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INTRODUCTION

Judges have long employed a range of techniques to motivate the voluntary resolution of legal disputes during pretrial conferences.[1] This includes child custody and visitation cases, which arise when adults are unable to agree about how to divide the rights and responsibilities of parenthood. A small amount of literature, written primarily by the judges themselves, discusses judicial settlement-seeking in the context of these family disputes.[2] The author's empirical research has identified judicial settlement-seeking strategies in custody and visitation cases, and points of consensus and controversy among those who do this work.[3]

This paper critically evaluates judicial mediation in parenting disputes by asking whether, and to what extent, it is in the best interests of the children involved. It begins by identifying several features that distinguish child custody and visita-

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1. The most recent contributions to this literature include Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences,* 26 OHIO ST. J. ON DISP. RESOL. 271 (2011); Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences,* 37 MONASH U. L. REV. 145 (2011); Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial,* 2006 J. DISP. RESOL. 335 (2006) [hereinafter, Robinson, *Adding Judicial Mediation*]; Peter Robinson, *Settlement Conference Judge – Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques,* 33 AM. J. TRIAL ADVOC. 113 (2009) [hereinafter Robinson, *Legal Lion*]; Peter Robinson, *Opening Pandora's Box: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques,* 27 OHIO ST. J. ON DISP. RESOL. 53 (2012) [hereinafter Robinson, *Opening Pandora's Box*]; Peter Robinson, *An Empirical Study of Settlement Conferences Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear,* 17 HARV. NEGOT. L. REV. 97 (2012).

2. E.g., Joanne Goss, Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton, 42 FAM. CT. REV. 511 (2004); Jacqueline W. Silbermann, Child Custody in Contested Matrimonials, 80 N.Y. ST. B.A. J. 16 (2008); Abraham H. Lieff, Pretrial of Family Law in the Supreme Court of Ontario – Simplify and Expedite, 10 LAW SOC'Y OF UPPER CAN. GAZ. 300 (1976); Hugh F. Landerkin, Custody Disputes in the Provincial Court of Alberta A New Judicial Dispute Resolution Model, 35 ALTA. L. REV. 627 (1997); T.J. Gove, Judge-Mediated Case Conferences in Family Law: Looking for the Best Attainable Outcome, 57 ADVOCATE 855 (1999); The Honourable François Rolland, Chief Justice of the Superior Court of Québec, Mediation/Arbitration in Family Law: Pros and Cons, Presentation at the Winkler Lecture on Civil Justice Reform (Oct. 6, 2009) (transcript available at http://www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=3115) Peter Robinson surveyed seventy-two California family law judges about settlement-seeking techniques. Robinson, Legal Lion, *supra* note 2.

3. Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy,* 29 CONFLICT RESOL. Q. 309 (2012) [hereinafter Semple, *Consensus and Controversy*]. This article was based on interviews with 29 judges and other family law professionals in Toronto and New York City. The York University Human Participants Review Sub-Committee granted ethics approval for the interviews (Certificate Number 2009-161, granted on November 25, 2009).

tion disputes from other types of civil litigation, and which are relevant to the normative analysis of judicial mediation in this context.

Next, this paper describes and evaluates three arguments that might be made against the use of judicial settlement-seeking to resolve custody and visitation disputes. First, one might argue that there is too much settlement and not enough neutral adjudication of civil cases in general, or of parenting cases in particular. Second, one might applaud settlement in these cases but say the efforts of the justice system to encourage it are ineffectual or inappropriate. Third, one might approve of settlement-seeking by the justice system in custody and visitation cases, but maintain that the system's reliance on judges to do this work is mistaken.

The first two arguments can be rejected, but the author argues the third point has substantial merit. This paper will conclude by arguing that facilitative mediation by non-judges has significant advantages over judicial settlement-seeking in child custody and visitation cases. Assigning settlement-seeking to facilitative mediators could greatly improve both settlement-seeking and adjudication in family court.

I. THE DISTINCTIVE CHARACTERISTICS OF PARENTING DISPUTES

The most important feature distinguishing custody and visitation suits from other civil litigation is the doctrinal supremacy of the interests of a non-party – the child. Throughout the West, the legally correct outcome to a private parenting dispute is that which is best for the children involved.[4] However, despite their doctrinal supremacy, children are almost never parties to the custody and visitation litigation concerning them. Although courts and practitioners have developed a variety of methods to hear the "voice of the child," in most cases the child is not an active participant.[5]

A second distinctive feature of custody and visitation suits is the prevalence of self-representation by adult litigants. For example, in California, 75% of court-adjunct family mediation cases in 2008 had at least one self-represented party.[6] In many North American jurisdictions the majority of cases involve at least one self-represented party, and the proportion of litigants without lawyers in these cases is generally thought to be increasing.[7] The high rate of self-representation is driven by a combination of financial and non-financial factors.[8]

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4. D. Marianne Blair & Merle H. Weiner, *Reolving Parental Custody Disputes – A Comparative Exploration,* 39 FAM. L.Q. 247 (2005). In Ontario *see, e.g.,* Divorce Act, R.S.C.1985, c. 3 (Can.); Children's Law Reform Act, R.S.O. 1990, c. 12 (Can.). In New York State, *see, e.g.,* N.Y. DOM. REL. LAW §240 (McKinney 2013).

5. Noel Semple, The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases, 28 CAN. FAM. L.Q. 7 (2009).

6. Center for Families, Children & the Courts, *Snapshot Study 2008: Summary Findings,* 6 (2010), *available at* http://www.courts.ca.gov/documents/Snapshot_2008_summary_findings_FINAL_Oct11_update.pdf. The overall self-representation rate in this sample was 58%. *Id.*

7. Randall T. Shephard, The Self-Represented Litigant: Implications for the Bench and Bar, 48 FAM. CT. REV. 609 (2010).

8. Drew A. Swank, *The Pro Se Phenomenon,* 19 BYU J. PUB. L. 373, 378-79 (2005); Herbert M. Kritzer, *Examining the Real Demand for Legal Services,* 37 FORDHAM URB. L.J. 255 (2010).

A third key element of custody and visitation disputes is the prospective and relationship-focused nature of the legal inquiry.[9] Unlike most civil cases, visitation disputes are primarily about the future rather than the past. The goal is to determine what will be best for the child going forward, even if the relevant evidence is largely historical in nature.[10] By contrast to litigants in tort claims, litigants in parenting cases will not usually become strangers once the dispute is resolved. It is increasingly common for joint legal custody to be ordered and for children to spend substantial amounts of time with both of their parents after they separate.[11]

Moreover, the nature of the parties' interaction has a powerful impact on the children involved.[12] Specifically, researchers have established that parental conflict has a negative impact on children, especially if that conflict is apparent to the child.[13] Evaluating settlement-seeking alternatives in parenting cases therefore requires special attentiveness to the *quality* of the settlements.[14] Some parents who settle have arrived at a position of deep and abiding respect and long-term harmony; others are simply catching their breath for the next round of litigation.[15] To evaluate judicial settlement-seeking exclusively by the number of settlements it produces would be no wiser than evaluating a surgeon exclusively on the basis of how many surgeries she is able to conduct per day, without asking what happens to the patients after they are sewn up.[16]

II. CHARGE #1: PARENTING CASES ARE SETTLED TOO FREQUENTLY

A. Prosecution

One argument against judicial pretrial settlement-seeking is that settlement of custody and visitation disputes is already too frequent, and that decision-making by neutral third parties is preferable. In 1984, Owen Fiss made what has become the classic argument against settlement.[17] Fiss argued that only public adjudication serves the public goals of justice and insulates outcomes from the effects of ine-

9. Jana B. Singer, Dispute Resolution and the Postdivorce Family: Implication of a Paradigm Shift, 47 FAM. CT. REV. 363, 364 (2009).

10. *Id.*

11. Lawrence M. Berger et al., *The Stability of Child Physical Placements Following Divorce: Descriptive Evidence From Wisconsin*, 70 J. MARRIAGE & FAM. 273, 274 (2008); PAUL MILLAR, THE BEST INTERESTS OF CHILDREN: AN EVIDENCE BASED APPROACH 30 (2009).

12. Liz Trinder & Joanne Kellett, Fairness and Effectiveness in Court-Based Dispute Resolution Schemes in England, 21 INT'L J. L. POL'Y & FAM. 322, 326 (2007).

13. Robin Deutsch & Marsha Kline Pruett, *Child Adjustment and High-Conflict Divorce, in* THE SCIENTIFIC CHILD CUSTODY DECISIONS 353-74 (Robert M. Galatzer-Levy et al. eds., 2d ed. 2009); Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives,* 52 FAM. RELATIONS 352, 353 (2003).

14. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective,* 27 PACE L. REV. 627, 650 (2007); Rolland, *supra* note 3, at 16-17.

15. BERNARD S. MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES 2 (1st ed. 2009). Regarding the importance of considering agreement, durability, and relitigation rates in evaluating family court dispute resolution. *See* Trinder & Kellett, *supra* note 13 at 325.

16. Marc Galanter, *The Quality of Settlements*, 1988 J. Disp. Resol. 62, 83 (1988).

17. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

quality between the parties.[18] According to Fiss, it would be better to have pure justice determined by neutrals than to have compromises such as settlements.[19] In elaborating on Fiss' argument, David Luban distinguished between the "instrumental" and "intrinsic good" theories of adjudication.[20] The most common instrumental argument for adjudication is that it produces rules and precedents, which have public value.[21] Litigation may also have the benefit of publicizing social and legal problems.[22] Beyond these instrumental claims, Luban suggests adjudicated judgments are "reasoned elaboration and visible expression of public values," and as such, have intrinsic value.[23]

In the specific context of custody and visitation disputes, there is particular reason to be wary of settlements. The child, whose interests are doctrinally supreme, is almost never "at the table" when the settlement is reached.[24] Separating parents may therefore consent to custody or visitation arrangements that are not best for their children.[25] David Luban observes that "two parties trying to apportion a loss are most likely to reach agreement if they can find a way to shift the burden to a third party who is not present at the bargaining table."[26] This theory can be applied in post-separation parenting settlement agreements. Sharing parenting duties while living apart imposes new financial and temporal costs on the adults involved.[27] These new costs might be passed on to the children.

For example, suppose parents of a two-year-old child separate and move to towns which are 100 miles apart. They agree that the child will be in Parent A's sole custody, but that Parent B will have visitation rights for a 6 hour period, once every other week. This arrangement is satisfactory to both adults. It allows Parent A to have a substantial block of free time, and minimizes the number of times that Parent B – whom she detests – visits her house. It also allows Parent B to minimize the number of times he makes the arduous voyage between the towns.

