

A FEMINIST PHILOSOPHICAL CRITIQUE OF DOMESTIC MEDIATION (ADR)  
PRACTICES IN THE UNITED STATES: REALIZING MARY PARKER  
FOLLETT'S THEORY OF EMPOWERMENT

by

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A THESIS

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Title: A FEMINIST PHILOSOPHICAL CRITIQUE OF DOMESTIC MEDIATION  
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Dr. Scott Pratt

This thesis identifies four major problems facing the Alternative Dispute Resolution profession—especially domestic mediation—and proposes constructive solutions using ADR pioneer and feminist-pragmatist philosopher Mary Parker Follett's work. I argue these problems are grounded in a conception of persons as independent and radically autonomous, rather than interdependent and embedded in social communities. Mediators often justify professional expansion by claiming mediation is more empowering than other ADR methods. However, absent a well-developed theory of interdependence, mediation perpetuates the power of negative socioeconomic forces over clients, furthering oppression not empowerment. Central to Follett's theory is a conception of power consistent with the idea that persons are interdependent. Effective domestic mediation reform could be achieved using Follett's theory, which demonstrates how ostensibly individual matters

leading to “private” conflicts are inseparable from social circumstances and public concerns. I conclude with several solutions based on this alternative conception that help rectify current ADR problems.

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## CHAPTER I

### INTRODUCTION: SITUATING MY CRITIQUE OF DOMESTIC MEDIATION PRACTICES

Despite the growth of programs and applications, alternative dispute resolution (ADR)—and in particular, mediation—as currently practiced in the United States is facing major challenges, and may even be in the midst of a “crisis.”<sup>1</sup> This feminist philosophical critique aims to delineate key causes and aspects of those challenges, and propose avenues which may lead to constructive solutions, building upon a reclamation of the work of ADR pioneer and feminist-pragmatist philosopher Mary Parker Follett. I locate the crux of the problem in the tension that arises from the contradiction between the mediation profession’s widespread aim of empowerment and the mistaken conception of the individual persons who participate in mediation as radically autonomous—which Follett denounces as a “fallacy” (1918, 61).

Mediation professionals in the US, and in particular those who practice domestic mediation, are generally committed to the core value of empowering clients, and thus to developing mediation practices that are empowering. These same practices are nevertheless rooted in the individualist fallacy, which conceives of individuals as radically autonomous rather than embedded in social communities, as will be explicated

below.<sup>2</sup> As dispute resolution educators and practitioners Deborah M. Kolb and Linda L. Putnam point out, “Interdependence is clearly the sine qua non of negotiation. Parties need each other to make agreements.” Yet “[i]nterdependence, as it has been theorized and applied in [ADR] practice, is based on an instrumental assumption” that “parties need each other primarily to satisfy their individual interests. As a result of this individualistic view, theory and research on how parties construct interdependence are underdeveloped and typically treated as a residue of dependence” (2005, 142). This problem, as well as the challenges that the mediation profession currently faces, is not limited to relations *between* the individual parties who are participating directly in a mediation process. Rather, as I will show, the interdependence between those parties and other members of their community who are not directly participating—and between those parties and socio-economic institutions and conditions—also has been neglected in mediation practice, with detrimental consequences to the parties and to their communities. I want to be clear at the outset that, while my claim that the notion of the radically autonomous individual is mistaken and my claim regarding the reality of interdependence may prove to have general validity, my purpose here is limited to defending the validity and efficacy of those claims only as they apply in the ADR context.

### **Why A Feminist Philosophical Critique?**

While a central task of this critique is reclaiming the work of early feminist-pragmatist philosopher Mary Parker Follett, my project here is also directly informed by more contemporary feminist theoretical critiques of alternative dispute resolution and

mediation. Some significant changes in mediation practice already have been made as a result. For instance, feminist scholarly work undertaken primarily in the 1980s and early 1990s, shortly after the US mediation profession's inception in the 1970s, underlays the now widespread recognition within the profession of how mediation can amplify gender-based power disparities between disputants. This theoretical work also spurred the resulting practical measures that have been taken to avoid mediating unless those power disparities can be addressed effectively, especially in cases that involve gender-based violence (see e.g. Benjamin and Irving 1992, 133, 143-147 *passim*). For example, the "Model Standards of Practice for Family and Divorce Mediation," developed by a symposium of professionals ranging from experienced individual mediators to experts in ADR law to nonprofit professional organizations, state that family mediators "shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process." Those steps include ensuring mediators are appropriately trained, determining when mediation is not appropriate, and ensuring the safety and security of the participants during mediation (SSP 2000, 8).

Feminist theorists were also among the first to raise concerns not just about power disparities between individual disputants as such, but also about the fundamental problems that are central to this feminist philosophical critique. These problems include how assumptions about persons as radically autonomous individuals and the private nature of contemporary mediation processes can magnify socially-based power disparities between individual disputants, as well as put the burden on disputants for the effects of social pressures beyond their individual control (see e.g. Thornton 1991, 456-

59 *passim*; Lichtenstein 20-21, 25; see also Kolb and Putnam 2005, *passim*). A large part of the work I undertake in this constructive critique falls squarely within this contemporary feminist theoretical tradition.

### **Mediation at an Impasse**

Because the practice of mediation relies on a mistaken individualistic concept of persons rather than a well-developed theory of interdependence, despite the best intentions of professional mediation practitioners the mediation process can replicate and perpetuate the power of negative social forces *between* clients, and thus can unwittingly serve as an agent of oppression rather than empowerment. A related and fundamental, but less-recognized, concern—and a concern that is at the core of this project—is how the conception of individuals as radically autonomous has led to current professional practices that focus on the effort to help individuals find private solutions to problems, even though often the roots of those problems are beyond what individuals can control and lie outside their private purview. The mediation process can perpetuate the power of oppressive social forces *over* clients as well as between them. Consequently, the effectiveness of mediation in achieving the primary goal of empowering clients remains severely constrained. This has resulted in an impasse, in that as a profession mediators justify its further expansion in large part on the claim that mediation is more empowering for clients than other forms of dispute resolution, yet the profession has never adequately considered whether current mediation theory and practice can adequately sustain this

claim. The mediation profession has the responsibility and opportunity to find effective ways to resolve this impasse between our values and our current practices.

While both the nature of the challenges and their possible solutions that I address arguably have bearing across the mediation profession, my particular concern is with domestic mediation, since the constraints on empowering clients are magnified with regard to domestic mediation cases due to our inheritance of social mores regarding the separation of the “public sphere” of government and commerce from the more constrained “private sphere” of family and household affairs (Luban 2004, 494-95).<sup>3</sup> The resulting set of problems can be addressed by reforming mediation practices and particularly domestic mediation practices to incorporate the lessons from neglected theoretical resources, such as Mary Parker Follett’s work, that emphasize how ostensibly individual problems that lead to “private” disputes are necessarily inseparable from social circumstances and public concerns.

### **Overview of This Critique**

In this introductory chapter, in addition to the presentation of the purpose and scope of this critique, I address the importance of experience for linking theory with practice in the context of mediation. I also provide an introduction to current mediation practices, along with a clarification of the use of some ADR terminology. Chapter 2 explicates four key interrelated problems with mediation practice that contribute significantly to the challenges that the mediation profession, and particularly domestic mediation, is currently facing. Then I outline the social and legal conditions that



contributed to how the mediation profession has developed, focusing on the unwitting reliance on the mistaken idea that persons are radically autonomous individuals. I also provide a working definition of what I call the “individualist fallacy.” Chapter 3 is an in-depth explication and analysis of Mary Parker Follett’s work, focusing on her theory of persons as interdependent and socially embedded, showing how that work is an invaluable resource both for critiquing current mediation practices and as a theoretical basis for rectifying the problems with those practices. In Chapter 4, I offer several specific constructive solutions for reforming current mediation practices based on Follett’s alternative conception of persons as interdependent. My final conclusions are presented in Chapter 5.

### **The Importance of Experience for Linking Theory With Practice**

As a feminist philosopher who is also a practicing mediator, I am a strong supporter of mediation as a practice that generally is preferable to other ways of resolving disputes, such as through fiat (legal or otherwise) or threat of violence. I have experienced first-hand how mediation can offer productive insights and creative solutions for disputants who entered the process with little hope of either. However, I often also have experienced the pressure of the challenges described above while working to assist mediation clients, and my experiences as a mediator have inspired and informed this critique with the aim of promoting constructive solutions to the challenges facing our profession. So throughout this critique, I will illustrate my concerns and how possible

solutions might emerge with case studies, including composites of cases based on my experiences (omitting or altering any details that could compromise confidentiality).

Here is an initial example, informed in part by my experience, that helps clarify some important aspects of the challenges the mediation profession currently faces that are taken up in greater depth below. When married couples or domestic partners are forced by economic circumstances to work evening or graveyard shifts—sometimes even opposite shifts—to make ends meet, it is not surprising that the well-documented extra stresses that come with shift work make it highly unlikely such relationships will succeed over time.<sup>4</sup> Although these types of stresses may be acknowledged in passing during domestic mediation sessions (e.g., “we can’t agree on how to raise our children and have grown apart because there’s no time to sit down together to talk”), the burden remains on the disputing parties to resolve their differences in the context of privately reaching a mutual decision about whether and how to stay together or split up. While excellent facilitation by a mediator certainly can assist the individual parties *qua* individuals in doing this as amicably as possible, there is no systematic way during the mediation process to explicitly recognize and take into account the broader societal pressures that have contributed to those differences.

In my experience, mediation agreements that come out of this private setting often have the valuable effects of helping to alleviate the immediate intensity of the conflict and produce agreement on some short-term remedies. However, those same agreements tend not to endure over time because the mediation resources available to the individual parties as they attempt to resolve their conflicts do not help them confront the broader

societal roots of that conflict. For instance, it is not unusual for the same clients to return to mediation after a few months or years because they experienced the initial mediation process as providing some relief, yet their conflicts have resurfaced in largely the same way.<sup>5</sup> In short, the current practice of mediation is successful at treating some of the *symptoms* of domestic conflict, but lacks the power to reliably help disputants address major underlying *causes*. Yet, as Mary Parker Follett's work shows, being empowered to confront those underlying problems is crucial for enabling clients to work together to develop the creative solutions that in turn empower them to not only successfully move on from current conflicts, but also to be better prepared to face new problems as they arise.

### **An Introduction to Current Mediation Practices**

Alternative dispute resolution methods encompass a broad range of practices, from binding arbitration (basically a private version of legal judging) to facilitation (where the facilitator provides services that are limited to supporting discussion, but not specifically problem-solving, between the parties). Mediation has become the most prototypical of the ADR methods, which provide alternatives to the government-based legal system (Fiadjoe 2004, 23; Coltri 2004, 313-14). Moreover, the largest and fastest growing area of mediation in the US is the practice of "domestic mediation," also called "family mediation." Domestic mediation provides services for people who are in disputes related to conflicts that occur in the context of kinship and family relations, such as those arising from divorces, child custody arrangements, elder care responsibilities, teen-parent

interactions, or even from running family businesses. In this context, “kinship” and “family” refer not only to domestic relations established by blood-ties, marriage and formal adoption; they may also include relations established through formal or informal guardianships, formal or informal domestic partnerships, other forms of co-habitation, and even close friendships or partnerships absent co-habitation (Mayer 2004, 66-67).<sup>6</sup>

Since the term “mediation” has evolved over the years and still is sometimes used interchangeably with other ADR terms such as “arbitration” (Schwerin 1995, 15; Coltri 2004, 14, 306-309), a working definition for the practice of mediation is important, particularly as the term encompasses domestic mediation (see Taylor 2002, 3, 104).<sup>7</sup> Dispute resolution professor and mediator Carrie Menkel-Meadow observes that articulating any comprehensive definition of mediation is a necessary yet possibly futile exercise, since as a human practice “mediation has become almost as variable as the other human processes it was designed to replace or supplement.” Consequently, definitions of mediation practices “can be constructed and evaluated on many different dimensions,” which “makes the creation of typologies complex” (2003b, 190, 180).<sup>8</sup>

Nevertheless, current practices within the profession of mediation in the United States generally may be distinguished from other ADR practices, such as arbitration, by the following five features (see Mayer 2004, 85, 105-108; Coltri 2004, 390, 350, 436, 256, 318, 538-545 *passim*; Kovach 2005, 309-314 *passim*). Although some of these features may be found to some extent in other ADR practices besides mediation (and a few practitioners who claim to be mediating may at times omit or depart some of these features), taken together these five features can serve to demarcate mediation practice.

The first distinguishing feature is the commitment to providing a *private and confidential setting* for the individual clients present at mediation proceedings. Unlike other dispute resolution practices, such as arbitration, mediations in the United States are almost always conducted in closed sessions limited only to the mediator(s) and those few parties who are deemed to be most actively and directly involved in the conflict (such as divorcing spouses in a child custody dispute). In addition, both those parties and the mediator(s) pledge to keep the mediation proceedings confidential, and not to use information that is learned solely through those proceedings in any other forum. A common way these confidentiality requirements are explained to mediation clients is that if information is revealed during mediation that would not be separately discoverable in another way, the parties agree it will not be used outside the mediation process. However, when a signed settlement agreement is reached, that agreement is considered a legally enforceable contract.

The second feature that helps distinguish mediation from other ADR practices is the ideal of the mediator maintaining *impartiality or neutrality* with regard to which of the parties to the dispute is “right” and what possible outcome would be “best.” A related ideal of fair or equal consideration is widespread in all ADR methods, including arbitration. However, at the point in an arbitration when the arbitrator may need to make the final decision about how to resolve the dispute if the parties cannot agree, often the arbitrator will rely explicitly on outside expertise, community standards, or legal considerations as rationales for the final decision which determines the outcome of the dispute and which party will prevail.

The third and related distinguishing feature is that mediators are *not required to consider legal precedents* or follow legal procedures, unlike arbitrators in many arbitration processes and unlike judges, lawyers, and juries in court proceedings.<sup>9</sup> In many states, mediators are statutorily required to report certain criminal activity that they learn about during mediation, such as child abuse; however, these types of legal requirements are separate from requirements to follow legal precedents or lack thereof.

The fourth distinguishing feature is the emphasis in mediation on the dispute resolution *process* over substantive matters (but not to the exclusion of substance). For example, although the importance of the goal of reaching a settlement agreement may vary widely (from the highest to the lowest priority) depending on the method of mediation, in all methods *how* conflicts are resolved generally is held to be more important than *what* the dispute is about or the substantive content of any resulting resolution. Indeed, mediators often hold that absent an effective process, reaching agreement on the substantive issues is unlikely or even impossible.

The last distinguishing feature is prioritization in the mediation process of the commitment to *empower the parties to voluntarily create their own mutually acceptable solutions* for their dispute, rather than the mediator imposing or providing solutions for them. While initial participation in mediation may be required, and that requirement may be made public (e.g. by unsealed court order), decisions to continue with the mediation process and agree with any possible solutions must necessarily be voluntary in order to fall within the scope of mediation as commonly practiced in the United States (see Coltri 2004, 313-14.)

