

7-1-2001

## A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens

Kate McCabe

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

---

### Suggested Citation

Kate McCabe, Comment, A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens, 21 N. Ill. U. L. Rev. 459 (2001).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact [jschumacher@niu.edu](mailto:jschumacher@niu.edu).

# A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens

KATE MCCABE

## INTRODUCTION

The radical notion that women have voices and the intelligence to use them has fueled the quest in this country for a recognition of women's rights.<sup>1</sup> Battling a history that has failed to acknowledge their contributions and arguably, their existence,<sup>2</sup> women have struggled to have their stories told.<sup>3</sup> The re-emergence of the women's movement in the latter half of the 20<sup>th</sup> century has resulted in changes in how contemporary women view themselves and their place in the world.<sup>4</sup>

Women's quest for recognition challenges the social, cultural, and legal structures, demanding that women be heard and acknowledged.<sup>5</sup> The legal system in particular has failed to hear women's stories.<sup>6</sup> The rise of alternative dispute resolution (ADR) during the last 25 years represents a dissatisfaction with the legal system and an effort to transform the dispute resolution process. As an ADR process that validates one's experience, mediation invites women to tell their stories and to have them heard. The nature of the process complements women's strengths and provides them with an alternative forum, thus promising an opportunity for women to share their individual and collective experiences.

This article explores the potential that mediation offers to women as a forum to tell their stories in their own voices. Part I explains the process of mediation. Part II examines the interplay of law, mediation and women, suggesting that the adversarial system has failed to acknowledge women and neglected to hear their voices or listen to their stories. This section also

---

1. See SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* (1989).

2. See GERDA LERNER, *THE CREATION OF PATRIARCHY* 4 (1986). "Until the most recent past, these historians have been men, and what they have recorded is what men have done and experienced and found significant." *Id.*

3. See DEENA METZGER, *WRITING FOR YOUR LIFE: A GUIDE AND COMPANION TO THE INNER WORLDS* (1992).

4. See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 176-79 (1982).

5. See BETTY FRIEDAN, *THE SECOND STAGE* (1981).

6. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. L. REV.* 589, 609 (1986).

investigates the role of mediation within the legal system and the dangers adherent in that position. Part III introduces feminism and feminist jurisprudence. Part IV looks at mediation as an alternative process and explores the vitality of an "ethics of care" and the critical importance of incorporating such an ethic into the dispute resolution processes. Part V considers the dangers of mediation for women and suggests that what are considered weaknesses should be viewed from a perspective of strength. Part VI applies a feminist jurisprudential lens to mediation, advocating that mediation in fact offers women greater opportunity to speak for themselves and share their experiences as women than the traditional adjudicatory system. The article concludes with the suggestion that a feminist framework should continue to influence the future of mediation, ensuring that it remains a woman-friendly process, holding the promise of giving women a place where their voices are heard.

### I. THE PROMISE OF MEDIATION

Mediation is a process in which a third party neutral (the mediator) works to facilitate communication between the disputing parties. Often this expanded communication results in a resolution of the dispute. By nature, it is a voluntary,<sup>7</sup> informal,<sup>8</sup> private process.<sup>9</sup> Confidentiality rules often attach, and information used or gained through the mediation process are not admissible in the event adjudication follows.<sup>10</sup> Advantages of the process include its nature, which allows the parties to retain control and decide the outcome.<sup>11</sup> This characteristic allows procedural flexibility and is more responsive to parties' needs than traditional adjudication.<sup>12</sup> Because the parties determine

---

7. Court-ordered mediation programs do exist and are growing in number. See JOAN BLADES, *FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT* (1985); LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES AND THE LEGAL SYSTEM* (1990).

8. Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 26 (1984). But see Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. SOC. L. 245, 249 (1981) (arguing that advantages claimed for informal institutions are vague and inconsistent).

9. Rifkin, *supra* note 8, at 26.

10. See Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1 (1995); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17 (1988).

11. Robert A. Baruch Bush, *Efficiency and Protection, Or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).

12. *Id.*

the agreement, better solutions emerge in which the parties have a sense of ownership and are more likely to voluntarily implement the agreement.<sup>13</sup> Mediation is hailed as faster, more efficient, and less costly than adjudication.<sup>14</sup>

Mediation defies a "black law" definition, and a wide variety of mediator roles and strategies are adopted and employed.<sup>15</sup> Robert A. Baruch Bush and Joseph P. Folger describe a transformative mediation which offers the parties an opportunity for empowerment and recognition in the process of resolving disputes.<sup>16</sup> Lon Fuller sees mediation as an opportunity for parties to "reorient" themselves to the other's perspective.<sup>17</sup> Deborah Kolb describes mediators as orchestrators and dealmakers.<sup>18</sup> Stulberg describes the mediator as a catalyst, an educator, a translator, an agent of reality, and a scapegoat.<sup>19</sup> The mediator may also be responsible for expanding the resources available to the parties and becoming the bearer of bad news.<sup>20</sup>

Leonard Riskin has mapped out a mediator's grid, describing the overarching style of the mediator as either facilitative or evaluative.<sup>21</sup> The mediator operates from a predominant quadrant on the grid, ranging from narrow evaluative to broad facilitative. According to Riskin, the facilitative mediator employs strategies and techniques designed to clarify and enhance communication between the parties, while the evaluative mediator uses a style designed to provide guidance to the parties.<sup>22</sup> Similarly, Sibley and Merry

---

13. *Id.* See also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34-35 (1982).

14. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717 (1993). But see Abel, *supra* note 8, at 246.

15. See JAMES J. ALFINI ET AL., *MATERIALS ON MEDIATION THEORY AND PRACTICE* (forthcoming 2001); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* (1994); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (2nd ed. 1994).

16. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* xvii (1994).

17. Lon L. Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

18. DEBORAH M. KOLB, *THE MEDIATORS* 23-45 (1983). Dealmakers see the role of the mediator as making deals. *Id.* at 41. Orchestrators see the mediator as a gatekeeper, providing a forum in which parties meet. *Id.* at 42.

19. Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91-94 (1981).

20. *Id.* at 93.

21. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

22. *Id.*

define two types of mediation styles, bargaining and therapeutic.<sup>23</sup> The bargaining mediator strives to reach a settlement whereas the therapeutic mediator works to help the parties communicate and identify areas of agreement.<sup>24</sup>

Regardless of the type of mediation and style employed, a prototypical framework of the mediation session is definable.<sup>25</sup> In a typical mediation session, the disputing parties meet with the mediator, who provides an opening statement explaining the process, sets rules, and answers questions. Next, the parties are given a chance to "tell their stories." The mediator may then choose to meet with the parties individually in a caucus. A caucus is a confidential, one-on-one meeting between the mediator and a disputing party and is often an opportunity for the party to divulge information that he or she is uncomfortable sharing with the other party or to step out from a posturing position and share authentic concerns.<sup>26</sup> After the mediator meets one-on-one with each party, the group reassembles for additional dialogue and ultimately an agreement.

Although the agreement is non-binding in a court of law, it may be enforceable as a contract between the parties.<sup>27</sup> Agreements are often in writing.<sup>28</sup> Lawyers may or may not be present during the mediation session; however, agreements may be contingent upon attorney approval.<sup>29</sup>

As an alternative dispute process, mediation lends itself to disputes which involve concerns not addressed in American jurisprudence, such as apologies.<sup>30</sup> It is a process well designed for disputants who are involved in ongoing relationships, such as landlord and tenants, family members, and neighbors.<sup>31</sup> The process is a method which brings out the real needs at issue. Most important, it offers an alternative to the adversarial courtroom battle which is idealized as "American justice." ADR proponents argue that an

---

23. Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 20 (1986).

24. *Id.* at 21.

25. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986); see also *supra* note 15.

26. See JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 107-122 (1987).

27. See Cathleen Cover Payne, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. ON DISP. RESOL. 385, 388-397 (1986).

28. *Id.*

29. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1346 (1995) (arguing that attorney participation promotes fairness in process).

30. See Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987).

31. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1367 (1985).

adversarial system is inadequate to handle human problems and that alternative dispute resolution processes provide a better means.<sup>32</sup> It is further suggested that mediation widens access to justice for people not within the dominant cultural group.<sup>33</sup>

## II. LAW, MEDIATION, AND WOMEN

As ADR in general and mediation in particular become integrated into the existing legal hierarchy, discussions on mediation neglect the promise of its key component, that it is an *alternative* dispute resolution method. Analyzed according to the semantic connotations of the word "alternative," it may seem that mediation is a substitute for the formal legal system. The strengths and weaknesses of mediation are evaluated in comparison to the dominant system of dispute resolution, using the same language and stance.<sup>34</sup> The discussion focuses on mediation's very nature, its position as an alternative, and being construed in that light, its paradigmatic boundaries will always be within the framework of the adversarial legal structure. Furthermore, because mediation is viewed in its alternative category as something less than the formal adjudicatory method, participants can fall back on "having their day in court" if the mediation "fails." Within that framework, participants are instilled with the image that the parties are adversaries seeking a kinder, gentler means to resolve their dispute, reserving the harsher litigation option as a failsafe, in case the mediation does not result in settlement.

Mediation may also be viewed not as a means to settlement but as a means to "exploring mutually acceptable outcomes."<sup>35</sup> Under this rubric, four core values underlying mediation are defined as: (1) promotion of self-actualization or self-determination of the individual disputants; (2) individual responsibility for actions taken by disputants; (3) responsibility of the disputant to understand the experience of others; and (4) responsibility to act in ways acknowledging that understanding.<sup>36</sup> Employing these core values, mediation offers the possibility of "acquiring truth by incorporating

---

32. Carrie Menkel-Meadow, *Pursuing Settlement In An Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 7 (1991).

33. Treuthart, *supra* note 14, at 717. *But see* Abel, *supra* note 8, at 247.

34. Menkel-Meadow, *supra* note 32, at 13. "As ADR becomes institutionalized within the court system, one can ask whether advocacy is one of the many tools of dispute resolution, or whether alternative forms of dispute resolution will be captured by the dominant culture of adversarial advocacy." *Id.*

35. Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution, A Myth: Bridge Makers Who Face the Great Mystery*, 25 U. TOL. L. REV. 253, 257 n.10 (1994).

36. *Id.* at 258.

everyone's version of the experience" and serves as the "theoretical rationale for building understanding and agreement in any mediation process."<sup>37</sup> Conversely, if the process works to perpetuate historical discrimination or bias against subordinated classes, it is not mediation.<sup>38</sup>

Carrie Menkel-Meadow argues that "the adversary system may no longer be the best method for our legal system to deal with all the matters that come within its purview."<sup>39</sup> She suggests a variety of reasons for this idea, including the ineffectiveness of using binary presentations of facts in a quest to learn the truth, which acts to distort the truth, simplify complexity, and blur issues.<sup>40</sup> Menkel-Meadow also criticizes the adversarial mind set for the way it teaches people to act.<sup>41</sup> As a whole, she suggests that the modern adversarial methods lack a search for truth, particularly in a postmodern, diverse society in which there are different types of truth dependent on one's viewpoint and perspective.<sup>42</sup> She envisions alternative dispute resolution models, including mediation, as solutions to the adversarial mind set.<sup>43</sup>

As Menkel-Meadow warns, mediation is in danger of "becoming corrupted by the persistence of adversarial values."<sup>44</sup> The prominent view of mediation as discussed and practiced is in danger of promoting prejudice against subordinated groups, including women.<sup>45</sup> The language of law "can make subordination seem natural and inevitable."<sup>46</sup> Thus, participation in the legal framework, be it in the courtroom or through a legalized mediation process, reinforces the same hierarchical structure which mediation was initially envisioned to combat.<sup>47</sup> "Law, in relation to women, is seen as a measured and rational set of beliefs which at the same time asserts a

---

37. *Id.* at 257 n.10.

38. *Id.* at 258-59.

39. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

40. *Id.* at 6.

41. *Id.* at 10.

42. *Id.* at 13-14.

43. *Id.* at 33-36.

44. *Id.* at 37.

45. Delgado, *supra* note 31, at 1360-61 (abandoning the formal legal system leaves subordinated groups without its protections).

46. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (exploring the relationship between process and the substance of coalition).

