NUDGING CIVIL JUSTICE: EXAMINING VOLUNTARY AND MANDATORY COURT MEDIATION USER EXPERIENCE IN TWELVE REGIONS

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ABSTRACT

Nudge theory suggests that positive reinforcement to encourage compliance is at least as effective, if not more effective, than traditional directions issued through legislation. This Article tests nudge theory in the context of court mediation reform by examining whether, and if so how, light nudges encouraging voluntary mediation have a differential effect on civil justice outcomes as compared with more robust nudges through mandated mediation processes. A statistical analysis of 2016–2017 civil justice indicators in twelve regions suggests light nudges, (voluntary court mediation programs, or (self-directed resolution), on average associated with higher overall jurisdictional scores for efficiency and non-discrimination. In comparison, robust nudges, (court-mandated mediation processes) show no significant difference in relation to the quality of civil justice, effective enforcement, accessibility and affordability, and impartiality, and effectiveness between voluntary and mandatory mediation systems in the regions examined.

I. Overview

In recent years, policy makers, economists, and behavioral scientists have examined the use of positive reinforcement to encourage non-forced compliance with a given social objective.¹ The nudge theory approach of behavior change, suggests nudges are at least as, if not more, effective than traditional directives; for example, “forced compliance” issued through regulatory legislation. As described by Thaler and Sunstein, “a nudge . . . is any aspect of

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the choice architecture that alters people’s behavior in a predictable way without forbidding any options . . . Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not."²

Fields as diverse as business management, health and safety, and corporate culture have applied nudge theory to influence behavior.³ While effective in many cases, nudge designs are not without criticism. Key critiques of nudge theory include lack of evidence on whether, and how, nudges help people “make long-term behavior changes.”⁴ In addition, there are concerns over short-term fixes⁵ that may ignore underlying psychological motivators of behavior that are the target of such nudges.⁶

Cognizant of such critiques, this Article examines whether, and the extent to which, nudges, oriented toward encouraging mediated resolution through court encouragement, have a differential effect on civil justice outcomes. The Article uses indicators from twelve jurisdictions to compare different mediation processes and investigates whether and how variation in civil mediation policy (mandated or voluntary) affects variation in judicial efficiency, confidence in courts, and public perceptions of justice.⁷

II. VOLUNTARY AND MANDATORY MEDIATION DESIGN MOTIVATIONS

The design of mandated and nudged—voluntary—mediation models varies across regions.⁸ While the mediation process ordina-

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² Id. at 6.

³ Id.


⁷ See generally SHAHLA F. ALI, COURT MEDIATION REFORM: EFFICIENCY, CONFIDENCE AND PERCEPTIONS OF JUSTICE (forthcoming 2018). With the kind permission of the publisher, selected findings from the forthcoming book have been included in this Article. For full discussion see the forthcoming publication.

⁸ REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS (Felix Steffek et al. eds., 2013) [hereinafter REGULATING DISPUTE RESOLUTION]; see also Ali, supra note 7.
rily presupposes participation of two or more consenting parties,\textsuperscript{9} parties may arrive at the process in numerous ways with varying levels of encouragement. Whether through robust encouragement or voluntary selection, once parties engage in facilitative mediation processes, the final outcome rests in the hands of the parties.\textsuperscript{10}

As discussed elsewhere,\textsuperscript{11} mediation policy scholars have described how variation in mediation program design exists with respect to the "initiation control"\textsuperscript{12} of mediation.\textsuperscript{13} A spectrum of approaches exist: from mandatory assignments for all cases under a particular monetary amount or case type; compelled orders for mediation (characterized in some cases as case settlement);\textsuperscript{14} to informal party-directed initiation of mediation.\textsuperscript{15} As described, the intermediary court mediation sessions vary. In some scenarios courts provide judges while in others, private mediators facilitate the process.\textsuperscript{16} Furthermore, the role of parties in relation to their respective duties concerning engagement in mediation also differs. Some states use "opt-out" rules where parties to a particular case-type are automatically subjected to mediation unless there is a good reason for opting out.\textsuperscript{17} The "opt-in" mechanism implements adverse cost consequences if parties unreasonably refuse to participate in mediation, or behave unreasonably.\textsuperscript{18}

At a broad level, the desire to address public policy concerns fuels the adoption of mediation practices across many jurisdictions.\textsuperscript{19} Some jurisdictions cite mediation as means toward enhancing communication and strengthening interpersonal relationships.\textsuperscript{20} For instance, many jurisdictions use mediation as an innovative

