

## Mediation and Inequality Reconsidered: Bringing the Discussion to the Table

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*The growing scholarship on inequality that occurs in mediation raises questions that challenge the underlying assumptions of the field. Reliance on mediator neutrality and the self-determination of parties masks the realities of how mediation can and does produce and reproduce substantive and procedural inequality. Critical interrogation of both the hegemonic paradigm and its practices permits insight into how this operates and points to the importance of learning from other paradigms and developing new strategies for addressing this dilemma.*

(Setting: a small conference room with five mediators sitting around a table.)

“So, I’ve got a dilemma to share.”

“Great, tell us. My mediations seemed relatively routine this week. What happened in your neck of the woods?”

“Well, I was doing a follow-up for a mediation that was completed at my center a couple of months ago, and I got some strange feedback.”

“Oh, this ought to be good!”

“One party said that she was really happy with the agreement, that it addressed all her needs, and that both of the parties have kept it. She was also enthusiastic that a friendship had emerged between her and the other party, which she attributes to having gone to mediation.”

“You can’t beat that!”

“Well, hold on a minute—listen to this. Then I spoke with the other party. She said that the agreement was being upheld and also volunteered



that a kind of a friendship has grown between them. And she too said that the mediators were fair and very nice.”

“So, what’s the problem?! You must be so pleased—that’s what this is all about!”

“I thought that too, until I heard her response to my next comment. I said ‘Great, sounds like things are better now.’ And she said, ‘No. Not really. The agreement didn’t address the most important thing—the problem that brought me there is still pressing on me; it hasn’t changed at all.’”

“Sounds like your mediators didn’t do a good job. Wonder what happened?”

“But what if they did a good job?! What then?”

“Maybe it was a situation where she couldn’t get what she wanted from the other party. At least they improved their relationship and are sticking to the agreement they choose to make. They both thought the agreement was fair, right?”

“Yes, they did.”

“Well then! It must have been that the second party who is still having problems just didn’t have enough negotiation power. These things happen. As long as the mediators were neutral and the agreement the parties reached was their own, then that’s all we can do.”

“Is it?”

“What are you getting at?”

“I’ve been thinking about this for a while, and I’m stuck. That’s why I’m bringing it to you all. I love coming to reflective practitioner meetings so that we can learn from each other and improve our practice—and sometimes get a good laugh!”

“Yeah, me too.”

“So, what were you saying about being stuck?”

“This isn’t the first time that I’ve heard this from parties after they have reached a supposedly successful agreement, and some of my other colleagues have said they’ve had this experience too. Then I was doing some reading, and it seems there is a pattern about whose issues are more fully addressed in mediation and—”

“Hold on there a minute! Are you saying that mediators are biased?! Because I think that, overall, this crowd is seriously interested in facilitating a process in which everyone is treated fairly, and leaving it up to the parties to choose the topics and to design their own agreements—after all, neutrality and self-determination are at the core of what we do!”

“I agree, and I’m not arguing otherwise. But, consider for a moment, what if it *is* true? What if there *is* a pattern to whose stories and which stories are told least and addressed least during the process and outcome of mediations? What then?”

“Wow. That is food for thought. I guess I’d assume that we as a field would figure out what to do differently since that’s not what we’re working towards.”

“Exactly! So, that’s why I’m bringing it to you all. I figured that together we could come up with some new analyses and strategies to change this.”

“Tell us more, and let’s put our heads together about what to do.”

Arguably, the field of mediation has developed useful and well-tested frameworks and practices for analyzing and overcoming dilemmas encountered by practitioners and disputants. Faced with concerns about lack of access to being heard or genuine involvement in the outcome of a mediation, the field offers engaged scholarship and a number of strategies to assist interveners out of such dilemmas. Many of these tools have improved our services by making mediation more responsive to the needs of different parties and conditions. This is evident through some of the new approaches introduced in the field over the past several decades that have expanded our understanding of what mediation is and what it could be. Therefore, it is not an exaggeration to say that the field has a dynamism set to the task of increasing its ability to intervene to help improve relationships in the world in which we live.