47. Blaustone, *supra* note 35, at 262. "The challenge in addressing diversity, justice and peace in dispute resolution is to make choices which result from an integrated perspective on difference and togetherness." *Id.*

mythological vision which is believed by many to present an accurate statement of the world."<sup>48</sup>

For women, maintaining a belief in the statements and solutions provided by the adversarial courtroom can be particularly detrimental. A brief survey of the landmark cases involving women's rights issues provides a context in which the law's view of women is exemplified. Based on common law notions, women were considered property of men, belonging to either their fathers or their husbands.<sup>49</sup> It was not until 1839 that the first state allowed married women to own the property they held prior to marriage or received during the marriage as bequest or gift.<sup>50</sup> State laws did not recognize women's right to contract, a doctrine that was used to prevent Myra Bradwell from admission to the Illinois State Bar.<sup>51</sup> Justice Bradley, in concurrence, stated, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."<sup>52</sup>

The special role assigned to women by society and reinforced by the legal system delegated women to the private sphere. Statutes regulated women's ability to enter the marketplace, fortifying women's second-place status and assuring their subordination to men. In upholding an Oregon statute that limited women's participation in the workplace while leaving unregulated men's participation,<sup>53</sup> Justice Brewer announced for the Supreme Court that "it is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him."<sup>54</sup> Furthermore, Justice Brewer stated "her physical structure and a proper discharge of her maternal functions – having in view not merely her own health, but the well-being of the race – justify legislation to protect her from the greed as well as the passion of man."<sup>55</sup>

48. Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 84-85 (1980).

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (Chitty ed. 1826). "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything..." *Id.*

50. NORMA BASCH, IN THE EYES OF THE LAW 27 (1982). The first state passing a married woman act was Mississippi.

51. *Bradwell v. State*, 83 U.S. 130 (1872). The Supreme Court found that Bradwell's incapacity to contract prevented her from performing "the duties and trusts that belong to the office of an attorney and counselor." *Id.* at 141 (Bradley, J., concurring).

52. *Id.*

53. *Muller v. Oregon*, 208 U.S. 412 (1908).

54. *Id.* at 422.

55. *Id.*



Nationwide, legislation further solidified women's place in the private sphere.<sup>56</sup>

It required a Constitutional amendment to extend the right to vote to women,<sup>57</sup> yet even this electoral equal ground did not place women on even footing with men in the eyes of the law. The notion of women as needing the special (paternal) protection of the law has required women to request from the courts rights unquestionably assumed by men. The formal equality argument, based on application of the Equal Protection Clause of the Fourteenth Amendment,<sup>58</sup> is premised on the concept of equal rights for men and women. In *Reed v. Reed*, the Supreme Court held that providing "a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ."<sup>59</sup> The Equal Protection argument has led to a number of successes for women,<sup>60</sup> but has also exacted a price. A formal equality argument evades the question of women's differences, particularly biological, and instead attempts to fit women into the defined categories of patriarchy. Responding to a formal equality argument, the Supreme Court found that discrimination does not exist on the basis of sex when pregnancy benefits are excluded.<sup>61</sup> According to Supreme Court Justice Sandra Day O'Connor:

The dilemma is this: if society does not recognize the fact that only women can bear children, then "equal treatment" ends up being unequal. On the other hand, if society recognizes pregnancy as requiring special solicitude, it is a slippery slope back to the "protectionist" legislation that historically barred women from the workplace.<sup>62</sup>

---

56. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan legislation disallowing women to work in a tavern unless owned by her husband or father); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding Washington minimum wage law applicable only to women); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding Florida statute which automatically exempted women from jury duty unless they expressly waive that privilege; overturned on Sixth Amendment grounds in *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

57. U.S. CONST. amend. XIX.

58. U.S. CONST. amend. XIV, § 1.

59. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

60. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Orr v. Orr*, 440 U.S. 268 (1979).

61. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

62. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1554 (1991) (Centennial Celebration: A Tradition of Women in the Law, Madison Lecture, in which Justice O'Connor examines the Supreme Court's jurisprudence in the area of women's rights).

Discussions such as Justice O'Connor's fail to recognize discrimination against women that is ingrained in the legal system. Considered by the United States Supreme Court to be a semi-suspect class, Legislation adversely affecting women is held to intermediate review,<sup>63</sup> reinforcing a legal hierarchy which fails to acknowledge historic discrimination against women and serves to subordinate women's positions as partners, parents, workers, and citizens. "The social definition of women has been constructed around the needs of men."<sup>64</sup> This social definition, based on traditional concepts of "woman," results in an "under-personification of women."<sup>65</sup> By defining femininity as submissive, dependent and domestic, the construct of *woman* reinforces a system of control by men.<sup>66</sup> This system in turn "reinforces itself in a circular pattern."<sup>67</sup> Ultimately, the result of this definition of woman is an incongruence between the image of "woman" and definition of "citizen."<sup>68</sup>

As mediation adapts itself into the legal framework, it is in danger of perpetuating this incongruence, leaving women in the same second-class position they are in within the legal system. As mediation has moved toward the mainstream, it has evolved along the traditional legal framework.<sup>69</sup> The National Conference of Commissioners on Uniform State Laws, in partnership with the American Bar Association Section of Dispute Resolution, is currently working on developing a Uniform Mediation Act<sup>70</sup> governing the field, and as mediation continues to be implemented in the court system, it begins to mirror that system's characteristics.<sup>71</sup> "The difficulty in all of this rule setting and mediation programming is that mediation is a subtle and perhaps even fragile process that may be disrupted and even undermined by the good intentions to manage it."<sup>72</sup> There are a number of ways in which mediation's connection

---

63. *Craig v. Boren*, 429 U.S. 190, 197 (1976) "Classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.*

64. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 452 (1984).

65. *Id.* at 455.

66. *Id.* at 456.

67. *Id.* at 459.

68. *Id.* at 465.

69. Menkel-Meadow, *supra* note 32, at 2.

70. Uniform Mediation Act (current draft), at [www.abanet.org/dispute/webpolicy.html](http://www.abanet.org/dispute/webpolicy.html) and [www.pon.harvard.edu/guests/uma/](http://www.pon.harvard.edu/guests/uma/). (last visited May 1, 2001).

71. See Menkel-Meadow, *supra* note 32; James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This The End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991) (analyzing concerns and practices threatening to transform mediation from a consensual to a coercive process).

