EMPOWERMENT IN MEDIATION: FOR THE MASSES

I. Introduction

Mediation is a collaborative process by which two or more parties attempt to resolve their dispute through the assistance of a neutral third party facilitator who has no decision making power. As the growth of mediation as a popular alternative to the formal adjudicative system continues, some concerns have been raised about the efficacy of mediation in relation to the disempowered and marginalized members of society. The issues of power and empowerment are critical in evaluating the effectiveness of various conflict resolution mechanisms. Critics of dispute resolution argue that the lack of procedural protection and behaviour modulation facilitate a bias against the disempowered members of society. Feminists and critical race theorists postulate that mediation negatively diverts its participants from focusing on their legal rights towards negotiated agreements that are reflective of societal power imbalances. Conversely, critics of the formal judicial system argue that the lack of access and the forms and rituals of the courtroom, disempower its users. This essay will evaluate the issues of power imbalances and empowerment in mediation and assess the viability of functional interventions that mediators can employ in addressing cases where power imbalances may materialize.

II. Power - The Weberian and Marxian Paradigms

There exists a multitude of definitions of social power, but essentially power can be defined as, "the ability to affect the actions or ideas of others, despite resistance."

Power is a dynamic instrument of social influence and control and it pervades all areas of social life. Max Weber and Karl Marx provide two paradigms which are useful to the analysis of power in its relation to critiques of mediation and modern society.

According to Weber, 'power' (Macht) is the probability that one actor within a given social relationship will be in a position to carry out his own will despite resistance, regardless of the basis that this probability rests upon. Power is synonymous with 'domination' (Herrschaft), the probability that a command within a specific content will be obeyed by a person or given group of persons. Thus, the combination of power and domination are legitimated through the emergence of three types of authority: 1) Rational Authority, 2) Traditional Authority, and 3) Charismatic Authority. Of particular relevance here, is the category of traditional authority where Weber identifies the seedlings of patriarchalism and today's male dominated society. Thus, for the feminist critique, the power and domination that men exert within modern society is not based on rational or legal precepts, but rather are embedded in traditional rules and beliefs that are strengthened by the structure of society.

Unlike most political philosophers who link power dynamics to the state and related organizations, Marx proposed an alternative social analysis based upon the economic distribution of wealth. For Marx, social power originates primarily in economic production and the principal units of power dynamics are social classes. Those who control the economic means of production (bourgeoisie) will be the dominant social class since they would have the unfettered power to access society's major resources. The other classes, consisting of the middle class whose power is limited to their services provided to the bourgeoisie, and the workers (proletariat), who have no power except their labour, are subjugated to the structural supersystem instituted by the dominant class. Thus, the dominant class creates social, economic, political and legal systems to not only maintain the status quo, but also to further their economic domination of social power. This is reflected in our current legal system where contract and tort law remedies are often infused with notions of what Freidman identifies as "economic utility".

According to Marx, the two most important classes are the power wielding bourgeoisie and the large proletariat, between which class conflict and social change would likely arise. Marx proposed a theory of social change based upon Hegel's dialectical model. This model consists of three stages: 1) An initial thesis or existing set of social conditions; 2) An alternative antithesis or radically different set of conditions that develop from the initial conditions (but are not necessarily the complete opposite from the first stage); 3) An integrating synthesis, or a wholly new set of conditions that emerges from the thesis and antithesis conditions, contains portions of both of them and resolves the fundamental contradictions inherent in each of them. For Marx, the proletariat would gain a class conscientiousness and eventually transform itself from being class in itself to a class for itself. As the proletariat gained collective momentum and adequate resources to exert considerable amounts of social power, class conflict would arise due to the inherent fundamental contradictions between the goals of the bourgeoisie and the proletariat. At some point, structural and social problems would become too severe for control mechanisms such as economic exploitation and deprivation, socialization, legal and political systems and ideologies to cope with. Therefore, the dominant class would lose its ability to exercise its control over the subordinate classes resulting in a social revolution. Marx proposed that the revolution could be led by the middle or working class. However, by virtue of its collective potential for exerting social power, the proletariat would likely be more successful.