\textsuperscript{9} See Jacqueline Nolan-Haley, Consent in Mediation, 14 DISP. RESOL. MAG. 4 (2007).
\textsuperscript{10} Id.
\textsuperscript{11} Ali, supra note 7.
\textsuperscript{12} Regulating Dispute Resolution, supra note 8.
\textsuperscript{13} Carrie Menkel-Meadow, Variations in the Uptake of and Resistance to Mediation Outside of the United States, in Contemporary Issues in International Arbitration and Mediation 189, 197 (Arthur Rovine et al. eds., 2015).
\textsuperscript{14} Mordehai (Moti) Mironi, Mediation v. Case Settlement: The Unsettling Relations Between Court and Mediation—A Case Study, 19 Harv. Negot. L. Rev. 173 (2014) (discussing the distinction between mediation, characterized by an interest-based, party-focused process and case settlement, a rights-based positional discourse).
\textsuperscript{15} Menkel-Meadow, supra note 13.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} See generally Regulating Dispute Resolution, supra note 8; see also Elizabeth Ellen Gordon, Why Attorneys Support Mandatory Mediation, 82 JUDICATURE 224 (1999).
\textsuperscript{20} Gordon, supra note 19.
way to reduce case backlog. Many countries see mediation as a potential platform to attain efficacy in the dispute management process, achievement of regional integration objectives, enhancement of cohesive social bonds, relational capital, and peace building. At the global level, soft law-making bodies, such as the United Nations Commission on International Trade Law ("UNCI
TRAL"), generally leave open the question of mediation program design—inclusive of voluntary and mandatory modalities—for member state decision-making.

This convergence of evolving public policy expectations has resulted in a proliferation of mediation practices. Voluntarily initiated mediation assumes the parties opt for mediation out of free will, without direct court supervision of the process. Court-mandated mediation models integrate direct court supervision into mediation process. Typical supervisory measures include compulsory attendance or participation in mediation conferences prior to adjudication. Other mandatory mediation practices impose "good faith" requirements, essentially setting a qualitative bar for courts to assess disputants' participation in pre-adjudication mediation. This is often achieved through formal reporting obli-

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gations on the supposedly neutral mediator to the court, and in some instances such a mediator may even be required to testify.\textsuperscript{30} Finally, in several instances, courts have imposed penalties or costs on perceived non-cooperative disputants.\textsuperscript{31}

Despite the above overarching public policy basis for mediation, the degree of movement along the voluntary—mandatory spectrum seems to vary from one jurisdiction to another without discernible global patterns or trends. Instead, different national experiences point to prominent influence of unique domestic factors in a country’s eventual adoption of a particular mediation model, whether voluntary or mandatory.\textsuperscript{32} A significant factor that influences the adoption of a given mediation model in a jurisdiction seems to be society’s cultural and societal approaches to dispute settlement.\textsuperscript{33} The nature of a given dispute also seems to be an important factor in mediation models across jurisdictions. Domestic disputes have generally been referred to mediation and have registered high settlement rates in comparison with other types of civil disputes.\textsuperscript{34} Suggestions have also been made that communal disputes, especially those focusing on narrow but inclusive issue areas like environmental protection and landfill reclamation ought to be preferentially subjected to mediation.\textsuperscript{35}

\section*{III. Statistical Analysis of Civil Justice Outcomes for Nudged and Compelled Mediation}

\subsection*{A. Methodology}

This Article examines the range of mandatory and nudge mediation design; the relationship between mediation incentives and

\textsuperscript{30} Winston, supra note 28, at 188–90, 197–98.

\textsuperscript{31} Id. at 195–96.

\textsuperscript{32} \textit{Regulating Dispute Resolution}, supra note 8; see also Gordon, supra note 19; see also Hanks, \textit{supra} note 27, at 929–32.


judicial efficiency; and perceptions and overall confidence in justice systems. The analysis examines these associations within the context of selected mediation centers in North America, Europe, and East Asia. The research methodology employed relies primarily on indicators of both civil justice statistics and opinion data.

An independent sample t-test was conducted to compare relative mean scores for efficiency, quality of civil justice, accessibility and affordability, impartiality, enforcement, delay, and level of discrimination in voluntary and mandatory court mediation conditions. The independent sample t-test was conducted on court and opinion data to determine the association between variation in civil justice reform and judicial efficiency, perceptions of justice and overall confidence in the court system. Specifically, the test compared court-mandated versus voluntary mediation structures with variation in user experience, including perceptions of efficiency, accessibility and affordability, impartiality, level of discrimination, and enforcement.