In light of this, the growing scholarship on inequality experienced by mediation participants raises important questions that challenge underlying assumptions in the field about neutrality, equality, and fairness to all parties. There is no doubt we need to put that same dynamic energy to work in addressing these problems. Some practitioners and scholars have concluded that mediation has failed to provide a truly accessible, fair, and empowering process for all. (See Baker, French, Trujillo, and Wing, 2000; Cooper, 2001; Delgado and others, 1985; Grillo, 1991; Goldberg, 2009; Hermann, 2001; Neves, 2009; Rifkin, Millen, and Cobb, 1991; Trujillo and others, 2008; and Wing, 2002, 2008.) Looking at a few examples found in the literature, critics have documented that mediators offer disparate opportunities for referrals to mediation on the basis of race (Cooper, 2001), that patterns exist favoring white Anglos in the quantitative benefits they receive from mediation outcomes (Hermann, 2001; Wing, 2008), and that mediation processes more often than not reflect the dominant culture’s paradigm (Goldberg, 2009;

Trujillo and others, 2008). Unfortunately this has consequences for all participating parties regarding the experience of empowerment and material benefit that may accompany a mediation process. The loss or gain of material outcomes is viewed by many as one important marker of how the mediation “went” for the participants, but critics within the field recognize that mediation agreements and outcomes do not have to be “balanced,” with each party giving and getting the same for the process to seem “fair” to both parties. Because outcomes in mediation are to be based on the needs of the parties, merely comparing them for material equality misses the mark for an effective evaluation of the entire experience and process. Rather, what is argued is that those “imbalances” that are blatantly problematic are the ones participants name for themselves (such as the one in the opening dialogue of this article), as well as the macro patterns of inequality found in the field. The latter point refers to the disproportionate disempowerment and disenfranchisement experienced during mediation and its outcomes by parties from social groups with less power in society. This is problematic for a field that espouses a fair and neutral process focused on all parties’ needs. Yet this marginalization has continued as though normalized throughout the life of the field without sufficient pathways to change the pattern (Auerbach, 1983). Why? One significant reason, I argue, is that when these concerns are raised, the internal logic of the field in the West—the focus of this article—provides explanations that both mask this inequality and perpetuate it, hence making it difficult to more effectively and creatively break the mold and address the pattern. This is little help when dedicated practitioners want to move beyond the status quo and make their practice and this field more socially and culturally responsible.

In hopes of participating to address this dilemma, this article explores how the reliance on neutrality and self-determination operates in mediation, laying the claim that it is enactment of these values from the dominant paradigm that has formed a practice serving some better than others. Research and practice suggestions are offered in the hope that together we can, as Chene (2008) encourages us, “uproot a comfortable, anachronistic model in order to grow into a more workable one” (p. 36)—one that is workable for all.

### Addressing Claims of Inequality in Mediation Practice

Let’s begin with a brief overview of how the mediation field addresses claims of inequality in its processes and outcomes. This will highlight

circularity of thinking and demonstrate how the internal logic can protect us from having to reexamine whether or what our theories and practices are lacking.

There are three common responses given for why inequality may occur during mediation:

1. A fundamental tenet of mediation is the self-determination of all parties; therefore they are responsible for empowering themselves by raising issues of concern and *choosing their outcomes* in light of the options they have. It is the parties' decision on how to participate and what is contained in any agreement they make. This means that mediators who do not violate their neutral role are not responsible if parties feel disenfranchisement during the process or frustration that an outcome does not sufficiently address their needs. Because parties and practitioners do not frequently have access to aggregate data on party qualitative and quantitative outcomes, patterns will not be evident. In addition, such patterns are not valued in the logic of mediation because it is supposed to be tailor-made for each situation (see Bush and Folger, 1994; Delgado and others, 1985).
2. Inequality in participants' experience of the process or the outcome can occur if any aspect of the mediation process is not carried out properly; for example, if mediator neutrality is violated. If this does take place, it is a failing of the mediator but is not an inherent failing of the process (see Gerami, 2009).
3. Mediators and the mediation process are not responsible for societal, organizational, or interpersonal imbalances in power. In fact, attempting to address imbalances of power violates the fundamental belief in neutrality embedded in this mechanism. As a result, an unequal outcome can occur if a party does not have the power necessary to negotiate the change it desires. Although mediators may help parties explore their options, going beyond that is outside the scope of mediation (see Forester, 1999; Susskind and Cruikshank, 1987; Neves, 2009).

Central to the logic of the dominant paradigm embraced by the field are core values such as belief in the agency of the individual participant and the importance of self-determination. With underlying values that emphasize individual choice, it follows that the participants are responsible for preventing any experiences that would violate their self-interest by not

allowing any form of inequality to interfere; and there is faith in their capabilities (no matter the social conditions they face) as well as in each individual mediator's capacity to not violate neutrality. Thus we count on participants to make choices that are self-empowering and that address their own needs, and we count on mediators to be capable of setting aside their socialization and biases in the service of disputant self-determination. Yet, how realistic is this premise when social science research and lived experience document that we are all the products of our socialization and that it is a significant force behind social inaction? (See Adams, Bell, and Griffin, 1997, for a general analysis of this; and Delgado and others, 1985, and Trujillo and others, 2008, for discussion of this within the field of mediation.) The problem with this approach, it can be argued, is this complete focus and faith placed solely on individuals involved in mediation. If humans are capable of addressing inequalities merely through individual self-determination and the desire to not be biased, then why do we continue to see a pattern of disempowerment and of dissatisfaction with mediation disproportionately from those whose outlook does not reflect the dominant views in society or who belong to groups that do not hold social power in society? Alternatively, as a field we are resigning ourselves to facilitating processes that routinely fail to address inequality.

