

“Let’s Talk about Sex”¹: Exploring the Benefits of Mediation in Lawsuits Involving the Contraction of Sexually Transmitted Diseases

ALEXANDRA S. TUFFUOR*

I. INTRODUCTION

In a nation where sex and provocative images infiltrate our lives through every newsstand, Internet advertisement, and popular television show, it is ironic that the direct consequences of sexual activity receive only a fraction of the same attention. Perhaps then, it is no surprise that the United States has the highest rate of sexually transmitted diseases (STDs) among all industrialized countries.² Each year, an estimated 19 million Americans contract an STD.³

Courts in most states have held that a person who contracts an infectious or contagious disease can recover from the person who exposed him or her to the disease.⁴ This liability has been extended to include those persons who

* J.D., The Ohio State University Moritz College of Law, 2010; B.A., The George Washington University, 2006. I would like to thank my family for their love and support. I would also like to extend my gratitude Professor Mary Beth Beazley and the members of the *Ohio State Journal on Dispute Resolution* for their assistance with this Note.

¹ Derived from, SALT-N-PEPA, *Let’s Talk About Sex*, on BLACKS’ MAGIC (Next Plateau Records 1990) (providing a lyrical discussion on the importance of openly discussing sex, the value of safe sex, and the negative consequences of unprotected sex).

² Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 770 (2007) (arguing that the adoption of a strict liability theory in the context of the transmission of sexually transmitted diseases would better serve public policy). The term “sexually transmitted disease” (STD) is commonly used to refer to the twenty-five plus infectious organisms transmitted through sexual activity. INST. OF MED., THE HIDDEN EPIDEMIC: CONFRONTING SEXUALLY TRANSMITTED DISEASES 30 (Thomas R. Eng & William T. Butler eds., 1997).

³ Daniel J. DeNoon, *Chlamydia, STD Rates Soar in U.S.: Teenage Girls, Young Women Have Top Rates of Fertility-Robbing Infection*, WebMD, Nov. 13, 2007, <http://www.webmd.com/sexual-conditions/news/20071113/chlamydia-std-rates-soar-in-us>.

⁴ See generally *Hendricks v. Butcher*, 129 S.W. 431, 432 (Mo. Ct. App. 1910) (holding the defendant liable for communicating smallpox to the plaintiff and the plaintiff’s family); *Earle v. Kuklo*, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953) (upholding claim against a landlord who rented premises knowing that the premises were infected with tuberculosis).

expose others to STDs.⁵ From both a public health perspective and the perspective of an individual who contracts an STD, society has an interest in resolving disputes that arise pertaining to the transmission of STDs. Although a person can face liability for transmitting an STD, litigation is not necessarily the most effective way to resolve these disputes, which are laden with various social, financial, and emotional issues. Rather, mediation may provide a better means of resolving disputes involving the transmission of STDs and would better address the issues inherent in these types of disputes.

This note argues that mediation can serve as a valuable means of resolving conflicts stemming from the transmission of STDs. Mediation is a valuable alternative to litigation in this area because it can offer victims the opportunity to confront the person who infected them in a safe and structured environment, while also holding the offender accountable and providing assistance and compensation to victims. Part II of this note discusses the high rate of STDs in the United States, the current legal jurisprudence with respect to cases in which people have sued when they contracted an STD, and the policies supporting these claims. Part III discusses the flaws of the traditional legal system in handling STD disputes. Part IV explains the value of mediation with respect to STD disputes and discusses how mediation is a better alternative to litigation. Finally, Part V discusses the broader implications of using mediation to resolve these types of disputes.

II. THE CURRENT LEGAL STATUS OF STD CASES IN THE UNITED STATES

In 2000, over 65 million people in the United States—or approximately 23% of the population—were living with an STD.⁶ Equally shocking is that the rate of people who contract STDs in the United States is on the rise.⁷ Similarly, the different types of contractible STDs are also on the rise.⁸ The

⁵ See generally *Meany v. Meany*, 639 So.2d 229 (La. 1994) (upholding wife's claim that her husband negligently infected her with herpes).

⁶ Youth Connection, *STDs Are a Serious Problem*, in *OPPOSING VIEWPOINTS: SEXUALLY TRANSMITTED DISEASES 22* (Margaret Haerens ed., 2006) (describing the alarming rate of STDs in the United States). "Some researchers believe that as many as 80% of teens with STDs never seek medical attention [and thus, are never reported] because they do not notice or recognize symptoms." *Id.*; see also U.S. Census Bureau, United States Census 2000, available at <http://www.census.gov/main/www/cen2000.html> ("The population of the U.S. on April 1, 2000 was 281,421,906").

⁷ Youth Connection, *supra* note 6, at 22.

⁸ INST. OF MED., *supra* note 2, at 39 (describing the sharp rise in the rate and various types of STDs); see also WOLFGANG STROEBE, *SOCIAL PSYCHOLOGY AND HEALTH*, 188 (2000) (explaining the flawed concept of "negotiated safety"—an agreement between sex partners to not have unprotected sex outside of the relationship).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

past few decades have exposed sexually active individuals to a variety of emerging STDs.⁹ While some of these infections are treatable, some are viral and thus incurable,¹⁰ while others are fatal.¹¹ The frequency and severity of STDs imposes a heavy burden, not only on an individual who is infected with an STD, but on society as well.¹² As a result, the criminal and civil justice systems have found ways to address instances when individuals have infected others with an STD.

A. The Modern Legal Theories for STD Claims

An individual who transmits an STD to his or her partner potentially faces both criminal and civil penalties.¹³ Some states, such as New York and Oklahoma, criminalize the transmission of any STD.¹⁴ In the majority of

⁹ INST. OF MED., *supra* note 2, at 39 (stating that since 1980, eight new sexually transmitted pathogens have been identified, including: Human papillomavirus, HTLV-1, HTLV-II, mycoplasma genitalium, mobiluncus sp., HIV-1, HIV-2, and type 8 of the human herpes virus); *see also* Youth Connection, *supra* note 6, at 22 (“Twenty-five years ago, who would have thought that . . . sex could have life-threatening consequences? Not that an unwanted pregnancy or an STD such as gonorrhea or syphilis that was prevalent then isn’t a tremendous challenge . . . but the stakes are now much higher.”).

¹⁰ Alison Motluck, *The Threat of STDs Is Exaggerated*, in OPPOSING VIEWPOINTS, *supra* note 6, at 28. The most prevalent STD in the United States is Chlamydia, with an estimated four million cases occurring annually. INST. OF MED., *supra* note 2, at 34. Chlamydia and other bacterial STDs such as trichomoniasis and gonorrhea are generally curable with prescribed antibiotics. *Id.* at 161. However, if left undetected, they can cause permanent damage such as infertility or chronic pain. *Id.* at 34–36.

¹¹ Youth Connection, *supra* note 6, at 23. Viral STDs such as human papillomavirus (HPV) and herpes are not curable. Over twenty-four million Americans are currently infected with HPV. INST. OF MED., *supra* note 2, at 32. In the United States, approximately one in four women and one and five men will become infected with herpes during their lifetime. *Id.* at 33.

¹² INST. OF MED., *supra* note 2, at 58 (explaining the direct and indirect costs of STDs).

¹³ Barbara Bevando Sobal, *Nice People Get Sexually Transmitted Diseases*, 11 PRENTICE HALL LAW & BUSINESS Mar. 1991, at 3, 5–6, available at http://www.bbsobal.com/pdf/Nice_People_Get_Sexually_Transmitted_Diseases.pdf. *See generally* OHIO REV. CODE ANN. § 2903.11(B)(1) (West 2010) (stating that knowingly engaging in sexual conduct without disclosing to one’s partner that one has tested positive for HIV is punishable as felonious assault).

¹⁴ NY PUB. HEALTH LAW § 2307 (McKinney 2001); OKLA. STAT. ANN. tit. 63, § 1-519 (West 2004); *see also* LA. REV. STAT. ANN. § 40:1062 (2008); VT. STAT. ANN. tit. 18, § 1106 (2002).

states, however, criminal penalties are limited to cases where either HIV or the AIDS virus was transmitted.¹⁵

In the civil arena, courts also permit plaintiffs to assert claims for the wrongful transmission of STDs.¹⁶ Generally, the predictor of liability is based on the severity of the disease transmitted. Thus, courts have considered cases involving the transmission of bacterial infections, such as gonorrhea and Chlamydia, in only a handful of cases.¹⁷ Presumably, one of the reasons courts hear few civil cases involving the transmission of bacterial STDs is because these types of bacterial infections can be treated and cured with antibiotics;¹⁸ they do not impose a life-long obligation to take drugs and they do not require individuals to explain their infected status to future sexual partners. As a result, the majority of civil claims surrounding the transmission of STDs involve the transmission of incurable viral infections, such as HIV, herpes, and human papillomavirus (HPV).¹⁹

When an individual files suit after contracting an STD, the various causes of actions recognized by courts are: negligence, misrepresentation and fraud, battery, and the intentional infliction of emotional distress (IIED).²⁰ Negligence is one of the most frequently asserted causes of action in cases for the transmission of an STD. A negligence theory focuses primarily on whether a person has a duty to warn prospective sexual partners about his or her medical condition or disease.²¹ Filing suit on the basis of misrepresentation and fraud usually requires that the plaintiff prove the defendant made some false representation about his or her health, and that the plaintiff relied on this misrepresentation in engaging in sexual conduct

¹⁵ See CAL. HEALTH & SAFETY CODE § 120291 (West 2006); FLA. STAT. ANN. § 384.24 (1986); MD. CODE ANN. HEALTH-GEN § 18-601.1 (West 1989); MICH. COMP. LAWS § 333.5210 (2001).