A non-random selection of six regions in a “mandatory mediation” group and six in a “voluntary mediation” group were chosen to provide for relative comparability. Each group of six include at least two common law and two civil law jurisdictions, with at least two members of the Organisation for Economic Co-operation and Development (“OECD”) per group. Within the civil law groupings, both primary and secondary civil law jurisdictions are selected. In particular, focus was on examining selected civil court-mediation programs in the following jurisdictions: court-mandated (United States federal courts, Australian federal courts, India, China, Japan and Italy) and voluntary (United Kingdom, Hong Kong, France, Malaysia, Singapore and the Netherlands).

Judicial and governance indicators measuring efficiency, quality of civil justice, accessibility and affordability, impartiality, enforcement, delay, and level of discrimination were selected from survey databases, including the World Bank Group’s Worldwide Governance Indicators (“WGI”), the World Economic Forum’s Global Competitiveness Report (“GCR”), and the World Justice Project’s Rule of Law Index (“Rule of Law Index”). This data was analyzed by country and coded according to judicial mediation approach. The WGI is based on more than thirty individual data sources produced by various survey institutes, think tanks, non-governmental organizations, international organizations, and pri-
vate sector firms. GCR derives its indicators from the International Monetary Fund, the World Economic Forum, and the Executive Opinion Survey. General public polling ("GPP") and qualified respondent questionnaires ("QRQs") contribute to the WJP indicators. The indicators compared are derived from the following definitions:

**Efficiency of Legal Framework in Settling Disputes:** This indicator appears in the GCR. It measures the efficiency of the legal framework in settling disputes. Data was collected from the Executive Opinion Survey where participants rate the efficiency of the legal framework in their countries on a one-to-seven scale. Data from the World Economic Forum was also used in generating the results.

**Accessibility and Affordability:** This indicator appears in the World Justice Project Rule of Law Index. It indicates people's awareness of available remedies and the accessibility and affordability of courts, legal advice, and representation. It also examines the extent to which court procedures and costs affect the accessibility and affordability of civil justice.

**Impartial and Effective ADR:** This indicator appears in the Rule of Law Index. It measures the accessibility, impartiality, efficiency, and the effectiveness in enforcing decisions reached through mediation. It also examines whether mediation is free of improper influence.

**Quality of Civil Justice:** This ranking is included in the Rule of Law Index and measures the overall ranking of civil justice systems.

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38 WORLD JUST. PROJECT, RULE OF LAW INDEX 2015 15 (2015), https://worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf. The project is conducted by local polling companies using a representative sample of 1,000 respondents in the three largest cities of each country.
39 Id. (consisting of close-ended questions completed by practitioners and academics).
41 WELD ECON. F., supra note 37, at 538.
42 WORLD JUST. PROJECT, supra note 38, at 28–29.
43 Id. at 31–32.
No Unreasonable Delay: This indicator appears in the Rule of Law Index. It indicates the level of delay in adjudicating disputes and general perception of delay.

Level of Discrimination: This indicator appears in the Rule of Law Index. It indicates the extent to which a person's economic and social status, e.g., sex, race, religion, place of origin, or sexual orientation affect one's access to civil justice.\(^4^4\)

Effective Enforcement: This indicator appears in the Rule of Law Index. It indicates levels of effectiveness in enforcing judgments and the delays in enforcing decisions.\(^4^5\)

B. Limitations

A number of limitations must be acknowledged. First, given the non-random, small-n sample, such findings cannot be considered generalizable. A different country selection may lead to an entirely different set of research findings. Second, given the high standard deviations reported, the level of confidence in the findings is not high. Third, the mandatory mediation group includes two of the most populated countries in the world with relatively recent introduction of modernized court systems, which further influences comparative outcomes. Fourth, correlation of changes in civil justice systems and perceptions of efficiency, justice, and confidence in the aggregate are not a sign of a causal relationship.\(^4^6\)

At the same time, in many cases civil justice quality indicators and civil justice design mutually influence one another. For example, the quality of a given civil justice system may directly effect the preferences for a particular form of mediation. Fifth, a diversity of external, exogenous, and intervening variables, including court financing, cultural factors, and wider socio-political environments also impact program outcomes and mediation program design.