The result of the use of the internal logic of this paradigm is that mediators do not need to attend to complaints of inequality so long as the mediator performs his or her task of being neutral. In this way, the core values and practices of the field are protected from critical interrogation. However, as long as the field continues to function using this line of reasoning and perpetuates patterns of disparate treatment, experience, and outcomes, then it will not only be challenged for serving some disputants' needs better than others but will continue to act as a conduit for legitimizing power structures despite our intentions to the contrary. Many practitioners and scholars are troubled by the consequences of neutrality masked behind the guise of objectivity, to say nothing of the disputants who have experienced it. Therefore, critical examinations of the paradigm that has given us this logic can help illuminate how our practices reenact inequality. We can ask whether the dominant paradigm is sufficient to handle narratives emerging from all communities in a stratified world. We may consider how deep the cultural and political imperatives of these foundational ideas of our field are that reinforce an exclusionary conceptual system disproportionately serving the needs of certain classes, races, and other privileged categories. There are ways in which the dominant paradigm not only

supports a particularized worldview but confounds critical reflection that could hold answers to a reality existing outside what is familiar to many. Roy and colleagues (2008) encourage us to recognize both the exclusion and hope that the field offers: “Conflict resolution is a field that strives for openness to varying points of view. Resolving conflicts and making decisions collaboratively depend on a willingness to hear all sides and weigh all perspectives . . . [yet] just as in many other arenas of American life, so too in the world of conflict resolution, a monocultural dynamic has set in, the domination of narrowly construed understandings of both practice and theory” (p. xi).

It may be understandably discomfiting and at the same time liberating to interrogate our theory and practice for its relationship with equality, particularly in terms of core values such as neutrality and self-empowerment. Yet to respond to the pattern of inequality and address our relationship with those experiencing it, here is a call to the field to resist practices pointed out by participants as authorizing domination and not meeting the needs of all. In our struggle to understand the impact of hegemonic practices in mediation, we will not be alone. There are rich discussions taking place within mediation programs as well as in the literature, and more and more people are joining the search to respond to the exclusion and inequality that continues to be reproduced. This article seeks to engage with this conversation and encourage a broader research and practice agenda to address these concerns.

### Exploring and Critiquing Mediation’s Core Values

What follows is an examination of some of the field’s core values, the strategies that are often undertaken to deploy them, and their relationship to the dilemmas of inequality in mediation experiences. Since conventional mediation’s resurgence in the 1960s and 1970s, there have been a diverse set of goals outlined by its advocates: streamlining court efficiency (Goldberg, Greene, and Sander, 1985; Burger, 1982), transforming individuals and relationships (Bush and Folger, 1994), enhancing self-determination and mutual problem solving (Welsh, 2001), and using its “magic” (Davis, 1989, p. 23) to heal relationships and communities (Girard, Rifkin, and Townley, 1985; Shonholtz, 1984). Despite these seemingly disparate goals, there lie a unifying set of beliefs, and neutrality and self-determination are at their center. Frequently, mediation is defined as a process in which a neutral third party facilitates communication and aids in resolution of a conflict that is designed by the parties (Association for Conflict Resolution, 2004).

The most widely accepted view defines “neutral third parties” as impartial to the content of the dispute and unbiased to the parties involved. The mediators are presented as mere facilitators of a *process*—ensuring that participants are the decision makers. It is this emphasis on the individual agency of the parties that makes mediation different from other methods of conflict resolution. What is at the center of its success and popularity as a voluntary (read: participant-selected) and fair (read: neutral) process is that it is designed for self-determination and the creation of win-win outcomes (Kolb and others, 1994).

#### *Relationship of Power with Neutrality and Self-Determination*

Although a practice based on neutrality and self-determination may have served many participants very well over the years, the growing visibility of dissatisfaction in the field by others points to needs and values that are systematically left unaddressed. Examination of critiques of the dominant paradigm and the problems it manifests for participants in mediation uncovers repetition of hegemonic cultural norms and struggles regarding power and neutrality. It is significant to note that the critiques center on issues of power as it is inextricably tied to neutrality and self-determination. This analysis attempts to highlight the importance of their reliance on one another and how they reproduce inequality in mediation.