However, there is evidence that the child's interests would be better served by shorter, more frequent visits with Parent B.[28] Given the memory span and cognitive abilities of a two-year-old, the visitation time would be more likely to foster healthy attachment if divided into three one-hour blocks each week. By choosing an arrangement that works well for the parents, instead of one that works well for

18. *Id.*

19. Jules Coleman & Charles Silver, *Justice in Settlements,* 4 SOC. PHIL. & POL'Y 102, 108 (1986).

20. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995).

21. Trevor Farrow, *Public Justice Private Resolution and Democracy,* CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE, 2008; Coleman & Silver, *supra* note 20, at 114-15.

22. Sylvia Shaz Shweder, Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements, 20 GEO. J. LEGAL ETHICS 51, 55 (2007); Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the Law of ADR, 19 FLA. ST. U. L. REV 1, 25-30 (1991).

23. Luban, *supra* note 20, at 2626.

24. Semple, *Consesus and Controversy*, *supra* note 4, at §III(2).

25. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering,* 18 U. MICH. J.L. REFORM 1015, 1032-33 (1985).

26. Luban, *supra* note 20, at 2626.

27. *E.g.* the cost of maintaining living space and amenities for children in two different homes, and the time cost of transporting children between the homes.

28. Joan B. Kelly & Michael E. Lamb, Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children, 38 FAM. & CONCILIATION CT. REV. 297, 300 (2000).

their child, these parents have passed the costs of the compromise on to a third party, their child.

Separating parents may also unintentionally externalize the loss of the economic and emotional benefits of cohabitation by passing the loss on to their children. Consider the case of a "traditional" family with one breadwinner parent and one homemaker parent. Apart from 10 hours per week with the breadwinner, the child is cared for by the homemaker. When they divorce, the breadwinner is threatened with the loss of affectionate companionship at the end of a workday. The homemaker is threatened with the loss of the financial benefits of the breadwinner's income. In negotiating a parenting arrangement, the breadwinner asks to have the child spend 25 hours per week in his company. This is far more time than he spent with the child before divorce, and he will likely struggle to provide this much high-quality parenting after divorce. However, his proposed arrangement assuages the loneliness brought about by the loss of his family. The homemaker accepts this arrangement, in exchange for a support award and property division more generous than the law provides.

The settlement is satisfactory to the parents, but may not reflect the best interest of the child, which is probably better served by a schedule more similar to the pre-divorce parenting arrangements.[29] By contrast, a judge directed to identify the best interest of the child would in principle be unswayed by the parents' personal interests. To the extent that adjudication can produce parenting arrangements that are more closely aligned with the child's interests than settlement terms would be, one might argue there is too much settlement and not enough adjudication of custody and visitation cases.

B. Defense

The Fiss and Luban arguments for adjudication have been answered by compelling generalist arguments for settlement. Research indicates that parties prefer settlement, that settlement is more affordable for everyone involved, and that it produces better outcomes, deterrence, and moral education.[30] Carrie Menkel-Meadow argues persuasively that a settlement need not be a "compromise" of justice – it also has the potential to create better justice, or at least more satisfaction for all parties, than an adjudicated outcome would.[31] To the extent that there is an adjudication-versus-settlement debate, the settlement side would appear to be ascendant.[32] In fact, the formerly polarized debate between settlement and adjudication proponents has largely been replaced by more nuanced questions about

29. American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. b (2002).

30. Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STAN. L. REV. 1339, 1350 (1994); Lon L. Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 316 (1971); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute is it Anyway?*].

31. Menkel-Meadow, Whose Dispute is it Anyway?, *supra* note 30, at 2674; Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485, 487 (1985) [hereinafter Menkel-Meadow, For and Against Settlement].

32. Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 STAN. L. REV. 1255, 1266 (2005).

"when, how, and under what circumstances" cases should be settled or adjudicated.[33]

Arguments for more adjudication of parenting cases are weakened by the real limitations of the justice system. Given that the existing judiciary is, at best, barely sufficient to handle the small minority of custody and visitation cases which are adjudicated, many more judges would be required if adjudication rates increased.[34] In the absence of concerns about protecting a child, the state has little basis for denying separating parents the rights that that other parents have to make decisions about how, and by whom, their children will be cared for.[35]

The fact that parents sometimes reach settlement agreements that are contrary to their children's interests does not mean that adjudication is better able to satisfy those interests. It is notoriously difficult for a judge to determine which parenting arrangement would be "best" for a specific child.[36] It is the author's observation that the keys to making such a determination are (i) knowledge of the parents' abilities to meet the child's needs, and (ii) knowledge of the child in question. Even after a two-week trial, the judge's understanding of a child's needs and interests will pale in comparison to that of the parents.

Most importantly, there is strong evidence that settlement of parenting disputes is generally in the best interest of the children involved.[37] Litigation imposes burdens on parents, which are passed on to their children. It can quickly drain parents' financial and psychological resources, diminishing their ability to care for their child. [38] Litigation also appears to increase the level of inter-parent hostility and the likelihood the child will be exposed to it.[39] Given its substantial costs and dubious benefits, the cost of adjudicating custody and visitation cases exceeds its benefits for many of the children who are involved in it.[40]

33. Menkel-Meadow, *Whose Dispute Is It Anyway?, supra* note 30, at 2664-65; Menkel-Meadow, *For and Against Settlement, supra* note 31, at 498.

34. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process,* 1994 Wis. L. Rev. 631, 659 (1994).

35. Mnookin, *supra* note 25, at 1034.

36. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 153 (2005); Noel Semple, *Whose Best Interests?*, 48 OSGOOD HALL L.J. 287 (2010).

37. *See also* Semple, *Whose Best Interests?*, *supra* note 36, at 321-25 (developing the argument more at length).

38. Regarding the financial impact of parenting litigation on families, *see* Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective,* 32 FAM. L. Q. 95, 105 (1998) [hereinafter Schepard, *Public Health Perspective*]; CORNELIA BRENTANO & ALISON CLARK-STEWART, DIVORCE: CAUSES AND CONSEQUENCES 135 (2006). *See also* the figures in Semple, *Whose Best Interests?*, *supra* note 36, at 322.

39. Marsha Kline Pruett and Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys,* 33 Fam. L. Q. 283, 288 (1999); Marsha Kline Pruett, Glendessa M. Insabella and Katherine Gustafson, *A Court-Based Intervention for Separating Parents with Young Children*, 43 FAM. CT. REV. 38 (2005); HARVEY BROWNSTONE, TUG OF WAR: A JUDGE'S VERDICT ON SEPARATION, CUSTODY BATTLES, AND THE BITTER REALITIES OF FAMILY COURT 12 (2009).

40. Semple, *Whose Best Interests?*, *supra* note 36, at 319-25.

III. CHARGE #2: THE JUDICIARY SHOULD NOT ENCOURAGE SETTLEMENT

A. Prosecution

The specificities of parenting disputes do not provide a justification to discourage settlements. If anything, they suggest that the present level of litigation and adjudication is excessive for children's interests. However a second possible line of attack on judicial settlement-seeking is that, while settlement is a good thing, the justice system should not or does not need to actively encourage it.[41] The justice system includes not only judges but also other public employees and contractors including mediators.

Most cases settle, whether or not the justice system does anything to encourage this outcome.[42] Settlements may be reached within "the shadow of the law," on the basis of the parties' predictions of what the adjudicated outcome would be.[43] A building or tree casts a shadow without having to try to do so; likewise it might be sufficient for the justice system to passively cast a settlement-fostering shadow. Moreover, settlements might grow outside of the shadow of the law, on the basis of the natural potential of human beings to recognize the interests of others and find creative solutions which "expand their pie."[44] Court-sponsored mediation might diminish litigants' incentive to negotiate settlement on their own. For example lawyers might see no need to even attempt bilateral settlement negotiations if they can simply wait and engage in those negotiations at court in the presence of the judge.[45]

Even if it is true that more child custody and visitation cases should be settled, in some cases the best interests of the child can only be protected through an adjudicated outcome.[46] Examples include cases in which one parent has alienated the child from the other, and cases in which the more fit parent would concede sole custody to the less-fit parent in a settlement negotiation due to unequal bargaining power.[47] In such cases, mandatory mediation or other alternative dispute resolution interventions can be a barrier to justice, regardless of whether they are led by judges or by other justice system workers. Requiring litigants to participate

41. For a summary of the debate about court-sponsored ADR and adjudication, *see* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 241 (1995).

42. Marc Galanter, A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States, 12 J.L. & SOC'Y 1, 3 (1985); Mavis Maclean, Family Mediation: Alternative or Additional Dispute Resolution?, 32 J. SOC. WEL.& FAM. L. 105, 106 (2010).

43. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

44. Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 30, at 2675-76; Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice,* 6 PEPP. DISP. RESOL. L.J. 351, 357 (2006). For an empirical study of the nature and extent of law's shadow in family dispute resolution, *see* BECKY BATAGOL & THEA BROWN, BARGAINING IN THE SHADOW OF THE LAW: THE CASE OF FAMILY MEDIATION (2011).

45. H. Lee Sarokin, Justice Rushed Is Justice Ruined, 38 Rutgers L. Rev. 431, 439 (1986); Michael Stevenson, Garry D. Watson & Edward Weissman, The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment, 15 OSGOODE HALL L. J. 591, 595 (1977).

46. Lawrie Moloney, et al., Evaluating The Work Of Australia's Family Relationship Centres: Evidence From The First 5 Years, 51 FAM. CT. REV. 234, 245 (2013).

47. Nicholas Bala, et al., Alienated Children and Parental Separation: Legal Responses in Canada's Family Court, 33 QUEEN'S L.J. 79 (2007).

in mediation before they can access authoritative decision-making means requiring them to spend more time and professional fees in order to obtain a judgment.[48]

The increased process costs to the parties created by mandatory mediation are also a source of strategic advantage to the party better able to bear them, and therefore a possible source of bad outcomes.[49] In the parenting context, this means that mediation-related costs can be an impediment to reaching an outcome which is in the best interests of the child. For example, suppose that Good Parent and Bad Parent are divorcing. Both parties are represented by lawyers, but Bad Parent is much wealthier and has more free time than Good Parent. Each of them is seeking sole custody of their child, and each is willing to fight until their resources are exhausted in order to get it. It would be in the best interest of the child for Good Parent to be awarded sole custody. If the matter reaches trial, the judge will perceive this and make such an order.