Although Marxian theory is now antiquated, its utility lies in the ease of which it maps onto an analysis of mediation's emergence as a reaction to the shortcomings of the present legal system. Marx's analysis of social change, based on the dialectic model, provides a paradigm by which the current mediation movement can be evaluated and understood. Society continues to be dominated by one socio-economic cohort comprised of white males. This is not intended to be an unfounded damning indignation of society today, but rather it is a fact of life. The current bourgeoisie owners of Marx's economic means of production are, more likely than not, to be male and white. The subordinate groups would thus include females and visible and cultural minorities who are disempowered by their lack of access to societal resources. Arguably, the current socio-economic and political systems have and continue to operate as control mechanisms for the subjugation of the weaker segments of society. One only needs to look at the current heads of the top corporations and political parties to find evidence of this fact. The system has been instituted by, and for, the male white members of society. One offshoot, the formal legal adjudicative system, is fraught with rules and procedures that effectively shut out the disempowered members of society who lack the means or knowledge to navigate the system. However, things are changing. Great strides have been accomplished by the feminist and civil rights movements. Greater representation of females, aboriginals and minorities within law schools and the legal profession is a positive step towards addressing some concerns about equitable access to the legal system. However, until true equality among all people of society is gained (which may be a rather utopian ideal), there will remain an aura about the legal system that it operates only to the advantage of the privileged few. Notions of "if the choice between a better case or a better lawyer from a prestigious law firm arises, choose the better lawyer" will continue to abound.

The general dissatisfaction in the formal adjudicative system has resulted in the emergence of mediation as a viable alternative to the legal system. Mediation, which focuses on the shared interests and common concerns of the disputants, is juxtaposed with the adjudicative system's emphasis on positional arguments based on rights and entitlements. Thus, we have a set of contradictory conditions, which a Marxian analysis would see as characteristic of stages one and two of the dialectic of social change. Stage one, the formal legal system is instituted by the dominant male white social class to exert its social power. The subordinate classes are left to abide by the system's complex set of rules and procedures or face the deprivation of their "rights" should they not follow it. Stage two, the subordinate classes, consisting of the intelligentsia (academia) and members of historically disadvantaged groups, gain a collective conscientiousness and their reaction to the "closed" adjudicative system has resulted in the rise of mediation. Therefore, we have a radically different set of conditions for resolving disputes and

mediation can be viewed as the antithesis of the formal adjudicative system. However, mediation is not the complete opposite of the legal system as a Marxian analysis would reveal. Mediation is not a movement against or an abandonment of "rights" per se, but rather a reaction against the perceived inaccessibility of "rights" in the complex web of the formal legal system. In other words, what good are rights if the majority of the population does not know or understand the legalese and complex procedures of the formal adjudicative system, and cannot afford the services of someone who does "know" the intricacies of the system. Thus, accessing their rights in court is literally dependent upon their ability to pay a member of a privileged law society to exercise their rights. Rather than expending valuable resources such as time and money on lawyers and court fees, mediation attempts to resolve disputes in a fashion whereby parties can move on with their lives without the lingering prospects of an expensive, long and continuous court case. Moreover, mediation also recognizes the significance that parties may place in a solution that tries to account for personal beliefs, values and future relations. Critics of mediation, including feminists and critical race theorists, reduce mediation to an alternative second class system of dispute resolution as compared to the formal adjudicative system. According to Fiss, mediation is "The civil analogue to plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgement renders subsequent judicial involvement troublesome, and although dockets may be trimmed, justice may not be done. Like plea bargaining, *settlement is a capitulation to the conditions of mass society* and should not be encouraged nor praised". The irony of Fiss' critique about mediation and alternative dispute resolution generally, lies within his own choice of words. If mediation, embraced in the hopes of reaching a mutually agreeable settlement, is really a surrender to the 'conditions of mass society', then mediation would thus be a critical reaction to the entrenched inequalities of the formal legal system, by the masses for the masses. Should not alleviating the conditions of mass society be an overriding requisite of any judicial system? Are we, as current and future members of the legal profession, to adapt Fiss' elitist theory that would have us ignore the human condition and reduce the majority of society to an uneducated mass, ignorant of their own rights?

Feminists and critical race theorists such as Bottomley and Delgado, criticize mediation as being unable to accommodate gendered and racial power imbalances. They argue that mediation usurps the ground gained by the equal rights and civil rights movements as settlement occurs outside of the legal protections and precedents of the law. However, what their critiques fail to recognize are the protections that are embedded within the basic processes of mediation. First, mediation does not focus on values at the expense of one's rights. On the contrary, mediation is often referred to as "bargaining in the shadow of the law", meaning that mediated settlements are usually conducted with the knowledge of what would be considered to be in the normal legal range of settlement outcomes. Parties in a mediation operate with a sense of how the legal system would resolve the matter and thus, entailing a sense of the time, cost and implications of a litigated outcome. Skilled mediators also serve as an important check upon the fairness of any outcome. The mediator's obligation to recognize and address power imbalances is a direct derivative of the general duty to ensure informed consent of participants and to facilitate their understanding of the consequences of any mediated settlement. As Cooley notes, "the mediator must perform these checks to guarantee that the settlement is fair and equitable within the parties' own perceptions." This approach accounts for and respects the subjective values of what the participants consider to be a settlement within their own notions of fairness. Correspondingly, an objective measure of fairness is often built into the mediation process, whereby mediators adhere to standards and ethical codes of conduct that require the mediator to terminate any mediations where "the continuation of the process is likely to harm one or more of the participants". These standards, as Boulle and Kelly point out, "place an obligation on mediators to raise questions about the fairness and equity of proposed settlement outcomes and to ensure consideration of the interests of children and other potentially affected third parties." Mediated agreements can also be subject to judicial review where the court would consider the public interest and material circumstances in determining the validity of such agreements. Any evidence of undue influence, unfair pressure, capacity issues and situations of material