Of these five features that distinguish professional mediation practices in the US, the most widespread—and also the most significant in both theory and practice—are the insistence on upholding the values of *voluntary* participation of the parties and *non-coercive* nature of the proceedings in order to *empower* the participants (Schwerin 1995, 9; Coltri 2004, 318-319).<sup>10</sup> For example, the 1994 version of “Model Standards of Conduct for Mediators,” which have been widely adopted in the United States by governmental entities, nonprofit mediation organizations, and private mediation associations, states:

A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their *own agreement*. . . Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a *voluntary, uncoerced* agreement. (ACR 2008a, under Preface, § 1; emphasis added)<sup>11</sup>

Very similar language has been used for the “Model Standards of Practice for Family and Divorce Mediation” (SSP 2000, 2).<sup>12</sup> These values of voluntary participation of the parties in a non-coercive process in order to empower the participants have particular weight with regard to domestic mediation. As Lori S. Coltri points out in her ADR textbook, many mediators use what she terms “pure mediation” or “facilitative mediation.” This kind of facilitative process, “whose goal is to promote [a] collaborative, integrative, principled” approach that is “characterized by the mediator’s efforts to promote constructive negotiation by the disputants” is widespread in domestic mediation (2004, 318, 603).

### **ADR Terminology: Definitions and Clarifications**

Before proceeding, the following clarifications regarding ADR terminology as used in this critique are in order. First, I want to be very clear that the term “mediation” as used here refers only to ADR method(s) where, at a minimum, the parties most directly involved in a conflict are encouraged to work together to voluntarily try to reach their own consensual solutions with a mediator who is committed to providing non-coercive assistance. Mediation in this sense is *not* a process that involves a third party—such as a judge or arbitrator—who has formal powers the other parties in the mediation do not have (beyond facilitative power). On the contrary, while those whose specific role it is to guide and support mediation efforts indeed can be influential, by definition they do not have or exercise more power to promote or adopt solutions or agreements than the other parties. Rather, in formal terms they explicitly do not hold such power. The parties to a mediation, not the mediator, are the persons designated to gain and retain the power to create and implement productive solutions.

Second, within the ADR field, the terms “profession” or “professional” generally do not serve to distinguish between providing mediation services on a paid versus unpaid basis. Instead, these terms indicate mediators who have had some training or experience that allows them to meet certain minimum standards or follow certain guidelines of practice, although there is considerable variation among the standards and guidelines (see Coltri 2004, 324). Many of the mediators who meet these minimum standards are volunteers (see Schwerin 1995, 8-9). Likewise, the term “client” does not necessarily imply that those who are provided or avail themselves of mediation services are



customers, in the sense that the purchase of mediation services becomes the main feature of the relationship between mediators and clients. Mediation services are often provided at little or no cost, or in settings where, although there may be some exchange of money or other compensation provided for the mediators, the relationship of mediation clients to the mediators is not primarily that of customers (ibid.). Finally, note that the terms “clients,” “disputants,” “parties,” and “participants” as used both here and in the dispute resolution literature generally are interchangeable when they refer to the role of those who take part in an ADR process with the assistance of a mediator or other ADR practitioner.

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## **Notes for Chapter I**

<sup>1</sup> “Crisis” is Bernard S. Mayer’s term (2004; see title and *passim*).

<sup>2</sup> A working definition of the mistaken notion of persons as radically autonomous—the “individualist fallacy”—is provided in the Summary section of Chapter 2.

<sup>3</sup> The traditional association of the public sphere with men and masculinity, and the private sphere with women and femininity, has affected ADR practices as Margaret Thornton points out (1991, 448-49 and *passim*). David Luban notes that transactions between individuals (including corporations as legally deemed to be persons) are sometimes located in a (quasi-)private sphere, leaving the public sphere to politics and governmental institutions (2004, 494-95). However, as Thornton explicates, in either case interactions and commerce *outside* the domestic realm are associated with freedom (1991, 450-53). Thornton provides an extensive analysis of how this “malleable” but persistent dichotomy between the masculine public sphere of freedom and the constrained feminine private (domestic) sphere is reified in dispute resolution methods (see *ibid.*, 450-51, 456-58). (Although most of Thornton’s specific examples center on British and Australian practices, they are relevant to ADR as practiced in the United States.)

<sup>4</sup> The detrimental effects of shift work on domestic relations have long been recognized. Blanche Grosswald summarizes and documents these effects in “Shift Work and Negative Work-to-Family Spillover” (2003).

<sup>5</sup> Mayer’s analysis supports my experience: “Even if there are high rates of agreement and satisfaction associated with collaborative processes [i.e. mediation], there is no clear evidence to date that these result in better relationships over time, [or in] improved long-term cooperation and adjustment (as in divorce)...” (2004, 59). However, this is not to deny that some clients do return to mediation for assistance with domestic disputes that are substantially different from their original concerns, rather than remaining mired in those original concerns.

<sup>6</sup> For an in-depth explication of many of the various types of disputes domestic mediators address, see “Part III: Specialized Practices in Family Mediation” in Alison Taylor’s *The Handbook of Family Dispute Resolution* (2002, 293-418).

<sup>7</sup> Note that Mary Parker Follett often uses the terms “conciliation” and “mediation” interchangeably, and with a similar meaning to the term “mediation” as used here, as contrasted with other more coercive dispute resolution processes such as arbitration (see for example 1942f, 230, 231-238 *passim*). However, in current usage, “conciliation” is considered to be a “poorly defined term, sometimes referring to mediation, other times to various [other] processes that focus on relationship repair” (Coltri 2004, 597).

<sup>8</sup> As Joseph A. Scimecca succinctly states, “The field of conflict resolution has been characterized by a lack of clarity and definitions” (1993, 219n). E. Franklin Dukes’s “Appendix: Terminology” (1996, 185-195) provides further information on the varied definitions (or lack thereof) for alternative dispute resolution processes; the difficulties with and various approaches to defining mediation are addressed at some length (190-193). Note that Dukes’s proposed solution, to adopt a definition of mediation that would encompass forms of alternative dispute resolution that

include imposition of a settlement by a third party as a last resort (see 191), has been rejected by most domestic mediation practitioners and by professional organizations whose specific focus is mediation. For example, both the 1994 and revised 2005 Model Standards of Conduct for Mediators (discussed below) emphasize that mediation should be a voluntary and noncoercive process (see ACR 2008a and 2008b).

<sup>9</sup> It is worth noting that Lawrence Susskind discusses how a sort of *informal* precedent does apply to mediation, in that the outcome of a mediation (whether formally settled or not) is known by the mediators who will then use that knowledge to inform their role in further mediations. In addition, the outcome will inevitably become generally known by friends, family members, colleagues and others who interact with the disputants (2004, 515). For example, if the schedule when young children should stay with each parent is at issue, day care workers will be aware of which parent drops off or picks up the children on which days, as well as whether the parents and/or the children seem stressed by or satisfied with the situation. However, such informal precedent does not create any specific legal responsibilities or requirements for mediators or participants.

<sup>10</sup> While much attention has been given within ADR research to the nature of the power mediators do and should have in the mediation process, the value of empowering *mediators* is not as widely attended to or shared within the mediation profession as that of empowering clients (Mayer 2004, 108-109; Schwerin 1995, 26-27). However, some attention has been given by advocates of the community mediation movement to the need to empower mediators within the mediation process. This is in part because the community mediation model involves training *volunteers* who are part of the communities to be served, and as such are presumed to need mediation to provide them with a more positive experience than would necessarily be the case if significant monetary compensation were involved (see Schwerin 1995, 26-29 *passim*, 125-131 *passim*).

<sup>11</sup> The 1994 Model Standards were jointly developed and approved by the Society for Professionals in Dispute Resolution (now the Association for Conflict Resolution), the American Bar Association, and the American Arbitration Association. Both the Washington (State) Mediation Association and the Oregon (State) Mediation Association have adopted these standards in whole or in large part (see WMA 2008 and OMA 2008). A revised version of the Model Standards was jointly developed and approved by all three organizations in 2005, but has not yet been as widely adopted as the 1994 version. The 2005 Preamble that corresponds to the 1994 Preface and Section One excerpts quoted here has been revised to read, "Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired...A mediator shall conduct a mediation based on the principle of party self-determination [which] is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome" (ACR 2008b).

<sup>12</sup> These standards for domestic mediation were adopted in 2000 after a two-year collaboration by an ad-hoc Symposium on Standards of Practice (SSP), which included representatives from a wide range of professional mediation organizations and domestic mediation service providers, including the Academy of Family Mediators and the American Bar Association Family Section.

## **CHAPTER II**

### **A CLOSER LOOK AT THE CHALLENGES AND HOW MEDIATION GOT TO THIS IMPASSE**

The previous chapter introduced the purpose and scope of this critique, and addressed the importance of experience for linking theory with practice in the context of mediation. I also provided an introduction to current mediation practices, along with a clarification of the use of some ADR terminology. In this chapter, I explicate four key interrelated problems with mediation practice that contribute significantly to the challenges the mediation profession, and particularly domestic mediation, currently is facing. Each of these four key problems highlights the tension between the mediation profession's core value of empowerment and particular aspects of mediation practice that subvert realizing that value: 1) how mediation as currently practiced magnifies social power disparities between disputants; 2) how the private and confidential nature of mediation proceedings curtails access to information needed to identify and remedy problems that have a community or social scope; 3) how individual disputants bear the burden of domestic failures when both the causes of those failures and resources that could help remedy those failures are outside the purview of the disputants; and 4) how neither individual disputants nor mediators are accountable to other individuals who are

affected by the dispute and its outcome. I also present an outline of the social and legal conditions that contribute to how the mediation profession has developed, focusing on the unwitting reliance on the mistaken idea that persons are radically autonomous individuals.

#### **Four Interrelated Problem Areas in Current Domestic Mediation Practices**

As discussed above, alternative dispute resolution methods and mediation in particular have proven successful judging by the growth in their use, and when evaluated within the narrow confines of offering a private extralegal alternative<sup>1</sup> for dispute resolution in response to limited viable public options provided by court systems and to the decline of traditional communities. Yet beyond this narrow context, ADR methods in general and domestic mediation practices in particular have limited appeal and applicability, and thus are facing severe challenges, a situation that has been described as an impasse or crisis. These challenges are due in significant part to several key interrelated issues, each of which has been insufficiently or ineffectively addressed by the mediation profession. These issues all concern power disparities and injustices that are perpetuated by those current practices, which separate what are considered private issues from the public realm, and maintain the artificial isolation of individuals from their communities and social circumstances. Such power disparities and injustices are in tension with the dedication of mediators to the empowerment of their clients. It is helpful for further analyzing these problems, and for finding constructive solutions to redress

those tensions, to organize them into four main issue areas that are not discrete but rather are interconnected.<sup>2</sup> These four key interrelated issue areas are:

*1. Social Power Disparities Between Parties Magnified*

First, it is already well-recognized that processes such as mediation that emphasize collaboration within a private setting may sustain and even magnify pre-existing power disparities among the disputing parties, as legal scholar and ADR educator Oscar Chase points out (see 2005, 134 and *passim*; see also Coltri 2004, 339, 351-355; Mayer 2005, 141-144). Although it can be empowering for someone in a marginalized position to be able to engage a privileged person in a nominally fair process such as mediation, that nominal fairness cannot adequately address deeper socio-economic inequalities. Perhaps the most widely recognized examples of this effect in the literature on alternative dispute resolution involve mediation clients with a documented history of domestic violence. Mediation processes that fail to directly address the effect of the power relations between the clients when one client has been abusing another (usually but not always the male partner is the perpetrator and the female partner the victim of such violence) can allow the abuser to continue exerting coercive power over the victim, even when no overt threats are made and both clients may appear to be seeking mutually acceptable solutions (see Busch 2002, *passim*; Strang and Braithwaite 2002, *passim*).

However, such social disparities can be perpetuated by current mediation practices even when there is no history of domestic violence. “The nature of the

[mediation] process, though evenly applied, can interact with the dynamics of external power in such a way as to reinforce one party's power and diminish another's," as

Bernard S. Mayer notes:

[I]f I feel that I am under no time pressure to settle a dispute and believe I have many alternatives, I can use a mediation process to slow things down, obtain more information, appear flexible to many different alternatives, and in general strengthen my bargaining position. But if I feel my alternatives are very poor, my time limited, and my ability to articulate my needs in a rational and dispassionate way [is] minimal, then the process of mediation may further disempower me. (2004, 142).

For example, a woman with limited higher education and trained in a relatively low-paying service career who has been out of the workforce for years while the primary caretaker of young children is at an inherent disadvantage when divorcing a better-educated husband who has worked more or less continuously in a higher-paying career. If mediation fails to lead to a settlement, such a husband is almost always in a more advantageous position to actually hire competent lawyers to represent him (even if nominal resources are provided for the wife to do so) before a judge, which in practical terms puts pressure on the wife to settle for less than she might if their backgrounds and situations were more equal in terms of sociological and economic factors.<sup>3</sup>

In my experience, clients often will allude to these types of power disparities that relate to social inequities, such as power disparities based in gender, race, or class distinctions. A wife may argue that the husband should cede her a greater share of the jointly owned real property in a settlement because her future earning power is likely to be less than his. A husband may casually mention his option of withdrawing from mediation to go to court with "his" lawyer—i.e. the family's lawyer with whom the

husband had established a close working relationship over the years because he was presumed by both spouses to be more suited for the role of dealing with legal issue based on his education and occupation—which leaves the wife without access to such counsel. (Lawyers may be present in some domestic mediations, but this often is discouraged due to the adversarial nature of the legal system they are pledged to uphold as officers of the court and advocates for their clients; see Coltri 2004, 37-41, 325-27, 412-413. Instead, clients generally are encouraged to consult lawyers and get other expert advice on their own before signing off on a final agreement in domestic mediation cases; see *ibid.*, 330.)

However, mediators pledged not only to impartiality but also to keeping the focus on the disputants creating their own private solutions have no grounds on which to ensure such power disparities are explicitly and effectively addressed. Thus, even if consensus is reached between the parties, mediation cannot be relied on to provide outcomes that are either just or enduring when significant power disparities between disputants exist.

## *2. Private Proceedings Curtail Access to Information Needed to Identify and Remedy Social Problems*

Second, because—unlike most court proceedings—mediation is a confidential, *private* process, the ability to collect information on problems individual disputants are facing, to recognize that these problems may be widespread, and to formulate public policies to address those problems is severely curtailed. This concern has long been recognized by ADR theorists—certainly since it was indirectly yet forcefully raised by Owen M. Fiss in his oft-cited 1984 article, “Against Settlement” (see also Luban 2004, *passim*). Even before Fiss, mediation critic Richard L. Abel wrote in 1982 that,



In one respect, informal institutions actually excel their formal counterparts in individualizing conflict: They operate in total privacy. Although this guarantee of confidentiality is justified in the name of process [i.e. that parties will be more willing to forthrightly participate], its effect is to isolate grievants from one another and from the community, inhibiting the perception of common grievances.

Yet despite these longstanding criticisms, with some limited exceptions, the issues and outcomes of ADR cases remain private and isolated from public access.