¹⁶ Dena Pollard, has coined these actions "sex torts." Pollard, *supra* note 2, at 770.

¹⁷ See, e.g., *Doe v. Roe*, 598 N.Y.S.2d 678, 680 (N.Y. Just. Ct. 1993) (denying a claim for the transmission of gonorrhea because it was unclear which party initially transmitted the disease to the other, but stating, "if there were proof by a preponderance of the evidence that the defendant knew she had Chlamydia when she engaged in sexual relations with the plaintiff, the court might be persuaded to uphold plaintiff's cause of action in negligence."); *Duke v. Housen*, 589 P.2d 334 (Wyo. 1979) (denying recovery for a claim asserting the wrongful transmission of gonorrhea because the statute of limitations had run).

¹⁸ INST. OF MED., *supra* note 2, at 34.

¹⁹ See, e.g., *Doe v. Roe*, 267 Cal. Rptr. 564, 566 (Cal. Ct. App. 1990) (awarding damages for the negligent transmission of herpes).

²⁰ Pollard, *supra* note 2, at 795-803.

²¹ Celia M. Fitzwater, Comment, *Tort Liability for Sexual Transmission of Disease: A Legal Attempt to Cure "Bad" Behavior*, 25 WILLAMETTE L. REV. 807, 814-17 (1989).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

with the defendant and was infected as a result.²² A cause of action for civil battery requires the plaintiff to establish that the person who transmitted the diseases had the intent to infect the plaintiff with the disease.²³ However, courts occasionally infer intent when the transmission occurred during a period of an outbreak or when the probability of contamination was known to the transmitter.²⁴ Finally, intentional or negligent infliction of emotional distress are also commonly pleaded causes of action.²⁵ These theories require the plaintiff to prove extreme and outrageous conduct by the defendant, which can only be proven once the plaintiff establishes that the defendant knew, or should have known, that he or she was infected with the STD.²⁶

B. *The Policies Supporting the Modern Legal Theories for STD Claims*

Some individuals argue that judicial attention to the transmission of STDs is an invasion of privacy and an invasion into the most intimate area of citizens' lives—the bedroom.²⁷ Others believe that judicial intervention in this area encourages immoral behavior and that it provides compensation to those that are harmed as a result of their own inappropriate actions.²⁸

²² *Id.* at 820–21.

²³ *Id.* at 823.

²⁴ *Id.*

²⁵ See *id.* at 824; see also *McPherson v. McPherson*, 712 A.2d 1043, 1046 (Me. 1998) (denying claim for the negligent transmission of HPV).

²⁶ *Endres v. Endres*, 912 A.2d 975, 976 (Vt. 2006) (denying wife's claim for intentional infliction of emotional distress because intent is a required element of the cause of action and the wife failed to prove that her husband actually knew he was infected with HPV).

²⁷ See *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) (refusing to uphold a claim for a partner's refusal to take birth control, which resulted in the birth of a child. The court stated, "[t]o do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."). The court went on to say, "the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference." *Id.* at 621.

²⁸ Thomas R. Mendicino, *Characterization and Disease: Homosexuals and the Threat of AIDS*, 66 N.C. L. REV. 226, 228 (1987) (explaining societal views that believe that those who engage in immoral behavior, such as pre-marital, extra-marital, or homosexual conduct, deserve to be punished when they contract a disease such as HIV).

Nonetheless, some states recognize the transmission of an STD as a basis for a valid civil claim.²⁹

One basis for the recognition of STD claims as valid legal claims is that they are a subgroup of infectious diseases. Both history and current case law demonstrate that courts have traditionally imposed liability for the transmission of various nonsexual infectious diseases, such as tuberculosis, smallpox, and salmonella.³⁰ STDs are merely one subgroup or type of infectious disease.³¹ Like other types of infectious diseases, STDs are extremely contagious and carry a high social stigma.³² Courts recognize claims for the transmission of infectious or communicable diseases, in general, as grounds for recognizing STD transmission claims.³³ However, courts provide additional rationales in support of their recognition of these cases.³⁴ These rationales include public health, deterrence, accountability, and compensation for victims.

Courts frequently cite the public health goal of preventing the spread of STDs as a policy rationale for enforcing wrongful transmission claims. In a California case, *Doe v. Roe*, a woman sued her former partner for infecting her with the herpes virus.³⁵ The court said, “it is beyond question that our state’s policy of preventing the spread of venereal disease is great. . . .”³⁶

²⁹ *E.g.*, *Doe v. Johnson*, 817 F.Supp. 1382 (W.D. Mich. 1993); *Berner v. Caldwell*, 543 So.2d 686 (Ala. 1989); *Doe v. Roe*, 267 Cal. Rptr. 564 (Cal. Ct. App. 1990); *Gabriel v. Tripp*, 576 So.2d 404 (Fla. Dist. Ct. App. 1991); *Long v. Adams*, 333 S.E.2d 852 (Ga. Ct. App. 1985); *Meany v. Meany*, 639 So.2d 229 (La. 1994); *McPherson*, 712 A.2d at 1043; *R.A.P. v. B.J.P.* 428 N.W.2d 103 (Minn. Ct. App. 1988); *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986); *Mussivand v. David*, 544 N.E.2d 265 (Ohio 1989); *Panther v. McKnight*, 256 P. 916 (Okla. 1926); *Hamblen v. Davidson*, 50 S.W. 3d 433 (Tenn. Ct. App. 2000); *Martin v. Zihler*, 607 S.E.2d 367 (Va. 1990).

³⁰ *Meany*, 639 So.2d at 234 (providing a brief summary of the various infectious diseases that courts have imposed civil liability upon defendants for transmitting).

³¹ *See* INST. OF MED., *supra* note 2, at 30.

³² Elizabeth A. Stull, Book Note, *Confronting AIDS in the Community*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 429, 432 (2000) (reviewing JANE BALIN, A NEIGHBORHOOD DIVIDED: COMMUNITY RESISTANCE TO AN AIDS CARE FACILITY (1999)).

³³ *Meany*, 639 So.2d at 234.

³⁴ *See generally Doe v. Roe*, 267 Cal. Rptr. at 566 (affirming the trial court’s holding that found the defendant liable for transmitting herpes to his partner and stating, “strong public policy reasons existed for imposing a duty on those who have sexually transmissible diseases to disclose such conditions to their partners.”).

³⁵ *Id.* at 564–65.

³⁶ *Id.* at 567; *see also John B. v. Superior Court*, 137 P.3d 153 (Cal. 2006); *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 106 (Minn. Ct. App. 1988) (stating that legal doctrines should be constructed to prevent the spread of communicable diseases).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDS

Courts also accept STD transmission cases with the hope that the parties involved, and the public in general, will alter their behavior.³⁷ A New Jersey court stated, “[i]f nothing else, fear of liability may serve as a deterrent to such hateful conduct in the guise of love.”³⁸

The health of citizens is an important public concern not only because it deals directly with individuals’ physical and mental wellbeing, but also because a healthy population is a fundamental element of a productive and economically sustainable society.³⁹ For example, in the United States, the estimated 19 million new STD infections that occur each year cost the United States \$14.7 billion.⁴⁰ In 2008, the federal government alone spent \$1 billion on STDs.⁴¹ The financial burden of STDs are reflected in terms of health care expenditures and lost productivity.⁴² Thus, in tandem with private actors and other governmental agencies, civil courts have assumed the responsibility of deterring risky sexual activity to promote our nation’s health.⁴³

The California case *Doe v. Roe* also demonstrates that courts sometimes uphold STD transmission cases on the basis of accountability.⁴⁴ A general principle of tort doctrine is that a person is responsible for injury occasioned to another by his or her own actions.⁴⁵ Accordingly, courts hold that individuals who know, or should know, of their infected status, have a duty to protect others or inform them of the infection.⁴⁶ Requiring infected persons to notify their partners of their infected status places the burden on

³⁷ J.B. v. Bohonovsky, 835 F.Supp. 796, 802 (D.N.J. 1993).

³⁸ *Id.* at 798.

³⁹ See Skillings v. Allen, 173 N.W. 663, 664 (Minn. 1919) (describing the health of a nation’s citizenry as an economic asset and how state laws have been designed to protect both the public’s health and individuals’ health); see also Gabriel v. Tripp, 576 So.2d 404, 405 (Fla. Dist. Ct. App. 1991) (“[S]exually transmissible diseases constitute a serious and sometimes fatal threat to the public and individual health and welfare of the people of the state and to visitors of the state.”).