inequality in the bargaining power of the parties would likely lead the court to invalidate the contractual agreement. Correspondingly, patently unreasonable agreements usually will not find a mediator's finalization due to the mediator's own indirect interests of maintaining her reputation and contributing towards an excellent practice of mediation.

Fiss' remarks about the possibility of a "bargain being struck by someone without authority", fails to recognize that the guiding principle of mediation is the parties' right to self-determination. Thus, the ultimate decision making authority lies within the mediation participants themselves, and the mediator is to be impartial throughout the process. Is not the principle of self-determination, based on informed consent, a value that is worthy to be praised or encouraged by society? Mediation is not to be touted as a replacement of the legal system. Rather, it represents a viable option for those who might value an empowering process that incorporates self-determination as opposed to a system where a judge retains the decision making power. Mediation is not for those who are seeking to establish legal precedents, that is the purview of the courts and legislatures. Therefore, mediation is not inimical to the causes of feminists and critical race theorists. Rather it operates within the shadows of precedents and rights gained by those movements while simultaneously recognizing the value of individual beliefs, interests and concerns.

Feminists and critical race theorists would be wise to recognize the Marxian paradigm that mediation is representative of a stage two critical reaction against the current structural impediments to accessing peoples' rights. If they accept that mediation is a popular reaction against a justice system instituted by a male, white dominated society, perhaps then their resources would be more wisely spent in focusing their discourse more on the systemic causes of power imbalances deriving from traditional values and inequitable distributions of resources.

If mediation represents the second stage of a social conflict between competing contradictory values, then arguably, we are entering stage three, whereby one side will succumb to the pressures of the other or a synthesis of the competing values will occur. What the end result of this dialectic will be is not clear at the moment, and remains to be seen.

III. The Feminist Critique

The feminist critique can be divided into two groups for analysis, the first surrounding a critique of mediation in general and the second being cases of domestic violence. The first, general feminist critique of mediation is not specifically directed at the goals of mediation per se, but rather at the perceived inability of the mediation processes to deal with gendered power imbalances. They criticise mediation on the basis that the main fallacy of mediation is the assumption of a roughly equal balance of power between women and men. They argue that "most women in a patriarchal society are not equal to their male partners in bargaining power and experience or financial resources". Thus, the power differential is influenced by a number of psychological and socio-economic factors. According to Boulle and Kelly, the power disparity between women and men "involves unequal access to resources such as lawyers, limited educational and employment opportunities, perceptions of domination and submission, high anxiety and low confidence and unfamiliarity with negotiation techniques." Feminists argue that the lack of the procedural protections of the formal adjudicative system renders mediation to a mechanism for replicating the conditions of systemic inequality of society. This imbalance of power cannot be fully addressed by interventions initiated by the mediator and thus the promised goals of mediation would not materialize. However, as Grillo notes, mediation appears to embody a number of characteristics that feminists consider to be preferable to that of the traditional legal approach, namely,

1. The rejection of an objectionist approach to conflict resolution and the consideration of disputes in terms of relationships and responsibility.

2. Theoretically, the mediation process is cooperative and voluntary, not coercive.

3. The mediator has no decision-making authority, but rather the parties exercise self-determination in reaching a mutually agreeable settlement. This eliminates the hierarchy of dominance of the judge/litigant and lawyer/client relationships.

4. In mediation, the absence of procedural rules and legalistic notions of relevancy work to promote decisions informed by context rather than abstract principles.

5. Finally, emotions are recognized and incorporated into the mediation process.

This conception of mediation has led some to characterize it as a feminist alternative to the patriarchally inspired adversarial system.