In mediation, these exceptions include cases where all parties waive confidentiality, and requirements that mediators report certain serious crimes revealed during mediation sessions such as abuse of a child. In a few states, legislation has been adopted requiring that some settlements of lawsuits reached through ADR processes, including mediation, be made public if governmental entities are involved or if the settlement involves major consequences to health or environmental safety (Coltri 2004, 391-399 *passim*; Menkel-Meadow 2004, 508-510). However, these limited exceptions do not encompass most domestic mediation situations. For instance, although the strain shift work puts on domestic relationships already is well-established (as noted above), when domestic partners choose mediation to settle disputes related to their divorce or dissolution of a domestic partnership, the facts about how economic pressures forcing them to do shift work are causing those mediated divorces or dissolutions remain undiscoverable for public policy purposes. Even if the parties waive confidentiality, in most cases effective mechanisms are absent for collecting, reporting, or using any information that may result from such a waiver for the public interest.

### *3. Individual Disputants Bear Burden of Failure*

A third and closely-related problem is that individual disputants must bear the full weight of their domestic “failures,” since there are few or no grounds in the domestic mediation process to discuss how social factors beyond their control may have contributed to their situation, nor to bring in community support to help them address those pressures. Mediator and educator Bernard S. Mayer puts it very well: “[Alternative] conflict resolution tends to psychologize, personalize, and depoliticize conflicts that are rooted in social or institutional dynamics.” For instance, if “every conflict...between divorcing spouses is framed in terms of relationships, communication, or individual behavior, then underlying social inequities or systemic problems can easily be lost or ignored” not only outside of the mediation process, but also within it (2004, 46-47). The result is a focus by participants in the mediation—both mediators and disputants—on identifying and trying to address the shortcomings of disputants.

With regard to mediators, an emphasis in domestic mediation practice is often placed on the mediator’s ability to correctly diagnose the “dysfunction” or “negative manner” of each of the parties and the relationship between them before underlying issues can be addressed (Taylor 2002, 23; Coltri 2004, 156). As an example of just one aspect of this emphasis, consider the information presented by two respected authors of recent ADR textbooks, Lori S. Coltri and Alison Taylor, with regard to communicative interactions between disputants both prior to and during the mediation. Taylor lists five “common patterns of communication,” only one of which—“leveler”—is positive in terms of the possibilities for the “growth and fulfillment.” The other four—“placater,”

“blamer,” “computer,” and “distracter”—are all negative (ibid., 16-18). Coltri presents psychologist Morton Duetsch’s influential theory of cooperative versus competitive personal communication styles: Cooperative communication aides “constructive” conflict resolution; however, many disputants employ a “competitive communication” style characterized by “autistic hostility,” “reactive devaluation,” and other “destructive” patterns (2004, 155-159). This practice of diagnosing negative traits is so widespread in domestic mediation that Taylor feels compelled to warn against it, despite her own contributions to the practice:

*Normal and abnormal, healthy and sick, functional and dysfunctional, cohesive and chaotic are...external judgments placed on the family by those outside. Mediators are cautioned against making premature and often inaccurate, unnecessary judgments about their clients [such as] labels of dysfunctional, sick and abnormal...(2002, 23.)*

Communicative interactions are just one area where this particular type of negative diagnosis by mediators commonly occurs. Many additional examples exist of how mediation practices reinforce the notion that the fault for domestic problems lies with the disputants.<sup>4</sup>

This pattern in mediation practice in turn serves to reinforce the disputants’ own sense that they are the ones who are solely responsible for their domestic problems and conflicts—that they have only themselves or each other to blame. As mediation critic Richard L. Abel notes, “The very effort by the mediator to help the grievant understand his [sic] adversary’s behavior tends to convince the former that the latter’s conduct was intentional rather than accidental” (1982, 291).<sup>5</sup> Abel also explicates an aspect of how informal dispute resolution methods can exacerbate the tendency toward self-blame.

When a person is caught up in contexts such as ADR where the individualist fallacy informs how the dispute is framed, that “alienated, atomistic individual who experiences the world as out of control can only help to control himself” by “blaming oneself in the first place” (ibid., 286). This dilemma arises because radically autonomous individuals are deemed the ones who are responsible for their own choices and predicaments that have led to a dispute, but in reality as interdependent persons they cannot achieve the full control over their situation that would be necessary to fulfill those expectations of responsibility: “[I]nformal institutions [such as mediation] perfect the process of individualization: The complainant comes to see himself as his own worst enemy, the solution to his problem as entirely within, ‘accommodation’ as the proper—the only possible—response” (ibid., 291). Within the individualist paradigm, the way to resolve the dilemma becomes a stunted control over one’s self through “dysfunctional” mechanisms such as self-blame.

That disputants tend to blame themselves or each other is part of a vicious cycle, in that such blame is one of the negative patterns mediators are expected to diagnose (e.g. recall Taylor’s “blamer” category). Yet, as noted above, mediators generally are not in a position to offer disputants resources or guidance that would help them interrupt this cycle of blame, such as information about the impact of social factors beyond the control of the disputants. This auto-reinforcing cycle is itself dysfunctional, and symptomatic of the challenges the mediation profession faces that can be addressed by reforming our practices based on persons and interdependent, rather than radically autonomous.

#### *4. Individual Disputants and Mediators Not Accountable to Others Who Are Affected*

A fourth problem with current mediation practices (also closely related to the other three) is that the individual disputants are not necessarily made aware of or required to be accountable for the effects of their ostensibly private actions, decisions and agreements on others who are not direct parties to the dispute—and neither are mediators. These others include both the individuals who are affected but are not directly involved in the mediation, as well as the wider community and society (see Susskind 2004, *passim*). Indeed, particularly in domestic disputes, usually much effort is expended by mediators to *exclude* all but the most directly involved “primary” disputants from the private and confidential mediation proceedings; mediators who do not attend to this task before proceeding with a mediation are failing to follow recommended practices (see Taylor 2002, 152; Coltri 322, 325, 328-30).

One limited exception to this lack of accountability to others in my experience is that when the parties in a mediation are parents or guardians of minor children, most mediators do remind the parties that their children’s interests must be prioritized, even though minor children usually are not present at mediations. One way some mediators do this is by asking the parties to provide photographs of their children, which are then displayed in a prominent place during the mediation. The intent is to bring a tangible presence of the children into the mediation through their photographic representation.

Also, Lori S. Coltri does point out the need for ADR professionals such as mediators to identify others “who are not directly involved in a conflict but whose interests may be affected by the process or outcome of the conflict, or who may

themselves affect the course of the conflict” (2004, 10). Nevertheless, the main reasons given for this identification process are so that: 1) the mediator can make sure none of these “constituents” or “stakeholders” are actually direct disputants who should be brought into the mediation space; and 2) possible resolutions and settlement agreements can be more effectively crafted and implemented by taking into account those who are not direct parties to the mediation but nevertheless may have power to impact the outcome (see *ibid*, 9-10, 93-100 *passim*, 132-33, 205-206). No specific responsibilities of the disputants or mediators to those constituents and stakeholders are detailed, and no recommendations on whether or how to bring them into the mediation space are given beyond including those who are deemed to be direct disputants (*ibid.*, 10) and allowing brief visits to help diffuse the power of an “excluded stakeholder” to disrupt settlements (*ibid.*, 206, 329).

However, even after taking into account such limited exceptions, current mediation practices inevitably tend not only to prioritize the voices and interests of those parties who are in the room. Current practices also elide the voices and interests of those who are not present but nevertheless are involved or affected. Likewise, little if any consideration is given to the effects of disputes resolution processes and outcomes on the broader community or society, let alone what should be done about those effects.

### **How Did Mediation Get to This Problematic Juncture?**

How did mediation get to this problematic juncture, where a promising practice that was intended to empower people and address the lack of services to assist them in

creatively resolving domestic disputes has proven to have such limited efficacy and, in some cases, may even be exacerbating the concerns mediation was originally intended to address? As psychologist and mediator Peter T. Coleman points out, “Feminists argue that power differences may begin with our images but persist through the structures and institutions of a society. Thus, power in any given situation must be understood in its historical context.” Such a historically situated understanding in turn compels “us to look beyond the current surface manifestations of power and into its deep structure” (2000, 119). Before proceeding it is important to consider in more detail how domestic mediation as currently practiced has come to be shaped by its ongoing reliance on assumptions about the radical autonomy of individuals that underpin much of our legal system, while leaving out many of the aspects of the legal system that help to meliorate those assumptions, such as the ability to bring public policy to bear on problems that negatively impact individuals but are beyond their control (see Fiss 1984; Luban 2004).

Rather than a deliberate commitment on the part of ADR theorists and practitioners, I believe this reliance on the assumption of the radical autonomy of individuals largely has been received as an unwitting inheritance from certain parts of our political and legal traditions (see Coltri 2004, 32-34). This unwitting inheritance has been enabled and exacerbated by the undertheorizing of how our fundamental *interdependence* relates to concepts of power, which leads to a narrow focus on individual independence and dependence instead, as Deborah Kolb and Linda Putnam have explained (see 2005, 142-1440). This is not to say that there has been a complete lack of recognition of these

issues. For example, sociologist and conflict resolution professor Joseph A. Scimecca asserted in 1993,

ADR, like formal law, is embedded in individualism. As such, the fundamental principle of individual responsibility is seen as the cause of conflict. This focus enhances social control by not looking to structured inequalities in the society as a reason for conflict. Grievances are trivialized and the basic social structure is rarely, if ever, questioned. The assumption is that rational individuals should be able to resolve their conflicts, and if they cannot, then the problem lies with them. (217)

There is some evidence that these problematic assumptions have been exacerbated by our incomplete contemporary understanding of the long and multi-faceted history of extralegal dispute resolution in the United States, which if better known arguably could provide a richer set of resources on which to base our current practices. Of three widely cited sources on the history of ADR, for instance, none mentions the important influence of the community-based Settlement House movement associated with Jane Addams and others (Auerbach 1983, Barrett 2004, and Menkel-Meadow 2003a).<sup>6</sup> However, in part because mediation in general and domestic mediation in particular only emerged as a recognized professional practice in the United States during the 1970s (Barrett 2004, 177-80, 185-87; see also Scimecca 1993, 211-12) and became widespread in the 1980s (Barrett 2004, 209-211, 214-19), two relatively recent developments likely had a more direct impact on shaping current US mediation practices than our impoverished knowledge of ADR history may have had: first, the link between issues in family law with newly-delineated constitutional rights to privacy as the ADR profession was forming; and, second, concurrent socio-economic changes.<sup>7</sup>



With regard to the first development, long before mediation coalesced as a profession in the 1970s criticisms of the law's conception of persons were being made.

For instance, Mary Parker Follett claimed early in the twentieth century,

Our nineteenth-century legal theory (individual rights, contract, 'a man can do what he likes with his own,' etc.) was based on the conception of the separate individual. We can have no sound legal doctrine, *and hence no social or political progress*, until the fallacy of this idea is truly recognized. (1918, 61; emphasis added)

Other feminist philosophers and ADR theorists and practitioners share Follett's view that this "Individualist ideology that is central to the mainstream culture of the United States" can be traced back at least to the 1800s, as mediators Joseph Folger and Robert Baruch Bush point out (1994, 12-13). However, political philosopher Michael Sandel argues that the most significant shift in the legal conception of persons as radically autonomous individuals occurred relatively recently, and is marked by a key 1972 United States Supreme Court decision on whether married couples should have ready access to contraceptives: "The explicit change was to redescribe the bearers of privacy rights from persons *qua* participants in the social institution of marriage to persons *qua* individuals, *independent of their roles or attachments*" (1998, 97; emphasis added). In a culture that was already susceptible to the individualist fallacy, this recent shift in the legal conception of persons was concurrent with the development of mediation as a profession in the United States (Bush and Folger 1994, 1-2), and had a significant effect on both theory and practice.

With regard to the second development, during the 20<sup>th</sup> century, particularly after World War II and accelerating after the Viet Nam war—again, as the profession of

mediation was being formed—a number of economic and social changes took place that altered the sources and character of many interpersonal disputes in the United States (see Abel 1982, 285; Auerbach 1983, 10-11, 120). Among these changes were that residents of the fast-growing suburbs were no longer living as members of tight-knit ethnic communities as had once been common; instead, they often barely knew anyone in their neighborhood outside immediate family members except in some cases a few “next door” neighbors. Active membership in stable religious communities that might otherwise have helped mediate or settle disputes fell for a variety of reasons. For example, as marriage across rather than within religious and ethnic communities, as well as divorce, became more common and socially acceptable, distance from traditional religious communities that discouraged such practices increased. Schools became larger, while the increasing numbers of working women, the rising economic pressures for both parents (and for the increasing number of single heads of households) to work long hours, and even busing students long distances with the aim of desegregation, all made it more difficult for parents to be involved in their children’s activities both inside and outside the home. Employers hired increasing numbers of workers on an “at will” rather than “life-time” basis, while support of and membership in unions declined and so on.

Mary Parker Follett’s description in 1918 still serves as an excellent summary of what these changes wrought, starting in her century and continuing into ours:

We work, we spend most of our waking hours working for some one of whose life we know nothing, who knows nothing of us; we pay rent to a landlord whom we never see or see only once a month, and yet our home is our most precious possession; we have a doctor who is with us in crucial moments of birth and death, but whom we ordinarily do not meet; we buy our food, our clothes, our

fuel, of automatons for the selling of food, clothes and fuel. We know all these people in their occupational capacity, not as men like ourselves with hearts like ours, desires like ours, hopes like ours. And this isolation from those who minister to our lives, to whose lives we minister, does not bring us any nearer to our neighbors in their isolation. (190)

In short, from at least the beginning of the last century and increasingly so up to the present, residents of the United States have found many of our close dealings are with near strangers who often represent large institutions, while we often are isolated in domestic relationships that are not firmly embedded in a broader community. Thus, we find ourselves without apparent recourse to traditional community-based resources that could help us prevent and resolve disputes as they arise.

Yet the court systems remain ill equipped to offer effective, affordable and fair services for domestic disputes, such as those between divorcing spouses. Those in socially and legally marginalized positions remain particularly leery of the official court system (see Auerbach 1983, 120, 134-36). As a result, many separate courts and legal processes with stream-lined or specialized processes were established or expanded, such as divorce courts and small claims courts that do not require representation by an attorney. But soon these venues also became clogged, and parties to disputes at all levels of the court systems were encouraged and sometimes even required to at least attempt to settle their differences privately outside of court (Auerbach 1983, 120-21; Coltri 2004, 55, 310-311). Arbitration and other allied negotiation processes, such as mediation with arbitration as the fallback if a mutually acceptable settlement was not reached, were a significant part of this push toward alternative dispute resolution from the legal system, as they had been in meeting the needs of trade and organized labor disputes.