⁴⁰ Cheryl Wetzstein, *Spending on STDs Advisable*, THE WASHINGTON TIMES, Feb. 3, 2009, <http://www.washingtontimes.com/news/2009/feb/03/spending-on-stds-advisable/>.

⁴¹ *Id.*

⁴² INST. OF MED., *supra* note 2, at 58.

⁴³ R.A.P. v. B.J.P., 428 N.W.2d 103, 106 (Minn. Ct. App. 1988) (“Minnesota courts have long recognized that the preservation of public health is a matter of great public importance.”).

⁴⁴ *Doe v. Roe*, 267 Cal. Rptr. 564, 566 (Cal. Ct. App. 1990).

⁴⁵ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 434 (Cal. 1976).

⁴⁶ McPherson v. McPherson, 712 A.2d 1043, 1046 (Me. 1998); see also *Doe v. Roe*, 267 Cal. Rptr. at 566 (“the burden of warning a prospective sex partner was small.”).

the party who has the most knowledge of the condition.⁴⁷ Failure to assume this duty prior to engaging in sexual conduct may result in the defendant being held liable to the plaintiff-victim.⁴⁸ Courts are willing to impose liability on an individual's failure to uphold this duty on the basis that individuals should be answerable to those they harm.⁴⁹

Finally, compensation for victims is another rationale courts use to support cases involving the transmission of STDs.⁵⁰ A person who contracts an STD can suffer from significant economic, physical, and emotional consequences.⁵¹ Viral STDs, which are incurable, generally require medical attention that is substantial, frequent, and life-long.⁵² As a result, doctor visits, medical procedures, and prescription medication can lead to costly medical bills, putting a substantial financial burden on those who are infected with an STD.⁵³ Additionally, plaintiffs regularly seek damages for the emotional trauma associated with the disease, the constraints it places on

⁴⁷ See *Meany v. Meany*, 639 So.2d 229, 235 (La. 1994) (explaining that public health concerns justify imposing the burden of disclosure on the person infected with the disease).

⁴⁸ Some courts apply the public policy of accountability strictly. See *R.W. v. T.F.*, 528 N.W.2d 869, 873 (Minn. 1995) (refusing to require a defendant's homeowners insurance policy to indemnify him against transmission of an STD). "We refuse to promote the abdication of personal responsibility by providing insurance coverage when an insured engages in unprotected sexual intercourse despite having knowledge that he is infected with herpes. . . ." *Id.*

⁴⁹ *But see Zysk v. Zysk*, 404 S.E.2d 721, 722 (Va. 1990). While most courts have agreed with the theory that individuals have a duty to inform their partners, the Supreme Court of Virginia was unwilling to hold a husband liable for concealing and transmitting the herpes virus to his wife prior to their marriage. *Id.* However, this case has since been overruled. *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 1990).

⁵⁰ *J.B. v. Bohonovsky*, 835 F.Supp. 796, 802 (D. N.J. 1993) (stating that "such contemptuous conduct should be subject to liability, not only to compensate the victim, but also serve to deter those who would engage in such acts of betrayal.").

⁵¹ *Doe v. Johnson*, 817 F.Supp. 1382, 1385 (W.D. Mich. 1993) (stating that the plaintiff claims that she "suffers, and will continue to suffer, many consequences including physical illness, severe emotional distress, loss of enjoyment of life, extreme embarrassment, humiliation, shame, medical expenses, and lost wages and benefits."); see also INST. OF MED., *supra* note 2, at 335; RENEE F. LYONS, MICHAEL J.L. SULLIVAN & PAUL G. RITVO, RELATIONSHIPS IN CHRONIC ILLNESS AND DISABILITY 66 (1995).

⁵² INST. OF MED, *supra* note 2, at 278.

⁵³ *Deuschle v. Jobe*, 30 S.W.3d 215, 216 (Mo. Ct. App. 2000) (explaining how the plaintiff's contraction of an STD would require her to remain on prescription medication for the rest of her life); see also *Meany v. Meany*, 639 So.2d 229, 237 (La. 1994) (awarding plaintiff \$93,676 in damages, \$21,324 of which was for laser surgery to remove the genital warts she contracted from her husband).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDS

their sex life, the future prospect of being unable to reproduce, and for women, possible complications during childbirth and the possibility that her newborn child might be born with the disease.⁵⁴ The damages plaintiffs receive from civil lawsuits provide plaintiffs with compensation to help alleviate these burdens.⁵⁵

III. THE FLAWS OF LITIGATION IN STD TRANSMISSION CASES

A person who contracts an STD can assert a claim based on a number of theories.⁵⁶ However, these theories of liability, and litigation in general, do not always provide plaintiff-victims with an adequate means of resolving their disputes. Litigants face procedural and substantive barriers that make it difficult for plaintiffs to succeed. Further, litigation does not advance the policies that give rise to these claims.

A. Headlines Do Not Help: The Chilling Effect of Publicity in STD Cases

The public nature of STD lawsuits can discourage individuals from filing a lawsuit, meaning that publicity stops many STD lawsuits before they even start. Most lawsuits are public record, so not only is a court's holding available to the public, but the factual details that lead the court to its holding are also available for public inspection.⁵⁷ In contrast to other types of personal injury cases, an STD case involves what most individuals characterize as deeply personal because of its intimate origins.⁵⁸ Because of the intimate nature of these claims, STD transmission cases demand that very personal details of one's life be publicly exposed.⁵⁹ Additionally, STDs carry

⁵⁴ *Deuschle*, 30 S.W.3d at 217.

⁵⁵ *See id.*

⁵⁶ These claims include negligence, misrepresentation and fraud, battery, and intentional infliction of emotional distress. *See supra* Part II. A.

⁵⁷ *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992); Gale H. Carpenter, Comment, *Protecting the Privacy of Divorcing Parties: The Move Toward Pseudonymous Filing*, 17 J. AM. ACAD. MATRIM. LAW. 105, 108 (2001) (explaining that one of the underlying reasons for why criminal and civil proceedings are available to the public is grounded in the First Amendment).

⁵⁸ EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 351 (1994).

⁵⁹ *See* Walter B. Stokes, *Our Changing Sex Ethics*, in *THE FAMILY AND THE SEXUAL REVOLUTION* 102 (Edwin M. Schur ed., 1964).

a high social stigma.⁶⁰ Parties' sexual practices become a matter of public record, forever memorialized, and therefore, deter victims from filing suit.

Criminal rape cases present a perfect illustration of the problem of public exposure that individuals struggle with in STD cases. Many of the characteristics that deter victims of rape from reporting offenses and pursuing a criminal conviction are also present in civil STD cases.⁶¹ It is suggested that the high number of unreported rape cases is a result of self-blame and humiliation, with victims blaming themselves for their perpetrators' aggression.⁶² Like rape victims, individuals that contract an STD may hold feelings of shame and personal responsibility that would also prevent them from filing a lawsuit.⁶³ When both rape and STD cases enter the courtroom, public exposure and critique often result in victims being inundated with messages that the victims were the cause of their own injuries, reinforcing feelings of shame.⁶⁴ Additionally, for some victims, pre-trial investigation, and the trial itself, operate as deterrents because they require victims to present and defend their own actions.⁶⁵ In fact, despite the existence of rape shield laws that limit the admissibility of a victim's past sexual behavior,⁶⁶ rape cases remain significantly underreported.⁶⁷ Although some individuals question the genuine effectiveness of rape shield laws, STD cases are ill-suited for such procedural mechanisms that could provide victims with added protection from public exposure. Unlike rape cases, in STD transmission cases, inquiry into a person's former partners and sexual activity is an essential element of establishing liability.⁶⁸ Because "[t]he revelations of highly stigmatizing information . . . may well impact one's personal relationships and employment prospects,"⁶⁹ it is no surprise that

⁶⁰ Stull, *supra* note 32, at 432.

⁶¹ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 224 (2d ed. 2003) (explaining that an "unacceptably high" number of rapes in the United States go unreported).

⁶² See *id.*

⁶³ See LYONS, SULLIVAN & RITVO, *supra* note 51, at 66.

⁶⁴ See LAURIE A. RUDMAN & PETER GLICK, THE SOCIAL PSYCHOLOGY OF GENDER: HOW POWER AND INTIMACY SHAPE GENDER RELATIONS 234 (2008).

⁶⁵ See CHAMALLAS, *supra* note 61, at 228.

⁶⁶ ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 83 (1999).

⁶⁷ See CHAMALLAS, *supra* note 61, at 224.

⁶⁸ See, e.g., *Hamblen v. Davidson*, 50 S.W.3d 433, 435 (Tenn. Ct. App. 2000) (describing the plaintiff's testimony regarding her number of sexual partners).