Despite the fact that mediation has inherent characteristics that are amenable to the feminist perspective, critics charge that, "the portrayal and implementation of mediation as a gentler art, and as a more humane and "feminine" way of resolving disputes than the traditional model actually does a disservice to women." These critics argue that such a portrayal of mediation is detrimentally more attractive to the negotiation styles of women than men. Gilligan states that "from early childhood women are socialized to be cooperative and concerned about meeting other people's needs, whereas men are encouraged to be competitive and concerned about meeting their own needs." These different mind-sets materialize in the contrasting negotiation styles of women and men. The tendency of women to negotiate based on relational aspects and emotional needs puts them at a significant disadvantage to men who typically employ hard bargaining techniques aimed at coercion, self-gratification and wealth maximization. Critics argue that mediation's lack of procedural protections perpetuates the male domination of women through this unequal bargaining process. "If two parties have unequal attitudes towards being relational, the person who is more relational, the woman, will likely overcompromise". For pro rights feminists, there is a need for women to focus more on the self than on their relations, in order to achieve a substantively fair settlement and that the mediation process cannot foster that requisite. Therefore, the adversarial nature of the courtroom is a more appropriate forum that would encourage women to focus more on the self and their rights as opposed to focusing upon any false hopes of shared interests, values and concerns.

Another similar line of feminist criticism is aimed at mediation's "marriage" of legal and emotional aspects of divorce that also contribute to undermining the woman's individual rights. Critics of mediation claim that mediation's attempts to address the underlying emotional issues of divorce and custody are erroneously predicated upon the assumption that continued close contact will occur after the dissolution of the marriage. Therefore, a corresponding attempt to foster any future relation based on mutual interests is unnecessary. However, as Zaher notes, "for couples with children, continued contact is hardly an assumption- it is a social reality." The adversarial systems' notion of a "clean break" is therefore not applicable to marriage break ups where children are involved. Indeed, family law statutes generally call for "maximum contact" between the access parent and the children of the divorce. "Moreover it is only through resolving their personal differences as parents, that divorced couples can truly put their children first." It is the mediator's emphasis of the child's best interests that Bottomley sees as a denial of the woman's right to a fresh, self-focused life, free from the bonds of a male dominated relationship. Thus, Bottomley dismisses the focus on the best interests of the child in family mediation as being a veiled attempt to reinforce the patriarchal constructs of society. According to Bottomley, "while mediators are represented as neutral, they actually work within patriarchal paradigms that tend to validate the existing set of power relations and tend to share a common belief in the functionalism of the family and the corresponding family ideology where roles are cast". However, mediation advocates such as Zaher correctly point to fact that the best interests of the child test is

identically the main consideration that courts employ in all family law cases. In *Young V. Young* the Supreme Court of Canada reaffirmed "the best interests of the child test" as the preeminent consideration in family cases where children are involved. Therefore, Bottomley's argument does not clearly indicate how the litigation system would be more advantageous in situations where child custody and continued contact arise. Furthermore, there is a wide body of evidence that the judicial system is ill-suited to the resolution of disputes arising between former partners. The adversarial mentality of win-lose outcomes fails to address the emotional aspects that underscore most divorces. Mediation addresses the emotional aspects of divorce, but not at the expense of the legal rights of the affected parties.

Professor Landau identifies an inherent contradiction in the feminist critique: "given that mediation offers the promise of a feminist approach, it is ironic and significant that its principal critics are feminists." It is true that generally, women are socialized to be cooperative while men are socialized to be competitive and adversarial. Mediators need to be aware of this in regard to negotiation styles and power imbalances. However, one has to question if mediation is ever advocated as a "feminine" way of resolving disputes, for if that is truly the case, then there are absurdities that would inevitably arise from such claims. Consider a male, who actively espouses the advantages of mediation, then, do his actions reflect that he is "more in tune with his feminine side?" Alternatively, in cultures where mediation is the norm for resolving disputes, does that fact reveal an inherently feminine way of thinking?

What really needs to be considered are the appropriate interventions that mediators can employ in combating gendered disparities in bargaining power without compromising mediator impartiality. Some feminists contend that claims made by mediators that power imbalances can be effectively dealt with through appropriate techniques are nothing more than a rhetorical smoke screen:

> It defies imagination to think of the skill required to empower a depressed wife with low self-esteem who believes in traditional sex role ideology, fears confronting her husband, and has no occupation outside the home. Nor can the mediator significantly improve the wife's psychological and emotional state.

The above quote is taken from Penelope Bryan's compelling and in-depth review of gender, power imbalances and mediation: "Divorce Mediation and the Politics of Power". The importance of Bryan's and other feminist literature to the practice of mediation is the identification of cases where mediation might not be an appropriate forum in which there exist severe power differentials. In situations where a party is subjected to the interaction of power dynamics intermeshed with complex and severe psychological and physiological trauma and emotional states, mediators should carefully assess the viability of the mediation process. What the feminist critique has contributed is the identification for the need of cogent and stringent screening protocol for all mediation participants. However, one problem with the feminist critique is the proposition that mediation should never be used in divorce situations, since a woman will always be consciously or subconsciously subjugated to the male's domination through the patriarchal enforcing mechanism that mediation truly is. A lone and defenseless woman will be placed at the mercy of the male, in a closed setting, without the safeguards that a court room and judge would provide.