However, having strangers in the form of arbitrators with significant power to make intimate and life-altering decisions such as what the final terms of divorce or child custody arrangements should be—outside of the safeguards of formal and generally public legal processes aimed at justice—was troubling for many disputants, and for many of the arbitrators as well. Thus, the professional practice of mediation, and especially domestic mediation, as a private and confidential process that emphasizes the importance of the disputants creating their own mutually acceptable solutions in a non-coercive setting arose out of this growing need to address such concerns in the context of our still-overtaxed courts (Mayer 2004, 66-68; Barrett 2004, 216-17). At the same time, this is a legal system that at the highest levels was reconfiguring notions of privacy as inhering in radically autonomous individuals, now conceived to be largely independent of community or social relations. As the profession of mediation was forming, this newly-delineated notion of privacy as explicitly inhering in radically autonomous individuals was uncritically adopted by mediators, and applied to their view of their clients and of what constitutes minimally acceptable mediation practices (see Abel 1982, 285-86, 289-90; Scimecca 1993, 217).

### **A Working Definition of the Individualist Fallacy**

Before proceeding, I believe it is useful to provide the following “working definition” summary of the individualist fallacy based on the above discussion. The mistaken idea of the radically autonomous individual—the individualist fallacy—entails the claim or assumption that a human person is fundamentally or primarily a self-

sufficient entity who exists prior to and independent of social relations. At a minimum, each such self-sufficient person is presumed to have the capability, or at least the potential, for identifying and providing for his or her own basic needs and wants. This potential is usually assumed to be realizable only in a person who fits certain norms regarding maturity, mental and physical ability, and so forth; children, for example, generally have not been assumed to be capable of full self-sufficiency. A further claim or assumption entailed in the idea of radical autonomy is that the individual is not only capable of but also *responsible for* providing for his or her own basic needs and wants. In the ADR context, this responsibility extends to any need or desire the individual may have to address and resolve conflicts. Following Mary Parker Follett's theory, the assumption that human persons are radically autonomous is a mistake because individual personhood cannot exist outside interdependent relationships; to assert that it can is not only erroneous, but also leads mediators away from solutions that would address many of the problems with current mediation practice. Follett's argument will be addressed in more detail in the next chapter.

### **Summary**

In this chapter, I have explicated four key interrelated problems with mediation practice that contribute significantly to the challenges the mediation profession, and particularly domestic mediation, currently is facing. Each of these four key problems highlights the tension between the mediation profession's core value of empowerment and particular aspects of mediation practice that subvert realizing that value. I also

outlined the social and legal conditions that contributed to how the mediation profession has developed, focusing on the unwitting reliance on the mistaken idea that persons are radically autonomous individuals, and provided a “working definition” of this idea which I term the “individualist fallacy.”

The next chapter will address how the uncritical assumption of radical autonomy by the mediation profession is not supportable on a theoretical or practical basis, especially with regard to theory that is to be applied within the context of domestic mediation practices. Specifically, I now turn to explicating how an in-depth analysis of Mary Parker Follett’s theory offers an alternative conception of empowerment based on persons as interdependent rather than radically autonomous—a conception which can be used as the theoretical basis for reforming current mediation practices. While defense of the claims that the notion of the radically autonomous individual is fallacious and that interdependence is real may prove to have general validity, my purpose is limited to defending the validity and efficacy of those claims only as they apply in the ADR context.

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## **Notes for Chapter II**

<sup>1</sup> The term “extralegal” (or “nonlegal”) is sometimes used as a synonym for “illegal.” However, here these terms simply indicate dispute resolution practices other than formal legal processes of government court systems.

<sup>2</sup> I do not claim these four issue areas exhaust the problems mediation currently faces, but rather that these are the most central and important to address in the context of this critique. For discussion of the challenges mediation faces that include issues beyond the four central ones presented here, see for example Lori S. Coltri (2004, 383-420) and Bernard S. Mayer (2004, *passim*). Michael Benjamin and Howard H. Irving provide a useful description of “ten specific assertions” of the “feminist critique of family mediation” (1992, 131-134); however, almost all of these assertions could be categorized within the four issue areas presented here.

<sup>3</sup> Elizabeth Ellen Gordon (2002) provides a useful overview and explication of the documented effects of gender-based power disparities.

<sup>4</sup> Mediators also may sometimes be assigned a measure of responsibility if disputants fail to reach a settlement; however, in my experience this responsibility is limited to the mediator’s inability to diagnose and address the “negative” characteristics of the disputants as they apply to the mediation process. The responsibility for the situation that led to or underlies the dispute still is presumed to lie solely with the disputants.

<sup>5</sup> Because Follett wrote in a time when it was common practice to use the term “man” or “men” or masculine pronouns to refer in general to human beings including women, I am preserving that usage as is in direct quotations from her work. However, in otherwise useful quotations from more contemporary works, the first instance of the gratuitous use of a masculine term to refer to human persons in general or a person who may well be female is marked with a “[sic].”

<sup>6</sup> One of these ADR histories does mention Addams, but only in a passing reference to her views on the Pullman strike (Auerbach 1983, 62).

<sup>7</sup> Despite this impoverished history, Patrick Coy and Timothy Hedeem document a resurgence of community-based mediation programs in the US during the 1970s that “were successfully established and then partly maintained because they were embedded within the context of a supportive, reinforcing cultural environment” (2005, 408)—which is congruent with the ethos of earlier movements such as the Settlement Houses. However, Coy and Hedeem also trace the “co-optation” of the resurgent community-based programs by legal and other processes that were and are not as embedded in the communities they ostensibly serve (*ibid.*, 406 and *passim*).

### **CHAPTER III**

## **THEORETICAL FOUNDATIONS FOR EMPOWERMENT IN MEDIATION: RECLAIMING MARY PARKER FOLLETT'S WORK**

The previous chapter explicated the challenges currently facing the mediation profession, focusing on how we have arrived at this impasse created by the tension between realizing the value of empowerment and relying on mediation practices that are rooted in the individualist fallacy. In this chapter, I first address why feminist-pragmatist philosopher Mary Parker Follett's work is particularly important to reclaim in light of the challenges currently facing the mediation profession. Then I explicate the theory behind better-known aspects of Follett's dispute resolution practices, focusing on the preference for ADR methods that are based on empowerment as "power-with" rather than "power-over." Building on this relatively familiar ground, I present a deeper analysis of the theory that undergirds Follett's practices, showing how the rejection of the individualist fallacy (as well as any sharp division between the public and private spheres) in favor of a conception of power consistent with interdependence is central to her work and key to solving mediation's challenges. Finally, to help demonstrate how a deeper understanding of Follett's theoretical insights is directly applicable to the project of constructively reforming current domestic mediation practices, I use Follett's conception of



empowerment based on the interdependence of persons to reanalyze two similar domestic mediation case studies presented by renowned mediation theorists and practitioners Robert Baruch Bush and Joseph P. Folger. Although Bush and Folger emphasize the negative impact of the individualist paradigm on the mediation profession and advocate for a more relational approach to mediation, this reanalysis shows how pernicious the individualist fallacy is, since they too resort to the notion of individuals as radically autonomous.

### **Why Mary Parker Follett?**

Before addressing why reclaiming Mary Parker Follett's work is so important, it should be noted that Mary Parker Follett certainly—and fortunately—is not the only theorist whose work merits our further attention with regard to the issues I address here. As just two examples among many, we could turn to two thinkers whom Follett credits as having had a significant influence on the theory she developed that undergirds her practical applications, German philosopher G.W.F. Hegel and American philosopher Josiah Royce (see Mattson 1998, xlii-xliv; Tonn 2003, 120-22, 293-94).<sup>1</sup> Nevertheless, I have chosen to focus on Follett for this project for two main reasons. First, Follett was a dedicated dispute resolution practitioner who both insisted on seeking and providing theoretical foundations for her methods, *and* resolutely insisted on putting her theories to the test of practice. Her work is addressed to both philosophers and dispute resolution practitioners, and helps bridge any divide between the two fields, and so is particularly appropriate for my own task of bringing together these two disciplines in the service of

developing empowering and nonviolent practices to resolve our conflicts. As Follett herself asserts, we must “get behind academic abstractions and traditional conceptions and try for a thoroughly realistic treatment of authority, power, leadership and control” (1942b, 314). Likewise, with Follett we are not confronted by any significant divide between theory and practice. On the contrary, such a divide would be antithetical to both her philosophical and practical commitments (see Menkel-Meadow 2003a, 11; Mattson 1998, liv).

Second, in both her theory and her practice Follett was committed to what we today could call a feminist-pragmatist approach, which makes her work particularly helpful for the constructive feminist critique of mediation practices I am undertaking here.<sup>2</sup> Follett was not especially dedicated to causes that promote the empowerment of women *qua* women. For instance, despite her skepticism about the efficacy of representative voting schemes for realizing either individual or group empowerment, she did support the women’s suffrage movement but only took on local leadership roles within it (Follett 1918, 5, 157, 256; Tonn 2003, 179). Nevertheless, her often-unacknowledged theoretical contributions undergird and are compatible with many feminist commitments (see Mansbridge 1998, *passim*).

However, there is a particular difficulty that alternative dispute resolution theorists and practitioners face with regard to Follett: we generally have received only a the practice-oriented portion of her work. For example, here is a typical summary of her contributions, from Jerome Barrett’s *A History of Alternative Dispute Resolution*:

In the early twentieth century, Mary Parker Follett (1868-1933), a...social worker and pioneer in the areas of informal education and community building had talked about interest-based conflict resolution. Her books *The New State* (1918) and *Creative Experience* (1924) also developed the subject. A book of her speeches, *Dynamic Administration*, published posthumously in 1935, also advanced her arguments for an interest-based focus. Follett was one of the first people to apply psychological insight and social science findings to the study of industrial organization and conflict. (2004, 210)

This is true as far as it goes.<sup>3</sup> These *practical applications* Follett developed while working as a social worker and industrial consultant are relatively well known; she even has been called the “mother” of ADR.<sup>4</sup> Follett’s own ability in shorter works, such as the speeches and papers collected in *Dynamic Administration*, to deftly summarize her theory with a few well-chosen key words and examples—as well as her emphasis on putting that theory to use in practical applications—has no doubt contributed to this problem. As the editors of a later edition of *Dynamic Administration* point out, “in tailoring her remarks to practical rather than to theoretically inclined audiences, she often gave bits of practical advice and mentioned only in passing the fundamental concepts from which the advice was derived.” Yet those theoretical concepts of Follett’s are “essential to a full appreciation of the depth and broad relevance of her contribution” (Fox and Urwick 1982, xxii).

Follett herself likely would have been quite worried about the relatively one-dimensional aspect of how her work has been handed down to us. For example, we know that she often went out of her way to proselytize for the need to bring together theoretical insights, including those from varied disciplines, and apply them to practice. Follett points out this is necessary in order to get a foothold on such seemingly intractable

problems as the prevalence of unproductive and even violent disputes. Moreover, Follett not only advocated for an explicitly interdisciplinary approach, she embodied it. She explains that *Creative Experience* was written in part so that “we might get an appreciation of the full import of certain conceptions in one field of study by a cognizance of their value in other fields...the cross-fertilizations...which are now going on are worthy of recognition” (1924, xvii). Since there is continued emphasis on this need for an interdisciplinary approach to the ADR field, as mediation educators Michael Moffitt and Robert Bordone have summarized (2005, 6-8), Follett is a great resource in this regard as well.

### **The Theory Behind the Mediation Profession’s Commitment to Empowerment**

As noted above, the *practical applications* of Mary Parker Follett’s theory that she developed while working as a social worker and industrial consultant who pioneered ADR methods are well known. However, informing Follett’s methods is valuable original theoretical work she undertook in the then-nascent pragmatist philosophical tradition—work that still is not fully integrated into mediation practices. For example, Follett’s key precept that empowerment through the productive resolution of disputes takes place only within a context where the parties enjoy “power with” rather than “power over” one another is so widespread, it is difficult to find either theoretical or practical works on ADR that do not mention it (although often any reference to Follett as a source is omitted). Follett’s precept often serves as an explicit rationale for specific

alternative dispute resolution practices, and for the preference of mediation over other practices such as arbitration.<sup>5</sup>

It is important at this juncture to review the theoretical grounds for Follett's theory of empowerment, since her work does provide an excellent base for the values mediation practitioners seek to incorporate into our applied methods—yet as a profession we remain largely unaware of *how and why* Follett's well-developed philosophical conception of “power-over” versus “power with” affords such a strong theoretical base for preferring mediation over other forms of dispute resolution. Nevertheless, as will be shown later in this critique, merely achieving a better understanding of this aspect of Follett's theory *on its own* is not sufficient for addressing the current challenges the mediation profession faces. We will also need to go deeper into her theory to understand why we must move away from practices that are based on the two related notions that individuals are radically autonomous, and that traditionally private concerns should be kept separate from public ones.

With that caveat, Follett's theoretical approach to empowerment indeed does provide us with a grounding for the mediation profession's conviction that while conflict may be inevitable in all human affairs, including domestic relations, such conflict does not necessarily have to be detrimental, and can even be beneficial—that is, empowering for all those involved. Follett gives a detailed account in both theoretical and practical terms of why there is so much confusion about what exactly the problems are that lead to conflict. Such confusion occurs because any problem will necessarily arise in the context of a “situation [that] changes faster than anyone can report on it” (1924, 9). This dynamic

and temporal aspect of the situations we always find ourselves in as human beings is crucial to recognize. And if change is inevitable, so is conflict because—as Follett points out—at its base conflict is simply the name we have given “the appearance of difference, difference of opinions, difference of interests. For that is what conflict means—difference” (1942a, 30). The ever-changing nature of our situations creates new differences.

Follett’s formulation from *Creative Experience* of the ways we can deal with difference is: “When differing interests meet, they need not *oppose* but only *confront* each other. The confronting of interests may result in either one of four things: (1) voluntary submission of one side; (2) struggle and the victory of one side the other; (3) compromise; or (4) integration” (1924, 156). In a later paper on “Constructive Conflict,” Follett boils this down to “three main ways of dealing with conflict: domination, compromise, and integration,” since voluntary submission can be included as a form of compromise (1942a, 31). It is worthwhile to examine each of these three in light of Follett’s theoretical approach.

First, with regard to domination, Follett does not just assert that confronting conflict through integration or “power-with” is better than doing so through forceful opposition or wielding “power-over.”<sup>6</sup> Instead, she is careful to ground this axiom in theory. She introduces her concern with “power-over” this way in *Creative Experience*:

*What is the central problem of social relations? It is the question of power; this is the problem of industry, of politics, of international affairs... We frequently hear nowadays of ‘transferring’ power as the panacea for all our ills... but the transference of power has been the whole course of history—power passing to priests or kings or barons, to council or soviet. (1924, xii; emphasis added)*

Thus, the danger with domination is not solely due to the coercion, and often explicitly violent coercion, required to enforce it. Another main problem with domination has an important temporal aspect, that is, it simply does not work over time. As Follett notes in an understated way, domination “is the easiest way of dealing with conflict, the easiest for the moment but not for the long run, as we see from what has happened since the War” (1942a, 31). This is true even if the aim of using dominating force is for some greater good; recall that the specific war she refers to, World War I, was fought by some in the name of peace as “the war to end all wars.”

