

## Mediation From a Feminist Perspective: Promise and Problems

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### Introduction

The interest in alternative dispute resolution is intensifying in this country and others as well. Programs offering mediation, arbitration, negotiation and conciliation services are proliferating throughout the United States, Canada, Australia and Western Europe. These programs may be court-related or community-based. In either case, the overt justifications for mediation programs are similar. Mediating conflict as a substitute for litigating disputes has been justified by two basic rationales: First, the formal court system is not suited to handle the range and number of disputes being brought to it. Second, the adversary process itself is not suited to resolve interpersonal disputes.<sup>1</sup>

While mediation is flourishing, concern about the theory and practice of "informal" justice is also increasing.<sup>2</sup> Most of the criticisms focus on the manipulative potential of informal systems such as mediation. For example, critics suggest the bureaucratic logic that supports state legality is as much a part of the process in informal and non-bureaucratic settings as it is

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1. See generally Daniel McGillis, Recent Developments in Minor Dispute Processing, National Institute of Law Enforcement Assistance Administration, U.S. Department of Justice by ABT Associates under Contract No. JLEAA 81378.

2. It has been asked, for example, why informal systems purport to achieve justice in an unjust society when formal institutions cannot. It has been argued that just as the image of formal law is enhanced by legal representation and procedural protections, informal processes such as mediation use other mechanisms to convey the image of equality without achieving substantive equality. Critics further insist that compromise between unequals inevitably reproduces inequality, and that mediation limits and ultimately represses conflict. See generally Richard Abel, *The Politics of Informal Justice*, Vols I and II (1981).

in the formal court of law. Critics also suggest that the state, faced with fiscal crisis, achieves spending cuts by resorting to informalization, accompanied by appeals to popular participation, consensual social life, and the struggle against bureaucracy.<sup>3</sup> Others argue that mediation fosters the privatization of life—the cult of the personal—and denies the existence of irreconcilable structural conflicts between classes or between citizen and state.<sup>4</sup> Finally, critics claim that mediation is detrimental to the interests of women, who, being less empowered, need both the formal legal system and aggressive legal representation to protect existing rights and pursue new legal safeguards.<sup>5</sup>

Although these criticisms remain, the debate about mediation lacks a careful questioning of law and alternative dispute programs from a feminist perspective. For the most part, mediation's critics predicate their questions on the traditional view of law that litigation leads to social change and that the "lawsuit" is *the* appropriate and most effective vehicle for challenging unfair social practices, for protecting individuals, and for delineating new areas of guaranteed "rights."

This dominant view leaves unchallenged the patriarchal paradigm of law as hierarchy, combat, and adversarialness; and, therefore, generates only a certain kind of questioning of mediation. This viewpoint has not asked whether and in what way alternative dispute resolution reflects a feminist analysis of law and conflict resolution, and whether in theory and practice mediation challenges or reinforces gender inequality in contemporary society.

My intention in this discussion is to articulate some of the questions basic to an understanding of the relationship between law, mediation and feminist inquiry.<sup>6</sup> As one commenta-

3. Boaventura De Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, 8 Int'l J. of the Soc. of L. 379, 388-89 (1980).

4. Richard Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice* 9 Int'l J. of the Soc. of L. 245 (1981).

5. The National Conference on Women and the Law in Washington, D.C. (1983) (unpublished proceedings). Cf. Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1542 (1983) (mediation may be detrimental; women may need a more formal system).

6. This approach was chosen in part because the answers are unclear. Having mediated numerous disputes and directed the University of Massachusetts Mediation Project for the past two years, it is increasingly clear to the author that these questions need to be made explicit.

The University of Massachusetts Mediation Project began operation in February of 1981. To date, 90 mediators have been trained. The mediators represent a cross-section of the population including faculty, staff, students,

tor noted:

[O]bjective epistemology is the law of law. It ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own highest ideal of fairness. . . . Such law not only reflects a society in which men rule women; it rules in a male way. The rule form which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective as jurisprudence.<sup>7</sup>

What is not yet clearly developed is how mediation in theory reflects "a new jurisprudence, a new relation between life and law."<sup>8</sup> Further, what is not yet known is whether in practice, mediating disputes reflects feminist jurisprudential differences from the male ideology of law or whether mediating simply reinforces the "objective epistemology"<sup>9</sup> of law.