In these circumstances, compulsory mediation increases the likelihood that the child will end up in the custody of Bad Parent. This is because each party must pay legal fees and expend his or her own time and energy for as long as the dispute continues. The requirement to prepare for and attend mandatory mediation sessions imposes these costs on both parties, but wealthy Bad Parent is better able to pay them. If the mediation-related costs cause Good Parent to run out of money or energy and give up, the child will be left in Bad Parent's sole custody, or in a sub-optimal compromise. In fact, anticipating mandatory mediation costs might have even encouraged Bad Parent to bring a meritless application in the first place, knowing that he or she will at least get *something* from the inevitable compromise.[50] While this scenario does not describe the average custody or visitation dispute, it does illustrate the potential of mediation-related transaction costs to work contrary to the best interests of the child.

There is also a cogent feminist critique of mandatory mediation for family law cases.[51] Feminist commentators have argued that the power imbalances and domestic violence found in many intimate relationships make mediation of family law disputes dangerous for vulnerable people. In these situations, rights that would be vindicated by adjudication are often bargained away in mediation.[52]

48. Judith Resnik, Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement, 2002 J. DISP. RESOL. 155, 163 & n.39 (2002) [hereinafter Resnik, Mediating Preferences]; Rosanna Langer, The Juridification and Technicisation of Alternative Dispute Resolution Practices, 13 CAN. J.L. & SOC. 169, 182 (1998); Lucy V. Katz, Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?, 1993 J. DISP. RESOL. 1, 47 (1993).

49. Mnookin & Kornhauser, *supra* note 43, at 971-72.

50. Similar arguments have been made without reference to parenting disputes. *See* Sarokin, *supra* note 45; Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 762 (1989).

51. The most frequently cited articles include Martha Fineman, Dominant Discourse, Professional Language And Legal Change In Child Custody Decision-Making, 101 HARV. L. REV. 727 (1988) and Penelope E. Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441 (1992).

52. Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545, 1596 (1991); Noel Semple, Mandatory Family Mediation and the Settlement Mission: A Feminist Critique, 24 CAN. J. WOMEN & L. 207 (2012) [hereinafter Semple, Mandatory Family Mediation].

B. Defense

Notwithstanding these critiques, the characteristics of parenting disputes offer compelling reasons to accept the necessity of some form of public settlement promotion in this field. Below, this article will review convincing empirical evidence that non-judicial facilitative mediation is a form of family court settlement-promotion that reliably increases settlement rates and produces other benefits.[53] According to legal-economic theory, civil litigants settle when the perceived costs of proceeding to adjudication outweigh the perceived benefits.[54] However, the unique characteristics of parenting disputes may reduce the perceived cost of going to trial and increase the perceived cost of settlement, leading the parties to the mistaken belief that seeking an adjudicated outcome is preferable.

Good lawyers provide their clients with information about the costs of pursuing litigation to the point of adjudication. However, litigants in parenting cases are often unrepresented and, therefore, lack access to this information.[55] A parent who does not hire a lawyer, and who has never been involved in civil litigation, may have unrealistic expectations about the legal system, perhaps based on television programs such as *Judge Judy* or *Divorce Court*.[56] On TV, litigants tell their stories in their own words and receive a decision within minutes. These TV shows make the experience of "telling it to the judge" and getting an authoritative resolution appear much easier than it actually is. A neutral member of the justice system can inform parties about the true costs of proceeding to trial.[57]

Conversely, the perceived costs of settling may be unusually high in many parenting cases. Discussing resolution of a child custody or visitation dispute with an ex-spouse, without the assistance of a lawyer or a third party, may be a very unpleasant prospect. Given the prevalence of domestic violence, ex-spouses may perceive unsupervised face-to-face negotiations, such bipartite settlement negotiations, to be too risky.[58] High-conflict parents that are not actively encouraged or assisted in settling their custody dispute may be inclined toward adjudication, hoping to avoid a difficult task while imagining a glorious vindication. A neutral can supervise negotiations, making a difficult conversation somewhat easier and helping to secure the physical safety of domestic violence victims.

Even if we believe that most parents should settle their custody cases, we should not assume that they all *want* to.[59] Julia Pearce and her colleagues inter-

53. *See infra* Part V.

54. See Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337, 339 (1986); John Bronsteen, Some Thoughts About the Economics of Settlement, 78 FORDHAM L. REV. 1129 (2009).

55. *See* Part I, *supra.*

56. Steven A. Kohm, The People's Law Versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV, 40 LAW & SOC'Y REV. 693, 694 (2006).

57. Semple, *Consensus and Controversy*, *supra* note 3. These "neutral members of the judicial system" may include mediators, arbitrators, or judges. *Id.*

58. Domestic violence is present in between 50% and 80% of the conjugal relationships that dissolve before death, and in at least 50% of those which are subjected to family mediation. Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 320 (1997); Robin H. Ballard et al., Factors Affecting the Outcome of Divorce and Paternity Mediations, 49 FAM. CT. REV. 16, 17 (2011).

59. *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002) (critiquing the assumption that litigants dread adjudication).

viewed parents in an English family court in which settlement-seeking was pervasive. They reported that "many parents ... actually prefer to have the court decide, seeing this as preferable to reaching some compromise which they would then resent."[60] Encouragement to settle from a neutral party might be the "nudge" which is necessary for spouses to overcome their anger and alienation and discuss their child's future together.

The best interests of the child standard may offer another family law-specific reason to value settlement-promotion. As noted above, it is possible that parents will settle on terms which advance their own interests at the expense of the best interests of the child.[61] It may be possible for a neutral to encourage the parties to focus on their child's interests.[62] One can ask parents to carefully consider the interests of their child without telling them what outcome those interests require. Reminding parents to focus on the child may thus be entirely compatible with the non-judicial facilitative mediation that this paper espouses below.[63]

There remains the objection that mandatory mediation imposes useless costs on those whose dispute will be adjudicated, and provides a strategic advantage to the better-endowed party. Two points can be made in response. First, mediation that does not produce a settlement is not necessarily a waste of time.[64] It may open the lines of communication between the parties and allow them to better understand their options. More ambitiously, in the vision of Bush and Folger, mediation can "transform the quality of conflict interaction, so that conflicts can actually strengthen both the parties themselves and the society they are part of."[65]

Second, the rise of triage in family court dispute resolution processes offers hope that we may soon be able to promote settlement for the cases which should settle, while fast-tracking the adjudication of others. [66] Family courts across North America are investing in tools and staff to analyze incoming cases, channeling some to mediation and others to court.[67] While approaches vary, cases involving domestic violence and high conflict are usually flagged for adjudication, without

60. Julia Pearce, Gwynn Davis & Jacqueline Barron, *Love in a Cold Climate – Section 8 Applications under the Children Act 1989*, 1999 FAM. LAW 22 (1999). *See also* Rebecca Bailey-Harris, Jacqueline Barron & Julia Pearce, *Research: Settlement Culture and the Use of the 'No Order' Principle under the Children Act 1989*, 11 CHILD & FAM. L. Q. 53 (1999): "There is considerable evidence of the dissatisfaction of parents with the outcome of 'no order' when they consider that they have invoked the court's jurisdiction precisely for the exercise of its authority in a matter which they find difficult to resolve themselves."

61. *See* Section II(A), *supra*.

62. Batagol & Brown, *supra* note 44, at 7 (suggesting that, at least in Australia, many family mediators see advocacy for the children involved as part of their role).

63. *See infra* Part V.

64. *See supra* Part I.

65. Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict, 13 (2d ed. 2005).

66. Triage is the effort to determine at an early stage which interventions are most appropriate for each case, based on its specific characteristics. ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES Ch. 9 (Cambridge Univ. Press 2004).

67. Peter Salem, The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?, 47 FAM. CT. REV. 371 (2009); Peter Salem, Debra Kulak & Robin Deutsch, Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen, 27 PACE L. REV. 741 (2007); Noel Semple & Carol Rogerson, Access to Family Justice: Insights and Options, 413-449 in Middle Income Access to Justice (Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., 2012).

wasting time in mediation.[68] Triage allows those parties for whom settlement is possible to avoid litigation, without forcing parties for whom adjudication may be necessary to go through a futile mediation process before gaining access to the courts.

The distinct nature of parenting cases provides a strong argument that the majority that ought to settle need some encouragement from a public sector neutral in order to do so. Settlement-promotion must therefore remain a central part of the justice system's approach to parenting disputes. However, as the subsequent section will argue, this does not necessarily mean that it is judges who should be doing this work.

IV. CHARGE #3: JUDGES ARE NOT IDEAL SETTLEMENT-SEEKERS IN CUSTODY AND VISITATION CASES

Having been exonerated on the first two charges, judicial settlement-seeking in parenting cases faces a third indictment. It is alleged that judges, as a group, are not the best people to entrust with the work of settlement-seeking in custody and visitation cases. This section will first review empirical evidence about judicial pre-trial conferences, which does not clearly establish that they increase settlement rates in family or other civil courts. This section will then identify and consider four inherent characteristics of judges that make them unsuitable settlement-seekers in custody and visitation cases. These are: (i) high salary, (ii) ambivalence regarding the settlement-seeking role, (iii) autonomy, and (iv) authority.

A. Empirical Evidence on the Effect of Judicially Directed Settlements

It is clear that settlements are frequently reached within or shortly after judicial pretrial conferences in family courts. A survey of California judges found that 52% of the judges reported that 75% or more of their cases settle in pretrial conferences.[69] A similar Canadian survey found that only 9.3% of family law cases that underwent judicial settlement interventions subsequently went to trial.[70]

However, these findings do not prove that judicial settlement-seeking brings about settlements which would not otherwise occur. Leroy Tornquist compares pretrial settlement conferences to folk remedies for the common cold. Those who partake of the remedies find that their colds go away, and may consider this evidence of the remedy's efficacy.[71] However, the common cold also generally dissipates in the absence of any remedy. Likewise, most cases settle no matter what the justice system does, so the efficacy of judicial settlement-seeking requires

68. Rae Kaspiew et al., EVALUATION OF THE 2006 FAMILY LAW REFORMS E4 (2009), *available at* http://www.aifs.gov.au/institute/pubs/fle/ (last visited Jan. 22, 2014); Glenn A. Gilmour, *High-Conflict Separation and Divorce: Options for Consideration* 36 (2004), *available at* http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_1/index.html (last visited Jan. 22, 2014).

69. Robinson, *Legal Lion*, *supra* note 1, at 118.

70. Goss, *supra* note 2, at 515; Gove, *supra* note 2, at 858. In many family courts, the number of cases resolved in pretrial conferences substantially exceeds the number resolved in trials. *See e.g.*, Lieff, *supra* note 2, at 304. In this article about the introduction of pretrials in Toronto, Justice Lieff notes that, within a 9-month period beginning in 1975, "the court disposed of 107 cases after trial," and "301 cases were settled as a result of and following pretrial." *Id.*; *see also* Rolland, *supra* note 2, at 11.