It must also be acknowledged that the question of voluntary or mandatory program design is highly context dependent. As noted in an earlier study of mandatory and voluntary programs, "the differences in the structure and court environments of . . . programs mean that each program . . . is unique: they cannot simply be

\(^{4^4}\) Id. at 29.
\(^{4^5}\) Id. at 31.
\(^{4^6}\) See generally A1, supra note 7.
lumped together and viewed generically."47 While this Article explores the association between mediation program types and civil justice indicators, the results must also be seen as reflecting the unique conditions of each particular program; "any cross-program comparisons must therefore take into account the impact of programmatic and environmental differences on these results."48 In addition, given the small sample size of the country case studies (n=12), lack of policy uniformity in some cases, and the fact is to co-exist, the results cannot be considered generalizable, but rather aim at offering initial insights into the dynamics of distinct civil mediation policy approaches. Such relationships suggest, for example, that in environments of higher reported discrimination, safeguards addressing implicit bias,49 and lax civil50 and procedural51 justice compliance will be necessary.

Future studies will continue to refine and develop increasingly more accurate approaches to the analysis of civil mediation reform and experiences of justice. Insights from practice will no doubt assist in outlining directions for further study with the wider objective of developing a court system responsive to user needs. This being the case, several key insights may be drawn from the study as follows.

C. Key Findings

The key findings of the comparative statistical analysis of civil justice indicators suggest that, on average, sampled regions implementing voluntary or nudged court mediation programs are associated with statistically significant higher overall jurisdictional scores for efficiency and non-discrimination with no significant difference in relation to the quality of civil justice, effective enforcement, ac-

48 Id.
51 FEELEY, supra note 50; see also Albiston, supra note 50.
cessibility and affordability, and impartiality and effectiveness between voluntary and mandatory mediation systems.\textsuperscript{52}

While such aggregate regional mediation program data is informative, it is important to note the diversity of external, exogenous, and intervening variables including court financing, cultural factors, and political environment that also impact program outcomes. As noted, given the small sample size (n=12) and lack of policy uniformity in some jurisdictions, the results cannot be considered generalizable, but rather aim at offering initial insights into the efficacy of diverse civil mediation policy approaches and outlining directions for further study with the wider socio-political objective of developing a court system responsive to user needs.

1. Efficiency of the Legal Framework in Settling Disputes

In examining the efficiency of legal frameworks in settling disputes, an independent-sample t-test was conducted to compare mean rankings for efficiency in voluntary and mandatory court mediation conditions. In the countries examined, voluntary mediation jurisdictions were associated with significantly higher efficiency rankings (M=10.33, SD=8.82) than mandatory mediation jurisdictions (M=46.17, SD=45.26, t(6)=-1.90343, p=.043067). According to the independent sample t-test, such differences can be considered statistically significant.\textsuperscript{53}

\begin{table}[h]
\centering
\caption{Efficiency (Ranking)}
\begin{tabular}{|l|c|c|c|}
\hline
Efficiency of Legal Framework\textsuperscript{*} & N & Mean & Std. Deviation & Std. Error Mean \hline
Voluntary & 6 & 10.3 & 8.82 & 3.6 \hline
Mandatory & 6 & 46.17 & 45.26 & 18.47 \hline
\end{tabular}
\end{table}

\textsuperscript{*} The t-value is -1.90343. The p-value is .043067. The result is significant at $p < .05$. The figures represent the mean numerical rank.

In examining the mandated mediation countries compared, the following observations can be made. According to the 2016–2017 WGI, the overall average numerical rank for efficiency of the legal framework in settling disputes among mandatory medi-
ation countries was 46.17 out of 138 countries.\textsuperscript{54} This is an average of thirty-six positions lower than the voluntary court mediation jurisdictions compared.\textsuperscript{55} The United States ranked 21 in terms of efficiency of its legal framework in settling disputes,\textsuperscript{56} while Australia ranked 27.\textsuperscript{57} Italy ranked 136,\textsuperscript{58} while India ranked 322,\textsuperscript{59} and Japan ranked 15 in terms of the efficiency of its legal framework in settling disputes.\textsuperscript{60} China ranked 46.\textsuperscript{61} Clearly, a variety of factors influence a country’s overall efficiency score, including investment in the judiciary, personnel, and average length of court proceedings. It is perhaps also due to a desire for greater efficiency that mandated mediation programs are introduced.