### I. Mediation in Theory: Feminist Pedagogy and the Study of Law

Social structures supporting the pedagogy practiced in traditional American law schools conflict with the social structures espoused as the basis of mediation. In traditional legal pedagogy, the case book is the emblem of the authoritative character of the law and the "Socratic Method" mirrors and reinforces the structure of authority. Traditional legal pedagogy is hierarchical with a vengeance.<sup>10</sup> It trains students to reject an analysis of social reality as it is subjectively experienced, and instead requires them to internalize a series of abstract rules.<sup>11</sup> Traditional legal pedagogy is deeply wedded to a patriarchal conception of law. This wedding is characterized by hierarchy, adversarialness, linearity, and rationality, a paradigm

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community members, and attorneys. Over 350 cases have been handled by the project. Of those cases which have formally been mediated almost 80% have successfully reached agreement. The types of cases that have been mediated include roommate problems, landlord/tenant conflicts, fraternity conflicts, sexual harassment disputes, family disputes, consumer problems, and business partnership disputes. The University Mediation Project is supported by the University and a Massachusetts foundation. Disputes are referred to the project from all parts of the University hierarchy, the local bar, clergy, the probate and district courts, and the community, whose awareness of the project is increasing.

7. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 645 (1983).

8. *Id.* at 658.

9. *Id.* at 645.

10. Duncan Kennedy *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 40-61 (David Kairys ed. 1982).

11. Meredith Gould, *The Paradox of Teaching Feminism and Learning Law*, ALSA Forum: A Journal of Interdisciplinary Legal Studies, issues 2 & 3 (combined issue) (1983).

in which reason is synonymous with rule and the ideal of the reasonable man is the fundamental frame of reference for making decisions.<sup>12</sup> Whereas formal law reinforces the dominance of hierarchy and rationality supporting traditional ideas of public and private,<sup>13</sup> mediation challenges these notions. By explicitly asking different kinds of questions, by supporting dialogue and by challenging the authority of "objective epistemology" implicit in the law and in legal teaching, a new pedagogy emerges which is essential to a new way of thinking about law. This new pedagogical approach, in a mediation course, places the emphasis on the female concerns of responsibility and justice. These concerns contrast with the concerns for individual rights<sup>14</sup> that are characteristic of the male pedagogy dominant in law school and most other academic settings.

The study of mediation thus introduces and, indeed, requires a feminist pedagogy, a feminist pedagogy fundamentally different from traditional legal pedagogy.<sup>15</sup> "[F]eminist method is consciousness raising: the collective critical reconstitution of the meaning of women's social experience as women live through it."<sup>16</sup>

Legal pedagogy involves a learning process in which "facts, issues, principles, reasoning and laws are learned without specific reference to behavior or experience; where students are required to think in legal terms and to articulate problems and issues in the language of the law."<sup>17</sup> Legal pedagogy reflects the power relationships which feminist theory challenges. The study of mediation from a feminist perspective focuses on questions which are antithetical to traditional legal study: Is liberal law and the rationalistic linear mode of thinking, of which law study is a part, in some fundamental way male and distinguishable from female contextual

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12. Janet Rifkin & Peter d'Errico, *Response to Zillah Eisenstein*, *ALSA Forum: A Journal of Interdisciplinary Legal Studies*, issues 2 & 3 (combined issue) (1983).

13. Jean Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (1981).

14. See generally Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

15. See Marylyn Boxer, *For and About Women: The Theory and Practice of Women's Studies in the United States*, 7 *Signs* 661 (1982).

16. Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory* in *Feminist Theory: A Critique of Ideology* 29 (Nannerl Keohane, Michelle Rosaldo & Barbara Gelpi eds. 1982).