⁶⁹ Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471, 505 (2008).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDS

despite having suffered an injury, many individuals prefer to keep their identities hidden from the public and choose to avoid the legal system. Yet, in spite of their private nature and damaging effect, STD cases remain in the public eye, creating a deterrent for victims who would otherwise consider filing suit.⁷⁰

Because STD cases require individuals to reveal very personal and intimate details of their lives, many parties attempt to take procedural steps to protect their privacy by concealing their legal names.⁷¹ Many parties choose not to proceed with their own names, but with the use of initials or a pseudonym.⁷² However, courts generally have discretion to determine whether such a request will be granted.⁷³ For a party to conceal his or her name, the party must demonstrate that protecting the party's identity outweighs the public interest in knowing the details and factual elements of the case.⁷⁴ With respect to STD cases, taking advantage of this privacy tool becomes difficult because the information encompassed in STD cases goes beyond affecting the two parties involved. Sexually transmitted diseases are a matter of public health.⁷⁵ Because of their prevalence and ease of transmission, STDs affect the public as a whole.⁷⁶ Nonetheless, if a court is willing to grant a party's request to conceal his or her name, this achievement does not remove the case from the public eye. The use of initials or pseudonyms, as opposed to legal names, provides only a small amount of additional protection because the facts of the case remain available on the public record.⁷⁷ Once a party files a lawsuit for the transmission of an STD, there is only so much a party can do to avoid public exposure.

⁷⁰ See CHAMALLAS, *supra* note 61, at 224.

⁷¹ Schumm, *supra* note 69, at 505.

⁷² *Id.* at 484 (stating the factors courts consider when determining whether to allow a plaintiff to use a pseudonym: "(1) whether the plaintiff would risk suffering injury if publicly identified; (2) whether the plaintiff is challenging governmental activity; (3) whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution; (4) whether the plaintiff would be required to disclose information of the utmost intimacy; and (5) whether the party defending against a suit brought under a pseudonym would be prejudiced").

⁷³ See, e.g., Del. Sup. Ct. R. 7(d), available at <http://courts.delaware.gov/Rules/?-supremerrules.pdf> (last visited Mar. 30, 2010).

⁷⁴ Carpenter, *supra* note 57, at 111.

⁷⁵ See *Doe v. Johnson*, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993) (discussing the societal interest in preventing the transmission of STDs).

⁷⁶ See INST. OF MED., *supra* note 2 at 20 (stating that public awareness campaigns are being utilized to increase knowledge about STDs and to influence behavior).

⁷⁷ For example, many cases are readily available on the Internet or through online legal resources.

The public exposure and visibility associated with STD cases is not limited exclusively to the fact that lawsuits are public record. The media, too, plays a dominant role in this feature of STD cases.⁷⁸ High profile cases and those with “juicy details” often receive excessive attention from the media that results in public obsession and the unwanted exposure of the parties involved.⁷⁹ Headlines such as “\$25M Suit: Ho-Lovin’ Hubby Gave Me STDs”⁸⁰ in the *New York Post* and “The Summer of Horrible Public Divorces Is Far from Over” in *New York Magazine* are not uncommon.⁸¹ Both articles detailed author and former television producer Stephanie Lerner’s pending lawsuit against her venture capitalist husband for infecting her with several strains of HPV.⁸² Similarly, in 2006, *NBC Sports Online* captured Michael Vick’s settlement with his former girlfriend with the headline, “Settlement Reached in Michael Vick Herpes Case.”⁸³ These types of headlines are neither rare nor easy for readers to avoid, partially because the media’s fascination with STD cases extends beyond cases that involve high profile parties and celebrities.⁸⁴

When a party contemplates filing an STD case, the party is likely to consider that his or her personal life will be exposed to the public. The fact that STD cases become overly publicized through court records and the media strips parties of their desired privacy during a frustrating and

⁷⁸ Dareh Gregorian, *\$25M Suit: Ho-Lovin’ Hubby Gave Me STDs*, N.Y. POST, July 31, 2008, available at http://www.nypost.com/p/news/regional/item_oVkm5pdBlnbHwLnAjXoWiNj;sessionid=F4FC45A51A087847595D771122C83833.

⁷⁹ See, e.g., *id.*

⁸⁰ See *id.*

⁸¹ *The Summer of Horrible Public Divorces Is Far from Over*, N.Y. MAG., July 31, 2008, available at http://nymag.com/daily/intel/2008/07/the_summer_of_horrible_public.html.

⁸² Gregorian, *supra* note 78; *The Summer of Horrible Public Divorces*, *supra* note 81.

⁸³ *Settlement Reached in Michael Vick Herpes Case*, NBC SPORTS, Apr. 24, 2006, <http://nbcsports.msnbc.com/id/12468203/>; see also *Dwyane Wade Off the Hook for Wife’s STD Claim*, CHI. SUN-TIMES, Feb. 6, 2009, available at http://blogs.suntimes.com/sportsprose/2009/02/dwyane_wade_off_the_hook_for_s.html; *Dwyane Wade Sues Estranged Wife Over STD Allegations*, ATL. J. CONST., Feb. 18, 2009, available at http://www.ajc.com/services/content/sports/stories/2009/02/18/dwyane_wade_sex.html; *Ex-girlfriend Sues Former Cleveland Indian Robbie Alomar for \$15 Million, Says He Has AIDS*, THE CLEVELAND PLAIN DEALER, Feb. 11, 2009, available at http://www.cleveland.com/tribe/index.ssf/2009/02/former_cleveland_indians_secon.html.

⁸⁴ *Riverside County Woman Wins \$7 Million Lawsuit*, S. FRAN. CHRON., Feb. 26, 2009, at B6.

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

emotional time period. As a result, many individuals who contract an STD may perceive litigation as unattractive and are discouraged from taking advantage of this remedy.

B. *The Financial Burden of Litigating STD Cases*

The expenses associated with litigation make it unattractive and ill-suited to resolve cases involving the transmission of STDs. Whether a plaintiff's claim is frivolous or has merit, litigation can be expensive and time consuming.⁸⁵ When an attorney agrees to represent a plaintiff in an STD case, most cases are accepted on a contingency fee basis.⁸⁶ Nonetheless, preparing for the trial can be costly.⁸⁷

In STD cases, the expense of expert witnesses and the cost of discovery can substantially increase the costs of litigating the dispute.⁸⁸ Expert testimony can be a valuable component in STD cases, explaining why so many plaintiff-victims present experts at trial.⁸⁹ Experts can testify on a variety of issues relevant to an STD case, including: the various modes of transmission, the symptoms of a specific disease, the fact that some STDs can be transmitted without sexual conduct, the long-term health consequences of contracting certain diseases, and other medically pertinent

⁸⁵ Joseph Sanders, *Adversarial Legalism and Civil Litigation: Prospects for Change*, 28 L. & SOC. INQUIRY 719, 730 (2001) ("Litigation is expensive and time consuming, and even when you win, you will usually lose money." (internal citation omitted)).

⁸⁶ Claude R. Bowles Jr. et al., *Lawyers in a Fee Quandary: Must the Billable Hour Die?*, 6 DEPAUL BUS. & COM. L.J. 487, 497 (2008). For an example of a firm that accepts STD transmission cases on contingency, see The Pingleton Law Firm, <http://www.pinglaw.com/PracticeAreas/STD-Transmission.asp> (last visited Mar. 25, 2010).

⁸⁷ Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 732 (2005).

⁸⁸ *Id.*

⁸⁹ See, e.g., *Ray v. Wisdom*, 166 S.W.3d 592, 598 (Mo. Ct. App. 2005) (explaining wife's use of her treating physician to offer expert testimony in wife's action for tortious infection); *Meany v. Meany*, 639 So.2d 229, 236 (La. 1994) (affirming a wife's use of expert medical testimony to inform the jury of the pathology, symptoms, and medical ramifications of the herpes virus in a case against her husband for the transmission of the STD). *But see Hamblen v. Davidson*, 50 S.W.3d 433, 440 (Tenn. Ct. App. 2000) (stating that expert testimony was not necessary to establish causation in a negligence action against a husband for the transmission of herpes to his wife during the course of their marriage).

information.⁹⁰ Additionally, plaintiffs who claim emotional injuries, such as IIED, often utilize psychologists or psychiatrists to testify about the plaintiffs' mental condition.⁹¹

Depending on the nature of the case, the cost of expert witnesses can vary substantially.⁹² The price to retain a physician to testify as an expert witness is often higher than the price to obtain professionals in other fields.⁹³ Additionally, a party's treating physician will sometimes charge a higher rate for the physician to testify than the customary patient visit rate.⁹⁴ Plaintiffs are often required to pay this higher rate even though the physician may have diagnosed the STD and provides regular care and medication management to the plaintiff.⁹⁵ For a plaintiff-victim wishing to file suit, the costs of obtaining and reviewing medical records coupled with the costs of locating and depositing experts can amount to tens of thousands of dollars.⁹⁶

Because the majority civil cases involving the transmission of an STD involve an incurable STD, a plaintiff-victim filing suit will essentially have to live with the condition for the rest of his or her life.⁹⁷ Although these types of diseases are not curable, they do require regular treatment in the form of prescription medications or surgical procedures.⁹⁸ Adding the cost of litigation to a party's already significant medical expenses can make it financially difficult for plaintiffs to file suit.⁹⁹ The cost of defending STD disputes is also expensive for defendants. Because defendants may be required to expend substantial funds to treat their own medical condition and to defend themselves in the lawsuit, there may be little left in terms of actual

⁹⁰ 88 AM. JUR. *Trials* § 153 (2008).