72. Robert D. Benjamin, *Mediation as a Subversive Activity* (1998), available at <http://www.mediate.com/articles>.

with the court system jeopardizes the process, including framing the settlement within legal guidelines.<sup>73</sup> This characteristic, it is argued, may implicate the settlement in that it may be determinative of the settlement, as opposed to the parties implementing their own agreement. Furthermore, the design and implementation of court-referred mediation may impose a bias for the mediator to adopt.<sup>74</sup> In all, it is warned that "if mediation, as it is programmed into the legal structure becomes just another cog in the system to move cases or enforce preset notions of the correct result . . . mediation may become merely a means to coerce social harmony and order."<sup>75</sup> As a process "inherently at odds with the established order," it is argued that mediation should remain a subversive activity.<sup>76</sup>

Along similar lines, Janet Rifkin charges that the mediation debate "lacks a careful questioning of law and alternative dispute programs from a feminist perspective."<sup>77</sup> Accordingly, she argues that critics of mediation fail to explore "the patriarchal paradigm of law as hierarchy, combat, and adversarialness, . . . [which] therefore, generates only a certain kind of questioning of mediation."<sup>78</sup> Examining and exploring the field of mediation from a feminist perspective, and more specifically, through a feminist jurisprudential lens, enables the dialogue to move out of the patriarchal legal framework, with the potential of providing women with a "room of their own" for dispute resolution.

### III. FEMINISM AND FEMINIST JURISPRUDENCE

Feminism is a growing, living, evolving idea,<sup>79</sup> striving to define the world through women's perspectives. It seeks to empower women on their own terms.<sup>80</sup> As Adrienne Rich describes,

[T]he feminist movement could be said to be trying to visualize and make way for a world in which abortion

---

73. *Id.*

74. *Id.* For example, the author highlights "the best interest of the child" concept used in custody mediation, which has the potential to conflict with the mediator's neutrality. *Id.*

75. *Id.*

76. *Id.*

77. Rifkin, *supra* note 8, at 22 (arguing that inequality between men and women in mediation is not clear in how the process operates in practice).

78. *Id.*

79. See ROSEMARIE TONG, *FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION* (1989). Tong categorizes the various theories of feminism as liberal feminism, Marxist feminism, radical feminism, psychoanalytic feminism, socialist feminism, existentialist feminism, and postmodern feminism.

80. CATARINE MACKINNON, *FEMINISM UNMODIFIED* 22 (1987).

would not be necessary; a world free from poverty and rape, in which young girls would grow up with intelligent regard for and knowledge of their bodies and respect for their minds, in which the socialization of women into heterosexual romance and marriage would no longer be the primary lesson of culture; in which single women could raise children with a less crushing cost to themselves, in which female creativity might or might not choose to express itself in motherhood.<sup>81</sup>

Feminism "is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred."<sup>82</sup> Feminism recognizes the division in society between men and women, male and female, and seeks an integration.<sup>83</sup> Feminism proceeds on the theory that women have historically been subordinated by a society developed and maintained within a patriarchal framework.<sup>84</sup> Patriarchy, as defined by feminism, is any group or organization "in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive."<sup>85</sup>

Feminism, in challenging this view, employs a perspective of women and incorporates methods which embody that perspective. Feminist method demands a questioning of everything,<sup>86</sup> recognizing women's inequality to men.<sup>87</sup> Feminist method proceeds through consciousness-raising.<sup>88</sup> "Consciousness-raising is a vivid expression of self-creation and responsibility."<sup>89</sup> Its goal is individual and collective empowerment.<sup>90</sup> As an

81. ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE: SELECTED PROSE, 1966-1978* 16 (1980).

82. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635, 637 (1983).

83. LERNER, *supra* note 2, at 12-14.

84. *Id.*

85. Rifkin, *supra* note 48, at 83 (citing RICH, *supra* note 81, at 78).

86. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1384 (1986). The term "to question everything" comes from Adrienne Rich, who claims "one of feminism's tasks is to question everything. To remember what it has been forbidden even to mention." RICH, *supra* note 81, at 13.

87. CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 242 (1989).

88. Scales, *supra* note 86, at 1401.

89. *Id.* at 1402.

90. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 864 (1990).

individual and collective process, it supplies the means through which women's voices will be included.<sup>91</sup>

Feminist legal scholars have employed the feminist method of consciousness-raising in their quest to define a feminist jurisprudence. Feminist legal scholars contend that a "separation thesis" underlies jurisprudence and that modern legal theory is "essentially and irretrievably masculine."<sup>92</sup> Legal theory assumes a definition of human being which precludes women as defined by feminism.<sup>93</sup> Feminist legal scholars seek to depict a jurisprudence in which women's relational stance is encompassed, not marginalized. Built upon "feminist insights into women's true nature,"<sup>94</sup> it helps envision a world without patriarchy.<sup>95</sup> Feminist jurisprudence envisions a reconstructed legal order, one which includes and celebrates "women's ways of knowing."<sup>96</sup>

## VI. WHAT MEDIATION CAN LEARN FROM FEMINISM

The great promise of mediation emerges from its alternative nature. Similarly, the opportunities advanced by a vision of feminist jurisprudence are expansive because they too are unlimited by the historic, the traditional, and the status quo. Both concepts are formulated, reformulated, discussed, argued, applied, and criticized from and within a variety of arenas. As marginalized ideologies, both feminism and mediation share the privilege of creating a perspective that is not based on the patriarchal, hierarchal, linear framework which provides society the tools to disembowel, disenfranchise, and quiet the disharmonious voices. However, as especially apparent in the mediation debate, the conversation lulls because many of its commentators speak within the confines of the established discourse.<sup>97</sup> As feminists have long recognized, the master will not provide the means to tear down his castle.<sup>98</sup> Hence, like

---

91. Karst, *supra* note 64, at 505 (citing S. ROWBOTHAM, *WOMAN'S CONSCIOUSNESS, MAN'S WORLD* 33 (1973)).

92. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

93. *Id.* at 42.

94. *Id.* at 4. This perspective is in opposition to what is commonly accepted as the prevailing view, that of masculine insights assumed to define human nature. *Id.*

95. Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S LAW JOURNAL 64, 67 (1985).

96. *WOMEN'S WAYS OF KNOWING* (Mary F. Belenky et al. eds., 1985).