To begin, let us look at the core elements of neutrality as it is understood in the field. Neutrality is viewed as the condition necessary for parties to exercise their free will to raise topics, negotiate, and reach resolutions of their own accord. The two components of neutrality are together believed to make this possible: *impartiality* is the condition in which a mediator is not taking sides regarding the topic under dispute or the content of any potential agreement, and *equidistance* is the condition of being equally removed from and remaining unbiased toward each party. Equidistance demands that mediators make symmetrical moves toward each party. In other words, being neutral requires that mediators be engaged in an “unbiased” and symmetrical relationship with all participants (Rifkin, Millen, and Cobb, 1991). Therefore to provide fairness in the process, the field of mediation attempts to offer neutrality through impartiality and procedural symmetry as a seemingly objective response to a very personal conflict between disputants. The value placed on objectivity is the product of a worldview that sees its principles as universal and cultural-free (Mayer, 2004; Rifkin, Millen, and Cobb, 1991). It relies on positivist thinking that argues that an observer can be separate from the subject observed; that



a mediator can intervene without having his or her values or experiences affect the process (Borg and Gall, 1989). Thus allegiance to positivist thinking along with its attending value of neutrality are central to the hegemonic paradigm in the Western mediation world.

But despite being driven by an interest in fairness, what are the actual consequences when a mediator treats “equally” those participants who enter the mediation on uneven ground? In fact, mediation is heavily critiqued for functioning within stratified social contexts without recognizing power imbalances in the identities and rank of the parties (and the mediator) as well as the larger social structures that have an impact on their relationships. Critics question the impact of attempting to be neutral in such settings. In response, the literature in the field holds forth that mediators should treat all parties the same way to be of assistance in a self-determining process that parties can call fair (Goldberg, Greene, and Sander, 1985). Mediation has translated its methodology into a process that concentrates on individual empowerment through choice. Crucial to the practice are a set of interlocking assumptions that each person has the capacity to articulate and act and *therefore* will have equal access to individual power and participation within a mediation.

What this fails to take into account is the social context and specific circumstances that can place severe limitations on a party's ability to access or use its power, whether due to the possibility of retaliation as in a case of domestic violence or the reframing of a dispute by a mediator whose worldview does not reflect a party's values. These and other conditions can significantly affect participation if, for example, parties self-censor for safety reasons or experience lack of validation of their experiences and subjectivity. Therefore we continue to hear the refrain, especially from critics and marginalized groups, that attention to symmetrical interventions with an absence of reflection on imbalances of power leads to processes that enforce different modes of privilege and reveal the tendency to benefit those in power (Delgado and others, 1985; Grillo, 1991; Rouhana and Korper, 1996). These critiques acknowledge that mediation exists within larger social systems that are inherently based on social and political inequalities. For mediation services to offer something of value to more people, critics have argued, mediation must respond to the particulars of the social contexts in which it is offered. Which is to say, mediation must provide meaningful intervention for all interested parties, addressing the inequalities they experience.

The cultural specificity of the paradigm that is foundational to hegemonic practices in the West, is, in and of itself, proof enough that neutrality

cannot exist in mediation. In other words, mediators who are taught to be distant in a session and who do not seek to attend to the disenfranchisement of participants within the larger social context are clearly not seen as neutral by many who are in marginalized groups (Rouhana and Korper, 1996; Li-On, 2009). The impact of participating in a mediation in which the mediator does not effectively engage with the realities of one's worldview, oppression, limited resources, or violence can be actively disempowering to a party and influence the party's engagement in the process (Grillo, 1991). The tension between structure and agency in a session that relies on neutrality places limits on how such disempowerment could be addressed. For example, the hegemonic perspective ignores that disputants whose cultural values are not matched by this paradigm can find this model alienating and severely limiting. They may be seeking mediators who are connected, not equidistant, invested in the relationships and therefore the outcome, not neutral. In this way, we can see how a mediator's cultural worldview has an impact on her overall approach to practice; as an extension, it can be seen to infiltrate each activity she undertakes, even how she reframes a comment or an issue, and this, of course, can have an important influence on the process and its outcome (Gerami, 2009; Rifkin, Millen, and Cobb, 1991). The cumulative effect is that with every generation of new mediators, hegemonic values and techniques are continuously synthesized into the fabric of the field. Despite sincere desires for inclusion and full participation, it continues to exclude the worldview of many participants.