⁹¹ *Id.*

⁹² See Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998) (reporting that a survey of 1000 civil attorneys indicated that the median cost of expert discovery and disclosure was \$1,375).

⁹³ Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 938 (2000). However, most courts frown upon physicians charging exorbitant fees. *Id.* at 938-39.

⁹⁴ *Id.* at 939.

⁹⁵ *Id.*

⁹⁶ Peebles & Harris, *supra* note 87, at 732 (stating that in personal injury cases, average costs will exceed \$25,000 per case for the defense, and exceed \$50,000 for the plaintiff).

⁹⁷ See INST. OF MED., *supra* note 2, at 42.

⁹⁸ See *id.* at 278.

⁹⁹ See *id.* at 343.

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

compensation for the plaintiff-victim.¹⁰⁰ For many individuals, the financial aspects of STD disputes make these cases more of a financial burden than a legal remedy.

C. Satisfaction Not Guaranteed: Litigating an STD Case Does Not Guarantee a Satisfactory Result

Aside from the fact that litigation can be expensive, it offers no guarantee of its desired outcome. For example, New York currently recognizes STD claims. But a New York state court said, when dismissing a boyfriend's claim against his girlfriend for infecting him with an STD, "[w]hen one ventures out in the rain without an umbrella, should they complain when they get wet?"¹⁰¹ This rather unsympathetic statement reminds plaintiffs that the fact that they contracted an STD from their partner is not sufficient to guarantee that the plaintiff will win the case.

Additionally, not all states have been presented with cases involving the wrongful transmission of an STD. For example, it was not until recently that the state of Virginia began to recognize these types of cases.¹⁰² For over a decade, Virginia courts stood firm in their holding that the act of consensual fornication was a complete bar to recovery, regardless of the surrounding circumstances.¹⁰³ However, in a subsequent case, *Martin v. Zihlerl*, the Supreme Court of Virginia stated, "Zysk is no longer controlling precedent to the extent that its holding applies to private, consensual sexual intercourse."¹⁰⁴ The *Martin* case, which involved the transmission of herpes between two unmarried adults, was remanded to the trial court for further proceedings.¹⁰⁵ This was the last civil case in which Virginia courts examined the issue of the transmission of an STD. Therefore, it is difficult to predict how Virginia courts will rule on this issue in future cases.

While a number of states have decided cases recognizing that the contraction of an STD is a valid legal claim, not all states have heard a case

¹⁰⁰ See Peeples & Harris, *supra* note 87, at 732.

¹⁰¹ Doe v. Roe, 598 N.Y.S.2d 678, 681 (N.Y. Just. Ct. 1993).

¹⁰² Martin v. Zihlerl, 607 S.E.2d 367, 371 (Va. 2005).

¹⁰³ Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) (holding that a wife's action for injuries resulting from the contraction of herpes from her husband was barred due to her willingness to engage in sexual intercourse before their marriage, although her future husband was aware of his infection at the time of their premarital conduct and intentionally concealed it from her).

¹⁰⁴ Martin, 607 S.E.2d at 371.

¹⁰⁵ *Id.*

that would enable them to either recognize or reject these claims.¹⁰⁶ Although the general trend among states that have been presented with STD cases is to uphold these claims, there is no guarantee that other states will do the same. Thus, in the majority of states, especially those that have not yet addressed STD cases, a civil claim provides little assurance or guarantee for plaintiff-victims, even those plaintiff's with facts that are favorable to their claim.

D. Stereotypes Associated with STDs Create Courtroom Biases

Another characteristic of lawsuits involving the transmission of STDs is that parties may fear that an outcome will be based on biases and stigmas related to their sexual behavior.¹⁰⁷ This is because STDs carry heavy social stigmas.¹⁰⁸ One of the reasons STDs carry stigmas is because their contraction is often associated with uncleanness and immorality.¹⁰⁹ By nature, the courtroom is an arena that parties enter to be "judged"—either by a judge or a jury. For parties in an STD dispute, the underlying conflict is already one that bears a stigma.¹¹⁰

Race and gender also carry a number of stereotypes, and both of these characteristics have the ability to influence the outcome of litigation.¹¹¹ Stereotypes such as passiveness and purity have traditionally been associated

¹⁰⁶ Alabama, California, District of Columbia, Florida, Georgia, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, New York, New Jersey, Oklahoma, Ohio, and Virginia are among some of the states that recognize civil claims based on the wrongful transmission of an STD. *See supra* note 29.

¹⁰⁷ TASLITZ, *supra* note 66, at 17 (stating that "jurors judge the credibility of courtroom stories by comparing how they square with standard cultural ones.").

¹⁰⁸ Stephanie A. Wolfson, *Screening for Violence and Abuse Through the Lens of Medical Ethics*, 11 DEPAUL J. HEALTH CARE L. 1, 5 (2007) (explaining that private behaviors that generally occur behind closed doors, such as child abuse, alcoholism, and domestic violence, have significant public health concerns and carry a degree of social stigma).

¹⁰⁹ Stull, *supra* note 32, at 432 ("Infectious diseases, particularly sexually-transmitted diseases, carry a stigma of uncleanness and immorality.").

¹¹⁰ *See* Wolfson, *supra* note 108, at 5.

¹¹¹ *See* RUDMAN & GLICK, *supra* note 64, at 232 (stating that "prescriptive stereotypes and roles maintain a strong hold on gender relations, and misconceptions about sex and sexuality lead to myths that perpetuate the gendered status quo while detracting from healthy heterosexual unions."); *see also* TASLITZ, *supra* note 66, at 106 ("A lawyer who fails to appeal to race or gender bias will start losing cases if biased appeals work with juries.").

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

with women.¹¹² Other stereotypes have associated the black race with lust and being oversexed.¹¹³ Some of these stereotypes perpetuate the belief that the contraction of an STD is not a personal violation. They also suggest that a plaintiff-victim may not be traumatized by his or her condition.¹¹⁴ As a result, fact finders who hold these misconceptions may disregard some of the factual elements of the case and decide the case on the basis of stereotypes.¹¹⁵

Similarly, in rape cases, studies indicate that individuals with “macho personalities” assign more blame to rape victims.¹¹⁶ These same individuals might be more prone to shift blame toward a plaintiff-victim who contracted an STD. When an individual seeks refuge with the legal system after contracting an STD, his or her belief that the legal system is unable to provide security and protection can cause plaintiffs to feel neglected and as though they are without recourse.¹¹⁷

Although courts recognize STD transmission cases as valid legal claims, litigation does not offer an effective means of resolving these disputes.¹¹⁸ Litigation produces winners and losers.¹¹⁹ However, with the contraction and spread of an STD, both parties may perceive themselves as having already suffered a loss.¹²⁰ If litigation is expected to resolve these disputes, for the parties involved, “[t]heir avenue for redress . . . is a sham.”¹²¹ Litigating STD disputes involves unwanted public exposure, heavy financial expenses, and uncertainty. Also, because sexual activity is at the root of these disputes, STD cases involve social, sexual, and gender issues that are not customarily present in other personal injury cases.¹²² As a result, litigation is an

¹¹² See RUDMAN & GLICK, *supra* note 64, at 232.

¹¹³ TASLITZ, *supra* note 66, at 28–33.

¹¹⁴ *Id.* at 63.

¹¹⁵ See TASLITZ, *supra* note 66, at 19 (explaining in the context of rape that “[s]he is thus both consenting to intercourse and deserving of some punishment for her vicious behavior . . .”).

¹¹⁶ *Id.* at 62.

¹¹⁷ *Id.* at 59.

¹¹⁸ See *supra* Part III.

¹¹⁹ TASLITZ, *supra* note 66, at 9.

¹²⁰ JUDITH F. MILLER, *COPING WITH CHRONIC ILLNESS: OVERCOMING POWERLESSNESS* 10 (3d ed. 2000) (explaining that people with chronic illnesses may suffer from depression, anxiety, and a sense of helplessness).

¹²¹ TASLITZ, *supra* note 66, at 137.

¹²² See *id.* at 134–45.

ineffective way to resolve STD disputes because it is unable to address the issues that are so inherent in these types of cases.¹²³

IV. THE ROLE OF MEDIATION IN STD DISPUTES

Compared to litigation, mediation provides a superior method to resolve disputes concerning the transmission of STDs. Mediation is a form of alternative dispute resolution that involves the presence of a third party to assist the parties involved in reaching a mutually acceptable settlement on the issues in dispute.¹²⁴ Its attractiveness is an effort to “cut costs, increase efficiency, and better respond to the public’s increasing demands on the traditional court system.”¹²⁵ The popularity of mediation is visible in many areas of the law.¹²⁶ Yet, its formal application to suits involving the transmission of STDs is limited.