97. See Menkel-Meadow, *supra* note 32, at 7.

98. AUDRE LORDE, *Age, Race, Class and Sex: Women Redefining Difference*, in *SISTER/OUTSIDER* 112 (1984).

feminist discourse, dialogue on and about mediation needs to find its own language.<sup>99</sup>

Incorporated into the mediation debate, feminist jurisprudence invites a reformulation of the mediation process, a formulation that includes women's voices and provides an arena in which women are encouraged and empowered. Feminism retains the promise of returning law to its original purpose, "to decide the moral crux of the matter in real human situations."<sup>100</sup> Mediation, directed toward persons as opposed to law, which is directed toward acts,<sup>101</sup> offers a means by which to accomplish this return.

The first step toward a feminist jurisprudence is "to claim women's concrete reality."<sup>102</sup> Next, women need to recognize that individual rights in law embody male forms of power over women.<sup>103</sup> For women, the process of mediation moves away from the individual rights emphasis imbued in the American legal system and allows a recognition and empowerment of ways women connect with themselves and others. A feminist jurisprudence allows "women to speak for themselves."<sup>104</sup> Looking at mediation outside the legal framework provides a forum in which women cannot only speak for themselves but can speak in a language which is familiar to them.

Carol Gilligan's seminal book, *In a Different Voice: Psychological Theory and Women's Development*, posits that women see themselves and act from a perspective of relationships while men are more likely to operate from a perspective of logic and rules.<sup>105</sup> The male mode of moral reasoning, the "logic of the ladder," differs from the female "ethic of care."<sup>106</sup> Male reasoning creates a hierarchal "ethic of justice" while female reasoning is based on the structure of the web.<sup>107</sup> Women operating from an "ethics of care" consider responsibilities to others in decision-making.<sup>108</sup> In contrast, men, using an "ethics of justice" framework, focus on individual rights, the use of rules and a concept of fairness.<sup>109</sup> Those persons operating from an

---

99. See Blaustone, *supra* note 35, at 254 ("[I]t was time to craft an epic story which put the issues in a different form for dialogue."); Wishik, *supra* note 95, at 76.

100. Scales, *supra* note 86, at 1387.

101. Fuller, *supra* note 17, at 328.

102. MACKINNON, *supra* note 87, at 244.

103. *Id.*

104. See Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 755 (1989).

105. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 24-63 (1993).

106. *Id.*

107. *Id.*

108. *Id.* at 141-142.

109. *Id.* at 48, 73.

ethic of care see problems in light of the persons involved.<sup>110</sup> The ethic of care challenges the premise of separation underlying the notion of rights, and focuses on the way individuals experience those rights.<sup>111</sup> Moreover, the use of an ethic of care seeks to fulfill the needs of all involved, as in mediation, rather than satisfying one person as a winner, as in litigation.<sup>112</sup> Furthermore, an ethic of care incorporates "how the dilemma is resolved: the process by which the parties communicate may be crucial to the outcome."<sup>113</sup>

An emphasis on rights "authorize[s] the male experience of the world,"<sup>114</sup> stressing separation of the individual from the group.<sup>115</sup> Feminist theory uncovers the social dimension of individual experience and the individual dimension of social experience.<sup>116</sup> Feminist theory is concrete, growing out of direct experience, and acknowledging the importance of identifying that experience and "claiming it for one's own."<sup>117</sup> A feminist jurisprudence offers women a chance to tell true stories of their lives, and mediation offers the forum through which those stories can be told. Because mediation does not defer to or rely on the rules and procedures inherent in the courtroom, its flexibility allows women to speak for themselves, about themselves, and put into the discussion issues and concerns not recognized by the adversarial legal system.<sup>118</sup> As a process, mediation affords participants working from an ethic of care a forum from which to change the adversarial rules and to preserve relationships.<sup>119</sup>

Feminist method employs practical reasoning, acknowledging the multifaceted dimension of conflicts, which call not for one concrete resolution, but rather "imaginative integrations and reconciliations."<sup>120</sup> The use of practical reasoning allows the context of the situation to define not only the problem resolution but also to define what the problem is.<sup>121</sup> Mediation, likewise, strives to help disputants "understand themselves and relate to one

---

110. *Id.* at 31.

111. Schneider, *supra* note 6, at 614.

112. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 46 (1985).

113. *Id.* at 47.

114. MacKinnon, *supra* note 82, at 658.

115. Schneider, *supra* note 6, at 595.

116. *Id.* at 603.

117. *Id.* (citing ANDREA JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 11 (1983)).

118. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

119. GILLIGAN, *supra* note 105, at 44.

120. Bartlett, *supra* note 90, at 851 (quoting A. RORTY, *MIND IN ACTION* 274 (1988)).

121. Bartlett, *supra* note 90, at 851.

another *through and within conflict*."<sup>122</sup> "Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak, through rules, for the community."<sup>123</sup> Participants in mediation are not bound by defining the dispute in legal categories; hence, they are able to address feelings and perceptions relevant to the dispute.<sup>124</sup> Feminist practical reasoning integrates emotion and intellect, opening up new possibilities of analysis.<sup>125</sup> Those operating from an ethic of care express concern for the other disputant,<sup>126</sup> as well as the social contingencies of the dispute.<sup>127</sup> Mediation, especially transformative and facilitative, strives to explore multiple issues involved in the dispute and offers a "potential means to integrate the concern for right and justice and the concern for caring and interconnection."<sup>128</sup>

Alternative dispute resolution in general, and mediation in particular, offer a potential for kindness which is lacking in adjudication.<sup>129</sup> "The tendency of women to defer to another's point of view, insofar as it arises out of empathy and moral concern is a quality much needed in a society of growing racial and ethnic diversity."<sup>130</sup> Gilligan's recognition of the differences between men and women's moral stances does not suggest that the female "web" is the result of women's dependent condition.<sup>131</sup> Rather, woman's morality provides an "outlook recognizing the claims of both the actor's own well-being and 'the guiding principle of connection.'"<sup>132</sup> In its pure sense, women's web-based morality is not less than men's ladder-based morality, but merely a different perspective. It is regarded as less than the prominent view of morality because it has incorporated women's second-class citizenry and the corresponding stereotypes.