There are a number of problems with the feminist characterization of the mediation process. First, there is a danger of precluding all women from utilizing the mediation process, because that would be stripping them of their power to choose a process that might fit their needs. Not all women are vulnerable to male influence. To categorize women as such would be to denigrate the achievements and intellectual contributions to society that women continue to make. There are capable women, who are educated, shrewd bargainers. I am empathetic towards the poor hapless, chap who might one day find himself sitting across the bargaining table from one of my female colleagues. Notwithstanding women who are educated and trained in negotiation, there are also other women who have developed coping

mechanisms that play upon their vulnerability in order to overcome power differentials.

Second, Bryan's statement that, "Nor can the mediator significantly improve a wife's psychological and emotional state," alludes to a common misconception made by feminists and reveals some misunderstanding of the mediation process. A mediator's duty is not to improve the psychological and emotional state, but rather to explore the underlying needs and interests of mediation participants in order to resolve the dispute and reach a mutually agreeable settlement. Mediation generally is not advanced as a professional therapeutic intervention, that is the job of psychologists and therapists. However, mediation does recognize that disputes frequently entail highly charged emotions. Techniques such as active listening are often used to address emotions and feelings in order to facilitate communication. Providing mediation participants with the feeling that they have been heard, understood, and not judged, often motivates full participation, increasing the likelihood of reaching a mutually satisfactory agreement. Feminists such as Bryan and Bottomley "need to recognize that the corresponding image of mediation is the negotiation table and not the psychiatrist's couch".

Third, one has to question whether the courtroom setting actually does protect the interests of women better than mediation. In mediation, women are empowered by the principle of self-determination. They have a right to accept or reject any proposed solution and they can withdraw from the process at any time. Comparatively, in the judicial system, the decision making authority lies within a judge, who is likely to be male and although bound by precedent, still left with a considerable amount of discretion. Arguably, this leaves the woman at the mercy of the judge who may be consciously or subconsciously applying a patriarchal paradigm that would be reflected in the judgement rendered. Below, is an extract from family law course materials currently used in a leading Canadian law school and is an account of one woman's experience with divorce and custody litigation:

> From the time I first filed for divorce, the case has been to court at least sixteen times and judgements rendered at four different levels including the Supreme Court of Canada… Sixteen judges reviewed the evidence…only one was female. It is clear the judge undervalued the work I did and overvalued the work of the father, this distortion had huge implications as he was given more access than I preferred. My husband refused to appear for discovery, violated rules of evidence, refused to pay court ordered legal fees, child support and other costs awarded to me…I continue to live in apprehension about what may happen next…the judges appeared consider the father's interests to be of paramount importance...the court system has cooperated with how the father has set the agenda. They also ignored the emotional effect on the children, the drain on my emotional and financial resources, my increasing sense of victimization, frustration, and helplessness-none of these were at issue.

The above excerpt suggests that all is not well with the current court system and raises the questions about the feminist belief that the adjudicative system is really the only fair option in divorce and custody situations.

'For the majority of women, mediation is an affordable and realistic option, for unlike courts, mediation does not consume vast financial resources, resources that belong to the children." In the above case study, the litigant incurred costs of $20 000 in lawyers and court fees. Average costs of a divorce mediation, including legal fees, is estimated between $2000 to $5000 (which is shared by both parties) while a protracted courtroom battle can cost each party from $10 000 to $300 000. One California based study concluded, "Women in mediation were more satisfied with their property, custody and spousal support agreements than women in adversarial divorces". Generally, as mediation proponents, Mecklinger and Landau submit, mediation results in a greater adherence to settlement terms and less residual conflict as compared to litigated divorces.

Domestic Violence

In cases involving a history of domestic violence, there is an issue of whether any mediation interventions can truly have an effect on the real and prevalent power disparities inherent in abusive relationships. Domestic violence is a ubiquitous social reality and transcends all socio-economic, cultural and racial cohorts. It includes situations of spousal abuse, sexual assault, incest and sexual harassment. The effects of violence on women have been well documented and the statistics are overwhelming. Ninety-five per cent of the victims of spousal assault are women. One million women in Canada are abused physically by their husbands or partners each year. On average, during 1990 in Canada, two women were killed by their partners every week.