Ironically, as discussions among practitioners and in the scholarship reveal, neutrality is viewed as unrealistic and unachievable by many in the field; yet it continues to be highly valued. The recognition that human nature makes neutrality truly unattainable has resulted in a shared understanding (albeit contested by some) whereby we agree on an operational understanding of neutrality requiring that we strive for it (Goldberg, 2009). This again points to the limitation of interpretive approaches to the field that continue to look for solutions within the hegemonic paradigm rather than opening the space to lived experiences that challenge neutrality. This hinders possibilities of seeking from other worldviews what they may offer as solutions. Instead the discourse within the field argues for neutrality as valuable even if achieving it is unlikely. Why, we might ask? I would argue that reliance on the power invested in the parties through self-determination is directly tied to our passive acceptance of neutrality, even as many in the field point to its flaws. Therefore, party responsibility and

choice as well as mediator use of symmetry are seen to ensure the necessary checks and balances against any potential inequality and lack of fairness.

What follows from this, then, is to ask how much power a mediator or a participant should have and who should decide this. Over the decades, new strategies and even new models have been developed in response to debate over this subject. However, what has continued to remain center-stage is some integrated relationship between intervener neutrality and party self-determination. Therefore, the field seems to have reached a consensus that party self-determination (read: party power) is a key component to representing and protecting the interests of the parties. To illustrate, we assume parties are exercising self-determination when they come to mediation. There is a shared understanding in the field that if we inform parties about our approach to mediation (that is, how much power they will get and how much we will exercise over the process), then parties who *choose* to mediate are exercising their agency. Thus power is imagined as a product of social and historical making that is bargained over and shifted through free will, during a transaction from participant to mediator to the process itself. The focus on the individual level means that in typical transactions the role of institutions in wielding the power to influence both parties and the intervener is not examined and therefore remains safely entrenched and uncontested. How does this bode for our work in social settings in which significant power imbalances exist? This practice of articulating power acontextually raises questions of ethical responsibility for mediators to explore further, in the profession and field as a whole, in order to respond to the needs of those who are or can be disempowered.

Critics raising concerns about the impact of institutionalization of the field have sought to point out the influence of social structures on party empowerment. Some have argued that integrating mediation into courts and schools has led to some loss of self-determination. Institutionalization, they argue, puts pressure on mediation programs to produce a high rate of agreement. Studies have also shown that this in turn results in mediator pressure on parties to settle for less than what they want or need (Gerami, 2009; Welsh, 2001). Other reductions in party power occur in some school and court programs, where the rhetoric suggests that mediation is a voluntary option and yet there is coercion, from institutional policy or norms, to participate. Critiques regarding mandatory mediation programs are especially harsh because studies have revealed that such programs can perpetuate disempowerment and be a damaging experience owing to lack of participant self-determination (Grillo, 1991).

Another perspective on how power as a social political narrative or discourse operates is offered by critics analyzing mediation. It views power as a socially constructed phenomenon and not a material “thing” (Cobb, 1994; Cobb and Rifkin, 1991; Li-On, 2009; Roy, 2008). It is presented as a quality of something that gets its meaning socially, politically, and culturally. Power can emerge through varied points of view, or it can be centralized through one dominant commentary. In effect, then, power is framed as narrative with sociopolitical and cultural meanings attached. Li-On (2009) points out that power can be destructive or enabling to mediation participants and practitioners. It can be empowering if a party’s narrative is heard and if it creates an impact through understanding and personal or institutional change. Because discourse is reflected in all we do and think, it can be so familiar that it is invisible to cultural insiders; to outsiders the discourse of a community may not be so easily visible or understandable either. Therefore when people from different communities face one another in mediation, the intervener or a party must translate the discourse for the other party by interpreting the socially and politically constructed meanings in a story. Unless a mediator or participant, like a capable translator, explains the story of a party by grasping the discourse that has helped create its narrator, the transmittal of information can remain incomplete and ineffectual. This translation is crucial to counterbalance the universalization of one story. This view of narrative power argues against universalizing meanings, and it sees individuals as being able to “speak truth to power” by creating their own narrative outside the dominant one.

Some scholars who use this approach to show *how* power typically circulates in mediation have concluded that hegemonic power relations are often replicated within a session and that discourse from a marginalized point of view rarely survives in mediation (Cobb, 1994; Cobb and Rifkin, 1991; Winslade and Monk, 2000; Wing, 2008). At this point, the field lacks sufficient tools and applications to help facilitate sessions that attend specifically to the circulation of power from all parties *and* the intervener from the perspective of managing discourses. Could this be tied to the fact that this perspective on power is not frequently taught in conflict resolution courses or trainings? How might its use in both research and practice enable us to provide effective services for more people?

Whether one views power as something to be transacted or as a discourse that can circulate and emanate from multiple sources, the rhetoric of neutrality and self-determination not only can but does mask its actual

operation in mediation (Cobb, 1994; Cobb and Rifkin, 1991; Wing, 2008). Given this, it seems crucial to look past the rhetoric of neutrality and examine how mediators enact their roles—the strategies our field teaches and uses to manifest neutrality and promote party empowerment—and how they can and have been conduits for producing or reproducing inequality.<sup>1</sup>

Here are four themes that outline the problems emerging with regard to the role of power and the reenactment of domination in mediation. Following the list is a discussion of how they play out through narrative engagement during mediation.