Follett’s empirical analysis of historical situations reveals that reliance on domination merely ends up with an unstable shifting of control, rather than a progressive resolution of the conflicts that arise out of our differences (1942a, 35). It is important to emphasize here that Follett’s theory of power shows coercion or “power over” does not benefit even the *dominators* over time, since this can seem counter-intuitive. As psychologist and mediator Peter T. Coleman explicates,

From a practical perspective, a chronic competitive approach to power has harmful consequences...[R]eliance on competitive and coercive strategies of influence by power holders produces alienation and resistance in those subjected to power...If the goal of the power holder is to achieve commitment from subordinates (rather than merely short-term compliance), excessive reliance on a power-over strategy eventually proves to be costly as well as largely ineffective. (2000, 122)

Moreover, the costs of a domination strategy accrue not only to nation-states or captains of industry, but also within the types of relationships that mediation addresses (*ibid*).

Even when the aim is ostensibly to achieve a “balance of power”—that is, a balance of

the forces of those who seek to dominate—Follett points out that no progress is made:

In fact, observation of industrial controversy for the last ten years leads me to think that those disputes which are ‘settled’ merely by the balance of power are not really settled at all. The slightest shift of power brings the matter up again with accumulated rancor and hard feeling. The balance theory *gets us nowhere* in law or politics or international relations. (1942a, 45; emphasis added)

At best, a “static” equilibrium is attained that often is so fragile, it also requires enormous resources to maintain on the one hand, yet on the other the slightest difficulty can upset it (1924, 181-82).

Follett’s point about the uselessness of the “balance theory” also applies to dispute resolution in other contexts, such as domestic mediation. As Follett notes, “It is surprising how often we can succeed in finding the unifying solution in our everyday affairs one we begin to search for it: either with members of our family...or our friends or fellow-workers” (1924, 161-62). Follett’s insistence that any approach based on “balancing” is problematic in all situations involving disputes is of particular importance in the context of helping mediation clients to confront their differences rather than avoid them, which in turn leads to nonproductive compromises.

In many mediations—especially those involving conflicts that arise in the context of family situations such as divorce or child custody—mediators must face the strong temptation to accept the insistence of the disputants that there is no need to address certain issues. These are issues that often come to the mediator’s attention because one or both parties will mention they are not satisfied with the current situation, but at the same time it becomes clear a compromise-based *détente* of sorts has been reached that both



parties are quite reluctant to disturb since there has been a short-term lessening of tensions as a result. Yet my experience is in keeping with Follett's theory: mediation agreements that result from the tacit desire to avoid confronting significant issues because to do so would disturb the current balance of power in a relationship may provide short-term relief, but are doomed to failure over time. This conclusion also supports an emphasis in the domestic mediation process on aiding the disputants in addressing directly *all* the issues necessary to help ensure that their own, and their children's, needs will be met over the longer term.

Another important underpinning for preferring methods that incorporate Follett's approach to integration or "power with" is that here we find more theoretical support for how the mediation process has the potential for working effectively to help disputants find creative and empowering resolutions to their conflicts, despite the problems that arise from current practices. Follett notes that, even within dispute resolution processes that are not explicitly focused on integration, the real solutions always emerge from moments when the parties somehow find room to collaborate with each other rather than focus on adjusting to demands through mechanisms of domination or compromise. For example, she cites a labor arbitrator as confiding, "the secret of arbitration in labor disputes is not adjustment but invention"; and she notes an industrial leader advised her, "I find that we come to agreement not by adjusting...our ideas [to each other], *but by finding the new idea which is always something different from the addition of the previous ideas*" (ibid., 117; emphasis added).

Perhaps Follett's most famous illustration of the creative solutions that arise from a joint process of problem-solving is from her personal experience—although *she* is not necessarily famous for it since the authors of the influential 1981 book, *Getting to Yes*, used Follett's example almost word-for-word without any direct attribution (Mansbridge 1998, xxiii-xxiv; see also Tonn 2003, 381)<sup>7</sup>:

In the Harvard Library one day, in one of the small rooms, someone wanted the window open, I wanted it shut. We opened the window in the next room, where no one was sitting. This was not a compromise because there was no curtailing of desire. We both got what we really wanted. For I did not want a closed room, I simply did not want the north wind to blow directly on me; likewise the other occupant did not want a particular window open, but merely wanted more air in the room. (1942a, 32)<sup>8</sup>

Granted, this is a relatively straightforward situation because only two people's desires were involved, the time frame within which those desires would pertain was short, and there was another room with another window available. Moreover, the consequences would be minimal if a creative resolution had not been found or if there had been a resort to compromise—confined to some minor physical discomfort on the part of one or the other person or perhaps both if they had opted for a “window half-open” approach, or else one person might have been inconvenienced by having to move to another room.

Follett provides another example to illustrate what she means by the creative possibilities opened up by a joint or integrative approach to dispute resolution, in this case one that is somewhat more complex and relates directly to domestic mediation. She recounts the experience of her friends, a couple who were having a disagreement over whether to send their son away to a boarding school that offered the high academic standards the father prioritized, or to enroll him in a school in their community that would

allow them to make sure his friends were appropriate as the mother thought most important. They were able to resolve their conflict without either one having to significantly compromise, by diligently searching for a school with high academic standards that also was close enough to home to allow them to monitor the social situation, combined with a summer sleep-away camp that provided some benefits of a boarding school experience. The concerns of both the father and the mother were satisfied by this solution. Follett adds that if such a school had not been available locally, they still would not have had to give in to a compromise or resort to other forms of coercion (such as the father insisting that as the head of the household, the final decision should be his). As just one example, Follett notes they could have considered starting a school with high academic standards themselves that could benefit not only their son but also other children in the community (ibid., 1924, 162). Although in this particular situation the parents were able to reach a creative solution on their own without assistance from a formal mediation process, the value of the mediator's role in helping disputants in complex situations focus on possible resolutions that avoid compromise and other forms of coercion is clear.

The stakes are higher with regard to the negative consequences if there is a resort to coercion or compromise when the number of different interests that need to be satisfied is larger, or the resolution sought needs to be viable over a longer timeframe while changes continue to unfold, or the resources that can be brought to bear on a situation are more limited—or conversely, are more abundant and varied. Any of these factors, alone or in combination, adds to the complexity of the problem and the difficulty of reaching a

mutually acceptable creative outcome. The challenge is, rather than trying to eliminate the differences that underlie such complexity, to “do away with *muddle*” as Follett puts it (ibid., 6; see also 24, 69). She notes that one way to do this is whenever possible (without losing sight of the whole situation) to break up complex problems involving multiple disputants into “single situations”—“employer and employee, landlord and tenant, or whatever the case may be.” Employing this practice of untangling the relationships between the disputants as one part of the dispute resolution process can help clarify the different interests and needs of each party, as well as help reveal possible effective resolutions that avoid compromise (1924, 188; see also 1942e, 60). And indeed, there is always a risk of failure in such complex situations. Follett explicitly acknowledges that in some situations productive resolution may not be possible, adding “I do not say that there is no tragedy in life” (1942a, 38). Yet she insists, “I believe that in every conflict—between persons or nations, classes or races—this method [for finding creative resolutions] should be tried” (1924, 43).<sup>9</sup> The theoretical basis for the practice of such creative invention has its roots in Follett’s commitment to a conception of conflict as arising out of inevitable difference, out of the ever-changing dynamic and temporal aspects of our experiences, which always take place in an interactive context.

But Follett goes further, since she shows that without conflict as the state of being at variance with or in opposition to others, solving new problems or finding new and better solutions to old ones is next to impossible. For it is out of the different and changing views about why, and how, and who, and what, and when, that creative solutions are to be found that are virtually always better than if those involved in a given

situation proceed automatically, in a state of unquestioning, predetermined accord (let alone unquestioning, predetermined opposition). As Follett explicates, “What people often mean by getting rid of conflict is getting rid of diversity, and it is of the utmost importance that these should not be considered the same.” Rather, “fear of difference is dread of life itself. It is possible to conceive conflict as not necessarily a wasteful outbreak of incompatibles, but a *normal* process by which socially valuable differences register themselves for the enrichment of all concerned” (1924, 300, 301) Follett provides a useful everyday example of how this can work in practice:

Perhaps the most familiar example of the evolving of a group idea is a committee meeting. The object of a committee meeting is first of all to create a common idea. I do not go to a committee meeting to give my own ideas. If that were all, I might write my fellow-members a letter. But neither do I go to learn other people’s ideas. If that were all, I might ask each to write me a letter. I go to a committee meeting in order that all together we may create a group idea, an idea which will be better than any one of our ideas alone, moreover which will be better than all of our ideas added together. For this group idea will not be produced by any process of addition, but by the interpenetration of us all. (1918, 24)

Follett’s term for what results from the type of process that enriches our lives rather than overpowering our differences, and thus leads to creative solutions, is “*progressive experience*” (ibid., 106). Follett wants us to fully recognize how, like domination, compromise blocks the progress that results from the meaningful solutions and actions generated by creative, interactive, noncoercive attention to our differences—and to our conflicts.

Moreover by its very nature, compromise—perhaps even more than domination—tends to stifle the conflict that is necessary for integration, which is also the

conflict that is necessary for making real progress in finding solutions to the problems we confront. If we try to stifle conflict in the name of conflict resolution, that conflict does not disappear, but rather festers in a way that makes integration unlikely or impossible. This is a large measure of why Follett is so emphatic that “integrative experience is always progressive experience” (ibid.). If a main goal of conflict resolution is to help those involved make real progress in resolving their conflicts, it is futile to try to decouple conflict from conflict resolution—and futile to avoid confronting the full import of that conflict by compromising. Thus, Follett’s theoretical work further assures mediators that the time and effort we urge and encourage our clients to put into confronting their differences through the open-ended creative process of mediation is justified, because that is the only possible way real, lasting, productive solutions can be achieved. And yet merely achieving a better understanding of these particular aspects of Follett’s theory remains insufficient for addressing the current challenges the mediation profession faces. We must delve deeper to realize why the mediation profession should move away from practices that are rooted in the individualist fallacy.

### **Reclaiming What We Are Missing from Follett’s Theory of Empowerment**

As detailed above, most dispute resolution practitioners and theorists are not aware of the philosophical depth that undergirds Mary Parker Follett’s advocacy of empowerment—“power with” versus “power over”—that has been so widely adopted in the ADR field, and particularly in the professional practice of mediation. This reliance on partial theoretical resources has in turn led to mediation practices that are only partially

empowering, as is the case when mediators allow disputants to negotiate agreements that include compromises; or may even be disempowering, as is the case when mediators are unable to redress the replication in the mediation process of widespread social dynamics based on “power over.” However, there is a further and even more problematic omission in our theoretical understanding that cripples the ability of our practice to empower our clients: Empowerment on Follett’s terms has been widely adopted *without* Follett’s commitment to *rejecting* the notion of the radically autonomous individual, along with her rejection of any fundamental separation of the public and private “spheres,” which the notion of individual autonomy often entails. Indeed, these commitments preceded Follett’s theorizing of empowerment; the theoretical and practical justifications for the efficacy of practices that employ “power with” is grounded in her conception of persons as *interdependent*, and in the related necessity of working *across* boundaries that would traditionally be termed the “public” and “private” spheres.<sup>10</sup> Moreover, the creative integration of interests that leads to the real resolution of conflicts on Follett’s terms—that is, on terms that cohere with the core values of the mediation profession—is unrealizable without a concept of empowerment that is firmly rooted in such interdependent, interactive concepts of persons and social communities.

Follett is clear and emphatic on these points at least as early as *The New State*, published in 1918: “The individual is created by the social process and is daily nourished by that process. There is no such thing as the self-made man. What we think we possess as individuals is what is stored up from society, is the subsoil of social life” (1918, 61-62). Moreover, “we cannot put the individual on one side and society on the other, we

must understand the complete interrelation of the two” (ibid., 61). She adds, “There is no line where the life of the home ends and the life of the city begins. There is no wall between my private life and my public life” (ibid., 189). In a helpful footnote, Follett provides a “list of words which can be used to describe the genuine social process and a list which gives exactly the wrong idea of it” (ibid., 39) to help clarify what she means by this inseparable interactive process between the individual and the community, and between public and private:

Good words: integrate, interpenetrate, interpermeate, compenetrates, compound, harmonize, correlate, coordinate, interweave [or interknit], reciprocally relate or adapt or adjust, etc. Bad words: fuse, melt, amalgamate, assimilate, weld, dissolve, absorb, reconcile (if used in Hegelian sense), etc. (ibid., 39n; see also 35)

Moreover, words are not “good” or “bad” merely based on their descriptive utility. Whatever we do, we do in a context of interdependence and thus of collective action, which encompasses the political: “the scope of politics should be our whole social life” (ibid., 183). This is so even within the artificial confines of the “private” sphere: “in fact the whole area of our daily life should constitute politics” (ibid., 189; see also 182). And this context of collective action entails an ethical dimension: “*Collectively* to discover and follow certain principals of action [as relation] makes for *individual* freedom” (1942b, 304; see also 307). That is, because our “interests are inextricably interwoven,” we must recognize that the key “question is not what is best for me or for you, but for all of us” (1918, 81). However, Follett is not advocating a “melting pot” version of social interaction. To the contrary, “my individualism is difference springing into view as relating itself with other differences” (1918, 64). The answers to that critical question



about what is best cannot involve erasure of the diverse characteristics and interests of each individual and each community, or we are constraining our ability to act at all.

### **Follett's Conception of the Human Person**

To see why this is so, a fuller explication of Follett's conception of the human person as interdependent and socially embedded is helpful. For Follett, it is not simply that there is "no chasm" between different persons, between the individual person and the community or society, or between the public and private spheres. Rather, individuals actually are *constituted* in, through, and by their interactions with each other, including interactions across any artificial divisions between the public and the private (1918, 60, 61, 189). By the same token, individuals and society are also co-constituted: "The *only reality* is the relating of [society] to the [individual], *which creates both*. The only reality is the interpenetrating of the two into *experience*...the relation of individual to society is not action and reaction, but the infinite interactions by which both individual and society are forever a-making" (ibid., 60-61; emphasis added). Without the individual person, other persons do not and cannot exist as either individuals or collectively as communities or societies—and without other persons, the individual does not and cannot exist. Thus, the notion of persons as radically autonomous individuals is a fallacy because persons do not and cannot exist at all absent interdependent relationships with other persons.

Moreover, even if one were to hold that human persons could somehow exist independent of others, any such radically autonomous individuals would be also be radically disempowered because the existence of human persons as individuals takes place

only through *interaction* with others: On Follett's account, and the account I defend here with regard to the theory that should inform mediation practices, the *only* power persons have to act at all is interdependent and coactive. Any notion of the radically autonomous individual necessarily would also be a notion of the individual as powerless. Part of the "fiction" (ibid., 60) Follett identifies at the core of this fallacy is that a radically autonomous person could be empowered at all, much less by virtue of that autonomy.

Follett's theoretical convictions were fundamentally informed by her experiences; she rejected out of hand any idea that "thought and action can be separated" (1924, 198; see also Mattson, xlii-li passim). Above all, Follett was interested in developing theoretical concepts that comport with our real actions and experiences, and that could in turn inform both theory and practices that would lead to creative solutions to the ethical question of "what is best for all of us" (given that implementing those solutions cannot rely on coercion nor on erasure of difference, which amount to the same thing) (see e.g. 1918, 81, 63, 163). Follett saw early on that the erroneous idea of individuals as radically autonomous did not adequately reflect actual human experience, nor could it support the robust theory needed to sustain fruitful human practices. To sum up, for Follett, "Non-relation is death"; human life is interrelational, and human persons are constituted and sustained via interdependent interrelations (ibid., 63).