17. Gould, *supra* note 11.

thinking?<sup>18</sup> Do women have a distinct moral language emphasizing concern for others, responsibility, care, and obligation as distinguished from male morality, which focuses on abstract notions of individual rights?<sup>19</sup> Do female and male engenderment generate different modes of thinking and discourse and is it useful to distinguish between them?<sup>20</sup>

These questions not only exist outside the framework of traditional legal teaching but also represent a challenge to the way of thinking that supports the operation of law in this society. Theoretically, at least, the study of mediation challenges traditional pedagogy. This challenge and mediation's emphasis on the female concerns of responsibility and justice necessitate framing questions from a feminist perspective.

## II. Mediation in Practice: Promise and Problems

Mediation in practice operates as a process of discussion, clarification, and compromise aided by third party facilitators. It is a process in which the third party has no state-enforced power. A third party's power lies in the ability to persuade the parties to reach a voluntary settlement. It involves the creation of consensus between the parties in which the parties are brought together in an atmosphere of confidentiality to discover shared social and moral values as a means of coming to an agreement.<sup>21</sup>

In mediation, the focus is not on formal and substantive rights. The emphasis is on the process by which the individual parties are encouraged to work out their own solution in a spirit of compromise. The intervention of a mediator turns the initial dyad of a dispute into a triadic interaction of some kind. However, the disputing parties retain their ability to decide whether or not to agree and accept proposals for an outcome irrespective of the source of the proposals.

The following chart highlights some of the main contrasts between adjudication and the practice of mediation.<sup>22</sup>

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18. MacKinnon, *supra* note 16.

19. Gilligan, *supra* note 14.

20. Ann Freedman, (1983) (unpublished paper from the Conference on Critical Legal Studies at Rutgers University Law School in Camden, N.J.).

21. Conceptually, mediation and adjudication have nothing in common. The first involves helping people to decide for themselves, the second involves helping people by deciding for them. See P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* 3-7 (1979).

22. See generally *The Justice Motive in Social Behavior: Adapting to Times of Scarcity and Change* (Melvin Lerner & Sally Lerner eds. 1981).

Adjudication

public  
 formal  
 strict evidentiary rules

coercive  
 emphasis on conflict of interest, value dissensus  
 win/lose—combative  
 decision oriented  
 rule oriented  
 professional decision maker  
 representation by lawyer

Mediation

private  
 informal  
 no formal parameters—conversationalist

voluntary  
 emphasis on areas of agreement, points in common  
 compromise—conciliatory  
 agreement oriented  
 person oriented  
 community lay volunteers  
 direct participation

Although the mediator is a neutral intervenor with no self-interest, a mediator does become a negotiator. In that role the mediator inevitably brings to the process, deliberately or not, certain ideas, knowledge, and assumptions.<sup>23</sup> What a mediator can do is also affected by the particular context and the parties' expectations of mediation.<sup>24</sup>

The question of a mediator's technique brings us back to the issue of whether the methodology of mediation is premised on the same view of objectivity inherent in legal ideology. If neutrality, an important feature of being a mediator, masks the same "objectivist" paradigm of law, then mediation, like legalism, reinforces the ideology fundamental to the state as male and further institutionalizes male power.<sup>25</sup> In theory, mediation is fundamentally different from law in that law

aspires to science, to the immanent generalization subsuming the emergent particularity, to prediction and control of social regularities and regulations, preferably codified. Courts intervene only in properly "factualized" disputes. . . . The separation of form from substance, process from policy, role from theory and practice echoes and

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23. Gulliver, *supra* note 21, at 213.

24. *Id.* at 214.

25. *Cf.* MacKinnon, *supra* note 7, at 645.

Mnookin and Kornhauser note that "[i]n view of the critical role of lawyers and the disparate functions they may perform, it is startling how little we know about how they actually behave." Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 987 (1979).