Countries with voluntary court mediation programs, score slightly higher: with an average rank of 10.33 out of 138 countries with regard to the efficiency of the legal framework in settling disputes. According to the 2016–2017 GCR, the United Kingdom ranked 6 in terms of the efficiency of its legal framework in settling disputes,\textsuperscript{62} the Netherlands ranked 12,\textsuperscript{63} Singapore 1,\textsuperscript{64} Malaysia ranked 9,\textsuperscript{65} Hong Kong ranked 2,\textsuperscript{66} while France ranked 22.\textsuperscript{67}

2. Quality of Civil Justice

In examining relative scores for the quality of civil justice, an independent sample t-test was conducted to compare the mean rankings of civil justice quality in voluntary and mandatory court mediation conditions. In the countries examined, voluntary mediation jurisdictions were associated with slightly higher quality of civil justice rankings (M=17.5, SD =17.37) than mandatory mediation jurisdictions (M=41.5, SD=32.53, t(6)=-1.59399, p=.071011).

\textsuperscript{55} Id.

\textsuperscript{57} Id. at 102–03.
\textsuperscript{58} Id. at 212–13.
\textsuperscript{59} Id. at 202–03.
\textsuperscript{60} Id. at 233–34.
\textsuperscript{61} Id. at 146–47.
\textsuperscript{62} WORLD ECON. F., supra note 56, at 354–55.
\textsuperscript{63} Id. at 276–77.
\textsuperscript{64} Id. at 318–19.
\textsuperscript{65} Id. at 250–51.
\textsuperscript{66} Id. at 196–97.
\textsuperscript{67} Id. at 178–79.
However, according to the independent sample t-test, such differences cannot be considered statistically significant.68

**Table 2 Quality of Civil Justice (Ranking)**

<table>
<thead>
<tr>
<th>Quality of Civil Justice*</th>
<th>N</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Std. Error Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>6</td>
<td>17.5</td>
<td>17.37</td>
<td>7.09</td>
</tr>
<tr>
<td>Mandatory</td>
<td>6</td>
<td>41.5</td>
<td>32.53</td>
<td>32.53</td>
</tr>
</tbody>
</table>

* The t-value is -1.59399. The p-value is .071011. The result is not significant at p < .05. The figures represent the mean numerical rank.

In examining the mandated mediation countries compared, the following observations can be made. According to the 2016 WGI, mandated mediation countries reflect a slightly lower overall ranking of 41.5 out of 113 countries in terms of the quality of civil justice. The United States ranked 2869 and Italy ranked 46.70 Australia’s civil justice ranking was 14,71 Japan’s ranking was 672 and India was ranked at 93.73 Finally, the rank for China’s system of civil justice was 62.74 It is possible that lower civil justice quality, on average, in these jurisdictions, incentivises diversion of cases into mandated mediation programs.

Countries with voluntary court mediation programs in place received a slightly higher average ranking of 17.5 out of 113 countries in the quality of civil justice reported. It may be that accessibility of options for resolution are associated with positive perceptions of the quality of civil justice or, alternatively, higher civil justice quality may provide less incentive for mediated case diversion, and therefore support voluntary program design. According to the Rule of Law Index 2016, the rank for the United Kingdom’s civil justice was 16,75 the Netherlands ranked 1,76 Singa-

68 The result is significant at p <.10.
70 Id. at 98.
71 Id. at 51.
72 Id. at 100.
73 Id. at 95.
74 Id. at 69.
75 World Just. Project, supra note 69, at 152.
76 Id. at 117.
pore ranked 4, Malaysia ranked 4, and Hong Kong ranked 12. France ranked 12.

3. Accessibility and Affordability

An independent-sample t-test was conducted to compare the mean percentile scores for accessibility and affordability as measured by citizen’s awareness of available remedies for dispute resolution and the accessibility and extent to which court procedures and costs affect accessibility and affordability of courts in voluntary and mandatory court mediation conditions. In the countries examined, there was no statistically significant difference in average mean scores for accessibility and affordability between voluntary programs (M=62.50, SD=10.62) and mandatory mediation programs (M=51.83, SD=13.24, t(6)=1.60301, p=.070007). It is possible that more accessible and affordable jurisdictions have less incentive to mandate alternatives, such as mediation, to bring civil justice costs in check. According to the independent sample t-test, the results are not statistically significant.

<table>
<thead>
<tr>
<th>Accessibility and Affordability*</th>
<th>N</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Std. Error Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>6</td>
<td>62.5</td>
<td>10.62</td>
<td>3.87</td>
</tr>
<tr>
<td>Mandatory</td>
<td>6</td>
<td>51.83</td>
<td>13.24</td>
<td>5.40</td>
</tr>
</tbody>
</table>

* The t-value is 1.60301. The p-value is .070007. The result is not significant at p < .05. The figures represent the mean country percentiles.