### **Interdependence and Empowerment**

When appropriately situated in a context of interdependency, Follett's conception of "power-with," or "co-active" power as Follett later calls it (1942d, 101), encompasses

empowerment or what has been called the “power-to” as “the ability to make things happen” (ibid., 99); that is, the power to act effectively while being free of oppression from and avoiding use of “power-over.” This is because no ability to act can exist absent or outside of interdependent interaction, and that ability to act via interdependent interaction is enhanced by “power-with” and constrained by “power-over,” whether the actor is the one wielding the power over another or vice versa. Other theorists, including some feminist theorists, have equated “power-to” with enhancing individual independence in a context that relies at least in part on the concept of persons as radically autonomous (see Coleman 2000, 110-111; Allen 34-35).<sup>11</sup> This problematic theoretical assumption confines empowerment to a binary logic: If “power-over” entails power relations imposed and maintained by coercion and compromise (in Follett’s sense of the term, including for example social expectations to sacrifice one’s self as discussed below), then those with less “power-over” also have less “power to” and are dependent on those who have more. Therefore, it is assumed that full-fledged empowerment as freedom from “power-over” in order to enjoy “power-to” entails full individual independence as radical autonomy. This assumption also entails relying on the “balancing” theory of power that Follett rejects: in order for one person to be empowered, another must give away or be forced to relinquish some of their own power. For example, in the volume *Mediation: Positive Conflict Management*, mediators are informed that one of their tasks “is to develop strategies to empower all the members of the family,” and advised that one strategy for doing so is “by *disempowering* one member of the family who knowingly exercises power to the detriment of others” (Haynes 2004, 130; emphasis

added). A similar problematic binary logic informs the individualist fallacy on which current ADR practices generally rely. However, as Follett's theoretical work makes clear, the opposite of dependence is not independence, but *interdependence*—and the opposite of disempowerment is “power-to” not as “power-over,” but as “power-*with*.”

This full-blown version of Follett's theory as one that entails a fundamental rejection of both strategies of domination (including any recourse to “balance of power”) and strategies of compromise is based not on the mere concepts of “power over” versus “power with,” but on a rejection of the individualist fallacy in favor of a theory of power consistent with persons as interdependent. The resulting theory is a very useful resource for reconstructing current mediation practices. To help see how this is so, I would like to return here to Follett's discussion of the problems with compromise and extend the analysis, keeping interdependence at the forefront. Recall that employing any significant compromise—whether involving the voluntary submission of just one side, or of both or all sides—in an effort to resolve differences is futile, as Follett asserts. This is because compromise involves sacrifice rather than creative integration: “[S]elf-sacrifice has no social value. No sound solution of [a] question depends on sacrifice” (1924, 170).<sup>12</sup> Follett argues, “I must not subordinate myself [to others]. I must affirm myself and give my full positive value...a readiness to compromise must be no part of the individual's attitude” in any undertaking that involves others (1918, 26).

Without the commitment from each party to a dispute that they will avoid sacrificing their real interests and needs to benefit others or for expediency's sake, those who are on other sides of a dispute cannot have access to necessary information that will

allow any agreements to address problems at their root and reach solutions that are effective over time. The individual who compromises her own interests—whether voluntarily or as a result of social pressure or other coercion—will suffer, as Follett emphatically states, “Whoever advocates compromise abandons the individual: the individual is to give up part of himself in order that some action may take place. The integrity of the individual is preserved only through integration—and the similarity of these words is not insignificant” (ibid., 163). However, *so too will every other member of the community or society in which that compromise takes place suffer*. This inescapable interdependence undergirds every aspect of Follett’s theory on empowerment and dispute resolution. There simply is no place for the notion of persons as radically autonomous individuals who are imagined as being able to exist independent of their social situation and attachments.

In cases of ostensibly voluntary one-sided submission, such sacrifice is usually understood as a sacrifice of one’s situation for an abstract social good—such as by resorting to an “emotional...[or] moralistic appeal of ‘sacrificing’ your individual interests to the general good” (1924, 37). Follett’s concern is not only to protect the individual (or minority) from the coercion by others that even “voluntary” compromise may entail, but also to protect others from the collective harm that results from individual self-sacrifice:

Such people think that when they have reached an appreciation of the necessity of compromise they have reached a high plane of social development; they conceive themselves as nobly willing to sacrifice part of their desire, part of their idea, part of their will, in order to secure the undoubted benefit of concerted action. But compromise is still on the same plane as fighting. (Ibid.)

At first glance, Follett's assertion here may seem at odds with other statements that appear to advocate sacrificing one's self-interests for the good of others, such as this one: "With our new social ideal there is going to be a far greater demand on our capacity for sacrifice than ever before, but self-sacrifice now means for us self-fulfillment" (1918, 82). Yet there is no contradiction for Follett. In a context of interdependence, self-sacrifice that results from a spirit of compromise does indeed promote disempowering temporary "solutions" while prolonging conflict; however, the "unselfishness" that inspires willingness to listen to other points of view while seeking creative mutual solutions that avoid compromise—including solutions that may require giving up some short term individual benefits for even greater benefits for both *one's self* and others over the longer term—can be empowering for all concerned (ibid.).

Follett's further practical concern is that sacrifice is almost always unnecessary. Like her analysis of balance of power, there is an important temporal aspect here as well, in that often *over time* what seem to be sacrifices prove not to be real sacrifices at all (1924, 39-41). For example, Follett describes how it was difficult to enforce a law to prevent pollution of a river in England so long as the main polluters—mill-owners in this case—felt they were being asked to give up their short-term interests, even if it was for the common good. However, through additional discussion, these same mill-owners came to realize how ensuring rivers remained unpolluted was also in their *own* greater long-term interests; this realization, in turn, made effective enforcement of the law possible (ibid., 38). In cases like these, the important feature is that those contemplating

“sacrifice” have reasonable certainty that their long-term interests are well worth whatever is being given up in the shorter term, and that both the long-term benefits and short-term costs are not entirely abstract (e.g. neither merely for “the common good” nor for “your future good” nor for “my future good”), but have a concrete dimension that can be realized through embodied interdependent experience (e.g., cleaner river water for all of us, as well as our children; see *ibid.*, 41).

Follett’s insights about the need to avoid self-sacrifice for the good of both the individuals and the communities of all parties to a dispute are also useful for realizing the ideal of empowerment in a context that not only prioritizes our interdependence, but also recognizes the inescapable interrelationships between what have traditionally been termed the public and private spheres. This provides a theoretical anchor for practices that seek to avoid and redress social power imbalances that affect the relationships between disputing parties, such as those based in gender or race. For example, because in our society women often are expected and taught from an early age to defer to men—as are people of color to whites—these disempowering “power-over” patterns will tend to be replicated within the mediation setting even when mediators work hard to avoid this, as feminist and other ADR critics have shown (Mayer 2004, 170-74; Clark 2005, 106-7).<sup>13</sup>

Even when mediators work to prevent overt coercion of disputants who belong to more socially powerful classes over those who are less socially powerful, if mediators remain unaware of these patterns or do not have effective ways to assure they are addressed and redressed within the mediation process so that all parties are in a position

to avoid self-sacrifice, it is not just the individual disputants who are in the less powerful social positions who will be harmed. *All* parties in the dispute and their communities also will be negatively affected, as Follett demonstrates, because the best and most lasting solutions to disputes can only come out of dispute resolution processes that recognize our interdependence, and thus the importance that they be free of both coercion and compromise. Because other forms of dispute resolution either involve some form of domination, where a solution is *imposed on* the parties for their own or some other good, or else prioritize settling disputes through various forms of compromise, mediators should focus instead on practices that promote *interdependent empowerment*—what Follett terms integration or “power-with”—as more efficacious.

### **A Re-analysis of Current Domestic Mediation Practice Using Follett’s**

#### **Interdependent Theory of Empowerment**

In order to help illustrate how a fully *interdependent* theory of empowerment such as the one Mary Parker Follett provides us can serve as helpful resource in critiquing current ADR practices, I would like to take this opportunity to reanalyze two somewhat similar cases that Robert Baruch Bush and Joseph P. Folger address in their 1994 book, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*—a book which remains highly influential in domestic mediation theory and practice (see e.g. Coltri 2004, 320-21; Mayer 131-32). Bush and Folger are very concerned about the negative impact of what they call “the individualist worldview” on



the mediation profession; they share many of the concerns that have been addressed above regarding the problematic notion of individuals as radically autonomous rather than interdependent. Instead, they urge a more “relational” approach to mediation practice that prioritizes recognizing and transforming the inter-relations between the parties to a dispute, rather than bargaining aimed specifically at reaching a settlement (1994, 236-239 *passim*, 245-48 *passim*). However, their analysis also shows how insidious the individualist fallacy is, because they end up reasserting the notion of individuals as radically autonomous in order to criticize other approaches to mediation that they believe are *less* relational than their own.

In one of the cases, which Bush and Folger present as an actual mediation situation, a heterosexual married couple (who are either childless or whose children are grown) has mutually decided to separate (1994, 214). However, the wife unilaterally removed all the furniture from the home, claiming that the furniture was more important to her than to her husband and was all she wanted in lieu of a financial settlement, even though she was aware the furniture was worth only about one-sixth of their major asset, the equity in their jointly-owned house. The husband apparently was willing to consider other financial settlement options, but after discussion agreed to the wife’s terms. The mediator in this case insisted that he would assist the parties in writing up this settlement agreement only after the wife had received further legal and financial advice.

The other somewhat similar case that Bush and Folger analyze is presented as a role-playing scenario in the context of a training session on maintaining mediator neutrality, at a conference for professional alternative dispute resolution practitioners

(1994, 34-35). In the scenario, the roles of the parties to the mediation again are a heterosexual married couple, both of whom are well educated and hold good professional jobs that pay well, who have two teenage sons. Their main shared assets are their equity in their home and \$40,000 in savings. The wife is the one seeking the divorce, and after deliberation in prior mediation sessions, she is proposing that in exchange for a \$30,000 lump sum financial settlement, she would forfeit any claim on the home equity or other financial assets. Further, she believes it would be best if her husband had full custody of the sons, and that the wishes of the sons for visitation with their mother, if any, should be followed. The wife says the main reasons behind her proposal were that her decision to leave the marriage had caused considerable tension in the family, and it would be best for everyone if the issues are resolved quickly so she could “get out.” She also feels her sons are closer to their male parent than to her, so at their ages it is best if they remain with their father. The husband finds this settlement proposal acceptable. The scenario ends with the mediator, who was represented as previously advising the parties to consult legal and financial advisors, preparing to write up the settlement agreement.

Bush and Folger report that many of those attending the training session were dismayed at the mediator’s actions in the scenario. They felt that as portrayed in the role-play, the mediator actually was not being “neutral,” but had allowed the parties to agree to an outcome that one or both of them would find unfair or unworkable over time.

(While Bush and Folger do not emphasize the ideal of neutrality in their approach, they do advocate neutrality in the sense of the mediator working hard to empower the parties to communicate with *each other* and to come up with their own solutions to their dispute

if the mediation process gets to that point. Although helping the parties “test” whether their agreement will be in each of their interests and workable over time is part of the mediator’s responsibility, they counsel that a mediator should avoid imposing her *own* values or beliefs about what is best upon the parties.) The trainers then asked for volunteers from the audience comprised largely of ADR professionals—although presumably most audience members were not as experienced as the training session leaders—to join the role-play as the mediators and went through the scenario again. This time, the mediators challenged the parties more directly about their proposals regarding finances and custody, including challenging the wife about her role and responsibilities as a mother. In this alternate version of the role-playing scenario case, no settlement was reached (Bush and Folger 1994, 35-36).

Bush and Folger’s main analysis of both cases is similar: In the first case, by insisting that the wife get additional legal and financial advice, they argue the mediator acted in a way that “undermines empowerment” when he “deprived the wife of her freedom to make her own decision” after she said she was ready to do so, even if that decision would be a “mistake” (1994, 214). Regarding the second case, Bush and Folger adopt the same general approach, criticizing the audience for focusing too much on whether the settlement agreement is “workable, stable, and equitable” as well as adequately protecting the wife and children (*ibid.*, 36):

The members of the role-play audience, in their rejection of the first enactment of the case [by the seminar leaders] and their endorsement of the second [by volunteers from the audience]...showed their relative unconcern for fostering empowerment by supporting party decision making and control over outcome. The audience considered the first mediator’s moves as insufficiently concerned

with the quality of the solution, although those moves were well suited to preserving party determination. They treated the second mediators' moves as well suited to achieving a quality solution, although those moves evinced little concern for party control. In both reactions, the audience's concern for problem solving and satisfaction was accompanied by a converse lack of concern for empowerment and transformation. (Ibid., 40)

It is clear that Bush and Folger mean to defend an approach to mediation practice that respects the need of the parties to relate to each other and the mediator in a way that empowers them, and that does not resort to a paternalistic version of "power-over." However, their rejection of the individualist fallacy goes only as far as explicitly recognizing the relations between the parties (and relations with the mediator) *within* the mediation context, instead of acknowledging the full "inter-relationality" of the parties not only with each other, but with their community and society both inside and beyond the mediation context. Thus, Bush and Folger become stuck in the very trap of the individualist fallacy that they seek to reject: the cure for paternalistically dependent relationships is empowerment solely in terms of the radical independence of the individual, rather than empowerment through recognition of our mutual interdependence.

This trap blinds Bush and Folger to the ways that recognition of interdependence in mediation practice can be empowering for the individual parties to a dispute, rather than merely serving as a symptom of a mediator's need to impose their own values or prioritize settlement agreements over relations of the parties in the mediation process. I believe most mediators who practice not just transformational mediation, but also what Bush and Folger call more "directive" styles, do indeed hold the core value of empowerment for clients, although they may not agree on how it is that clients are best

empowered through mediation. I support Bush and Folger's insistence that the goal of a settlement agreement should not be the *overriding* aim since that would work against a voluntary process that successfully avoids resorting to "power-over" in the form of compromise and self-sacrifice. However, their inability to move beyond the individualist fallacy leads them to erroneously "assert that empowerment is 'independent of any particular outcome of the mediation'" as Carrie Menkel-Meadow points out (2003b, 188). That is, a mediation process or settlement that unintentionally serves to reconstitute or exacerbate existing power disparities between the parties by definition is not empowering, as Bush and Folger explicitly acknowledge with regard to situations where "one party is the victim of past violence by the other" (1994, 215). Yet, because of their reliance on a notion of empowerment defined in terms of an abstract notion of persons as radically autonomous individuals as the tie-breaker or trump in the mediation process in order to avoid mediators being over-directive and paternalistic, Bush and Folger are unable to fully extend their analysis to how socio-economic forces (beyond physical violence between the parties) can allow the practice of mediation to become an agent for coercive "power over."