The question needs to be asked about the practice of law as well as the practice of mediation. Do lawyers base their work on the "objectivist" epistemology of law or in reality, do lawyers serve a more conciliatory, less paradigmatically "male" role?

re-echoes at each level of the regime its basic norm: objectivity.<sup>26</sup>

The rhetoric of mediation rejects the "objectivist epistemology" of the law. Theoretically, in mediation precedents, rules, and a legalized conception of facts are not only irrelevant but constrain the mediator's job of helping the parties to reorient their perception of the problem to the extent that an agreement can be reached.<sup>27</sup> The legal rights of the parties are not central to the discussion which takes place in mediation. Again, in theory, the lack of focus in mediation on abstract legal rights contrasts with the emphasis on them in legal proceedings.

These differences, however, are clearer in theory than in practice. The following two case studies reflect this. They only begin to fill the void in the literature on mediation. They provide a means through which questions about the practice of mediation (in contrast to the theory of mediation and the practice of law), can be examined more accurately. Numerous questions emerge from actually mediated disputes:

- 1) Does the mediation process substitute another form of "objectivist" manipulation of conflict?
- 2) Does the mediation process really shift the focus of the dispute from an abstract notion of right to the more female concerns of care, responsibility, and concern for others?
- 3) Does mediation involve a new definition of justice?
- 4) What is the measure of whether these things or others are happening in mediation? What kinds of questions need to be asked of the participants in particular and of the process in general?
- 5) Does mediation of a conflict alter the power relationship between the parties? Does it redistribute that power or does it perpetuate a relationship of inequality?
- 6) Does mediation, by requiring participation and decision making by the parties, offer a better forum for resolving problems in situations where traditionally women have been particularly victimized?

### Case Study 1: Separation and Divorce

The participants in this study were a man and woman who wanted to separate after fifteen years of marriage. They had three children aged six, eight, and ten. They had each retained separate counsel but after legal negotiations had broken down they decided to try mediation.

The woman came to the office first. The couple had agreed

26. MacKinnon, *supra* note 7, at 655-56.

27. See Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 327-28 (1970-71).

to separate ten months before but still occupied the same house. Relations were hostile and communication strained. The woman said that her children were not speaking to her and she felt that her husband was turning them against her. At the initial interview the woman said that the atmosphere among them—the lawyers, the children, and she and her husband—was so hostile that resolution of their marital dispute appeared impossible. She also indicated that she thought he needed “help.”

The husband’s interview verified her description. His anger and frustration were compounded because he had lost his job and was moving out of town within a month. He wanted to resolve the dispute before he moved. He also commented that she needed “help.”

The following is a *summary* of their concerns:

- Custody:** *He* wanted custody of the children.  
*She* supported his having custody, but feared that she might never see them again. During the mediation she agreed to give him full custody of the children once assured of ample visitation rights.
- Child Support:** *He* would “take care of his kids.”  
*She* was not in a position to support the children.
- Alimony:** *He* wasn’t willing to give her alimony.  
*She* was uncertain of her financial needs but said that she wanted some financial help while looking for a job. She agreed to no alimony.
- Property:** The financial settlement involved an extensive and complex division of property. The main asset was their house. She agreed to accept a lump sum of money and twenty-five percent of the net sale of the house over \$80,000 in lieu of alimony.

Their attitudes and relationship with their lawyers became one of the most difficult and perhaps interesting aspects of this case. Both of their attorneys initially agreed that mediation might be useful. The man stated that he planned to drop his lawyer and represent himself in court if the mediation went well. His lawyer offered to put any final mediation agreement into legal language for presentation to the court. In the end, the man represented himself with his attorney’s approval.

The woman came to the project with conflicting feelings

about her lawyer. Although aware that she might gain financially with a formal, contested divorce, she feared the process could irreparably damage her relationship with her children. The case coordinator initially advised her to talk with her attorney about using mediation. She did so and her attorney agreed, with some reservations about her ability to protect her own interests. As the mediation proceeded, she was advised several times to consult with her attorney but the case coordinator suspected that she was not doing so.

In the end, her attorney rejected the final mediation agreement and told her it was impossible for him to represent her if she insisted on keeping the agreement as the divorce settlement. She chose to discontinue the relationship with her attorney and she, like her husband, represented herself in the court proceedings. Her attorney was very upset and told the judge in her presence that he objected to her mediated settlement. The judge accepted the agreement after speaking with her at length.