In this area, the feminist critique raises valid questions that mediators should be aware of and raise in regards to this sensitive area. There is no balance of power issue in abusive relations. Power, in the form of physical, mental and emotional coercion, rests solely with the abuser. The victim is often left alone, isolated, and traumatized by the actions and threats of the abuser. The violence is not a simple loss of temper, but is often a cold and calculated assertion of power and dominance over his partner's actions. Thus, the victim is often in a state of learned helplessness trapped within the parameters of a relationship dictated by the abuser. As a result, the efficacy of any mandatory or voluntary mediation in cases of abuse is seriously called into question.

The abuser's intent is to maintain power and control over his victim. The "batterer may use any combination of physical, emotional, sexual or economic techniques to establish his position of authority over the partner". The effects of abuse upon victims of domestic violence often permanently scars the victim psychologically and physiologically consisting of conditions such as post-traumatic stress disorder. Maxwell identifies "dissociated coercion" as a particular psychological condition that is triggered by an abusive or violent relationship within the victim and is difficult to detect. According to Maxwell, dissociated coercion arises when violence occurs in the context of a close interpersonal relationship and the perpetrator is a lover, family member or friend. Hence, the usual trusted sources of safety and nurturance-become simultaneously the sources of danger through assault, violence and rape. Dissociated coercion manifests when the victim attempts to address the disjunction between trust and coercion by minimizing, suppressing or dissociating the violence from conscious memory. Therefore, a victim may not even consciously admit or recognize that she is a victim. The studies on domestic violence serve as a red flag to all mediators who potentially may encounter these situations and entail the need to address their implications for mediation in general.

According to Professor Pirie, some critics have advanced a number of reasons to avoid mediation in cases of domestic violence:

1. Mediation to be fair and effective requires a level playing field on which the parties can negotiate. The presence of violence or abuse, real or threatened, makes it impossible to bargain equally, and any agreement reached will necessarily reflect the power imbalance between the parties, whether the agreement can be legally challenged or not.

2. Women who have experienced abuse are more likely to establish a pattern of deferring to their abusers in disagreements.

3. Victims may be too intimidated to give an informed and voluntary consent to mediation.

4. Most women in a patriarchal society are not equal to their male partners in bargaining power and experience, or financial resources.

The above factors present broad challenges to mediation advocates who believe that gendered power imbalances can be effectively dealt with if sufficient safeguards are instituted into the mediation process. Given the psychological and emotional complexities of domestic violence, it would be difficult for even a skilled mediator to identify the subtle and intimate cues that abusers transmit to their victims. For example, a raised eyebrow from the batterer can intimidate the woman who knows the meaning behind the gesture. Feminists and general women's organizations vociferously oppose the use of mediation in family disputes especially where violence is involved. Therefore, the task at hand for mediators is to recognize these concerns and effectively develop protocols that would screen out of mediation, cases where the power disparity is so great or a violent history of abuse override any advantages served by mediation.

IV. The Response of Mediation to the Feminist Critique

Mediation advocates respond to the feminist critique by citing the weaknesses of the formal legal system. The mediation process does not serve to perpetuate male dominance, but rather represents the emancipation of women from the chains of a court system that replicates the sexist mentality of the men who dominate it. Mediation promotes a woman's right to self-determination. Rather, it is the legal system that reinforces the patriarchal culture that continues to exist today and mediation is its antithesis. The Weberian analysis recognises that male power and patriarchalism are rooted on traditional authority, not legal or rational precepts. Thus, feminists would be wise to address the systemic inequalities embedded within society and its values instead of forcefully dismissing a process which is viewed by many women and men alike to be fair and empowering.

Contrary to most critiques, there are plausible intervention techniques that mediators can and do apply in addressing power imbalances without necessarily infringing upon their impartiality:

- Exchange of information- in the case of a lawyer/mediator providing legal information (but not legal advice).
- Mandating full disclosure of assets.
- Ensure equal speaking time.
- Advising participants to have their lawyers review any memorandum of agreement.
- Advising participants to seek legal counsel before the mediation, to gain knowledge about their rights and entitlements.
- Deflating the stronger party's power influence by questioning the party about the fairness of an offer or accuracy of data.
- Caucusing with a party who is inappropriately taking advantage of the power imbalance. Entreating the perpetrator to desist in the current course of action by asking him/her to assess the risks of his/her actions.
- The mediator can terminate the mediation.