71. Tornquist, *supra* note 50, at 772.

some demonstration beyond the fact that settlements emerge from judicial pretrial conferences.[72]

A few articles have suggested anecdotally that mandatory judicial pretrial conferences increase settlement rates.[73] The strongest evidence is found in a 1977 study, which found that judicial pretrial settlement negotiations increased settlement rates.[74] The study examined the pretrial settlement program introduced by the Toronto Supreme Court of Justice in the late 1970s.[75] With the cooperation of the court, the authors were able to conduct a controlled and randomized experiment. They found that 86.4% of cases in which the parties were required to participate in settlement-oriented pretrial conferences settled, compared to a settlement rate of 68.8% in the control group.[76]

However, the preponderance of the evidence points in the other direction. Three major American studies of civil court systems have failed to find support for the proposition that judicial pre-trial settlement negotiations increase settlement rates. Maurice Rosenberg carried out perhaps the first quantitative study in this field, examining New Jersey personal injury cases resolved in the 1960s. Rosenberg found that pretrials neither increased the likelihood of a settlement, nor reduced the length of the trials, which occurred in the absence of settlement, nor reduced the average period between opening and closing of the case.[77]

Judicial settlement-seeking was among the topics of the 1978 "Justice Delayed" investigation into the pace of litigation and solutions to delay in urban American courts.[78] The report compared cities with contrasting modes of judicial conduct, seeking correlations to settlement rates among other output criteria. While acknowledging that the data was insufficient to establish a causative link, the authors concluded that "the most settlement-intensive courts are the slowest courts," and "fast courts on civil case processing need not be 'settling' courts."[79]

Steven Flanders and his colleagues applied a similar methodology in ten American federal district courts, and reached a similar conclusion. The researchers ranked six of the courts in terms of "settlement involvement".[80] The surprising

72. Katz, *supra* note 48, at 47; Stevenson, Watson & Weissman, *supra* note 45, at 595.

73. Anecdotal claims of judicial dispute resolution increasing settlement rates are found in Gwynn Davis, *Mediation in Divorce: A Theoretical Perspective*, 5 J.SOC.WEL.& FAM.L. 131, 135 (1983); Lieff, *supra* note 2, at 304; Harold Baer, *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 143-44 (2001); Goss, *supra* note 2, at 516-17. Richard S. Fox described the introduction of mandatory judicial pretrial conferences in Salt Lake City. *Pretrial Conferences in the District Court for Salt Lake County*, 6 UTAH L. REV. 266 (1958). One year later, 53.6% of the cases were settling without trial and the waiting period for those which were tried had been reduced dramatically. *Id.* However, no data were provided in this report regarding settlement rates before the introduction of judicial pretrial conferences.

74. Stevenson, Watson & Weissman, *supra* note 45 at 600-01. For a possible explanation for pilot study successes which larger scale research fails to replicate, *see infra* Section IV(B)(2).

75. Stevenson, Watson & Weissman, *supra* note 45, at 600-01.

76. *Id.*

77. Maurice Rosenberg, The Pretrial Conference and Effective Justice; A Controlled Test in Personal Injury Litigation 56-58 (1964).

78. Thomas Church et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978), *available at:* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=0.

79. *Id.* at 33.

80. Steven Flanders, Case Management in Federal Courts: Some Controversies and Some Results, 4 JUST. SYS. J. 147, 161 (1978).

result was that the court which was most involved in settlement-seeking had the *fewest* case "terminations per judge" and the highest percentage of civil cases tried.[81] While the "Justice Delayed" and Flanders studies do not rigorously define "settlement involvement" and do not statistically assess the relationship between the variables, when considered in conjunction with Rosenberg's experiment they certainly shed doubt on the efficacy of judicial settlement-seeking in bringing about settlements.[82]

A 2009 speech by Chief Justice Francois Rolland of the Superior Court of Quebec offers evidence which is specifically about family court. Chief Justice Rolland expressed enthusiastic support for Quebec's judicial settlement conference program for family cases. However, he acknowledged that the introduction of settlement conferences in 2001 had not had any effect on the proportion of cases which ended in a trial.[83] Overall, the limited empirical data available does not suggest that judicial pretrial conferences increase overall settlement rates.

B. Attributes of Judicial Settlement-Seekers

Empirical research and legal commentary confirm that judicial approaches to settlement-seeking in custody and visitation disputes are varied.[84] However, judges share four characteristics that are relevant to their suitability as settlement-seekers in parenting cases. These are (i) high salary,[85] (ii) ambivalence regarding the settlement-seeking role,[86] (iii) autonomy,[87] and (iv) authority.[88] This section will explain why these four characteristics make judges inappropriate for this role.

1. High Salary

Because judicial labour is more expensive than non-judicial mediators' labour, and because public resources are limited, using judges to seek settlement means having less time available for settlement-seeking in each case. Judges are paid substantially more than most other public-sector professionals who might do settlement-seeking work, such as lawyers or mediators. The judges who hear parenting disputes in Ontario, for example, are paid in excess of $250,000 per year.[89] While a thorough compensation review is beyond the scope of this paper,

81. *Id.* at 161.

82. Several of the law review articles on the topic have also reached this conclusion. *See, e.g.*, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 93 (2003); Menkel-Meadow, *For and Against Settlement*, *supra* note 31, at 494; Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases* 69 JUDICATURE 256, 265 (1986).

83. Rolland, *supra* note 2 at 15.

84. Semple, *Consensus and Controversy, supra* note 3; Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 Vill. L. Rev. 1363, 1370 (1984); Menkel-Meadow, *For and Against Settlement*, *supra* note 31, at 506.

85. *See infra* Section B(1).

86. *See infra* Section B(2).

87. *See infra* Section B(3).

88. *See infra* Section B(4).

89. GOVERNMENT OF ONTARIO, PUBLIC SECTOR SALARY DISCLOSURE FOR 2012: JUDICIARY, http://www.fin.gov.on.ca/en/publications/salarydisclosure/pssd/orgs.php?organization=judiciary (last visited Jan. 31, 2014). *See also* NOEL SEMPLE, *Cost-Benefit Analysis of Family Service Delivery:*

it is clear that most mediators earn much less than judges. According to a recent job advertisement from an Ontario government agency, a family mediator with a Masters of Social Work would be paid between $53,000 and $80,000 per year.[90] Judicial labour is also more likely than alternative labour (e.g. social worker labour) to require the payment of support staff such as clerks. The use of additional staff increases the cost disparity between judicial and non-judicial family court settlement mediators.

The public resources available for family court settlement-seeking are finite, and are often said to be inadequate.[91] In under-resourced jurisdictions, having judges do this work means having only small amounts of time available for settlement-seeking in each case.[92] For example, the average judge in New York City's Family Court (which hears custody and visitation matters arising in the absence of a divorce) disposed of 1,927 cases in 2008.[93] This equates to approximately 48 minutes of judicial time available per family, per judge, per year.[94] A family court's settlement-seeking budget will allow more time per case if less expensive non-judicial mediators are used. In California's court-adjunct family mediation program, the median mediation included a ninety-minute meeting with the parties, and fifteen minutes of preparation time.[95]

Having sufficient time is important for producing high-quality, durable settlements of custody and visitation disputes. Robinson's survey of California judges found that those who reported the highest settlement rates also reported having the longest pretrial settlement conferences.[96] Airing grievances before a neutral mediator is one of the elements of mediation with which participants are most satisfied.[97] Even when non-judicial mediators lead settlement negotiations, mediations that are rushed due to resource constraints tend to be less successful.[98]

Disease, Prevention, and Treatment, June 23, 2010 at 65, *available at* http://www.lco-cdo.org/family-law-process-call-for-papers-semple.pdf.

90. *See* LEGAL AID ONTARIO, *Careers at LAO*, http://legalaid.on.ca/en/careers/default.asp (last visited Jan. 22, 2014).

91. Andrew Schepard & Theo Liebmann, *Ending 3.5-Minute Justice in New York's Family Court*, N. Y. LAW JOURNAL, Nov. 13, 2009; Susan Pigg, *Breaking Up: Family Courts in Crisis*, TORONTO STAR, Oct. 3-7, 2009; Linda Diebel, *Family Court Crisis; Shortage of Judges is Running up Costs, Putting Lives on Hold*, TORONTO STAR, Dec. 9, 2007, at A1. Regarding the shortage of mediator hours, *see* Salem, *The Emergence of Triage*, *supra* note 67, at 377-79.

92. Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 238 (2002); Wissler, *supra* note 1 at 288-89.

93. Senate Policy Group, *Kids and Families Still Can't Wait: The Urgent Case for New Family Court Judgeships*, 7, http://www.nysenate.gov/files/pdfs/Family%20Court%20Report.pdf. Peter Robinson reported an average of 1317 new cases per year for California family law judges. Robinson, *Legal Lion*, *supra* note 1, at 117.

94. Testimony cited in the Senate Policy Group report suggests that each judge has 92,400 minutes of work time per year available. Senate Policy Group, *supra* note 93, at 8. Dividing this number by 1,927 equals 47.95. Regarding shortages of judicial time in California, *see* Edwards, *supra* note 14 at 643-44.

95. Center for Families, Children & the Courts, *supra* note 6, at 15.

96. Robinson, *Legal Lion*, *supra* note 1, at 120.

97. Robert A. Baruch Bush, *What Do We Need a Mediator For?*, 12 OHIO ST. J. ON DISP. RESOL. 1, 19 (1996).

98. Sandra J. Perry, Tanya M. Marcum & Charles R. Stoner, *Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation*, 11 PEPP. DISP. RESOL. L. J. 441, 455-56 (2011); Connie J. Beck & Bruce Dennis Sales, Family Mediation: Facts, Myths, and Future Prospects 27-28, 80 (1st ed., 2001); Nancy A. Welsh,

There is evidence that mediation succeeds in large part because it allows parties to tell their stories to a neutral who takes the time to listen.[99] If resource constraints do not allow judges enough time to properly hear these stories, then replacing judges with less expensive neutrals will increase the benefits of the process for children and families.[100]

2. Ambivalence

Settlement of parenting cases is a worthy goal for the justice system, and it is important to entrust this task to a cadre of employees which will pursue it diligently and consistently. In speaking to a group of enthusiastic family court judges about their settlement-seeking activities, the author was struck by their conscientiousness and dedication. The same impression is conveyed by the few published judicial accounts of this work.[101] Some judges are even willing to engage in intense "emotional labour" in order to create a deep and long-lasting resolution to a family dispute.[102]

However, in North America, the attitude of the family law bench as a whole appears to be more ambivalent regarding settlement-seeking. Some judges are not willing to seek settlement, some believe that doing so is inappropriate, and some may only be willing to do so in a cursory fashion.[103] While some jurisdictions have permanent family-specialist judges, judicial generalism prevails in much of North America.[104] This means that judges hearing parenting cases often have little interest in family law, and no pre-appointment experience with family law.