In examining mean percentiles for accessibility and affordability in the mandated mediation countries, a slightly lower overall score of 51.83 on a 100-point scale is reported, as compared with countries implementing voluntary systems. According to the Rule of Law Index 2016, in terms of the accessibility and affordability of the civil justice system, the United States scored 41.

77 Id. at 134.
78 Id. at 110.
79 Id. at 93.
80 Id. at 84.
81 The result is not significant at p < .05.
82 WORLD JUST. Proj. supra note 69, at 21; see also Ralph Sutton, With America's Poor Record on Civil Justice, Shouldn't we Encourage Litigation Finance?, THE HILL (Aug. 17, 2015), http://thehill.com/blogs/congress-blog/judicial/251086-with-americas-poor-record-on-civil-justice-shouldnt-we-encourage. The United States ranks 65th in the category of accessibility and af-
and Australia scored 57. This may be explained by the relatively low predictability of legal costs. India’s score was 31, Japan’s score was 67, while Italy’s score was 56. China’s accessibility and affordability was 59.

For countries with voluntary court mediation programs in place, overall, we see a slightly higher average accessibility and affordability score of 62.5 on a 100-point scale. According to the Rule of Law Index 2016, the United Kingdom’s score for accessibility and affordability of the civil justice system was 56, which is lower than average for countries within the European Union (“E.U.”), European Free Trade Association (“EFTA”), and North America. The problem of unpredictable legal costs persists in English civil procedure. The Netherlands score was 78, Malaysia’s was 50, Singapore’s was 63, and Hong Kong’s was 66. In terms of the accessibility and affordability of the civil justice system in France, their score was 62.

4. Impartial and Effective ADR

In comparing impartiality and effectiveness of ADR systems, as measured by the effectiveness of enforcing decisions reached through mediation and whether mediation is free of improper influence, an independent-sample t-test was conducted to compare the mean scores in voluntary and mandatory court mediation conditions. In the countries examined, while voluntary mediation pro-

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83 WORLD JUST. PROJECT, supra note 69, at 51.
84 Id. at 95.
85 Id. at 100.
86 Id. at 98.
87 Id. at 69.
88 Id. at 15.
89 WORLD JUST. PROJECT, supra note 69, at 152.
91 WORLD JUST. PROJECT, supra note 69, at 117.
92 Id. at 110.
93 Id. at 134.
94 Id. at 93.
95 Id. at 84.
grams were associated with slightly higher impartial and effective ADR scores (M=79.17, SD=5.11) as compared with mandatory mediation programs (M=73.83, SD=14.02), t(6)=0.87535, p=.20096), nevertheless, such difference is not statistically significant.96

<table>
<thead>
<tr>
<th>Impartial and Effective*</th>
<th>N</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Std. Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>6</td>
<td>79.17</td>
<td>5.11</td>
<td>2.54</td>
</tr>
<tr>
<td>Mandatory</td>
<td>6</td>
<td>73.83</td>
<td>14.02</td>
<td>5.72</td>
</tr>
</tbody>
</table>

* The t-value is 0.87535. The p-value is .20096. The result is not significant at p < .05.

In examining the scores of the mandated mediation countries compared, on average, they reflect a slightly lower overall average score of 73.83 on a 100-point scale in terms of impartial and effective ADR.97 Some scholarship has suggested that mandatory ADR programs may, at times, face challenges delivering impartial results; when sufficient skill has not yet developed in order to manage power imbalances and repeat player dynamics.98 According to the Rule of Law Index 2016, the United States' impartial and effective ADR score was 8099 This meets the average scores within E.U. and EFTA countries. In Australia, the score for impartial and effective ADR was 89.100 The score was particularly high: it is estimated that at least 90% of civil disputes settle without a court hearing.101 India's score was 57;102 Japan 89;103 Italy 66;104 and China 62105.