The potential for mediation to serve as a valuable means of resolving STD disputes is illustrated by a recent dispute involving NFL football player Michael Vick. In 2008, a Georgia judge ordered Michael Vick to submit to mediation regarding his alleged transmission of herpes to his former girlfriend.¹²⁷ Three months later, news reports indicated that the two emerged from mediation after agreeing “to an undisclosed resolution of the case.”¹²⁸ Although mediation is not commonly used in STD disputes, the outcome it produced in Vick’s conflict is evidence that mediation may have a promising effect in this area of the law.

A. The Recognition of STD Cases as Valid Legal Claims Make These Disputes Ripe for Mediation

Although litigation is not the most effective means of resolving STD disputes, its recognition as a valid outlet, through which plaintiffs can

¹²³ *Infra* Part IV. A–D.

¹²⁴ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (3d ed. 2003).

¹²⁵ René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 95 (2001).

¹²⁶ *Id.*

¹²⁷ *Michael Vick in Mediation in STD Case*, 11.com, Jan. 15, 2006, http://www.11alive.com/news/article_news.aspx?storyid=74636.

¹²⁸ *Settlement*, *supra* note 83. The specifics of Vick’s mediation are unknown, as the attorney for Vick’s former girlfriend stated “[t]he only comment I’ve got is the case has been resolved.” *Id.*

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

recover, is fundamental.¹²⁹ Mediation does not require the existence of a legally recognized issue.¹³⁰ One of its unique features is that it provides parties a forum to address non-legal matters that are unwelcome or ill-suited for the courtroom.¹³¹ However, it is the threat of litigation that encourages most defendants to participate in mediation.¹³²

For example, in STD transmission cases, a statute of limitations can be a substantial hindrance, or complete bar, to many would-be plaintiffs.¹³³ Although mediation does not require that the statute of limitations still be in effect, mediation is most effective when the statute of limitations has not yet expired because the threat of being held civilly liable still remains.¹³⁴ The uncertainty of how a court will rule in one's case can also be an incentive for both parties to agree to mediate the dispute.¹³⁵ Even in states that do recognize STD claims, litigation provides neither party with a guarantee of

¹²⁹ See *Michael Vick*, *supra* note 127 (stating that Vick agreed to provide blood samples and his medical records in preparation for mediation).

¹³⁰ See MOORE, *supra* note 124, at 16 (explaining that mediation requires conflict and that a conflict is simply a struggle between two or more people over such things as values, status, power, or resources).

¹³¹ See *id.* at 379.

¹³² *Id.*

¹³³ Statutes of limitations are laws imposed by each state that establish a time limit for filing a civil lawsuit. BLACKS LAW DICTIONARY 1546 (9th ed. 2009). The rationale behind such laws is to encourage "diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh." *Id.*; see also Sobal, *supra* note 13. In Minnesota, for example, the Court of Appeals of Minnesota addressed a case in which a husband alleged that his wife infected him with genital herpes. *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 103 (Minn. Ct. App. 1988). The court, however, barred the husband's battery and intentional infliction of emotional distress claims because the husband did not assert his claims against his wife until five years after he discovered he had been given the virus. *Id.* at 109; see also *Duke v. Housen*, 589 P.2d 334, 347 (Wyo. 1979) (denying relief because the statute of limitations had expired). *But see Beller v. Tilbrook*, 571 S.E.2d 735, 736 (Geo. 2002) (two year statute of limitations was tolled and the wife was permitted to proceed with her false misrepresentation case against her husband because the wife was "entitled to repose confidence and trust" in her husband, and the two were involved in a relationship of confidence and trust that deterred her from getting tested for the disease.).

¹³⁴ See Sobal, *supra* note 13.

¹³⁵ See MOORE, *supra* note 124, at 13 (suggesting that external constraints such as the "unpredictability of a judicial decision" is often a factor indicating a conflict is well-suited for negotiation); see also Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 72-73 ("Settlement, thus, offers litigants an opportunity to avoid, or at least minimize, regret, while trial increases the likelihood litigants will experience regret.").

prevailing. The prospect of being held civilly liable by a court provides parties in an STD dispute with an incentive to mediate, and it equips victims with an alternative means of recourse if mediation is unsuccessful.¹³⁶

B. Mediation Offers Privacy for the Parties Involved in an STD Dispute

The embarrassment and public exposure of litigating an STD case in a public forum can be minimized through the use of mediation to resolve the dispute. Unlike a civil lawsuit, mediation is a private means of dispute resolution.¹³⁷ It welcomes only the parties engaged in the conflict, a mediator, and those individuals whom the parties authorize to be present.¹³⁸ Additionally, no public record is produced.

Not only does mediation take place behind closed doors, away from both the public and the media, but mediation also provides other privacy protections.¹³⁹ It has the benefit of formal privacy protections such as the confidentiality of settlement discussions and state laws on nondisclosure and confidentiality.¹⁴⁰ Thus, in an STD dispute, mediation can ensure that the facts, the statements made, and the settlements that occur during mediation remain confidential.¹⁴¹

In STD cases, the use of pseudonyms to preserve party anonymity demonstrates that parties place a high degree of importance on individual privacy.¹⁴² The stigma associated with STDs and the intimate details that must be disclosed when litigating these cases also make STD disputes well suited for mediation. The privacy that these parties desire is an inherent feature that is available through mediation.¹⁴³

¹³⁶ See MOORE, *supra* note 124, at 379.

¹³⁷ *Id.* at 151.

¹³⁸ See JOHN M. HAYNES, *THE FUNDAMENTALS OF FAMILY MEDIATION* 2 (1994).

¹³⁹ Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 DISP. RESOL. J. 48, 54 (2008).

¹⁴⁰ Most states have confidentiality laws that encourage mediation. *Id.*

¹⁴¹ See *id.*

¹⁴² See, e.g., *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992); see also *Doe v. Roe*, 267 Cal. Rptr. 564 (Cal. Ct. App. 1990), *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988), *Doe v. Johnson*, 817 F.Supp. 1382 (W.D. Mich. 1993), *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988), *M.M.D. v. B.L.G.*, 467 N.W.2d 645 (Minn. Ct. App. 1991).

¹⁴³ See HAYNES, *supra* note 138, at 2 (explaining that most people prefer to solve interpersonal disputes privately and amongst themselves).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

Arguably, the idea that STDs are a matter of public concern would suggest that STD disputes should not be shielded from the public through the use of mediation. However, the rates of STDs in the United States are on the rise.¹⁴⁴ This is evidence that the policy rationales that courts often cite when upholding STD claims—protecting the public's health and deterring risky and misleading behavior—are not being achieved through litigation.¹⁴⁵

Mediating STD disputes behind closed doors diminishes what limited deterrent effect litigation strives to effectuate. But mediating these disputes does not necessarily thwart the prospect of deterrence. Even through mediation, the deterrent element of these disputes may still be achieved through the media.¹⁴⁶ For example, the news media surrounding Michael Vick's mediation is evidence that such conflicts, even when submitted to mediation, are not always fully removed from the public eye.¹⁴⁷ But by shielding the intimate facts of STDs case from the public, mediation strikes a balance between public awareness of an important public health issue and protecting the privacy of the parties involved in the dispute.

The excessive media attention that STD lawsuits attract, combined with the public nature of court records, are means of informing the public that STD disputes are legally recognized claims and that a potential remedy exists for some individuals.¹⁴⁸ However, the educational value that these lawsuits offer is not sufficient to deny STD disputes the opportunity to be resolved through mediation, which is better able to address the needs and circumstances of the parties that are directly involved. And as previously discussed, mediation will not wholly eliminate the public exposure of STD cases. This is because the media will undoubtedly continue to cover some cases, such as Vick's, that are submitted to mediation.

C. Mediation Is an Affordable Means of Resolving STD Disputes

Another reason mediation is appropriate to resolve STD transmission disputes is that mediation is generally less expensive than litigation.¹⁴⁹ In terms of counsel fees, it is generally less expensive than other forms of

¹⁴⁴ Youth Connection, *supra* note 6, at 22.

¹⁴⁵ *See id.*

¹⁴⁶ *See* 11.com, *supra* note 127.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* For example, coverage of Vick's mediation was published on 11.com, an Atlanta television news channel's website.

¹⁴⁹ Natasha C. Meruelo, *Mediation and Medical Malpractice*, 29 J. LEGAL MED. 285, 292 (2008).

alternative dispute resolution as well.¹⁵⁰ The cost of a mediator can vary depending on the mediator's background and the geographic location of the parties.¹⁵¹ However, some mediators will be able to provide a party with an estimated total cost of mediation before a party agrees to utilize the mediator's services.¹⁵² Through mediation, parties can avoid having to pay expensive courtroom costs.¹⁵³ Because mediation is often faster than litigation, parties spend less time resolving the dispute and fewer funds are expended on attorneys' fees.¹⁵⁴

Mediating STD disputes also provides low-income individuals with an affordable remedy. Socioeconomic status has a significant influence on one's sexual health.¹⁵⁵ An individual with a lower socioeconomic status is more at risk for contracting an STD.¹⁵⁶ Therefore, because mediation is less expensive than litigation, mediating an STD dispute would be a cost effective method for those most at risk for contracting STDs. Also, most "mediators feel an ethical obligation to provide free or reduced-fee services for [parties] with very limited incomes and assets."¹⁵⁷ This is another feature that makes mediation appropriate for low-income individuals, who carry the highest risk of contracting an STD.