1. *Neutrality and self-determination do not ensure equal access to creating a narrative that will not be marginalized by the mediator or others in the mediation process.* As previously noted, interventions are designed with the assumption that participants are agents of free will, and by furnishing a space for self-determination all parties will have equal access to narrating their story, their concerns, and their needs in a mediation. Building from the assumption that each person will feel comfortable in discussing any topic on his or her mind, mediators are taught to stay away from asking questions or prompting narratives that may delve into discussing inequality. Additionally, they are taught to treat all narratives as equally legitimate once they are expressed. However, research on mediation and age, ethnicity, gender, first language, and race issues demonstrates that mediator performance actually fails in this respect (Cooper, 2001; Hermann, 2001; Wing, 2002).
2. *Procedural symmetry fails to offer symmetrical experiences.* In spite of the desire and willingness to treat all narratives symmetrically, qualitative and quantitative research has demonstrated that participants experience mediation differently, both substantively and procedurally (Baker, French, Trujillo, and Wing, 2000; Hermann, 2001). Not only have these results negatively affected the lower-power groups but they have further privileged those belonging to social groups with more power (Cooper, 2001; Rouhana and Korper, 1996; Trujillo and others, 2008; Wing, 2002).
3. *Bias, common in human nature and society, can and does have an impact on mediation practices.* Because of unwavering faith in neutrality, the field pays insufficient attention to the likelihood of mediator bias.

The hegemonic view is that bias is uncommon in the culture at large and therefore a well-meaning mediator is ineluctably unbiased unless proven otherwise. However, the reverse is more commonly experienced in society (Adams, Bell, and Griffin, 1997; Delgado and Stefancic, 2001), and this is directly tied to disparate experiences for parties (Delgado and others, 1985; Grillo, 1991; Trujillo and others, 2008).

4. *The hegemonic paradigm of mediation does not respond effectively to the material realities of many who are in lower-power groups.* Mediation ideology, grounded in individual choice and neutrality, does not require taking into account social forces and institutional oppression. This has a disproportionately negative effect on those from less powerful groups (Auerbach, 1983; Baker, French, Trujillo, and Wing, 2000; Hermann, 2001; Trujillo and others, 2008; see Li-On, 2009, and Neves, 2009, for further discussion on this theme as it relates to community mediation).

### Performing Power: Using Strategies That Can Produce or Reproduce Substantive and Procedural Inequalities

A close examination of the narrative processes at work in a typical mediation session can illustrate how power operates through the strategies undertaken in the name of core principles and how they can lead to producing or reproducing procedural and substantive inequality. Understanding the circulation of power through the narration of stories in mediation is critical because *being able to narrate one's story—to describe key events and their meanings—as well as having this responded to by others and then built on by them is a crucial exercise of power in mediation.* Research findings by Rifkin, Millen, and Cobb (1991) demonstrate that the opportunity and agency to fully participate in constructing a legitimate narrative is central to party empowerment in both the process *and* the outcome of a mediation. The role of facilitation is vital in influencing which stories are developed, responded to, and built on (Rifkin, Millen, and Cobb, 1991). If a party's narrative is not fully shared along with the interpretation he or she gives to it, it will not be adequately engaged with during the discussion of the future. Underdevelopment of a participant's conflict story is one way to disenfranchise him or her in co-construction of a mutual future story, and of course this influences the ability to create an outcome that is hoped for

and needed. A strong correlation exists between asymmetrical access to story development and asymmetrical experiences and outcomes in mediation (Cobb and Rifkin, 1991).

But, we must ask, how could this occur when mediators are performing neutrally? A closer look at the impact of mediators' micro-level decisions such as asking questions and summarizing demonstrates how significantly they influence a story's development and therefore have an impact on party empowerment in a session (Cobb and Rifkin, 1991; Gerami, 2009; Wing, 2002). Rifkin, Millen, and Cobb's research (1991) found a direct correlation between the decisions mediators made and whose stories dominated not only the discussions during a mediation session but also the overall outcome. In more than 80 percent of the cases, the first speaker's story became the blueprint for mediators and the agreements they facilitated (Rifkin, Millen, and Cobb, 1991). The mediators reinforced the first speaker's story by their engagement with it; the second speaker, having already been put in the position of a respondent by the first story, was rarely freed from that position despite being given an opportunity to "tell their story." The majority of the time, the second speaker never constructed a full story with her own chronology, meanings, and interpretations with which the mediator(s) and other party engaged. The common technique mediators use—having parties take turns as they narrate and engage in a discussion—is a strategy based on the idea that symmetry results in fairness. In practice, research found that sole reliance on this practice with an assumption that each party would be equally empowered to tell his or her story actually interfered with the ability of the second speaker to tell another story that did not rely on the first speaker's narrative (Rifkin, Millen, and Cobb, 1991). Thus the mediator's assumption that each participant will have an equal opportunity to construct and articulate an independent narrative can be undermined through implementation of symmetrical turn taking. In spite of mediators' best intentions, in actuality neutral facilitation is not a meaningful avenue for story construction for a second or third speaker (Cobb and Rifkin, 1991; Wing, 2008).