For countries with voluntary court mediation programs in place, there is a slightly higher average score of 79.17 on a 100-

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96 The result is significant at p < .10.
97 WORLD JUST. PROJECT, supra note 69.
98 Marc Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc. Rev., 95, 95-160 (1974); see Feeley, supra note 50; see Albiston, supra note 50; see Genn, Paths to Justice, supra note 50; see Genn, Judging Civil Justice, supra note 50.
99 WORLD JUST. PROJECT, supra note 69, at 153.
100 Id. at 51.
101 Hodges, supra note 89.
102 WORLD JUST. PROJECT, supra note 69, at 95.
103 Id. at 100.
104 Id. at 98.
105 Id. at 69.
point scale for impartial and effective ADR.\textsuperscript{106} The specific country breakdowns can be examined as follows: according to the Rule of Law Index, the United Kingdom’s score was 77,\textsuperscript{107} meeting the average of countries in a similar economic category; the Netherlands overall score was 83,\textsuperscript{108} Malaysia scored 70,\textsuperscript{109} Singapore’s was 80,\textsuperscript{110} Hong Kong’s reflected the average at 81.\textsuperscript{111} France’s score was 84.\textsuperscript{112}

5. Level of Discrimination

With regard to examining the relationship between mediation program type to levels of discrimination within the civil justice experience, an independent-sample t-test was conducted to compare the mean scores for the absence of discrimination (“no discrimination”) in voluntary and mandatory court mediation conditions. In the countries examined, voluntary mediation programs were associated with significantly higher percentiles associated with “no discrimination” (M=74.5, SD=15.25) than mandatory mediation programs (M=58.33, SD=19.69, t(5)=1.58965, p=.071499). According to the independent sample t-test, such difference is statistically significant.\textsuperscript{113}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|}
\hline
No Discrimination* & N & Mean & Std. Deviation & Std. Error Mean \\
\hline
Voluntary & 6 & 75.5 & 16.46 & 6.71 \\
Mandatory & 6 & 57.33 & 17.55 & 7.16 \\
\hline
\end{tabular}
\caption{No Discrimination (percentile)}
\end{table}

Overall, the mandated mediation regional scores reflect a lower average value for “no discrimination” of 57.33 on a 100-point scale. According to the Rule of Law Index 2016, the United States score for “no discrimination” was 46,\textsuperscript{114} which is below average.\textsuperscript{115}

\textsuperscript{106} Id.
\textsuperscript{107} Id. at 152.
\textsuperscript{108} WORLD JUST. PROJECT, supra note 69, at 117.
\textsuperscript{109} Id. at 110.
\textsuperscript{10} Id. at 134.
\textsuperscript{111} Id. at 93.
\textsuperscript{112} Id. at 84.
\textsuperscript{113} The result is not significant at p < .05.
\textsuperscript{114} WORLD JUST. PROJECT, supra note 69, at 153.
Australia’s score was 65, India’s score was 43, and Japan’s score was 88. Finally, Italy’s score for no discrimination was 59 and China’s was 43. It is important then, that in environments of higher reported discrimination, effective safeguards be put in place including adequate training and accessible grievance mechanisms, to address the possibility for lax civil rights and procedural justice compliance.

For countries with voluntary court mediation programs, there is a slightly higher average score for “no discrimination” of 75.5 on a 100-point scale. According to the Rule of Law Index 2016, the United Kingdom’s score for no discrimination was 66, while France scored 70. The Netherlands scored 92, Singapore’s score was 94, Malaysia 51, while Hong Kong’s score was 80. These findings suggest that in environments of higher reported discrimination, safeguards including those aimed at addressing implicit bias and lax civil and procedural justice compliance will be necessary to safeguard the integrity of the mediation process.

6. Effective Enforcement

Of significance to parties engaged in the resolution of civil claims is ensuring that such agreements are enforced. This is relevant to the question of court mediation design since in several of

116 WORLD JUST. PROJECT, supra note 69, at 51.
117 Id. at 95.
118 Id. at 101.
119 Id. at 98.
120 Id. at 69.
121 See Edelman, supra note 50; see also Feeley, supra note 50; see Albiston, supra note 50; see Genn, Paths to Justice, supra note 50; see Genn, Judging Civil Justice, supra note 50.
122 See Feeley, supra note 50; see also Albiston, supra note 50.
123 WORLD JUST. PROJECT, supra note 69, at 152.
124 Id. at 84.
125 Id. at 117.
126 Id. at 134.
127 Id. at 110.
128 Id. at 93.
129 Izumi, supra note 49.
130 See Edelman, supra note 50; see also Feeley, supra note 50; see also Albiston, supra note 50; see also Genn, Paths to Justice, supra note 50; see also Genn, Judging Civil Justice, supra note 50.
131 See Feeley, supra note 50; see also Albiston, supra note 50.
the jurisdictions studied, mediated agreements are enforced similar to court judgements. Alternatively, parties may also sue on the basis of contract in the event that a mediated agreement is not carried out.