Contrary to Bush and Folger, I believe the mediator in the first case they analyze, and many of the audience members in the second case, in fact are concerned exactly with *empowerment* of the affected parties in terms of interdependence (even though they may not be prepared to articulate or evaluate their concerns in those terms). While I agree that the way some of the audience members in the second case apparently challenged whether the wife is meeting a (sexist) community or social test of what being a good mother

means would be inappropriate in an actual mediation, it also is crucial for mediators to recognize the wife's own beliefs (and the beliefs of the husband, children, friends, relatives, neighbors, employers, pastors, divorce court judges, etc.) about this could be a major disempowering influence *in the mediation*. In other words, I—and apparently many other mediators—remain unpersuaded that it is “empowering” in Mary Parker Follett’s sense of “power with” for individuals who are inextricably embedded in their communities and societies when mediators help facilitate agreements that have a significant potential for contributing to the socio-economic disempowerment over time of one or more directly affected parties. For example, such parties in the second case are the wife (and possibly the children) in the longer run since in our culture she is likely to need those assets to support her in old age even if she has a good job now, and probably the husband and children in the shorter run since the wife apparently is not going to contribute anything further to economically support the children or to future costs such as college. Mediation agreements also are not “empowering” when they are based in large part on social or economic discrimination against one or more parties. For instance, there is a strong possibility in the second case that either the wife or the husband or both may be feeling the wife needs to “atone” for not appropriately fulfilling her spousal and maternal roles in a socially-sanctioned way by forgoing economic assets to which she otherwise might have a strong claim. There is also the possibility that the parties are responding to the economic coercion that a court might be inclined to punish the wife for her transgression of social mores even more than may be reflected in the proposed

settlement agreement, so the husband's offer is both generous and the best deal she is likely to get in the circumstances (especially if he is not asking for child support).<sup>14</sup>

This re-analysis of these cases presented by Bush and Folger helps make clear how insidious the individualist fallacy is in the practice of domestic mediation. This is particularly so since one of its major symptoms is the hydra-headed conception of empowerment as tied to each individual as radically autonomous, instead of promoting interdependence that is based on “power with” rather than “power over”—even on the part of mediation practitioners who are both conscious and critical of that individualist fallacy. If Bush and Folger had theoretical resources such as full access to Follett’s work as a well-developed theory of interdependence, they likely would be able to recognize just how disempowering it is when individuals are treated as if they were radically autonomous during the mediation process. More importantly, beyond the specifics of these cases, this reanalysis shows how Follett’s work provides the critical resources the mediation profession needs to understand why we are facing the current problems and the nature of those problems, as well as the resources to help rectify those problems.

### **Summary**

This chapter has provided an in-depth examination of feminist-pragmatist philosopher Mary Parker Follett’s work. I have shown why her work is particularly important to reclaim in light of both the need to understand the challenges currently facing the mediation profession, and the need to reform mediation practices to effectively address those challenges: Follett’s work affords us the well-developed theory of power as

empowerment, consistent with the idea that persons are interdependent and socially embedded, that our profession has been lacking. In the next chapter, I turn to how the application of such a well-developed theory of empowerment rooted in interdependence can be used to reform mediation practices.



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### **Notes for Chapter III**

<sup>1</sup> Follett not only received inspiration from but also had disagreements with both Royce and Hegel. For example, in a section on “Loyalty” in *The New State*, she asserts, “we do not love [Royce’s] Beloved Community because it is lovable—the same process which makes it lovable produces our love for it. Moreover it is not enough to love the Beloved Community, we must find out how to create it...Loyalty to a collective will which we have not created and of which we are, therefore, not an integral part, is slavery” (1918, 59). And likewise, despite a spirited defense of Hegel against “the misunderstood Hegelianism,” she also defends “the real Hegel” against “the Hegel who misapplied his own doctrine” (1918, 266, 267).

<sup>2</sup> Jane Mansbridge points out that although Follett did not call herself a “feminist” (perhaps in part because the term was not yet in widespread use), many of her theoretical insights “have become a working part of feminist theory” (1998, xvii). Mansbridge provides a useful synopsis of the direct link between Follett’s feminist-pragmatist theoretical work and contemporary feminist theory (see *ibid.*, xvii-xxii).

<sup>3</sup> Barrett also states that Follett was a Quaker (2004, 210). Although brief biographies of Follett often assert her Quaker heritage, the source of that assertion is unclear (it is beyond the scope of this project to delve into the primary research necessary to resolve this matter). However, in her exhaustive biography of Mary Parker Follett, Joan C. Tonn reports that Follett’s mother came from a prominent *Unitarian* family in Boston, and Follett’s parents were married in a Unitarian church where her maternal grandfather “owned two pews” (2003, 12), which Follett’s father had joined. Tonn further reports that when Follett was about 8 years old, she began worshipping (and was later rebaptized) at an *Episcopal* church when her father rejoined the same congregation to which his own parents had belonged (*ibid.*, 21-22). In any event, Tonn does not indicate that Follett ever attended organized Quaker religious or educational institutions, nor that Follett credited the Quaker tradition *per se* as having any significant direct influence on her theory or practice, although Follett was influenced to some extent by the work of prominent people who were themselves of Quaker heritage, such as Jane Addams (*ibid.*, 139).

<sup>4</sup> See, for example, Carrie Menkel-Meadow (2003a, 8-12 *passim*).

<sup>5</sup> For a contemporary overview of why mediation generally is considered to be preferable to other dispute resolution processes, including other ADR processes, see Kovach 2005, 305; and Mayer 2004, 102-103. Also, see Follett’s own detailed discussion on the advantages of mediation over arbitration in “The Psychology of Conciliation and Arbitration” (1942f, 230-238 *passim*).

<sup>6</sup> Follett extensively addresses the theory behind her formulation of “power-over” and “power-with” in *Creative Experience*, particularly in the chapter on “Power” (1924, 179-194), and returns to these ideas in her 1925 paper on “Power” (1942d). The issue of power and empowerment as they relate to both problems with current domestic mediation practices, and possible solutions to those problems, will be taken up in more detail below.

<sup>7</sup> Extra-thorough and diligent readers will find the authors do mention that Follett is the source of this account in the “Acknowledgements” section of their prefatory material (see Fisher and Ury 1981, vii; 1992, xii).

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<sup>8</sup> Follett gives a similar account in *Creative Experience* (1924, 184-85).

<sup>9</sup> The context for this comment is judges making court rulings, which could be interpreted as “imposed,” at least in a formal sense; however, Follett’s point is that even the legal process (i.e., *not* an “alternative” dispute resolution process) can be used to find creative resolutions that do not involve coercion or compromise. Here, she commends judges who have taken pains to listen to the needs and desires of the claimants and to refrain from making any final ruling until a resolution that satisfies both parties emerges. While there undoubtedly are some involuntary aspects to this setting (e.g. one or both parties may have been compelled to appear), in the cases Follett cites there do not appear to be grounds for defining either the process or the final ruling as coercive or involving significant compromise—quite the contrary. (See Follett 1924, 43-44.)

<sup>10</sup> Note that the implications of Follett’s theory regarding the interrelation of public and private concerns do not eliminate privacy, any more than her rejection of the individualist fallacy eliminates individuals (see e.g. 1918, 73).

<sup>11</sup> Along with his own analysis, Edward W. Schwerin also provides a well-documented overview of concepts of empowerment, power and disempowerment (or “powerlessness”), with particular attention to their use in ADR theory and practice (1995, 55-81 *passim*). However, despite extended analysis of the terms “power over” and “power with,” he manages to omit any reference to Follett—yet another telling example of how her theoretical contributions have been appropriated without credit within the ADR field.

<sup>12</sup> The specific context here is a trade conflict about wages, but Follett makes clear she means this statement to apply broadly, beyond this specific issue (for example, see also 1924, 50).

<sup>13</sup> For an extended analysis of the effect of social power dynamics with regard to women, see *Women Don’t Ask: Negotiation and the Gender Divide* (Babcock and Laschever, 2003).

<sup>14</sup> I would be remiss here if I did not point out that as an experienced mediator who is committed to helping clients explore and create the best possible real-life resolution(s) for all those directly affected (whether or not formal settlement is reached), what the main scenario in both these cases strongly suggests to me is that these clients most likely are not confronting crucially important aspects of their dispute. It is not unusual for clients to mention early on in a mediation that they have already agreed on the main terms of a settlement. But I have learned this can be a red flag, because why then are they proceeding with mediation at all? In both these cases, why did the clients not just have the lawyers they consulted draw it up (or they could write it up and run it by the lawyers, then wave in front of a mediator if that is required) and be done with it? I have found the answer almost always is that their proposals are not nearly as mutually agreeable and pre-settled as their opening statements would suggest. In these types of situations—even when great pains are taken on the part of the mediator to avoid being directive—if an agreement is finally reached it usually will end up being very different from the one initially presented. And many of those differences will be analyzable in an interdependent context, in terms of how the original “agreement” fell short for all parties because it was based on “power-over” in terms of coercion or compromise, including the “voluntary” individual self-sacrifice that likely is operative in both cases that Bush and Folger present.

## CHAPTER IV

### REFORMING DOMESTIC MEDIATION PRACTICES: TOWARDS CONSTRUCTIVE SOLUTIONS

In light of my commitment both to feminist philosophy and to mediation as a practice that generally is preferable to other ways of resolving disputes, such as through fiat or threat of violence, before concluding this critique I would like to present several constructive solutions in this chapter. These constructive solutions are aimed at implementing reforms in domestic mediation practices based on the conception of power and empowerment consistent with the idea that is central to feminist-pragmatist philosopher Mary Parker Follett's theory, as explicated in the previous chapter, that persons are interdependent and embedded in social communities rather than radically autonomous.

If developed and adopted, these constructive solutions as well as others based on Follett's alternative conception of power as empowerment rooted in interdependence could help rectify the problems that the ADR profession, and particularly domestic mediation, currently faces. Note that none of these constructive solutions are *ex nihilo* creations. Instead, in each case they are based at least in part on the work of other theorists and dispute resolution practitioners that I believe often has been overlooked or

only partially implemented because the full value of that work is difficult to recognize outside the context of empowerment based on interdependence. Moreover, each of these constructive solutions necessarily provides only a part of the answer to our challenges and problems, and will need to be further refined as our profession continues to evolve in ways that empower our clients.

### **Some Direct Applications of Mary Parker Follett's Theoretical Insights to Domestic Mediation Practices**

As discussed above, Mary Parker Follett's feminist-pragmatist theoretical foundations for mediation point toward practices that emphasize inter-relationship (or intra-relationship) rather than radical individual autonomy. Her work also emphasizes the need for ongoing long-term solutions that take into account power and resource disparities, since she convincingly shows that "solutions" that cover over such disparities simply exchange uneasy short-term détente for exacerbated conflict later. Many of these theoretical insights are incorporated into her ongoing legacy of industrial and international dispute resolution practices. However, other than adopting the mantra "power with, not power over," these insights largely have been overlooked in domestic mediation (in part since most of her own professional experience was in those industrial and international settings). Since Follett's work deserves further examination as a potential resource for not only theory but also practical applications, I would like to take this opportunity to present two recommendations about changes that could result from

applying my reclamation of her theoretical work specifically to domestic mediation practices.

First, reliance on the individualist fallacy has led to an artificial abstraction of the *role of the mediator* as a facilitative leader who is radically independent and removed from social or community attachments (other than certain limited ethical commitments to our clients regarding fairness and efficacy of the mediation process), rather than conceiving of ourselves in our role as mediators as thoroughly interdependent and socially embedded. As Follett insists, our interdependence necessarily entails that mediators, no less than any other persons, are “participant-observers” who cannot claim to be outside or above or dispassionately involved in any situation—including the mediations we lead. Rather, in those mediations we are inextricably co-implicated and personally involved with the interpretation of the situation and with the other mediation participants (see Follett 1924, xi-xii, 13, 27).

Much of the current ADR literature on problems related to the ideal of the impartiality and neutrality of the mediator role overlaps with Follett’s work. However, that current literature tends to be narrowly focused on another important aspect, the resulting harms to clients (e.g. Benjamin and Irving 1992, 131, 135-137; Coltri 2004, 414-417), rather than exploring how the potential is stunted for the mediator to take a leadership role as an active yet noncoercive partner in helping to find creative solutions to conflicts. As Follett explains, “We get power through effective relations. This means...beginning to conceive of the leader, not as the man in the group who is able to assert his individual will and get others to follow him, but as the one who knows how to

relate the different wills so they have a driving force.” She adds, “the leader has not always the largest share in the decision, and thereby he may not be any less the leader” (1942c, 248, 257). The role of the mediator should be redefined from an impartial and neutral one to that of a participant in the conflict who, as part of their leadership role, brings one kind of useful specific expertise and helpful perspective to the situation.

Second, a more specific example of a change in mediation practices that could be adopted is based on Follett’s insistence on cooperative fact-finding in any processes directed towards problem solving: “We must recognize...that the facts on two sides of a controversy are in part different, *and will remain so except in those cases where the fact-finding can be a joint activity*” (1924,16; emphasis added). She adds, “It is true that even if we could have a cooperative gathering of the facts we should still interpret them differently, but the initial difficulty would be avoided—we should at any rate be looking at the same facts. When the attention of each side is riveted on *its* facts, discussion becomes rather hopeless” (ibid.). Mediators, as active participants in mediation processes aimed at empowering clients, could assist those clients in working together to research information that pertains to their dispute.

For example, rather than the usual practice in my experience of encouraging each parent in a child custody dispute to find out for themselves what their rights and responsibilities are as a “homework assignment” outside of the mediation session, mediators could help the parents use internet search technology *during* the mediation session to do that research. With appropriate assistance from the mediator, such cooperative fact-finding could be an important resource that helps build trust between the

parties and provides a solid joint basis on which to found creative solutions to the conflict. In addition, incorporating cooperative fact-finding into mediation sessions helps counteract any power disparities between the disputants based on differences in research skills, access to accurate information sources, computer literacy, and so on. Further, while this cooperative activity would take time during a particular mediation session, it has the potential to save time over the entire course of the mediation process because progress on addressing the dispute need not be delayed until “homework assignments” are completed. In addition, arguments arising out of the mistrust of information provided by the other party can be minimized.

### **Affording Access to Mediation Information in the Public Interest**

Laws and ethical codes that regulate the profession of mediation, which are currently based on the problematic assumptions (including theoretical assumptions) about radical autonomy of individuals outlined above, need to be modified in order to allow and encourage access to mediation information that is in the public interest. For example, laws that require strict confidentiality of mediation proceedings should be modified to allow and encourage reporting of social pressures on individuals (names and identifying details need not be attached) (see Menkel-Meadow 2004, 507-512 *passim*). An additional problem that needs addressing is that at present most mediation providers do not collect or retain the types of information that would be most useful for addressing social problems, even when it would be considered legal and ethical to do so. In consultation with public interest researchers, mediation providers should change their protocols and

procedures so that useful information from mediations is collected and retained. This information should be in a format that both maintains the individual anonymity of clients and enables ease of aggregation of that information to address social problems.