The above techniques may be employed in situations where all parties are willing and informed participants. Feminists argue that the mediator, will not and does not intervene to counteract any power imbalances due to the requisite duty of the mediator to be neutral. However, whether a mediator will

intervene is really dependent upon where he or she sits on the facilitative/evaluative continuum. A facilitative mediator will refrain from intervening while a more evaluative mediator would tend to use some of the above techniques to reduce the gap in power. In reality, most mediators lie somewhere along that continuum. One study by Folger and Bernard has shown that "65 per cent (of mediators) are interventionist as facts warrant: usually when agreements involve children or weaker spouses, 25 per cent are highly interventionist: will likely block agreements that do not protect children or the weaker spouse, and 10 per cent are highly non-interventionist: unlikely to block any agreement a couple reaches after being fully informed." Moreover, some mediator standards and codes now require direct intervention of the mediator to ensure fairness. For example, the American Bar Association's Divorce Mediation Standards states, "the mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants." Other codes place an obligation on the mediator to raise questions of the fairness of any proposed settlement and to consider the interests of potentially affected third parties such as children.

In cases involving domestic violence there are a set of specific interventions that mediators will employ to address the fairness of the process and the safety of the victim:

- The presence of a lawyer or advocate during the mediation, who is familiar with issues of family law and domestic violence.
- Rearranging the mediation environment so that there is natural barrier between the victim and the abuser.
- Ensuring an easy, accessible escape route for the victim.
- Conciliation measures, whereby the parties do not actually meet face to face.
- Referrals to outside support and protection, such as emergency shelters, community groups, legal and financial counseling.

The presence of a lawyer or support person during the mediation is arguably a critical power-balancing factor for abused women who voluntarily choose to participate in mediation. As Zaher notes, "mediation can empower the powerless by enabling them to speak in their own voice and assert their own interests, perhaps for the first time."

In regards to family mediators, there is a need for training to identify these underlying forces at work in situations of power imbalances that women face in mediation. Mediators need to acquire the skills to effectively screen for abuse in terms of the severity of physiological and psychological impacts. This would aid in ascertaining whether the victim has the requisite capacity to voluntarily and fully participate in the mediation process. Mediators need to understand the clear and present physical dangers that battered women face should mediation be determined appropriate.

The feminist critique of mediation has raised many valid concerns about the use of mediation and its impact upon women. Particularly in the area of domestic violence, the critique identifies the complex inter-relation between abuse, power, domination and fear. Mediation has benefited from the critique and will be able to better serve the interests of its participants. More research is needed in order to gain information on how to improve the protocols for screening for abuse. However, feminists have been too quick to dismiss the real advantages that mediation offers to women and other marginalized groups. Mediation is a social reaction against the prevalent inadequacies of the current adjudicative system. Mediation is an empowering process based on one's right to self-determination. By rejecting a viable

alternative to the judiciary, feminists are in danger of stereotyping all women as being passive and submissive and encroaching upon a woman's freedom of choice.

V. The Critical Race Theory Critique

The foundations of critical race theory lie within the Critical Legal Studies (CLS) movement. Historically, the CLS movement coincided with the Reagan Republican era, whereby most of the appointed federal judges were conservative. Thus, a wealth of liberal legal scholars found employment within the teaching ranks within the law faculties of the United States. Critical Legal Studies originated as an intellectual reaction led by American liberal legal scholars, who believed that the system of justice reflected the privileged subjectivity of society's dominant socio-economic powers. Critical race theorists while accepting the CLS' privileged subjectivity, criticize CLS for its economic and class based analysis. For Critical race theorists, race is the predominant factor that underlies the privileged subjectivity of the formal legal system.

There are three main tenets to critical race theory: 1) Racism is a norm of society and not an aberration, 2) Prejudice is not based on physical differences, but rather on assumptions that other races do not share common values or beliefs, 3) Society needs to place more value on the personal narratives of people of colour. These narratives provide a realistic alternative to the worldview dictated by the mainstream and provide an understanding of some of the unstated presumptions of privilege.

Critical race theorists such as Professor Delgado use socio-psychological theories to suggest that racism is deeply rooted in the American psyche and culture and that it survives in the subconscious. These negative racial attitudes contrast and co-exist with the American Creed which supports the ideals of liberty and equality, resulting in a socio-psychological conflict within the American individual. This conflict between two contrasting notions will usually be resolved in favour of prejudice unless the individual is led to engage in self-reflection and examination about his/her internal inconsistency. Delgado and others then apply prejudice reduction theories to conclude that the characteristics of mediation provide a fertile ground for prejudice. Prejudice reduction theory is based upon the belief that other races do not share the same values. Therefore, prejudice can be reduced through social contact with other races that show congruent beliefs exist across racial categories. This social contact between members of racial majority and minority groups requires that the contact be intimate, equality of status, and a mutual perception of beneficial gain. If these conditions are not met, then prejudice will continue to dominate. While mediation does provide an intimate setting for contact, participants from different races will not gain equal status due to power imbalances. These power imbalances are rooted in racial differences that are materially translated into socio-economic differences.