An independent-sample t-test was conducted to compare the mean scores for effective enforcement in voluntary and mandatory court mediation conditions. The results show voluntary mediation programs are associated with significantly higher scores for effective enforcement (M=77.5, SD=12.97) than mandatory mediation programs (M=62.5, SD=20.66, t(6)= 1.50578, p=.081519). Scholars have suggested that voluntary mediation may result in higher rates of compliance due to the parties’ initial involvement in selecting and initiating mediation; though the final crafting of an agreement remains in the hands of parties in both voluntary and mandatory mediation contexts. According to the independent sample t-test, such difference is not statistically significant.132

### Table 6 Effective Enforcement (percentile)

<table>
<thead>
<tr>
<th>Enforcement</th>
<th>N</th>
<th>Mean</th>
<th>Std. Deviation</th>
<th>Std. Error Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>6</td>
<td>77.5</td>
<td>12.97</td>
<td>5.29</td>
</tr>
<tr>
<td>Mandatory</td>
<td>6</td>
<td>62.5</td>
<td>20.66</td>
<td>8.43</td>
</tr>
</tbody>
</table>

* The t-value is 1.50578. The p-value is .081519. The result is not significant at p < .05

Overall, the mandated mediation countries studied reflect a lower overall average enforcement rate of 62.5 on a 100-point scale. In 2016, the score for effective enforcement in the United States was 66,133 on average with other jurisdictions in the E.U., EFTA, North America and high-income group countries.134 Australia’s score for effective enforcement was 8.135 Japan’s score was 89,136 while India’s was 38,137 Italy’s score for effective enforcement was 42138 and China’s was 58.139

132 The result is significant at p < .10.
133 WORLD JUST. PROJECT, supra note 69, at 153.
134 HODGES, supra note 90.
135 WORLD JUST. PROJECT, supra note 69, at 51.
136 Id. at 89.
137 Id. at 95.
138 Id. at 98.
139 Id. at 69.
For countries with voluntary court mediation programs in place, overall a slightly higher average enforcement score of 77.5 on a 100-point scale is reported. According to the Rule of Law Index 2016, the score for effective enforcement in the United Kingdom was 76, the Netherlands scored 88, Malaysia 57, Singapore 93, Hong Kong 81 and France scored 70.

IV. Conclusion

This Article suggests that sampled countries implementing voluntary court mediation programs, or those that lightly nudge parties toward self-directed resolution, on average, score statistically significantly higher when measuring overall jurisdictional scores for efficiency and non-discrimination, as compared with more robust court directed nudges. Additionally, no significant difference was found in relation to the quality of civil justice, effective enforcement, accessibility and affordability, and impartiality, and effectiveness when comparing voluntary and mandatory mediation systems. In environments of higher reported discrimination, effective corrective measures, including adequate training and accessible grievance mechanisms to address the possibility for lax civil rights and procedural justice, compliance will be necessary.

Given the small sample size (n=12) and lack of policy uniformity in some jurisdictions, the results cannot be considered generalizable. Instead this analysis offers insights into the efficacy of diverse civil mediation policy approaches. The findings echo socio-legal scholars’ examinations in similar contexts: “facilitation and encouragement together with selective and appropriate pressure are . . . possibly more efficient than blanket coercion to mediate.” While aggregate regional mediation program data is in-

140 Id. at 152. WORLD JUST. PROJECT, supra note 69, at 152.
141 WORLD JUST. PROJECT, supra note 69, at 117.
142 Id. at 110.
143 Id. at 134.
144 Id. at 93.
145 Id. at 84.
146 See Edelman, supra note 50; see Feeley, supra note 50; see Albiston, supra note 50; see Genn, Paths to Justice, supra note 50; see Genn, Judging Civil Justice, supra note 50.
147 Feeley, supra note 50; see also Albiston, supra note 50.
formative, it is important to note the diversity of external, exogenous, and intervening variables, including court financing, cultural factors, political environment, and impact program outcomes. Such aggregate data, while not generalizable, can assist in outlining directions for future study with the wider socio-political objectives for developing a court system responsive to user needs. Within the limitations mentioned above, this Article generally confirms insights from nudge theory suggesting that at least for the regions sampled, positive reinforcement encouraging mediation is at least as effective as traditional directions issued through legislation or formal court rules.