D. Mediation Caters to the Emotional Concerns Inherent in STD Cases

Civil suits that involve the transmission of STDs offer little attention to the emotional needs of the parties.¹⁵⁸ Even claims based on IIED focus on

¹⁵⁰ See Carper & LaRocco, *supra* note 139, at 54; see also Guthrie, *supra* note 135, at 47-48.

¹⁵¹ PAULA JAMES, THE DIVORCE MEDIATION HANDBOOK: EVERYTHING YOU NEED TO KNOW 38 (1997).

¹⁵² *Id.* at 39.

¹⁵³ *Id.*

¹⁵⁴ See Guthrie, *supra* note 135, at 47-48.

¹⁵⁵ Press Release, Ctr. for Disease Control, Annual CDC Report Finds High Burden of Sexually Transmitted Diseases, Especially Among Women and Racial Minorities, Jan. 13, 2009, available at <http://www.cdc.gov/nchhstp/newsroom/PressRelease011309.html>.

¹⁵⁶ *Id.* ("Higher rates of poverty among blacks than whites, and socioeconomic barriers to quality healthcare and STD prevention and treatment services have been associated with higher prevalence and incidence of STDs among racial and ethnic minorities.")

¹⁵⁷ JAMES, *supra* note 151, at 40.

¹⁵⁸ See *B.N. v. K.K.* 538 A.2d 1175, 1182 (Md. 1988) (stating the elements needed to prevail for a claim of intentional infliction of emotional distress, and simply stating

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

the legal elements needed to prevail; they do not address the plaintiff's need for emotional repair or well-being.¹⁵⁹

One area of law where mediation is being used extensively is medical malpractice.¹⁶⁰ Research studies indicate that many medical malpractice claims are emotionally driven, and that the majority of plaintiffs reported feelings of humiliation, betrayal, anger, and the need to punish the doctor as factors motivating their decision to file suit.¹⁶¹ Like medical malpractice claims, it is the emotional and financial issues associated with STD claims that make it ripe for mediation.¹⁶² Individuals who contract an STD from their partner suffer from many of the same emotional feelings that victims of malpractice suffer.¹⁶³ When personal matters such as one's health are affected in a permanent and disabling manner, it is not unnatural for an individual to have heavy emotional feelings.¹⁶⁴ Because STD cases are inherently emotional, "[l]ittle healing of the emotional wound is likely to occur without an opening of the heart through genuine dialogue, empowerment, and a recognition of each other's humanity despite the conflict."¹⁶⁵ Unfortunately, a civil lawsuit does not adequately address the emotional elements inherent in STD cases. But mediation does allow this healing process to occur by providing parties a safe forum to discuss the dispute, as well as their feelings.

"we obviously cannot pass on the sufficiency of the evidence as to the severity of Ms. N.'s emotional distress.").

¹⁵⁹ See generally *B.N.*, 538 A.2d at 1180–82 (considering a plaintiff's claim for intentional infliction of emotional distress, the court found that the wife had provided sufficient evidence to demonstrate that the transmission of herpes was intentional and outrageous).

¹⁶⁰ MOORE, *supra* note 124, at 31–32 (explaining the recent growth of medical malpractice claims and the use of mediation to resolve these disputes).

¹⁶¹ *Id.* at 32 (stating that 40% felt humiliated by their experience with their physicians, 50% felt betrayed, and 90% were very angry).

¹⁶² See *id.*

¹⁶³ MILLER, *supra* note 120, at 10 (explaining that people with chronic illnesses may suffer from depression, anxiety, and a sense of helplessness).

¹⁶⁴ See *id.*

¹⁶⁵ MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* 3–4 (2001).

1. *Mediation Provides a Safe Environment for Parties to Receive and Offer Apologies*

Mediation has the ability to deal with many of the emotional issues that a lawsuit is not capable of addressing.¹⁶⁶ When plaintiffs in medical malpractice suits were asked what could have been done to prevent litigation, 35% responded that the medical professional could have “apologize[ed] or offer[ed] further explanations.”¹⁶⁷ The fact that a significant number of plaintiffs desired a simple apology is evidence that an apology is a valuable tool.¹⁶⁸ One of the reasons mediation is effective in the context of medical malpractice disputes is because the plaintiffs who desire an apology are able to elicit one.¹⁶⁹

When an STD case is being litigated, the words “I am sorry” can certainly be spoken in the courtroom. However, the responses of the medical malpractice plaintiffs indicate that a sincere apology, if given *before* the parties enter the courtroom, can be a valuable tool that dissolves the need for parties to an STD dispute to proceed with litigation. An apology can cause the parties to never set foot into the courtroom in the first place.¹⁷⁰ This preventative value of an apology makes it useful in resolving conflicts surrounding the transmission of an STD.

Additionally, mediation offers a safe forum for parties to offer an apology. One of the reasons it is a safe forum is because it provides a potential defendant with a level of protection. Confidentiality agreements can be used to ensure that, while mediating an STD dispute, a party’s apology is not used against him or her in the event that negotiations fail, and the parties proceed to court.¹⁷¹

However, to be effective in STD disputes, not only must an apology be perceived as genuine, but it also must be voluntary. A compulsory apology is

¹⁶⁶ See MOORE, *supra* note 124, at 16.

¹⁶⁷ *Id.* at 32.

¹⁶⁸ See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1014–15 (1999) (suggesting that while in some cases an apology is as simple as “I’m sorry,” this phrase can be interpreted in a number of different ways. Generally, an apology encompasses three elements: “(i) admitting one’s fault, (ii) expressing regret for the injurious action, and (iii) expressing sympathy for the other’s injury.”).

¹⁶⁹ See MOORE, *supra* note 124, at 32.

¹⁷⁰ See Cohen, *supra* note 168, at 1015.

¹⁷¹ See *id.* at 1041 (describing how the rules of evidence, judicial protective orders, and confidentiality agreements offer a degree of protection for individuals who make apologies at the time of litigation, yet “mediation offers the ‘safest’ and most practical way to do this.”).

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

of little use to either party and would severely diminish the value of mediation.¹⁷² But mediating STD disputes enables a professional mediator or therapist to help steer the parties in a direction that might eventually produce a voluntary apology.¹⁷³

2. *Mediation Empowers Its Participants*

Mediation can also provide a sense of empowerment for those who contract an STD from their partner.¹⁷⁴ The recipient of an STD is likely to experience a range of emotions including anger, depression, and humiliation.¹⁷⁵ Most will feel both physically and emotionally violated.¹⁷⁶ Yet, “[m]ediation, as a future-oriented process, seeks to focus people on where they are going in their lives as separate, whole, independent people.”¹⁷⁷ To many parties of a dispute, a civil case means losing control of the situation, leaving the attorney to argue the legal merits of the case.¹⁷⁸ In situations involving such intimate acts and high emotions as in STD disputes, many parties will benefit from the ability to direct the discussion, thus creating a feeling of control.¹⁷⁹ This can be especially valuable for plaintiff-victims who may have experienced a loss of control after being infected with an STD.¹⁸⁰ In an attempt to diminish the sense of betrayal and humiliation associated with the contraction of an STD, “[u]nequal power needs to be redressed so that both sides have a fair opportunity for their competing tales

¹⁷² UMBREIT, *supra* note 165, at 64.

¹⁷³ MOORE, *supra* note 124, at 336–37 (“Mediators may want to coach parties in caucus on how and when to make, or not make, an apology.”).

¹⁷⁴ See TASLITZ, *supra* note 66, at 138 (explaining that rape victims often need a sense of empowerment to come to terms with the fact that they have been victimized).

¹⁷⁵ MILLER, *supra* note 120, at 10.

¹⁷⁶ Cary B. Cheifetz, *In Sickness . . . and in Health*, 27 FAM. ADVOC. 24, 24 (2005).

¹⁷⁷ Rimelspach, *supra* note 125, at 103 (addressing how and why court-connected mediation programs can be implemented to address domestic violence conflicts and family disputes (quoting Kathleen O’Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303, 313 (1990))).

¹⁷⁸ See HAYNES, *supra* note 138, at 4 (explaining that litigation often results in the attorneys’ and court’s definition of the legal issue being more important than actually trying the case).

¹⁷⁹ See UMBREIT, *supra* note 165, at 50–53 (explaining that the mediator can cater toward the needs of the parties and that the “[p]articipants will benefit from the opportunity to tell their stories uninterrupted.”).

¹⁸⁰ See MILLER, *supra* note 120, at 10.

to be heard. . . .”¹⁸¹ For the same reasons that some individuals favor mediation in domestic violence disputes,¹⁸² mediation in the current context can help restore a sense of value and strength to individuals who contract an STD.