Critical race theorists criticize mediation on the basis that mediators lack the requisite power to intervene and confront the prejudiced person with the internal inconsistency. They argue that a judge does have the necessary intervening power and serves as check on racial prejudice. Correspondingly, Delgado argues that judges are under an ethical code to recuse themselves should they feel that their neutrality is compromised. Also, judicial life-time appointments act as a check against any undue political influence.

Critical race theorists also argue that the procedural safeguards of the adjudicative system serve as a check against prejudice whereas mediation is informal and therefore, vulnerable to facilitating bias. Juries are also constrained from bias by formal rules. Voir dire and preemptory challenges are available to remove biased jurors, qualified juries may be sequestered and sanctions exist to deter jury

misconduct." Rules of evidence and civil procedure can be invoked to place parties on equal footing.

Some critical race theorists also posit that the American Creed values emphasized in the adjudicative setting provides an indirect confrontation within prejudiced parties about internalized equality values and racial animus. This confrontation serves to discourage parties from acting out their racial hostilities or biases.

Finally, some critical race theorists hold that the private nature of mediation dilutes the value of collective rights gained by the civil rights movement through the public adversarial system. They argue mediation is the privatization of justice and this fractionalizes the collective potential of power of the marginalized members of society to act in a public forum.

One study tracked the settlements reached in court annexed mediation as compared to small courts litigation. The study showed found that minority claimants settled for lower outcomes with Anglo respondents as compared to the average litigated outcome. "Critical race theory would suggest that these outcomes are due to the enhanced probability of discrimination by Anglos in the informality of mediation." Similarly, the Anglos could also been seen as exploiting the collective tendency for minorities to be soft bargainers due to their collectivistic nature as opposed to the hard bargaining, individualistic Anglos.

VI. Mediation's Response to Critical Race Theory

The criticisms that critical race scholars direct at mediation in defense of the adjudicative system are refutable and may even be reversed and applied to the court room context. Psychological theories of deep-rooted prejudice that lies within the conscious or subconscious minds of all people indicate that the formal procedures are insufficient at combating prejudice in the courtroom. Empirical evidence suggests the formal legal system continues to discriminate against the marginalized groups of society. The pervasiveness of sub-conscious racism may even affect the actions or inaction of judges. Caselaw suggests that judges continue to allow lawyers to remove racial minorities from juries based on prejudicial beliefs veiled as 'language deficiencies' or other 'neutral' factors. Mediators, like judges, are also under ethical obligations and codes requiring withdrawal should their impartiality be tainted. The sequestering of juries would also do little to discourage any intrinsic prejudice that the juror brings into the courtroom. Similar to critics' concerns about the undermining of rights, mediation does not operate to mitigate one's civil rights. Rather, mediation operates within the shadow of precedents set by civil rights cases.

Mediation empowers racial minorities by placing the right to self-determination in their hands. Racial minorities are disproportionately represented in the lower socio-economic classes and the corresponding lack of resources usually precludes access to the arguably what remains a biased judicial system. Moreover, racial minorities are usually not equipped with the linguistic capital that the dominant societal power mandates for maneuvering around the judicial system. Mediation provides a forum where the mediator will ensure that all parties be given an equal chance to speak and be heard. Should intimidation or other prejudicial actions arise, the mediator has the option of employing the same range of interventions that were identified in the response to the feminist critique. Namely, caucusing, active listening, sharing of information and outside legal advice work to ensure the fairness of the mediation process. One final option is the use of co-mediation whereby two or more mediators guide the mediation. Providing culturally diverse mediators where the parties are multiethnic appears to assist in eliminating any bias.

VII. Conclusions

Contrary to what the critics of mediation would like the public to believe, mediation is not a second class system of justice. Mediation is a social manifestation of the popular dissatisfaction with the current judicial system. It is an empowering process predicated upon the right to self-determination. Mediation operates within the norms of the law, but also incorporates the personal values, interests and concerns of its participants. It is a holistic approach giving credence to the human condition that not all members of society subscribe to the adversarial system's win-lose mentality.

What the feminist and critical race critiques have done on a positive note is to enrich the field of mediation by raising an awareness of gendered and racial power imbalances that might arise during the mediation process. They have assisted in underscoring the need of more diversity, training and standards in mediation to ensure that all voices are heard in the process.

Rather than opposing mediation, feminists and critical race theorists should recognize mediation for what it truly is. Mediation is a critical reaction against a system that is not serving all members of society equally. Mediation is the dialectical antithesis to the adjudicative system, created by the masses for the masses. The contradictory conditions between mediation and the legal system remain to be resolved and there is a danger if mediation is subsumed by a system dominated by a privileged few. What we should all fear and oppose is the co-optation of mediation veiled in the form professionalisation.

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