However, first-speaker domination is not the only reason some narratives are engaged less often by mediators. Narratives that resonate with the master narrative<sup>2</sup>—the dominant cultural stories of society—have cultural and political reinforcement behind them resulting in their being more easily identifiable and imagined by mediators (Cobb, 1994; Cobb and Rifkin, 1991; Winslade and Monk, 2000). This often-unknown alliance between a party's story and the master narrative can add strength to a story's stability at

the mediation table (Cobb, 1994), and this can be further exacerbated if the narrative is also mirrored by the worldview and life experiences of the mediator (Goldberg, 2009).

To illustrate the consolidation of power behind a narrative, let's look at an example of the impact the master narrative has on mediator engagement with a counternarrative—a story that does not resonate with the master narrative. The master narrative in U.S. society frames racism, sexism, and other forms of inequality as deviations from the norm of everyday life (Delgado and Stefancic, 2001). Therefore, according to this cultural story, racism does not exist unless a narrative can be offered that justifies beyond doubt such allegations (Delgado and Stefancic, 2001). This places a burden on a narrator describing racism and forsakes appreciation for her reality. The impact of the master narrative can manifest in unequal access to storytelling in mediation. If a mediator carries the master narrative of racism in his mind, he can seek from a party explanations that demonstrate racism is “provable” before allowing the narrative to be fully engaged at a session (Wing, 2002). Research has demonstrated that concerns related to race and ethnicity are often removed from the table by mediators through disengagement and explicit changing of the topic (see Wing, 2008, for a case study demonstrating this). Such delegitimizing of a party's story of inequality through active disengagement with the party's narrative is reinforced and encouraged by the master narrative as a conflict reduction device (Rouhana and Korper, 1996). However, lack of engagement or active disengagement with counternarratives are only two of the facilitation strategies typically employed that result in privileging some stories over others (Cobb and Rifkin, 1991; Wing, 2002; Winslade and Monk, 2000).

Another facilitation technique used in the service of neutrality is allotting the same amount of time to all participants. But this attempt to promote fairness can end up privileging the party whose story is most familiar to a mediator and resonates with the master narrative. This privileging occurs when an intervenor applies symmetry to narratives that have asymmetrical relationships with the mediator. A party's story buttressed by mediator familiarity and the master narrative does not require detailed explanation of its meanings to be understood by the mediator, and therefore it can take less time to narrate (Ross, 1995). By contrast, articulating a counternarrative so that it is truly understood by those unfamiliar or uncomfortable with it is likely to require more interpretation and therefore more time. Sincere engagement and, at times, patience (with both the



party and himself) is needed from the mediator to appreciate the meanings, symbolism, and context of a party's story, especially if it clashes with the mediator's worldview and the master narrative he has been taught is truth. The myth of neutrality hides the fact that a master narrative not even being told at the proverbial table is present in the room and creating push-back against emergence and engagement with some parties' stories (Ross, 1995). If this is recognized by a mediator who wants to understand the story that is less familiar, it likely takes more time and effort on his part than in story gathering with another party; in other words, it requires asymmetry. If a party herself senses that the mediator's worldview is different from her own and that the mediator is not aware of or willing to bridge that gap, she may be faced with the decision of whether to take on the role of translator of her own story. This requires that she be well versed in her own narrative and worldview, the master narrative, and mediator's worldview so that she can see what the mediator is missing and provide the necessary links. This may mean taking risks in her relationship with the mediator that the other party may not have to take. These are common burdens placed on those who belong to marginalized groups (Bowland, 2008), illustrating another moment in a mediation process where the labor of one party to fully participate is unequal to that of the other. However, despite this reality that some stories are less familiar to most mediators and take more work to share and be understood, the mediation field demands symmetry. Sadly, mediators often use as a baseline the time frame of whichever party needs less time to tell his or her story (Wing, 2008). The impact of this on a party telling a counternarrative can be a limitation on the narration and thus on participation, empowerment, and self-determination. For a field whose practices espouse a needs-based orientation, the focus on standards (such as symmetrical procedures) is sadly ironic.