Additionally, many judges do not welcome their assignment to family court. As Andrew Schepard noted, "assignment to the child custody court tends to be at the bottom of the judicial prestige hierarchy . . . . Newly appointed judges are often sent to the child custody court and cannot wait to be replaced."[105] A California judge acknowledged, forthrightly, that "juvenile and family court are the least

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Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation, in Divorce and Family Mediation: Models, Techniques, and Applications 420-446, 425 (Jay Folberg, Ann Milne & Peter Salem eds., 2004) [hereinafter Welsh, *Reconciling*]; Salem, *The Emergence of Triage*, *supra* note 67, at 377; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 23 (2004) [hereinafter Kelly, *Family Mediation Research*].

99. Katz, *supra* note 48, at 48-49. Bush, *What Do We Need a Mediator For?*, *supra* note 97 at 19.

100. Time scarcity can also impinge upon the settlement-seeker's ability to properly prepare for the session with the parties. *See, e.g.*, Susan Raines & Rosemary O'Leary, *Switching Hats: Issues and Obstacles Facing Administrative Law Judges Who Mediate EPA Enforcement Disputes*, 2 GOV'T POL'Y & L. J. 58, 61 (2000).

101. Gove, *supra* note 2.

102. Paul Vlaardingerbroek & Machteld W. de Hoon, Emotions in Court and the Role of the Judge: Results from Experimental Hearings in Divorce Proceedings, 2010 INT'L FAM. L. 319 (2010); Semple, Consensus and Controversy, *supra* note 3, at 320-21.

103. Judges are more likely to object to settlement-seeking by the judge responsible for adjudicating the case. Robinson, *Adding Judicial Mediation*, *supra* note 1, at 344. However, other judges do not seek settlement even in cases which are not assigned to them. Shweder, *supra* note 22, at 60 *et seq.*; Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes*, *supra* note 3, at 315.

104. *See* Donna Martinson, One Case – One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases, 48 FAM. CT. REV. 180, 180 (2010).

105. Schepard, *supra* note 66, at 117.

favoured assignments for judges."[106] Reluctant members of the family law bench may be more likely to limit themselves to the adjudicative role, as settlement-seeking requires more active, extra-legal involvement in the case, and often more time.[107]

Ambivalence may help explain why judicial pretrial conference pilot programs using self-selected judges have produced impressive results in settlement-seeking. These result have not been entirely replicated when the programs have been scaled-up to service an entire jurisdiction. The reason may be that pilot programs involve the best and most dedicated settlement-seekers among the local judges. For example the Stevenson et al. 1977 study discussed *supra*, which produced strong evidence that judicial pretrial conferences impacted settlement rates, focused on a newly introduced pretrial conference program in Toronto's Superior Court of Justice.[108] While cases were assigned randomly to the pretrial, test group, or to the non-pretrial, control group, it does not appear that the participating judges were chosen at random from all of the judges on the Toronto bench. It seems likely that the judges who volunteered to conduct the pretrial conferences were more enthusiastic and effective settlement-seekers than the average judge in the jurisdiction.[109] Variations in judicial aptitude and interest for this work help explain both (i) the success of small-scale pilot programs with self-selected judges, and (ii) the absence of a clear impact when the programs are scaled-up and formalized over a large jurisdiction.

3. *Autonomy*

Procedural rules and codes of ethics give family court judges the right to choose whether or not to seek settlement in each case.[110] In light of their ambivalence towards mediating settlements, this autonomy makes them collectively unreliable as settlement-seekers. Judicial autonomy is therefore a potential source of inefficiency in the family justice system's settlement-seeking efforts, and a source of confusion for litigants and their children.

While pretrial conferences are often mandatory in family courts, pursuing settlement in the conference is usually not mandatory. Ontario's *Family Law Rules*, for example, list 19 distinct tasks that judges may perform during pretrial conferences.[111] "Exploring the chances of settling the case" is only one of these.[112] Several jurisdictions, including New York State, allow judges to do whatever they "deem appropriate" in pretrial conferences, which may or may not include pursu-

106. Edwards, *supra* note 14, at 655. *See also* Alastair Nicholson & Margaret Harrison, *Family Law and the Family Court of Australia: Experiences of the First 25 Years*, 24 MELB. U. L. REV. 756, 760-61 (2000).

107. *See* Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590 (2005).

108. Stevenson, Watson & Weissman, *supra* note 45, at 595.

109. The study found some evidence that judges "vary in their ability to stimulate settlement through pretrial conferences." Stevenson, Watson & Weissman, *supra* note 45, at 612. For further discussion of whether or not special judicial personalities are required to reap pretrial successes, *see* Fox, *supra* note 73.

110. See infra notes 137-142.

111. Family Law Rules, O. Reg. 114/99 (Can.).

112. Family Law Rules, O. Reg. 114/99, at R. 17 (Can.).

ing settlement.[113] Similarly, codes of judicial conduct and ethics give judges the authority, but not the duty, to pursue settlement.[114] The American Bar Association's *Model Code of Judicial Conduct* states that a judge "*may* encourage parties to a proceeding and their lawyers to settle matters."[115]

This permissive language has been defended on the basis that it allows judges to seek settlement when doing so is in the best interest of the child or the parties, without compelling them to do so when it is not.[116] In family law, there is an especially good reason why settlement should not be "pushed" on some litigants. Many intimate relationships are characterized by domestic violence and power imbalance, and these cases arguably require authoritative adjudication, lest the weaker party be steamrolled into an unjust settlement.[117] However, court systems seeking to avoid unjust settlements in cases of violence and power imbalance generally now use formal screening and triage tools to exclude these cases from mediation.[118] By contrast, the author found no evidence of these tools being used by settlement-seeking family court judges to pick the cases in which settlement is pursued.[119]

A more straightforward explanation for the optional nature of judicial settlement-seeking is that some judges have no interest in mediating settlements, and this permissive language allows them to avoid this task. Judges, after all, have a central if not dominant role in drafting the procedural and ethical rules which apply to their own work.[120] It is not surprising that those rules allow discretion with regard to a role that is not universally accepted by judges.[121]

Whether or not settlement-seeking will occur in a family court pretrial conference often depends on which judge happens to hear the case. This leads to substantial potential for confusion among self-represented litigants in parenting disputes.[122] If pretrial settlement-seeking were clearly identified as mediation, and if settlement-seeking were to consistently occur in these meetings, then parents

113. An interesting exception is found in the province of Quebec. The Code of Civil Procedure of that province states that "in family matters ... it is the judge's *duty* to attempt to reconcile the parties." Code of Civil Procedure, R.S.Q., c. C-25, s. 4.3 (Can.). The Code also identifies settlement-seeking more clearly as an obligatory element of pretrial conferences: "The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions." *Id.* at s. 151.16.

114. Family Law Rules, *supra* note 112, at R. 17; John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 570 (2006); Shweder, *supra* note 22.

115. AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT R. 2.6(B) (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf.

116. Michael R. Hogan, Judicial Settlement Conferences: Empowering the Parties to Decide through Negotiation, 27 WILLAMETTE L. J. 429, 440 (1991); Martinson, *supra* note 105, at 184.

117. Noel Semple, *Mandatory Family Mediation*, *supra* note 52, at 211-18.

118. Salem, The Emergence of Triage, *supra* note 67.

119. Semple, Mandatory Family Mediation, *supra* note 52, at 234-39.

120. Resnik, *Mediating Preferences*, *supra* note 48, at 166.

121. Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627, 631 (1994).

122. Gwynn Davis & Julia Pearce, *A View from the Trenches – Practice and Procedure in Section 8 Applications*, 29 FAM. LAW. 457 (1999). This is an example of role-blending in family law, which has in other contexts been identified as a source of confusion for litigants. *See e.g.*, Allan E. Barsky, *Mediative Evaluations: The Pros and Perils of Blending Roles*, 45 FAM. CT. REV. 560, 564 (2007) (regarding child custody evaluators who also seek to mediate).

might enter the sessions in a more conciliatory frame of mind. Judges' autonomy, and their collective ambivalence towards settlement-seeking in parenting cases, make such reliability impossible when judges are responsible for settlement-promotion. Non-judicial mediators can at least be given a clear and explicit mandate to pursue settlement.

4. Authority

The final attribute that distinguishes judges *qua* settlement-seekers is their authority.[123] A settlement-seeking judge typically has three types of authority. The first is the actual ability to make an order backed by the enforcement power of the state. In the "one-judge" or "traditional" model, used in New York State and elsewhere, the judge that mediates pretrial settlement discussions will also have the authority to decide the matter should the case go to trial.[124] Under the two-judge or "modern" model, this is not the case.[125] Under the modern model, a different judge is assigned adjudicate the case at trial, however, the judge that mediates the pretrial conference may still make various interim and procedural orders, which can substantially affect the parties' rights.[126]

The second type of judicial authority is derived from the parties' perception that judges can predict the legal outcome of a case.[127] Litigants, especially when unrepresented, tend to view judges as experts who can predict legal outcomes. Those litigants who strategically assess settlement-seeker comments as predictions of adjudicated outcome are, therefore, influenced by this type of informal authority. Ilan Gewurz describes the impact of legal expertise in a mediator:

> The more the parties perceive the mediator's feedback to reflect a possible legal outcome - meaning, the more closely the mediator is linked to that legal structure - the more deferential the parties are likely to be to her intervention.... deference is more likely to occur the closer one moves into the shadow of the law.[128]

The third type of judicial authority is moral persuasion.[129] If a judge indicates that a certain parenting plan is best, the parties may internalize and accept the proposition without subjecting it to much scrutiny. People tend to defer to authority figures such as judges. One New York family court judge suggested that the emotional state of separating parents contributes to this deference:

123. Lisa B. Bingham, Why Suppose? - Let's Find Out: A Public Policy Research Program on Dispute Resolution, 2002 J. DISP. RESOL. 101, 121 (2002).

124. Brunet, *supra* note 92, at 232.

125. For empirical data about the prevalence and consequences of the two models, *see* Wissler, *supra* note 1 at 302-313; Robinson, *Opening Pandora's Box, supra* note 1 at 86-87.

