervo & Anna Nylund eds., 2014).

102. See *id.*

103. See *supra* note 96.

104. See generally Katrina Bochner, *Alternative Dispute Resolution and Access to Justice in the 21st Century*, 40 *ADEL. L. REV.* 343 (2019).



cases by introducing parties to a process that has worked well for many.<sup>105</sup> For parties with limited time, mediation can often reduce the total time involved in solving the matter.<sup>106</sup>

### C. Arguments Against ADR and Access to Justice

While arguments against ADR as a proper means of improving access to justice recognize the good-natured intent of such efforts, they are skeptical of its underlying implications. In an article titled “The Paradox of Access Justice, and Its Application to Mandatory Arbitration,” University of Chicago law professor Omri Ben-Shahar writes:

Access justice is merely an equality of opportunity, not of outcome. Some can draw on that opportunity better than others can. If those who take advantage of the open access and opportunity are disproportionately more sophisticated and affluent, the benefit of the program ceases to be progressive. And if the funding of such free programs burdens the poor, the result can be downright outright regressive.<sup>107</sup>

Given this statement, it seems the problem of inequality runs deeper than access to justice. If equality of judicial outcome is to be desired, perhaps the solution lies in identifying and solving more entrenched issues. However, those with education and affluence will (almost always) pursue outcomes that work in their favor more frequently than will those on the other end of the financial spectrum. If this is the case, it becomes the ADR community’s responsibility to ensure that the justice offered does not come at the expense of the already disadvantaged.

Other research has not directly argued against the use of ADR in promoting access to justice but instead has highlighted its limitations. Because access to justice is often coupled with a desire to promote democratic ideals, some have cautioned against inferring that access to justice is synonymous with regime stability.<sup>108</sup> In looking to Palestine and the legal processes available in the West Bank, Tobias Kelly argues that the pursuit of a centralized, strong government rooted in organizational cohesion and territorial sovereignty cannot be overlooked by recent gains in public access to legal procedure.<sup>109</sup> Therefore, this sort of strong government that is able to uphold judicial decisions may be added as a necessary condition of proper access to justice. Unless an established structure and precedent is in place, ADR may serve only to provoke low-quality justice for the impoverished.<sup>110</sup>

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105. Jacqueline M. Nolan-Haley, *Does ADR’s “Access to Justice” Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 384 (2018).

106. See generally Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865 (1998).

107. Ben-Shahar, *supra* note 23, at 1760.

108. See generally Tobias Kelly, *Law, Culture and Access to Justice Under the Palestinian National Authority*, 36 DEV. & CHANGE 865 (2005).

109. *Id.* at 867.

110. See generally Nylund, *supra* note 101.

Fordham law professor Jacqueline Nolan-Haley counters the claim that ADR has resulted in greater efficiencies for the courts. She also dubs the erosion of consent in ADR processes an “assault on human dignity.”<sup>111</sup> Lack of consent is a key concern within the debate, as many have criticized the use of mandatory mediation and arbitration requirements that eliminate access to courts for those who may eventually pursue it.<sup>112</sup> The most concerning part of this practice is that individuals often do not read such clauses and, if they do, they likely lack an understanding of their true implications. In a book titled *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Margaret Jane Radin highlights an inherent paradox: freedom of contract is perceived as a core value, but the coercion and deception that it can hide run contrary to this ideal.<sup>113</sup> Given that other sources have also cited access to justice as a core value or fundamental right, it seems the two cannot coexist.

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111. Nolan-Haley, *supra* note 105, at 377.

112. *See id.* at 386–87.

113. *See generally* RADIN, *supra* note 24.