### **Train Mediators to Help Disputants Understand the Effects of Social Pressures**

#### **Beyond Their Control**

Mediation training protocols should also be changed so that mediators are prepared to help disputants explore and understand how social and institutional pressures beyond their control have contributed to their dispute, and to take those pressures into account when helping disputants create mutually acceptable agreements (see Scimecca 1993, *passim*; Schwerin 1995, 68-69, ). To return to the specific example discussed above of disputes involving domestic partners who are working opposite shifts, the training could involve teaching mediators about how this common and severe stressor can negatively affect relationships, as well as how to present that information to the disputing parties in a way that is likely to help them move beyond self-blame or blaming each other.

However, since it is impractical to expect each mediator acquire sufficient expertise to be effective regarding every type of social and institutional pressure that might affect their clients, such training is likely to be most effective if it alerts mediators to their general responsibility to their clients regarding these pressures. More common stressors such as shift work could be used as examples during the training, and mediators could be directed on how to access resources on the less common situations when the



need arises in a particular mediation case. This could be combined with the addition of specific questions during the intake process (i.e. the initial contact with the clients prior to any mediation sessions [see Coltri 2004, 361]) that are designed to elicit information on the social and institutional pressures affecting a particular case. This would allow mediators time to access applicable resources before the actual mediation sessions begin. In addition, mediators could assist clients in cooperatively doing their own research on these issues during the mediation sessions, as discussed above.

### **Resources From the Community Mediation Movement: Empowerment Through Matching Cultural and Social Backgrounds of Clients and Mediators**

Two different but somewhat related mediation models arising out of the community mediation movement, developed by the Honolulu Neighborhood Mediation Network (HNMN) and the San Francisco Community Board (SFCB), provide good resources for a reconstruction of domestic mediation practices that is compatible with the aim of empowering persons based on interdependence. Some of their practices already have been adopted to some extent outside the community mediation movement, such as the goal of matching the cultural community and social backgrounds of mediators with those of the clients whenever possible. (So, for example, a dispute between people who are African-American, a dispute between a gay couple, or a dispute between fundamentalist Christians would be matched with mediators who are African-American, gay, and fundamentalist Christian respectively.) When combined with the co-mediation model discussed below, this practice can be adapted to situations where the disputants

come from different backgrounds. (For example, if a dispute is between a client who is a fundamentalist Christian and another who is an atheist, the goal would be that the co-mediators would also include a fundamentalist Christian and an atheist.)

Granted this practice is necessarily constrained by many practical limitations, such as the impracticality of closely matching all the significant cultural and social dimensions for each client. Our backgrounds are not limited to just a particular religion or ethnicity or gender or sexual orientation or occupation or economic circumstance; instead, often each of our backgrounds includes *all* of these and more. Thus, careful attention must be given to prioritizing matching the background of the mediator with those one or two aspects of the backgrounds of each client that are most important to the client in the context of the particular dispute that is to be addressed in the mediation.

In my experience, this is one way for mediation practices to recognize and honor the importance of the communities that mediation clients belong to, and to help ensure that clients feel their concerns will be recognized and taken seriously by mediators with respect to their socially-embedded circumstances. For instance, I have worked with several different fundamentalist Christian clients who each had the same basic concern. Their concern was that a mediator who did not share their faith would not understand how important it was for them to continue in a marriage despite serious marital conflicts rather than consider the option of divorce, or how important it was for them to continue homeschooling their children despite a severe lack of resources rather than consider the option of a free secular education in the public schools. Although my background is not fundamentalist Christian, I can understand their concerns since typically the process of

finding creative solutions to such disputes might well prioritize those very options that they believe would compromise their most basic values and commitments to their religious communities. As a mediator committed to the value of empowerment based on a theory of interdependence, part of my responsibility is to assist my clients in avoiding the need for such compromises (as Follett urges), rather than facilitating a coercive process that is biased toward such compromises through my own assumptions about dominant social norms. I will either need to be able to examine my own values and abilities in order to be able to reassure my clients that I am able to help them explore workable solutions that do not coerce them into compromising their basic values, or else recuse myself from their case. This is not to deny that part of the mediator's responsibility is also to make sure clients are aware of how those norms may affect them. If a social norm regarding the education of children has been codified as a legal requirement that all children below a certain age must be enrolled in some type of school program, for example, in order to be workable any creative resolution that is adopted will need to take such a norm into account.

These examples from my experience also illustrate another benefit beyond reassuring clients and providing some recognition during the mediation process of the cultural and social communities in which they are embedded: The practice of matching the backgrounds of the clients and the mediator can help ensure that the mediator is not inadvertently facilitating the replication of social power disparities in the mediation process, which the mediator may not be consciously aware of due to a different cultural background or more privileged social situation. Further, a commitment to matching the

backgrounds of mediators and clients helps avoid the all-to-common situation where the pool of mediators available to a mediation provider has a very different cultural and social profile from that of the clients that provider typically serves. This often happens when a provider that relies on volunteers finds it is easiest to recruit and train highly-educated middle-class white suburban residents, who have the resources to successfully complete the training and follow through on with a volunteer commitment, when most of its clients are inner-city residents of color who have not had access to good education or jobs that pay a living wage. Mediation service providers who seek to empower their clients should take responsibility for developing the resources necessary to recruit and train a significant portion of mediators from the communities being served, and adopting a policy of matching mediators with clients can help ensure that this responsibility is prioritized.

However, the uncritical wholesale adoption of this practice of matching the cultural and social backgrounds of mediators with that of clients may work against the aim of empowering clients. This is because, as Follett warns, the access of disputants to the difference and diversity that could be used to find creative solutions is limited (e.g. see Follett 1918, 24; 1924, 300-301). A mediator who is from a different cultural background and embedded in a different community can help bring a very different perspective to the dispute and possible creative solutions.

In addition, the uncritical wholesale adoption of this practice of matching could serve to perpetuate social power imbalances or inequities within the mediation process. For example, if a husband and wife who share a traditional religious background are in

mediation, that tradition may involve the wife deferring to the husband whenever a significant disagreement arises. In such a situation, it could be particularly difficult for a mediator who shared that same background to address gender-based power disparities. Further, similar concerns may arise when each of the clients is from a different background. For instance, it appears benign for a person of a particular ethnicity to request or automatically be assigned a mediator who shares their ethnicity. But what if a white anti-immigration citizen vigilante involved in a dispute with a Latino immigrant who is not a citizen makes this same type of request, for example? Certainly both the vigilante and the immigrant have good reason to believe that others—including mediators—who do not share their particular backgrounds will not be able to understand their situations, and thus will be unlikely to help them productively address their dispute.

It might seem advisable in such situations to fall back on a guideline that mediation services will not be provided to disputants who openly advocate the disempowerment of the other party to the dispute. Similar guidelines have been used to deny spouses who are known to abuse their partners access to mediation services, and in this case could be used to deny the vigilante mediation services. Yet almost always denying services to one disputant is in effect denying services to all disputants. When mediation is a better alternative than other ways of resolving disputes, denial of services forces the disputants to seek other ways of dealing with their conflict that are less empowering and more coercive.

In sum, refining the practice of matching the backgrounds of mediators with clients so that the benefits related to empowerment are enhanced and the detriments are avoided is important work that should be continued.

### **Expand the Use of Co-Mediators and Mediation Panels**

A minimal gesture towards changing mediation practices in a way that is compatible with Follett's theory of empowerment based in interdependence has been made by some mediation providers in the form of using co-mediators rather than single mediators whenever possible. For example, in my experience this is the practice at the Dispute Resolution Center of King County (WA). This practice is gaining more widespread acceptance, and recent changes to "Model Standards of Conduct for Mediators" specifically acknowledge co-mediation as an accepted practice (ACR 2008a cf. 2008b).

This practice should become the standard for domestic mediations, but more can be done on this front in order to address the current challenges. Other practices that may go further in applying the theory I am reclaiming here have not been seriously considered outside a few very limited applications. These include the San Francisco Community Board's community mediation panel approach, where three to five volunteers from the community are trained to serve as mediators for a dispute, and some or all of the mediation sessions are held publicly so any interested community members, may attend, although not necessarily actively participate (Schwerin 1995, 24, 128; see also Coy and Hedeem 2005, 248).

### **Incorporating Lessons from the Restorative Justice Movement: Involving the Community**

A related area that is ripe for reform has been raised by Lewis Mehl-Madrona, among others involved in the “restorative justice” movement. The restorative justice approach emphasizes empowering all participants in a dispute as a better way than “retributive justice,” which is based primarily on punishment, to achieve justice and maintain the integrity of relationships between individuals and their communities (see e.g. Mehl-Madrona 2006, 277, 290, 292-93). Mehl-Madrona has discussed the need to not just identify, but rather to explicitly involve and incorporate the “affected audience” or “shareholders” into mediation processes (ibid., 296, 291, 292-93). The affected audience is comprised of community members or others who may not be as directly and actively engaged in a conflict as those who are deemed to be the primary participants in a dispute resolution process, yet nevertheless have a significant stake in or are likely to be significantly affected by the dispute or its outcome (ibid.; see also Coltri 2004, 9-10, 93-100 *passim*, 132-33, 205-206). As discussed above,<sup>1</sup> the reliance on the individualist fallacy has led to a lack of accountability on the part of individual disputants and mediators to others who are affected by ostensibly private disputes.

In my experience, a common example of members of the “affected audience” in mediations involving child custody is grandparents who have close relationships with their grandchildren and have been providing regular childcare for them; such grandparents are definitely affected when, for example, the outcome of a mediation is a

child custody agreement that includes a provision for the grandchildren to spend summers with a parent who will be moving a considerable distance away from where the children and grandparents currently reside.

Possible changes to mediation practices that are consistent with Follett's alternative conception of empowerment based on interdependence could include two components. The conception could allow more people who are affected but not active disputants into the "private" mediation space (such as inviting grandparents who have a close relationship with their grandchildren to help parents find creative resolutions to child custody issues, or directly involving court officers and social workers who may hold "veto power" over custody arrangements into the mediation process). Second, the conception could open up the mediation space so that it is more public (such as holding some sessions of a mediation in front of community members who are concerned but not directly involved so they can share concerns and provide input). Both of these approaches are incorporated into some practices being developed in the "restorative justice" approach to resolving disputes that involve teen offenses (see Auerbach 1983, 126-8; see also Zehr 1995) as well as disputes that involve family violence, particularly in the context of indigenous communities. For example, Kay Pranis's outline of general guidelines for restorative justice practices in family disputes involving violence includes the goals of "involvement of the larger community in design and oversight of the [restorative] process," and "involvement of persons outside the nuclear family who have close ties to the family" provided they "disapprove of the violence" (2002, 32).



Restorative justice practices may prove to be effective and applicable not just to specific types of cases, such as those involving domestic violence, but also to domestic mediation practices in general.<sup>2</sup> Feminist legal scholar and indigenous studies professor Larissa Behrendt cautions that some “staunch advocates of mediation” have “seemed to forget that mediation may have been an alternative dispute resolution process but it was not an alternative to the dominant legal system; it was only an extension of it.” Instead, she advises that “a better way is a ground-up approach, one that starts with the community developing the process, not the process being adapted to the community” (2002, 188). This advice can serve as a guiding maxim in reconstructing mediation practices beyond those that relate strictly to process, a maxim that is compatible with the insights from Mary Parker Follett about the nature of the leadership role of mediators discussed above. For instance, a current model that is widespread involves professional mediators traveling as individuals to dispute resolution centers or other mediation venues to meet privately with clients, who themselves have also had to travel to the dispute resolution centers, often from some distance away. We should consider the possibility of redefining the model so professional mediators are trained to serve as mentor facilitators who travel into communities as invited visitors in order to collaborate with community leaders, who in turn directly assist disputants. This model would provide community leaders access to a broader range of mediation resources and expertise than is generally available in a given community. Also, and more importantly, those community leaders would be afforded the opportunity, with access to expert assistance and support, to create the mediation processes that will work best in their particular social context.

### **Summary**

In this chapter, I have presented a variety of constructive solutions that are aimed at implementing reforms in domestic mediation practices based on the conception of power and empowerment, consistent with the idea that is central to Mary Parker Follett's theory as explicated in the previous chapter that persons are interdependent and embedded in social communities rather than radically autonomous. I discussed how, if developed and adopted, these constructive solutions as well as others based on Follett's alternative conception of power as empowerment rooted in interdependence could help rectify the problems that the ADR profession, particularly domestic mediation, currently faces. In the next chapter, I briefly present my general conclusions from this critique.

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**Notes for Chapter IV**

<sup>1</sup> The issue of additional stakeholders is discussed in subsection 4 of the first section of Chapter 2.

<sup>2</sup> Although it is beyond the scope of this critique to provide a comprehensive overview of all the practices of the restorative justice movement that may prove fruitful for broader incorporation into mediation processes, in addition to Mehl-Madrona, Pranis, and Behrendt, the following sources collected in the 2002 volume *Restorative Justice and Family Violence* edited by Heather Strang and John Braithwaite can serve as excellent resources: Bazemore and Gordon, Blagg, Coker, Morris, and Pennell and Burford; see also Spitz 2006.

## CHAPTER V

### CONCLUSIONS

In this feminist philosophical critique, I have identified the main causes of the current challenges the mediation profession as primarily resulting from an inability to realize the aim of empowering mediation participants, due to the unwitting reliance in our theory and practice on the mistaken idea that the human person is radically autonomous. This has resulted in mediation practices that not only fail to empower participants, but can actually be disempowering. Domestic mediation is particularly vulnerable to these challenges, because the risks of disempowering participants are magnified in the domestic context. Building in large part on the work of contemporary feminist theorists, I have also shown that the requisite theoretical and practical resources are available to address these challenges and remedy the resulting problems, and offer my reclamation of the work of feminist-pragmatist philosopher Mary Parker Follett as a prime exemplar.

As a feminist philosopher and practicing mediator, I must reiterate my commitment to mediation—even given the current challenges and problems—as a practice that generally is preferable to other ways of resolving disputes, such as those that use coercion or even violent use of “power-over.” However, mediation theorists and practitioners now have the responsibility for addressing these challenges and remedying these problems so that our aim of empowering mediation participants can be more fully

realized. Otherwise, we are failing to do our part towards finding the creative solutions to answer that key ethical question of “what is best for all of us” (Follett 1918, 81). Given that the theoretical resources such as those I have presented here indeed are available to support constructive solutions, we have no excuse for not taking up the hard work of reforming our profession informed by a new understanding of what is at stake.

Since mediation is and should continue to be a flexible and responsive practice that can be adapted to meet the different needs of the diverse individuals and communities we serve, we can expect that the constructive solutions we will need to create will be many and varied. Yet as we pursue these varied solutions, we should keep the following guideline based on the lessons of this feminist philosophical critique in the forefront of our endeavors, especially with regard to domestic mediation theory and practice: As we theorize and do research and engage directly with our clients in mediation, we have the duty to interrogate our ideas and methods and practices to determine whether they rely on the individualist fallacy, or whether they take into account how both we and our clients are interdependent and embedded in social communities. If we consistently focus our efforts on developing and implementing theories and practices that affirmatively acknowledge a conception of power consistent with interdependence, we will be better able to realize our aim of fully empowering our mediation clients and their—or rather, our—communities.

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