The feminist method of consciousness-raising offers a means by which to expand perceptions<sup>133</sup> and transform the image of women's relational stance

122. BUSH & FOLGER, *supra* note 16, at 4.

123. Bartlett, *supra* note 90, at 855.

124. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 3 NEG. J. 217, 226 (1995).

125. Bartlett, *supra* note 90, at 857.

126. GILLIGAN, *supra* note 105, at 135-36.

127. *Id.* at 100.

128. BUSH & FOLGER, *supra* note 16, at 5. *But see* Menkel-Meadow, *supra* note 124, at 230-239 (book review of Bush & Folger, arguing that the concept of transformative mediation is vague and presumptuous).

129. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 246-47. (1995).

130. Karst, *supra* note 64, at 491.

131. *Id.* at 484.

132. *Id.* (citing Gilligan, *supra* note 105, at 57-100).

133. Bartlett, *supra* note 90, at 863.



from a subordinate position to one of strength. Because the goal of consciousness-raising is individual and collective empowerment,<sup>134</sup> this message correlates with mediation's transformative potential.<sup>135</sup> For women, mediation provides an opportunity to employ consciousness-raising as a means to help change public perceptions of women by "articulating one's experiences and making meaning of them with others who also articulate their experiences."<sup>136</sup>

Karst envisions a goal wherein social and legal institutions are redefined to include women's perspective and to meet women's needs.<sup>137</sup> Rather than incorporating a perspective from the ladder, Karst argues that women use, employ and define power as "the capacity to provide care for others in the network of connection."<sup>138</sup> Law generally operates on a zero-sum basis,<sup>139</sup> that is, one pie that must be divided and the winner gets the bigger piece,<sup>140</sup> while mediation incorporates the option of expanding the pie so that everyone is satisfied. The ethic of care imposes a demand to convert the zero-sum basis of litigation to a more positive sum game.<sup>141</sup> Mediation invites a view of disputes as "a world of expanding resources to be shared through concern of the Other and a recognition of interdependence."<sup>142</sup> The reliance of law on abstract universality, divorced from the individuals involved in a dispute, has "no bridge to the concrete by which to ascertain the emerging and cultural qualities which constitute difference."<sup>143</sup>

Implicit in this process of reconstructing dispute resolution is a rejection of the relational-autonomy dichotomy, which weaves its power in commentary analyzing the effects of mediation on women. Perspective needs to be beyond and outside those boundaries which continue to formulate the questions and issues as either/or; mediate or adjudicate; win/win or win/lose; masculine or feminine; right or wrong. If feminists within the legal system are serious about

---

134. *Id.* at 864.

135. See BUSH & FOLGER, *supra* note 16; DEBORAH M. KOLB, WHEN TALK WORKS: PROFILES OF MEDIATORS (1994); THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF AMERICAN COMMUNITY JUSTICE (Sally Engle Merry and Neal Milner, eds., 1993).

136. Bartlett, *supra* note 90, at 863-864.

137. Karst, *supra* note 64, at 486.

138. *Id.* at 487.

139. Karst, *supra* note 64, at 487.

140. See generally, Carrie Menkel Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992).

141. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 94 (1994).

142. *Cf., Id.* at 94 n.91 (discussing in the context of substantive legal rules along with ethical rules and norms).

143. Scales, *supra* note 86, at 1377.

expressing their voice and being heard, the tune must be different, using new instruments and playing different chords.

In discussing feminist theory, Joan W. Scott states:

We need theory that can analyze the workings of patriarchy in all its manifestations – ideological, institutional, organizational, subjective – accounting not only for continuities but also for change over time. We need theory that will let us think in terms of pluralities and diversities rather than of unities and universals. We need theory that will break the conceptual hold, at least, of those long traditions of (Western) philosophy that have systematically and repeatedly construed the world hierarchically in terms of masculine universals and feminine specificities. We need theory that will enable us to articulate alternative ways of thinking about (and thus acting upon) gender without either simply reversing the old hierarchies or confirming them. And we need theory that will be useful and relevant for political practice.<sup>144</sup> Feminist theory and feminist jurisprudence offer a variety of means through which mediation can maintain its alternative characteristics and provide a woman-friendly forum in which women are imbued with equal footing. Viewed from these perspectives, mediation offers women an opportunity for empowerment away from the mediation table through recognition of women's strengths on their own merits. Feminist theory supplies the potential of re-envisioning the framework, while feminist jurisprudence affords the opportunity to build a framework "built upon feminist insights into women's true nature, rather than upon masculine insights into 'human' nature."<sup>145</sup>

---

144. Joan W. Scott, *Deconstructing Equality-Versus-Differences: Or, The Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUDIES 33 (1988). Scott looks to poststructuralism to achieve this theory, analyzing the poststructural concepts of language, discourse, difference, and deconstruction and applies those concepts to the equality-versus-difference debate. *Id.* at 34.

145. West, *supra* note 92, at 3-4.

## V. IS MEDIATION DANGEROUS TO WOMEN?

As the definition of mediation is currently debated in alternative dispute resolution circles, one issue of concern is the effects and consequences of mediation for women.<sup>146</sup> Trina Grillo's provocative piece, *The Mediation Alternative: Process Dangers for Women*, argues that mandatory mediation as a process is dangerous for women.<sup>147</sup> Basing this perspective on women's inclination to a more relational stance and a variety of other socially-begotten ills facing women, Grillo equates women's experience of mandatory mediation as akin to a "psychic rape."<sup>148</sup> Grillo analyzes mandatory divorce and custody mediation in California, concluding that mandatory mediation is "neither a more just nor a more humane alternative to the adversarial system of adjudication of custody," and thus, fails to fulfill its promise as a viable alternative to traditional adjudication.<sup>149</sup>

Feminists and non-feminists alike argue that because women employ a relational stance, they are in danger in the mediation process of stressing compromise over assertion of their rights and will be more willing to reach an agreement which does not serve their needs.<sup>150</sup> Mediation is currently mandated or made available in a variety of family-centered disputes, including divorce, custody, and domestic violence. Mediation is perceived as particularly harmful to women who have been abused by their male partners.<sup>151</sup> The power imbalance developed in the relationship follows the couple into mediation, thus offering the female participants less bargaining power. Justifications for use of mediation in these disputes include avoidance of the hostility and psychological costs inherent in litigation and the positive view that disputant-determined agreements are less destructive to family relationships.<sup>152</sup> Other advantages cited for the process include reduced costs, efficiency, user satisfaction and increased access to the legal system.<sup>153</sup>

---

146. See M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation*, 14/15 *MEDIATION Q.* 163 (Winter 1986/Spring 1987).

147. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545 (1991). Grillo analyzed mandatory mediation for child custody disputes, and hence raises concerns particular to that subject. However, many of her criticisms are directed toward and can be broadened to incorporate other mediation processes and topics.

148. *Id.* at 1605.

149. *Id.* at 1549.

150. See *id.* at 1549-1550.

151. Treuthart, *supra* note 14, at 721.

152. *Id.* at 717.

153. *Id.*

Grillo recognizes that the "Western concept of law is based on a patriarchal paradigm,"<sup>154</sup> emphasizing hierarchy, linear reasoning, the use of abstract principles to resolve disputes and the ideal of a reasonable person. Mediation, she argues, eliminates both abstract principles and context as decision-making bases, leaving women participants in vulnerable positions, especially women who are taking the first steps to independence by leaving a marriage.<sup>155</sup> She finds that mediation can deprive women of the opportunity to have their perceptions validated by a judge and indirectly, society.<sup>156</sup>

Mediation holds the potential to incorporate the "feminine search" for context,<sup>157</sup> focusing on the relationships and issues individual to the particular dispute. In divorce and custody mediation, Grillo finds troubling the minimization of fault and the emphasis on cooperation, suggesting that it results in a lack of predictability (of results) and often harms the least powerful party, whom she assumes will be the woman participant.<sup>158</sup> Grillo seemingly criticizes mediation for the very perception that underlies her position, that women are incapable of standing up for themselves, for their rights as they perceive them, and for stating or even knowing what it is they want. For example, she states that mediation that uses a family systems approach, which she describes as imposing a value-free universe, fails to acknowledge the unequal power that society assigns to men and women and the influence of socialization based on societally-imposed sex roles.<sup>159</sup> She argues that mediation can "deprive a divorcing spouse of the opportunity to appear virtuous in society's eyes and her own."<sup>160</sup> Counseling, not mediation, would be a more appropriate forum for a woman who looks to society for a self-definition of virtue. Society will provide only the image of woman that serves to deny self-definition. Society will give the very definition of woman that mediation works to combat, a passive, quiet, obedient woman, ultimately responsible for the household and childcaring, in addition to full-time employment.

---

154. Grillo, *supra* note 147, at 1547.

155. *Id.* at 1557.

156. *See id.* at 1560-1561 (basing her arguments on mandatory child custody mediation. Hence, the wife or ex-wife seeks validation by the judge that she is a better parent or her ex-husband is the guilty party).

157. *Id.* at 1557.

158. *Id.* at 1558-1560. Grillo does acknowledge that a de-emphasis on abstract principles may make sense in an increasingly pluralistic society, where, for example, family means different things to different people. *Id.* at 1560.

159. *Id.* at 1561-62.

160. *Id.* at 1562.

While arguing that mediation operates in a value-free universe, Grillo criticizes what she sees as the subtle but damaging influence of a mediator.<sup>161</sup> For example, she claims that expression of anger, especially by women, is discouraged in mediation, as mediators accept "the societal taboos against the expression of anger by women."<sup>162</sup> If anger is accepted, Grillo says it is allowed merely as "venting," and is not taken seriously enough, depriving women of the opportunity to be energized by their anger. Thus, as products of society, mediators bring into the process the very same values Grillo argues are absent from it. Furthermore, Grillo presents seemingly contradictory perspectives of women: they are too cooperative and will be taken advantage of and they are angry and deprived of an opportunity to stand up for themselves through expression of their anger.

Professor Joshua Rosenberg, in response to Grillo, speculates that the mediation sessions analyzed in Grillo's article were merely examples of poor mediation and do not indict the entire process.<sup>163</sup> Grillo's article represents a commentary of mediation that examines the process through an adversarial perspective and in doing so, fails to incorporate either the alternative nature of the process and how it can be a better forum than the courtroom for women. For example, in discussing mediation's inability to provide a sense of vindication for divorcing women, Grillo does not acknowledge that a goal of mediation is the opportunity for parties to see the other's perspective, not vindication.<sup>164</sup> Mediation's focus on problem-solving puts Grillo's concern about women's ability (or inability) to express anger in a different context also. Mediation is not about blame but about compromise. As Rosenberg discusses, blame serves to distract from the focus of the mediation session.<sup>165</sup> He notes that the benefit of mediation is the opportunity for parties to be heard, to have a voice, and from this opportunity women will gain self-worth.

As Rosenberg points out, mediation as a process is not accountable for the problems which Grillo discusses, however, he acknowledges that it is important to the mediation dialogue to bring these issues into the discussion.<sup>166</sup>

---

161. *Id.* at 1588-1594.

162. *Id.* at 1575-1577.

163. Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

164. *Id.* at 474. ('Unlike courts, mediators may attempt to "orient the parties towards reasonableness and compromise, rather than moral vindication'...."), *id.* (citing Grillo, *supra* note 147, at 1560, 1578).

165. *Id.* at 475-483.

166. *Id.* at 468-470.

The use of mediation for family law issues raises several concerns.<sup>167</sup> Critics contend that mediation can be effective only if the following criteria are satisfied, none of which, it is argued, are met in family law issues. First, the issue must be capable of being resolved through modification of perceptions, attitudes, and/or behavior.<sup>168</sup> Secondly, there must be relative parity of power between the parties.<sup>169</sup> Third, the issue in dispute must be one which does not require punishment, deterrence or redress.<sup>170</sup> Lastly, the parties involved must be capable of entering into and carrying out an agreement.<sup>171</sup>

Laurie Woods contends that intra-family disputes are conflicts "between persons with distinctly differing and conflicting interests,"<sup>172</sup> and as such, are not amenable to settlement through mediation. On the other hand, mediation of family issues is proclaimed as more advantageous to dispute participants than the courtroom battle and offers dispute resolution in the "nature of relationships rather than individual rights."<sup>173</sup> Grillo's contention that women are endangered by participation in the mediation process needs to be re-examined through a feminist jurisprudential lens. Viewing women and mediation in this manner puts women in mediation at an advantage over women participating in the adversarial system, where they have little, if any voice at all. Mediation's focus on relationships and their contexts appears tailor-made for women, who, in Grillo's words, "see themselves and judge their own worth, primarily in terms of relationships."<sup>174</sup>

## VI. APPLYING A FEMINIST JURISPRUDENTIAL LENS

Incorporated within the patriarchal legal framework with its emphasis on autonomy and individual rights, mediation's ability to provide a true alternative forum, especially for women, is not only limited, but impossible, for "[l]aw is powerful as both a symbol and a vehicle of male authority."<sup>175</sup> Furthermore, when establishing a mediation process based on the patriarchal

---

167. See Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?* 2 WM. & MARY L. REV. 1 (1995); see also Penelope E. Bryan, *Killing Us Softly, Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 144-46 (1991).

168. Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REVIEW 431, 435 (1985).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Brinig, *supra* note 167, at 3.

174. Grillo, *supra* note 147, at 1603.

175. Rifkin, *supra* note 48, at 84.

hierarchy established and maintained through the legal system, the same process dangers which provide the justification for creating an alternative forum outline the framework for mediation.

The law's image of women is "largely a male product, for it is men who have held the power to define roles and institutions in our society."<sup>176</sup> Catharine MacKinnon observes of male dominance that "[i]ts force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy."<sup>177</sup> Furthermore, MacKinnon states, "[t]he law sees and treats women the way men see and treat women."<sup>178</sup> In his article, *Woman's Constitution*, Kenneth Karst recognizes this limitation, suggesting that "[t]he same male conception of society underlies the very constitutional doctrine that women seek to use in effecting a reconstructed order of male-female relations."<sup>179</sup> He posits an alternative conception, one in which the legal system recognizes women's values.<sup>180</sup>

When women enter mediation assuming the subordinate position assigned them by the legal system, the potential gender imbalance is due not so much to the participants' characters as to the images of their gender.<sup>181</sup> Because mediation is "commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves,"<sup>182</sup> mediation offers women an opportunity to step out of their socialized image and speak for themselves.

A New Mexico study, which examined women and minorities in adjudicated versus mediated cases, looked at whether women and minorities fared worse than males and non-minorities; whether there is a greater disparity in results in mediated as compared to adjudicated cases, and whether the disparity is lessened or removed when the mediator is a woman or minority.<sup>183</sup> The study indicates that women did not fare worse financially between

---

176. Karst, *supra* note 64, at 448.

177. MacKinnon, *supra* note 82, at 639.

178. *Id.* at 644.

179. Karst, *supra* note 64, at 449.

180. *Id.*

181. See Nancy A. Burrell, et al., *Gender-Based Perceptual Biases in Mediation*, 15 COMM. RES. 447, 453-454 (1988).

182. Fuller, *supra* note 17, at 308.

183. See MICHELE HERMANN, ET AL, METROCOURT PROJECT FINAL REPORT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED CASES AT THE METROPOLITAN COURT MEDIATION CENTER (1993). The study looked at small claims civil cases in Albuquerque, New Mexico. The hypotheses tested were whether alternative dispute resolution processes, such as mediation, are more susceptible to bias and prejudice disproportionately impacting women and minorities.

adjudicated or mediated cases.<sup>184</sup> White women reported greater satisfaction with adjudicated rather than mediated outcomes and were less likely than other study participants to see mediation as fair and unbiased.<sup>185</sup> Minority women reported the greatest level of satisfaction with mediation.<sup>186</sup> Similarly, Rosenberg notes that in his experience, mediation as a process is supportive, empowering and enlightening to the participants.<sup>187</sup>

### CONCLUSION

From their position as outsiders, feminists, and women in general, have the ability to see possibilities which exist outside the traditional legal framework, offering the possibility of transforming "the legal emphasis from one of rights to one of needs."<sup>188</sup> Thus mediation, with its emphasis on resolving disputes in a manner which best suits both parties' needs provides the tools with which women are already familiar but have been subsumed to an inferior position in the adversarial, rights-based legal system.

Applying a feminist lens, Janet Rifkin suggests that dialogue about mediation has not included discussion on how "mediation in theory reflects 'a new jurisprudence, a new relation between life and law.'"<sup>189</sup> She argues that the study of mediation from a feminist perspective focuses on questions in conflict with legal pedagogy.<sup>190</sup> Rifkin calls for exploration of whether mediation incorporates the patriarchal structure of law or challenges it.<sup>191</sup>

As the dialogue expands in the area of feminist jurisprudence, scholars and practitioners in the alternative dispute resolution field should travel down a similar path, for the evolving feminist jurisprudential concept offers the mediation field theories which hold the promise that mediation is an appropriate forum in which women can resolve disputes. As feminists

---

184. *Id.* The study indicated that minority participants in mediation consistently paid more than non-minority participants and that minority participants expressed more satisfaction with mediation. *Id.* But see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (documents adverse effects of race and gender bias in informal car negotiations). The study also found women paid less in mediation than adjudication, doing better than males. *Id.* But see Blaustone, *supra* note 35, at 257 (core values exist in the mediation process that are true across cultures, races, and gender).

185. See Hermann, *supra* note 184 (finding, however, white women achieved more favorable outcomes in mediation than other groups).

186. See *id.*

187. Rosenberg, *supra* note 163, at 468.

188. Menkel-Meadow, *supra* note 141, at 90-91.

189. Rifkin, *supra* note 8, at 23 (citing MacKinnon, *supra* note 82, at 645).

190. Rifkin, *supra* note 8, at 24.

191. *Id.* at 23.



recognize, the personal is the political.<sup>192</sup> Further, feminist theory emphasizes context and the importance of identifying one's experience and claiming it for one's own.<sup>193</sup> The courts have been unwilling and thus incapable of hearing women's experiences and modifying laws to take account of those experiences.<sup>194</sup> Mediation, the sole alternative dispute resolution method which allows the disputants to speak for themselves, holds the promise of giving women a place where their voices are heard.

---

192. Schneider, *supra* note 6, at 602 (quoting ZILLAH R. EISENSTEIN, *FEMINISM & SEXUAL EQUALITY* 11 (1984)).

193. Schneider, *supra* note 6, at 603.

194. *Id.* at 609.