In emotional interpersonal conflicts, such as STD disputes, mediators may play a different role than in other disputes.¹⁸³ Reaching a monetary settlement is often an important component of mediation.¹⁸⁴ But the personal and emotional elements inherent in STD cases demand that the parties communicate and engage in open dialogue, which would enable the parties to come to “grips with a painful and tragic event.”¹⁸⁵ The confidential nature of mediation fosters openness.¹⁸⁶ Thus, it is more likely that the parties will be able to openly and honestly discuss their dilemma.¹⁸⁷ In an STD dispute, mediation could promote “greater candor and decrease the posturing so often found in public adversarial relationships.”¹⁸⁸ When mediating an STD dispute, both parties can gain the confidence and strength to ask the questions he or she wants answered.¹⁸⁹

Mediating STD disputes would be especially beneficial for women, who are biologically more susceptible to STDs than men.¹⁹⁰ It is said that many

¹⁸¹ TASLITZ, *supra* note 66, at 61.

¹⁸² See MOORE, *supra* note 124, at 27–28; UMBREIT, *supra* note 153, at 51–52.

¹⁸³ See UMBREIT, *supra* note 165, at 10.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 50–51.

¹⁸⁶ MOORE, *supra* note 124, at 151.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See UMBREIT, *supra* note 165, at 47.

¹⁹⁰ NUJOLE V. BENOKRAITIS, MARRIAGES AND FAMILIES: CHANGES, CHOICES, AND CONSTRAINTS 194 (3d ed. 1996). Women are more susceptible to STDs, in part because they have more surface area than men, providing a greater likelihood of exposure to the virus. *Id.* at 195. In the absence of condom usage, a man’s exposure to a virus is limited to the duration of sex, while bodily fluids containing viruses may remain inside a woman’s body. *Id.* Additionally, some STDs such as gonorrhea are more easily transmitted from men to women, than from women to men, and “STDs are also more likely to remain undetected in women” because women have fewer physical symptoms than men. INST. OF MED., *supra* note 2, at 34–36. See also *Preventing Sexually Transmitted Diseases*, in Md. Health Improvement Plan 2000-2010, at 129, available at <http://www.fha.state.md.us/pdf/ohpp/hip/stds.pdf>; INST. OF MED., *supra* note 2, at 308–09 (providing a chart of syndromes and complications of STDs and how they affect men and women). Additionally, STDs can cause women the added burden of pregnancy-related problems, which can include actual complications during delivery and the possibility of infecting her newborn with the disease. *Id.* at 20.

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

women approach problem-solving from an interactive perspective and that they prefer the “give-and-take” of a discussion.¹⁹¹ Unlike litigation, which is adversarial, mediation would be especially appropriate for individuals who favor the use of collaborative dialogue to resolve disputes.¹⁹²

3. The Potential Role of Therapists in Mediating STD Disputes

As opposed to litigation and other forms of alternative dispute resolution, mediation leaves ample room for flexibility and for the parties involved to find creative solutions to their conflict.¹⁹³ Mediation provides room for mental health professionals to be involved in the party’s discussions.¹⁹⁴ It is unavoidable that parties in an STD dispute will have feelings of betrayal, frustration, and depression.¹⁹⁵ A therapist can aid parties in addressing these emotional issues.¹⁹⁶ Some therapists are dually trained to serve as mediators and can help parties maneuver through emotionally difficult discussions.¹⁹⁷

Proponents of victim-offender mediation—a form of mediation used primarily in criminal cases—discuss the value of having a support person accompany victims during mediation.¹⁹⁸ When mediating an STD dispute, the presence of a support person for both the victim and the individual who transmitted the infection could also be beneficial.¹⁹⁹ In an STD dispute, both individuals are infected with the disease. The majority of STD cases that are litigated involve incurable viral infections and there is a high probability that the parties mediating an STD dispute would also have an incurable viral STD.²⁰⁰ Because individuals coping with chronic illnesses often find comfort

¹⁹¹ JAMES, *supra* note 151, at 17.

¹⁹² *Id.* at 17–18.

¹⁹³ Carper & LaRocco, *supra* note 139, at 59.

¹⁹⁴ JAMES, *supra* note 151, at 33.

¹⁹⁵ See HAYNES, *supra* note 138, at 28 (explaining that parties in family disputes maintain such feelings).

¹⁹⁶ See JAMES, *supra* note 151, at 33. *But see* HAYNES, *supra* note 138, at 28 (stating that when emotions dominate mediation, they are given precedence over the legitimate issues and concerns of the party).

¹⁹⁷ See JAMES, *supra* note 151, at 33 (explaining that therapists can be useful in divorce mediation). “Whereas a lawyer usually concentrates on moving efficiently through legal matters, therapist may focus on exploring the emotional dynamics of a couple to improve their communication.” *Id.*

¹⁹⁸ UMBREIT, *supra* note 165, at 23.

¹⁹⁹ See *id.* (stating that the presence of a friend or relative can provide a sense of comfort).

²⁰⁰ *Supra* Part II. A.

with a close friend or family member, it is appropriate for both parties involved in an STD dispute to have the option of an added sense of security through the presence of a friend or relative.²⁰¹ The presence of a support person while mediating an STD dispute may encourage the parties to be open and honest, one of the essential elements of an effective mediation.²⁰²

4. The Neutral Role of a Mediator Enables Parties to Establish Confidence in the Resolution Process

For STD mediation to be successful, it is important for the parties to know that the process is credible.²⁰³ In STD disputes, the presence of a mediator, instead of a judge or jury, can be influential in assisting parties to resolve the dispute.²⁰⁴ Mediating STD disputes could foster communication and open dialogue between the parties because it provides an environment where the parties can avoid being judged by the external parties that are typically present in a courtroom.²⁰⁵ Additionally, successful outcomes can result when individuals attempt to resolve interpersonal conflicts among themselves.²⁰⁶ Unlike the adversarial nature of litigation, which often focuses on the legal issues,²⁰⁷ mediation focuses on the individuals involved. In mediation, a mediator assists the parties in expressing their interests and helps them reach a mutual decision based on a mutual understanding.²⁰⁸ Mediation encourages mediators to use their judgment, and to remove themselves from the conversation when appropriate.²⁰⁹

Because mediation eliminates external opinions, mediation may be a more attractive form of dispute resolution for minorities and women who fear that presenting their case in a courtroom, in front of a judge or jury, will lead

²⁰¹ See LYONS, SULLIVAN & RITVO, *supra* note 51, at 63–65 (explaining the importance of social support networks when coping with a chronic disease).

²⁰² See UMBREIT, *supra* note 165, at 23.

²⁰³ See *id.* at 21.

²⁰⁴ See HAYNES, *supra* note 138, at 8 (explaining the role of a mediator as a neutral aid to the parties).

²⁰⁵ MOORE, *supra* note 124, at 18.

²⁰⁶ *Id.* at 2.

²⁰⁷ See HAYNES, *supra* note 138, at 4.

²⁰⁸ MOORE, *supra* note 124, at 18, 32 (describing a mediator's tasks to include "assist[ing] the parties in examining their interests and needs, to help them negotiate an exchange of promises, and to redefine their relationship in a way that will be mutually satisfactory and will meet their standards of fairness.").

²⁰⁹ See UMBREIT, *supra* note 165, at 10.

THE BENEFITS OF MEDIATION IN LAWSUITS INVOLVING STDs

to unfair and unfavorable results.²¹⁰ During mediation, the stigmas associated with STDs are eliminated because the mediator plays a neutral role.²¹¹ When parties agree to mediate an STD dispute, knowing that a mediation program is credible and can produce fair and mutually acceptable results enhances both parties' sense of confidence and satisfaction with the outcome of the mediation.²¹²

V. CONCLUSION

It is said that “[t]he need for societal and individual retribution is great when society’s deepest moral codes . . . are violated.”²¹³ Although civil courts provide some protection for individuals who are wrongfully infected with an STD, victims face a number of obstacles in their efforts to seek justice through litigation. Fortunately, an alternative means of resolving these disputes is through the use of mediation. Over the past few years, mediation has grown increasingly popular in resolving personal injury matters, domestic disputes, and a number of other conflicts.²¹⁴ STD cases should follow this lead and take advantage of the many benefits mediation can offer. Mediating STD disputes enables parties to address the intimate emotional issues inherent in these disputes, as well as general practical concerns, such as the desire to protect their privacy and the ability to finance an effective resolution.²¹⁵

‘Hook ups’ and one-night stands are part of the evening curriculum today, and although private conversations may include discussions of the . . . color choices of condoms, it is what is often not said that has invited lawyers and sometimes the state back into the sacred precinct of the bedroom.²¹⁶

Because it is too often “what is not said” that drags STD disputes into the courtroom, mediating STD disputes is an opportunity to encourage parties to openly discuss what may not have been discussed in the past.

²¹⁰ See HAYNES, *supra* note 138, at 27–28.

²¹¹ *Id.*

²¹² See UMBRETT, *supra* note 165, at 21.

²¹³ TASLITZ, *supra* note 66, at 59.

²¹⁴ MOORE, *supra* note 124, at 22–33.

²¹⁵ HAYNES, *supra* note 138, at 27.

²¹⁶ DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA* 462 (2004).