That mediation does not respond well enough to the material realities of those who experience systematic inequality has been illustrated throughout this article. Perhaps this is not surprising, given what we know about the circulation of power through storytelling and the fact that the majority of mediators are from dominant social groups (Baker, French, Trujillo, and Wing, 2000; Cooper, 2001; Pipkin and Rifkin, 1984). Even for a mediator from a higher power group who works arduously for a socially just society, the master narrative imbedded in the hegemonic paradigm confounds this work in mediation by mandating promotion of neutrality and symmetry and a focus on individual choice. Therefore mediators who concentrate on being neutral are encouraged to see that they are doing their part

for fairness while faith in neutrality masks its impact. Unless a mediator has personal experiences or a critical lens challenging this, she is less likely to see the vacuousness in the promise of neutrality. If typical mediation strategies are employed in service of neutrality rather than the storytelling needs of each party, this can perpetuate unequal access to narration and, as research has demonstrated, affect the colonization of counternarratives as well as the disenfranchisement of the narrators.

### Joining the Call for Change

Exploring the political nature of mediation and the inequality that it can produce challenges the field to reconsider the paradigm from which we function and the strategies employed to uphold its values. Is relying solely on one paradigm sufficient or even appropriate as we work with and are a part of populations that are multicultural and transnational? In fact, we are increasingly working with people in cyberspace, and consideration of inequality in regard to mediating with the use of technology has yet to be rigorously examined. Technological innovations are creating an exponentially more connected world, and cyberspace seemingly offers an environment without borders in which anonymity, hidden identity, cultural differences, and text-only communication undoubtedly affect the circulation of power in new ways. What new opportunities, paradigms, and challenges might emerge from this arena?

Whatever arena we focus our mediation activities in, we can see the perpetuation of inequality in mediation experiences as both an urgent call to do something different as well as a rich opportunity to broaden our perspectives by learning from other paradigms and seeking answers to the problems of power inequity within societies and also within our field. This dilemma presents important questions for research and practice and their intersection (Trujillo, 2008) as we explore further how these patterns of inequality are replicated and how to enhance our training and teaching methodologies, intervention models, and programmatic structures to effectively respond to all parties' needs. Participants' experiences with mediation disenfranchisement are an important source of learning as we grapple with how power operates in mediation. Looking to those whose realities the field least effectively addresses may be a useful place to start (Matsuda, 1995). Research findings already illustrate the value of using narrative and critical theory to enhance our understanding and tools for facilitating stories in mediation. What mediation session structures could eliminate

the dynamic of having a first speaker: caucuses, new uses of technology, and so on? What techniques might emerge if we attempt to be multipartial and attend to each party's storytelling needs in ways that foster complete narratives and their understanding while accounting for the influence of the master narrative? Practitioners and mediation centers may consider functioning from a counternarrative, assuming inequality rather than equality—that parties will have different needs and resources that impact narrative participation. Having a diverse pool of mediators who can mediate from various worldviews and languages is particularly important. Other creative ways to prevent and address inequality are required and can be delivered by this field.

Tens of thousands of people from a variety of communities have benefited from mediation services that are based in the dominant perspective, experiencing empowerment and self-determination in mediation processes that helped to improve their lives. This is undeniable, but so too is the fact that strategies and processes grounded in this paradigm have disproportionately privileged some over others; the fault lines routinely have fallen along social group membership. Labor for addressing this must not fall along similar lines. In a field of such creativity and collaboration, I am sure it doesn't have to.

(Just as the mediator reflective practitioner group is about to start discussing the dilemmas raised by one of its members, the door opens and a head pops around the door frame.)

“Is this the meeting on inequality and mediation?”

(Simultaneously, the mediators respond:)

“You're in the right place for that discussion!” “Did you face a dilemma this week too?”

“Well, actually, I had an idea for addressing one, and I wanted to talk it out with some colleagues.”

“Great, come join in. The discussion is under way. . . .”

## Notes

1. Because a majority of those who have experienced procedural and substantive inequality in mediation are from nondominant social groups, this is a replication of other experiences common in their lives. There are some members of dominant groups who have also experienced inequality in mediation. For the latter, then, this is a production, rather than a reproduction, of inequality.
2. A master narrative, or grand narrative, is a leading mainstream cultural story a nation tells itself and others about the society (Delgado and Stefancic, 2001).

For example, neutrality is a valued concept within the U.S. master narrative, made evident by its centrality to society's leading institutions: the law and courts. The power of the master narrative is evident in its permeating even society's informal alternative dispute resolution forums, such as mediation.

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