126. Family Law Rules, *supra* note 111, at R. 17.

127. Brunet, *supra* note 92, at 239.

128. Ilan G. Gewurz, (Re)Designing Mediation to Address the Nuances of Power Imbalance, 19 CONFLICT RESOL. Q. 135, 145 (2001).

129. Rolland, *supra* note 2, at 14.

> The fact that I wear the robe and I am a judge means they do listen. . . . We have a lot of power that we have to use very carefully . . . sometimes people feel that they have to do what we say . . . people are very vulnerable when they're getting divorced and want somebody to tell them what to do, tell them how to think about what they're doing. So they're sort of open to being given some direction about how they ought to behave.[130]

Caucusing, or meeting in private with each of the sides, is an optional technique whereby a settlement-seeking pre-trial judge can enjoy increased influence over the parties. Caucusing lets the settlement-seeker solicit information from each party, which can either be kept confidential or selectively revealed to the other party.[131] Caucusing also gives the settlement-seeker the power to "throw cold water" on a party's argument, talking down the merits of each side's case.[132] The power that the settlement-seeker derives from caucusing might explain why many settlement-seeking judges find the instrumental to reaching a settlement,[133] and why many scholars find it troubling.[134]

When a judge is the settlement-seeking party in a parenting case his judicial authority may have an coercive effect on the parties. The settlement-seeker might coerce a settlement, by threatening to "punish" the litigant that is more resistant to the judge's settlement proposal.[135] The punishment might take the form of an order that is less favourable to the noncompliant party than it otherwise might have been.[136] In a parenting dispute, this might mean less parenting time or diminished custodial rights for one parent.

"Friendly parent" rules exist in many jurisdictions and may facilitate judicial coercion. Friendly parent rules create a presumption that a parent's willingness to facilitate the child's contact with the other parent is relevant to the evaluation of his or her parenting skills.[137] Because spending time with both parents is considered to be in the best interests of the child, the parent who is willing to facilitate the child's contact with the other parent is deemed to be acting in the best interest

130. Interview of Justice "MM", of the New York State Supreme Court, in N.Y.C., N.Y. (Sept. 28, 2010).

131. Baer, *supra* note 73, at 141.

132. Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies,* 27 CONFLICT RESOL. Q. 193, 202 (2009) [hereinaftet Della Noce, *Evaluative Mediation*].

133. Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role,* 3 Ohio St. J. ON DISP. RESOL. 1, 16 (1987); Hogan, *supra* note 116, at 18; Baer, *supra* note 73.

134. Tornquist, *supra* note 50, at 759; Della Noce, *supra* note 132; Schuck, *supra* note 54, at 353.

135. For allegations that judges coerce settlements, *see* Frank E.A. Sander, *A Friendly Amendment,* 6 DISP. RESOL. MAG. 11, 22 (1999); James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial,* 6 Disp. Resol. Mag. 11, 14 (1999).

136. Melissa Breger, Making Waves or Keeping the Calm: Analyzing the Institutional Culture of Family Courts through the Lens of Social Psychology Groupthink Theory, 34 LAW & PSYCHOL. REV. 55, 87-88 (2010).

137. Regarding the friendly parent rule generally, *see* Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody,* 6 LOY. J. PUB. INT. LAW 41 (2004); Brenda Cossman & Roxanne Mykitiuk, *Reforming Child Custody and Access Law in Canada: A Discussion Paper,* 15 CAN. J. FAM. L. 13, 51 (1998). For example, Canada's *Divorce Act* states that "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." Divorce Act (Canada), *supra* note 4 at 16(10).

of the child.[138] Therefore, the parent who is perceived as less willing to facilitate contact is less likely to be awarded custody and/or parenting time.[139] While the friendly parent rule is derived from the belief that children benefit from having on-going relationships with two loving parents,[140] this is not always the reason for its application. Especially in a one-judge system, the rule also provides a rationale for judicial punishment of a party who refuses to accept a parenting compromise suggested in a pre-trial conference. Parties may be reluctant to raise objections, for fear that those objections will be considered evidence of refusal to facilitate contact with the other parent.

However, judges need not result to coercion in order to influence the settlement process.[141] Judges' presumed predictive powers and capacity for moral persuasion are influential, whether or not a judge seeks to rely upon them. In the words of English scholar Simon Roberts:

> Courts are places where people tell us what to do . . . judges are such people. . . . Authority is inevitably going to make disputants more disposed than they might otherwise be to follow their suggestions, and be receptive to their persuasion . . . [The] judge is not in a position to discard this authority.[142]

In theory, a judge might adopt a purely facilitative posture which could render her inherent authority irrelevant.[143] However the existing research suggests that most judges will send some sort of evaluative message during the settlement-seeking process, even if that message is simply "you should settle."[144] These messages are mere "trial balloons," subject to the parties' critical analysis and taken for what they are worth. They will be accorded deference and have persuasive force as a result of the judge's inherent authority, whether or not the judge seeks or wishes to use it.[145]

Amitai Etzioni's typology of compliance helps explain why judges have such significant authority in this context.[146] *Coercive-alienative* compliance occurs when someone believes that he or she must do something or else face a sanction.[147] The judge's enforcement power creates the potential for coercive-alienative compliance. Etzioni's *utilitarian-calculative* compliance means that

138. Dore, The "Friendly Parent" Concept, *supra* note 137.
139. *Id.*
140. *Id.*
141. Sarokin, *supra* note 45, at 436.
142. Simon Roberts, *Mediation in Family Disputes*, 46 MOD. L. REV. 537, 556 (1983). In the United Kingdom, a registrar (also known as a "district judge") is a judicial officer with limited authority over family and other matters. *Id.*
143. *Id.* at 550.
144. Lambros, *supra* note 84, at 1371; Sharon Press, *Commmentary on "The Name of the Game Is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases"*, 15 MEDIATION Q. 368, 369 (1998); Brunet, *supra* note 92, at 234.
145. Gewurz, *supra* note 128, at 145.
146. Amitai Etzioni, A Comparative Analysis of Complex Organizations (1975); Bernard S. Mayer, *Mediation in Child Protection Cases: The Impact of Third-Party Intervention on Parental Compliance Attitudes*, 24 MEDIATION Q. 89, 95 (1989) (citing Amitai Etzioni, *Compliance Structure*, *in* A Sociological Reader on Complex Organizations (Amitai Etzioni & Edward W. Lehman eds., 1980)).
147. Etzioni, A Comparative Analysis, *supra* note 146.

someone complies in the belief that doing so will maximize rewards while minimizing costs.[148] Because disputants are likely to believe that a judge will reach the same conclusion in settlement discussions as at trial, each party will perceive immediate settlement as offering the same rewards as going to trial, but at lower costs. Thus, a judge's predictive power can create utilitarian-calculative compliance.

Finally, *normative-moral* compliance occurs when someone has a moral commitment to the goals of the authority, and is persuaded that the proposed course is best.[149] The moral suasion power of judges may easily convince the disputing parents that a proposed settlement is best for the child. Judicial authority in a settlement-seeker is powerful because it has the potential to produce all three types of compliance.[150] As such, judges rarely have to consciously engage in coercion for these combined compliance mechanisms to take effect.

V. FACILITATIVE MEDIATION IN CUSTODY DISPUTES

A. Facilitative Mediation Generally

The problem with authoritative settlement-seeking by judges is that it diminishes the potential for party empowerment and self-determination in arriving at settlement terms. This is the core promise of the facilitative vision of mediation. Part V will define facilitative mediation, demonstrate its incompatibility with authoritative judicial settlement-seeking, and review its empirical evidence base. It concludes that the best way to safeguard the benefits of both party self-determination and the rule of law in parenting cases is to replace judicial pre-trial settlement-seeking with presumptively mandatory, facilitative, non-judicial mediation, backstopped by speedy access to authoritative judicial decision-making for the cases which require it.

The premise of facilitative mediation is that the best resolutions to human conflicts are those generated by the conflicted parties themselves. Disputants are therefore given the opportunity to create their own solutions and encouraged to do so.[151] Facilitated resolutions reflect disputants' own moral and pragmatic judgments, and not necessarily those of legal authorities.[152] This principle, known as "self-determination" or "party empowerment," is at the core of facilitative mediation doctrine.[153]

148. Etzioni, A Comparative Analysis, *supra* note 146.

149. *Id.*

150. *Id.*

151. Jay Folberg, Ann Milne & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview, in* Divorce and Family Mediation: Models, Techniques, and Applications 1, 14 (Jay Folberg, Ann Milne & Peter Salem eds., 2004); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996); Bernard S. Mayer, *Facilitative Mediation, in* Divorce and Family Mediation: Models, Techniques, and Applications 29, 39 (Jay Folberg, Ann Milne & Peter Salem eds., 2004).

152. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid,* 3 HARV. NEGOT. L. REV. 71, 89 (1998).

153. Welsh, *Reconciling*, *supra* note 98, at 422.

The predominant technique of facilitative mediation is a joint session in which all parties are present.[154] The facilitative mediator's role is to encourage the parties' creation of solutions, and not to tell the parties what those solutions ought to be. This role generally includes structuring the mediation process and asking questions in order to improve communication between the parties.[155] It does not include predicting adjudicated outcomes or evaluating the legal merits of the parties' claims.[156] According to Zena Zumeta, a facilitative mediator is "in charge of the process, while the parties are in charge of the outcome."[157] Another manifestation of the party empowerment principle in family court mediation is the fact that the parties often have some ability to choose among available mediators.[158] This opportunity, which does not exist in judicial pretrial settlement-seeking, allows parties to choose a professional mediator with specific competencies.[159]

Facilitative mediators use a variety of methods.[160] The process may or may not involve isolating points of agreement and disagreement, identifying options, and uncovering the interests that underlie the parties' stated positions.[161] Facilitative mediation may be "therapeutic" or "relational" in nature, seeking to give the parties a better understanding of their past, present, and future relationship.[162] In his influential 1971 article, Lon Fuller celebrated facilitative mediation's

> capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another... helping them to free themselves from the encumbrance of rules and ... accepting, instead, a relationship of mutual

154. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, NAT'L ASS'N FOR CMTY. MEDIATION NEWSLETTER (2000), *available at* http://www.mediate.com/articles/zumeta.cfm (last visited Jan. 22, 2014).

155. Riskin, *supra* note 151, at 24.

156. Mary Adkins, Moving out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases, 22 YALE J.L. & FEMINISM 97, 103 (2010).