#### **Case Study 2: Sexual Harassment**

A twenty-five year old undergraduate woman was very troubled about what she described as sexual harassment by one of her professors. She claimed that he had made many inappropriate inquiries in class about the backgrounds of the women students, wanting to know about their boyfriends, their parties, and other similar matters. During a conversation with him regarding a research assistantship, he offered to drive her home. She consented to this and on the way, they stopped for a drink. During their conversation she learned the position would involve working closely with him. The conversation led to a discussion of personal matters and he told her of his unhappy marriage. Later on he mentioned that he was very attracted to her and would like to go to bed with her. She felt extremely uneasy and said that she would have to think about it.

The next day she went to his office and rejected his sexual proposal. He said that he was disappointed. Two weeks passed without any mention of the job. When she finally approached him, he told her the position was no longer available. She was upset and went to the department chair, who recommended that she consider mediation. She also spoke to the school's dean, who initially reacted with disbelief, but later believed the student after speaking to the professor. The dean told them

both that he wanted the dispute worked out in mediation, but indicated that if he received another complaint he would dismiss the faculty member.

In a lengthy meeting with the mediation staff, the student learned that she could arrange for a more formal, potentially punitive process by requesting the administration to form an ad hoc hearing committee. She considered this alternative but requested mediation, claiming she did not want the professor fired. The professor also agreed to mediation.

During a four hour mediation session with the two parties, the student explained why the incident was so upsetting. The professor responded with tears and an apology. At the end of the mediation, they shook hands and both expressed satisfaction to the mediator. She said she mostly wanted the opportunity to make him hear her point of view. He said he understood and expressed appreciation at being spared the humiliation of a more public proceeding. She also expressed her relief at being able to avoid the pain of a public and more formalized hearing where her credibility might be subject to review and cross-examination. At the end of the mediation he apologized and offered her a job, which she rejected. He also promised not to penalize her by lowering her grade.

### Summary

Although critics of mediation charge that it may keep the less powerful party from achieving equality and equal bargaining power,<sup>28</sup> it is not so clear from these case studies how this operates in practice. These objections to mediation are inextricably tied to the view that the formal legal system offers both a better alternative and a greater possibility of achieving a fair and just resolution to the conflict. The general assumption that the lawyer can "help" the client more meaningfully than a mediator is part of the problem with this view. In many instances, although new substantive rights or legal protections are realized, patterns of domination are reinforced by the lawyer-client relationship, in which the client is a passive recipient of the lawyer's expertise. This is particularly true for women clients, for whom patterns of domination are at the heart of the problem.

In both case studies, it can be argued that the pattern of *dominance* was affected. "Dominance produces a hierarchical

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28. Olsen, *supra* note 5.

arrangement of the partners, which is reflected in differences in such aspects of the relationship as freedom of movement, the utilization of resources, and rights and responsibilities."<sup>29</sup> In these situations, the women felt that the relationship of dominance had been altered and the hierarchy in the relationship had to some extent been altered. A transformation of the pattern of dominance will affect the power relationship as well.

Although mediation programs are proliferating,<sup>30</sup> many questions remain. Why is the interest in alternatives intensifying? What kinds of disputes are best suited to mediation? Who should be mediators—lay persons, lawyers, or other professionals? What kind of training should mediators receive? Can mediation in practice alter the patterns of gender inequality in our society more effectively than formal law? Can the teaching of mediation begin to change and challenge the traditional approach to legal study? The answers to these questions may remain unclear, but if these issues are not addressed, mediation will simply become another popular "technique" marketed as a panacea for a range of complex social problems.

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29. Ted Huston, *Power*, in *Close Relationships* 170 (Harold Kelley, *et al.* 1983).

30. There are currently over 200 programs in the U.S. See American Bar Association Special Committee on Alternative Dispute Resolution, *Dispute Resolution Quarterly Information Update*.