157. Zumeta, *supra* note 154.

158. Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster*, 84 U. OF N. DAKOTA L. REV. 769, 772-73 (2008); Bingham, *supra* note 123, at 103 *et seq.*

159. Regarding the value of cultural competence in court-adjunct family mediation, *see* Isolina Ricci, *Court-Based Mandatory Mediation* and Peggy English & Linda C. Neilson, *Certifying Mediators,* 483-515, 509 *in* Divorce and Family Mediation: Models, Techniques, and Applications (Jay Folberg, Ann Milne & Peter Salem eds., 2004); Alison Taylor & Ernest A. Sanchez, *Out of the White Box: Adapting Mediation to the Needs of Hispanic and Other Minorities within American Society,* 29 FAM. & CONCIL. CTS. REV. 114 (1991). These competencies may be linguistic or cultural, or may be in a particular field such as family law, domestic violence, etc.

160. Mayer, *Facilitative Mediation*, *supra* note 151, at 20-21.

161. Folberg, Milne & Salem, *supra* note 151, at 14; Zumeta, *supra* note 154; Mayer, *Facilitative Mediation, supra* note 151, at 33. For a theory of interest-based facilitative mediation in the divorce context, *see* Desmond Ellis & Noreen Stuckless, Mediating and Negotiating Marital Conflicts 12-13 (1996).

162. Gewurz, *supra* note 128, at 143; Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIMONIAL L. 233 (1997); Beck & Sales, *supra* note 98, at 10-11. A recent empirical study from Australia suggests that that facilitative mediation of family disputes in that country does *not* usually pursue goals of this nature. Batagol & Brown, *supra* note 44, at xxv.

respect, trust and understanding that will enable them to meet shared contingencies.[163]

However, the goals of facilitative mediation are not always so lofty. A modest compromise on a discrete legal or financial issue is a legitimate goal for a facilitative mediation. Leonard Riskin's canonical article identified a "problem-definition continuum" for mediators. The two poles of the continuum represent two different approaches to defining the problem to be solved in mediation: "narrow" and "broad."[164] Riskin observed that a facilitative approach is compatible with a narrow, broad, or intermediate definition of the problem.[165]

For example, suppose a child visitation dispute is being mediated. The non-custodial parent has brought an application seeking an expansion of his weekends with the child. He would like these weekends to begin on Friday evening instead of Saturday morning. The custodial parent opposes this change, and supports the status quo. The facilitative mediator could accept the parties' relatively narrow definition of the problem as pertaining to the commencement time of the weekend visit. Alternatively, the problem could be more broadly defined, in terms of safeguarding the child's relationship with the non-custodial parent, while preserving a stable environment in the child's primary home.

B. Facilitative Mediation in Parenting Disputes

Facilitative mediation appears to be well-suited to custody and visitation cases. As noted in Part I, the distinctive characteristics of these disputes include (i) the likelihood that the parties will have on-going interaction, and (ii) the relevance of this relationship to the goal of the advancing the child's interest.[166] Scholars have argued that cases with on-going relationships between the parties are natural candidates for facilitative mediation.[167] Carrie Menkel-Meadow has called for facilitative mediation when the "process may be more important than the substantive outcome."[168] This is true in many parenting disputes, where evidence suggests that the precise terms of the parenting agreement reached are often less important to the child's well-being than is the nature of the parties' subsequent interactions.[169] Similarly, Frank Sander has suggested that the facilitative process is more conducive to focusing on the future of an on-going relationship, while adjudication and evaluative mediation are primarily about the past.[170] In an article that was generally critical of court mediation programs, Deborah Hensler granted an

163. Fuller, *supra* note 30, at 325.

164. Riskin, *supra* note 151, at 18-23; *see also* Gewurz, *supra* note 128, at 140.

165. Riskin, *supra* note 151, at 18-23.

166. Berger, *supra* note 11, at 274; Trinder & Kellett, *supra* note 12, at 326.

167. Labour relations disputes share this characteristic with custody and visitation disputes. Facilitative mediation had become widespread in North American labour relations significantly before it was applied to other civil disputes. Colleen M. Hanycz, *Whither Community Justice - the Rise of Court-Connected Mediation in the United States*, 25 WINDSOR Y.B. ACCESS JUST. 167, 180-86 (2007).

168. Menkel-Meadow, *For and Against Settlement*, *supra* note 31, at 511.

169. For the argument that precisely determining the "right answer" in a parenting dispute is not particularly important to the child, *see* Semple, *Whose Best Interests?*, *supra* note 36, at 319-21. Regarding the importance of the parties' on-going relationship quality, *see supra* Part II.

170. Sander, *supra* note 135.

exception for parenting cases, due to the "public policy interest in helping divorcing parents maintain a sufficiently positive relationship to enable them to care adequately for their children."[171]

Amadei and Lehrburger have noted that facilitative mediation is well suited to resolving conflicts in which the disputing parties have "common or complementary interests."[172] Unlike a purely distributive conflict, in which one party's gain results in a loss to the other, the parties to a custody dispute often have very significant complementary interests. Every parent wants what is best for his or her child, a common interest between two people discussing their child's future.[173] Moreover, most parents wish to spend at least a few waking hours doing something other than caring for a child. This usually creates a complementary interest in having the child spend some time in the care of each parent.

C. Empirical Evidence: The Impact of Family Mediation

1. Benefits of Facilitative Mediation

a. Settlement Rates and Participant Satisfaction

While the empirical literature about family mediation may not be extensive,[174] it is voluminous compared to the sparse research available on judicial settlement-seeking. The most persuasive evidence regarding facilitative mediation pertains to settlement rates and participant satisfaction. The percentage of mediated family cases producing some form of agreement has been reported to be as low at 46% and as high as 94%.[175] A variety of studies have discovered that the vast majority of mediation participants are satisfied with their experience.[176] Mediation is especially satisfactory to parties when compared to divorce litigation.[177] Beck and Sales reviewed several mediation studies and found that mediation participant satisfaction rates were consistently in the 60-80% range.[178] Joan Kelly

171. Hensler, *supra* note 59, at 82.

172. Robin N. Amadei & Lillian S. Lehrburger, *The World of Mediation: A Spectrum of Styles*, 51 DISP. RESOL. J. 62, 64-5 (1996). This article specifically mentions "divorcing parents" as good candidates for the "process-oriented mediation style," which appears to be synonymous with facilitative mediation.

173. Mayer, Facilitative Mediation, *supra* note 151, at 38.

174. Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 39 (2004); Beck & Sales, *supra* note 98, at 21-24.

175. Center for Families, Children & the Courts, *supra* note 6, at 18; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 10, 16. For other reported settlement rates within this range, *see* DESMOND ELLIS, FAMILY MEDIATION PILOT PROJECT: FINAL REPORT (1994); C. J. RICHARDSON, COURT-BASED DIVORCE MEDIATION IN FOUR CANADIAN CITIES: AN OVERVIEW OF RESEARCH RESULTS (1988); Ballard et al., *supra* note 58, at 21; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EFFECTIVENESS OF ACCESS AND VISITATION GRANT PROGRAMS (2002), *available at* http://oig.hhs.gov/oei/reports/oei-05-02-00300.pdf; MINISTRY OF THE ATTORNEY GENERAL (ONTARIO), COURT SERVICES DIVISION ANNUAL REPORT 2009-2010 (2009); Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 27, 30-31 (2005).

176. Lori Anne Shaw, *Divorce Mediation Outcome Research: A Meta-Analysis*, 27 CONFLICT RESOL. Q. 447, 457-58, 460 (2010).

177. Emery, Sbarra & Grover, *supra* note 175, at 28.

178. Beck & Sales, *supra* note 98, at 77.

reviewed three other mediation studies, with satisfaction rates between 66% and 76%.[179] In a recent study of California's mediation program, 87% of respondents agreed that "mediation is a good way to come up with a parenting plan" and 88% indicated that they would recommend mediation to friends.[180] Although parties that settle their disputes report greater satisfaction than those whose mediations do not produce agreement,[181] satisfaction with mediation is driven by factors beyond its ability to lead to agreement. In California, for example, the rates of satisfaction far exceed the rates of settlement.[182] Participants find satisfaction in mediation because of the process, rather than the outcome.[183] In particular, parties value the opportunity to tell their story to a neutral party.[184]

b. Long Term Benefits

In addition to increasing party satisfaction, family mediation may also produce deeper long-term benefits. Researchers have investigated the extent to which mediation influences compliance with child support and parenting obligations. Some studies have found that mediation increases compliance,[185] while others have found no effect,[186] or only a short-term effect.[187] One study found reduced conflict between disputing parents during the two-year period following a custody mediation.[188] This reduced level of conflict was not found more than two years after the mediation, however the study concluded that the mediation experience may have taught participants to use a "more direct and mutual style" in resolving their conflicts.[189] Finally, a quantitative meta-analysis of mediation studies found that mediation had a "fairly large positive effect" on the quality of the disputing parties' relationship.[190]

c. Benefits for Children

The potential for family mediation to produce demonstrable benefits for the children involved is very important. Unfortunately, the evidence on the benefit to children is inconsistent. In California, 89% of family mediation participants agreed that the mediator "helped to keep us focused on our children's interests."[191]

179. Kelly, *Family Mediation Research*, *supra* note 98, at 14, 17, and 22.

180. Center for Families, Children & the Courts, *supra* note 6, at 21. *See also* Randall W. Leite & Kathleen Clark, *Participants' Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services*, 45 FAM. CT. REV. 260 (2007) (reporting a survey which compared satisfaction rates with various family court services, including mediation).

181. Beck & Sales, *supra* note 98, at 77-78; Kelly, *Family Mediation Research*, *supra* note 98, at 7-8.

182. Center for Families, Children & the Courts, *supra* note 6.

183. Beck & Sales, *supra* note 98, at 27; Bush, *What Do We Need a Mediator For?*, *supra* note 97, at 17.

184. Center for Families, Children & the Courts, *supra,* note 6.

185. Kelly, *Family Mediation Research*, *supra* note 99, at 14-15 & 23; Emery, Sbarra & Grover, *supra* note 175, at 27; Adkins, *supra* note 156, at 127.

186. RICHARDSON, *supra* note 175, at 33.

187. Beck & Sales, *supra* note 98, at 96.

188. Kelly, Family Mediation Research, *supra* note 98, at 18.

189. Kelly, Family Mediation Research, *supra* note 98, at 18.

190. Shaw, *supra* note 176, at 460.

191. Center for Families, Children & the Courts, *supra* note 6, at 21.

Lori Anne Shaw's quantitative meta-analysis based on several studies found moderate overall positive effects of family mediation on parental understanding of their children's needs.[192] Robert Emery's divorce mediation study found that, twelve years after a mediated divorce, non-custodial parents remained significantly more involved with their children than were non-custodial parents who had litigated their divorce.[193] Additionally, no commensurate increase in inter-parent conflict was found.[194] C.J. Richardson found a similar phenomenon in his study of divorce mediation participants from Montreal.[195] However, the study's findings from participants in Winnipeg were inconsistent with the Montreal findings.[196] This may be evidence that the particular circumstances of a family court mediation program, including the amount of time and funding available for each case, and the quality of the mediators available, are important determinants of its long-term success.[197]

However, positive findings regarding compliance, relationship quality, and parenting behaviour have not been consistently replicated.[198] Some of the more ambitious claims regarding mediation's benefits— that it reduces inter-parent conflict and that it aids children's long-term adjustment to divorce— are not supported by the evidence.[199] Beck and Sales, whose book on the subject reviewed a large quantity of empirical literature, concluded that mediation has little or no effect on the long-term ability of separated couples to communicate, especially when conflict levels are high.[200]

One of the goals of this paper is to compare the merits of facilitative mediation and judicial pretrial conferences, as alternative ways to further the interests of children whose parents are separating. The existing family mediation evaluation literature is of limited assistance for two reasons. First, the researchers have traditionally compared family mediation to courtroom litigation, and not judicial pretrial conferences or settlement-seeking.[201] Second, non-judicial family mediation is not always purely facilitative in character. Many of the studies do not clearly describe the nature of the mediation being studied, and whether it is facilitative or evaluative.[202] Research findings about family mediation are not, therefore, necessarily derived from study of the idealized facilitative mode described above.

However, recent literature on the topic indicates that facilitative and non-authoritarian settlement-seeking do in fact produce better results in most parenting disputes. Dean Pruitt and his colleagues studied the process and outcomes of mediation sessions at a community clinic.[203] Unlike most mediation research, this

192. Shaw, *supra* note 176, at 460.
193. Emery, Sbarra, & Grover, *supra* note 175, at 30-31.
194. Emery, Sbarra, & Grover, *supra* note 175, at 30-31.
195. RICHARDSON, *supra* note 175, at 39.
196. *Id.*
197. RICHARDSON, *supra* note 175, at 45 (identifying other possible explanations for differential success).
198. *See, e.g.*, RICHARDSON, *supra* note 175, at 38-39.
199. *See generally* Beck & Sales, *supra* note 98, at 57-97; Kelly, *Family Mediation Research*, *supra* note 98, at 18; Saposnek, *supra* note 174, at 48.
200. Beck & Sales, *supra* note 98, at 67-68.
201. Shaw, *supra* note 176; Beck & Sales, *supra* note 98, at 22.
202. Kelly, Family Mediation Research, *supra* note 98, at 4, 30.
203. D.G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 317 (1993). Some, but not all of the cases mediated were family matters. *Id.*

study placed observers within the mediation sessions. One of the attributes which they observed to varying extents in different sessions was "joint problem-solving," a type of discussion in which "disputants ... define the problems underlying their conflict, examine alternative ways of solving these problems, and make a mutual decision among these alternatives."[204] This concept bears a clear and close relationship to the doctrine of facilitative mediation as described above. For the respondents in the disputes, there was a significant correlation between the presence of joint problem solving in the mediation sessions and the quality of their subsequent relationships.[205] The authors conclude that "one road to relationship improvement, in community mediation as in marital therapy, is to get the disputants to engage in joint problem solving about the issues that divide them. This provides supervised experience in a skill that is likely to be subsequently useful."[206]

Even more germane is the work of an English team led by Liz Trinder. Trinder and Kellett studied "conciliation" schemes in English family courts, comparing the mechanisms by which they encouraged settlement in visitation disputes and the outcomes of the interventions. The researchers found a "high-judicial control" model of settlement-seeking in place at the Principal Registry of the Family Division in London. In this court the judge leads the discussions, and lawyers generally speak for the parties.[207] The court in Essex county, by contrast, deployed a "low-judicial control" model which seems similar to mandatory facilitative mediation. In Essex, before any judge is involved, an employee of the Child and Family Court Advisory and Support Service (CAFCASS) leads a joint meeting in which he or she "encourage[s] both parties to speak to one another ... focused on the present and the future."[208] In an intermediate or mixed position were three courts in Cambridgeshire and Suffolk counties. Here, each case goes before the judge as a first step but most are then sent to a CAFCASS-led mediation session similar to that used in the Essex court.[209]

The three courts were evaluated according to the number of agreements reached on visitation disputes, and on various measures of party satisfaction. The high-judicial control court significantly underperformed the other two in terms of number of agreements reached and satisfaction.[210] The low-judicial control court (Essex) also created noticeably higher participant satisfaction rates than did the intermediate courts (Cambridge and Suffolk).[211] This study was a "natural" rather than controlled experiment. The degree of judicial control was by no means the only difference between the three research sites. It does not therefore establish a clear correlation between judicial involvement and quality of outcomes. Nonethe-

204. *Id.* at 317.

205. *Id.* at 323-24, 327. There is no explanation offered for why this held true only for the respondents, and not the complainants in the disputes.

206. D. G. Pruitt, *Process and outcome in community mediation*, NEGOTIATION JOURNAL 365, 374 (1995).

207. Trinder and Kellett, *supra* note 12, at 324.

208. LIZ TRINDER, et al., MAKING CONTACT HAPPEN OR MAKING CONTACT WORK? THE PROCESS AND OUTCOMES OF IN-COURT CONCILIATION (2006), available at http://www.dca.gov.uk/research/2006/03_2006.pdf (last visited Jan. 31, 2014), 17.

209. *Id.* at 22.

210. *Id.* at 41.

211. *Id.* at 50.

less, it does provide an interesting hint that the self-determinative mode of facilitative mediation may indeed have substantial advantages over the authoritative mode of judicial pretrial conferences.

The empirical evidence on facilitative mediation of custody disputes clearly establishes that it consistently produces settlement and party satisfaction. The evidence also indicates, tentatively, that facilitative mediation can improve inter-parent relationships and compliance with custody agreements, at least in the short term.[212] The intuitively-appealing idea of a natural harmony between facilitative mediation and parenting disputes does seem to have basis in fact. Judicial settlement-seeking for family court cases does not have much evidentiary support; in fact it is not even clear that it increases settlement rates. If it is true, as argued above, that judicial settlement-seeking is inherently authoritative, then it follows from the analysis here that this characteristic makes it inferior to facilitative mediation as a dispute-resolution technique for custody and visitation disputes. The Pruitt and Trinder studies focusing on the role of joint problem-solving and judicial control add tentative support this conclusion.

VI. CONCLUSION: FOR SEPARATE SPHERES

Assigning mediation of custody and visitation disputes to facilitative mediators, as opposed to judges, would revitalize both mediation and adjudication of family disputes. While judicial authority is essential to resolving family law disputes, its natural channel is adjudication rather than mediation.[213] Lengthy waiting periods for adjudication are common in many family courts, and requiring judges to spend time pursuing settlements exacerbates this problem. As Judith Resnik and others have argued, "scarce judicial resources should be conserved and employed only when judges' special skill - adjudication - is required."[214] Separating the spheres could also revitalize judicial authority by reaffirming its link to due process.[215]

This article has analyzed judicially-led settlement attempts in custody and visitation cases. Custody disputes are distinguished from other cases by three distinctive attributes – the importance of a non-party's interests, the prevalence of self-represented parties, and the importance of the parties' on-going relationship. With continuing reference to these characteristics, the paper then subjected the

212. *Supra* article section V.C.1(b) and (c).

213. A number of procedural scholars have made this case for separate spheres, although without reference to the specificities of the custody and visitation context. *See, e.g.*, Michael T. Colatrella, *Court-Performed Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs*, 15 OHIO ST. J. ON DISP. RESOL. 391, 415-16 (2000); Sander, *supra* note 135, at 22; Roberts, *supra* note 142, at 557 (arguing for mediation and adjudication being conceptually and practically distinct). Sarokin, *supra* note 45, at 437; Tornquist, *supra* note 50, at 773 (suggesting that judicial settlement-seeking could be appropriate in defined and restricted circumstances).

214. Molot, *supra* note 82, at 32; Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 435 (1982). In light of the evidence that many cases do not require judicial attention in order to settle, Leroy Tornquist goes so far as to argue that "the judicial time spent in settlement discussions for all cases is greater than the time it would have taken to try the few cases that would not have settled without intervention." Tornquist, *supra* note 50 at 763.

215. Sarokin, *supra* note 45, at 434; Cratsley, *supra* note 114, at 574-75; Tornquist, *supra* note 50, at 772-773.

practice in question to a figurative mock trial. The first allegation was that there is too much settlement and not enough neutral decision-making in these cases; the second was that the justice system need not encourage settlement. The characteristics of the justice system and parenting disputes require the practice to be found "innocent" on these counts.

However this paper has sought to convince its jury of readers to convict on the third count – that judges are not the people who should be encouraging settlement in custody and visitation cases. The empirical evidence about the practice does not even establish clearly that it increases settlement rates, let alone that it accomplishes any of the deeper and longer-term goals which we should look for in parenting dispute resolution. Moreover, the high expense of judicial labor, the judiciary's collective ambivalence about mediation, and judicial autonomy raise questions as to the suitability of judges for this role.

The fourth relevant characteristic of judges is their inherent authority. This authority is a consequence of judicial enforcement power, predictive power, and moral suasion, and it has an effect whether or not the judge seeks to use it. As discussed above, authority in the settlement-seeker is authority not held by the parties, and party empowerment and self-determination are essential elements of the facilitative model.[216] Parents who are following a judge's way forward cannot simultaneously be blazing their own path. The hallmarks of facilitative mediation, self-determination and party-empowerment, are essentially incompatible with authoritative, judicial settlement-seeking. As Frank Sander put the point, "the skills required of judges and mediators are sufficiently different that we cannot assume that even first-rate judges will turn out to be first-rate mediators."

There is a natural harmony between the facilitative approach and parenting disputes, and a substantial body of empirical evidence supports the use of facilitative mediation this context. Every family deserves the opportunity to reach a facilitated and self-determinative solution to a parenting dispute, unless domestic violence or dramatic power imbalance make it clearly inappropriate. This paper has concluded by arguing for a separation of spheres in family court. Entrusting the settlement-seeking task in parenting disputes to facilitative and non-judicial mediators could revitalize both settlement-seeking and adjudication, which are both essential. Thus, while the "mock trial" conceit of this article is quintessentially adversarial in nature, the proposed remedy is a gentle form of restorative justice – a reinvigorated family court, with a renewed and enhanced ability to resolve each parenting case in the best interest of the child.

216. Jay Folberg, A Mediation Overview: History and Dimensions of Practice, 1 MEDIATION Q. 3, 9 (1983).