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What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life

Carrie Menkel-Meadow*

Trina Grillo and I trained together as mediators, met together as law teachers, commiserated together as women and civil rights activists, and laughed and cried together as friends. I shall miss her wise counsel, her sensible judgment, her measured indignation, her gentleness and her razor sharp perceptions about the world, across, through and with her gender, race, class, and human identities. I shall miss her words, her presence, her body, her corporeal essence, but she will always be with me and my students in her spirit and through her contributions to our work. In this Essay I want to reflect on some of what Trina gave me over the years in the hope that her contributions will continue to be heard, considered and listened to.

Trina and I first met as progressive law teachers—was it at a Society of American Law Teachers meeting? Or at a Critical Legal Studies meeting? Or at a gathering of feminist law professors? Or at a Law and Society meeting? It was so long ago, I forget, because we gathered in all of these places in the 1970s and 1980s, in the shared hopes that law teachers with a critical edge and an “outsider’s” perspective could affect social change, through teaching and practice that was committed to progressive ends. We had the sort of easy friendship that catches up in the interstices of meetings: at coffee, at lunch, sitting on the floor in living rooms or classrooms, talking, talking and talking—trying to figure it all out. How to stay committed to “good works” and also stay in legal education. How to name what we see and be honest; “Speaking truth to power” was a favorite expression then. Like many politically committed people, Trina left legal education for a while for legal practice, for mediation, for mothering, and for being true to

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her principles.¹ When she returned, she returned committed to academic support teaching, and, as always, to social justice and to a new more complicated version of how to use dispute resolution in the world of racial, gender, social, class and sexual inequalities. It is that particular issue, among others, that I want to address here.

I am a white woman,² daughter of Holocaust survivors, who, growing up with this family history in the 1950s, became a "race" conscious activist who heard and saw the damage that racial categories and exclusions could do to staggering numbers of people³ as well as to the spirit and material well-being of individuals and families.⁴ So as a young girl of a religiously mixed marriage,⁵ I was determined to spend my life working against racial discrimination and other forms of cruelty, intolerance, incivility, and injustice. Like many of my generation with these values, I went to law school and became a legal services⁶ and civil rights lawyer. When I moved into teaching I went into clinical education, the branch that promised to stay connected to real world injustice. Even there, however, I soon felt the ennui or skepticism that I had felt in practice. I knew

1. Later, in her own work, Trina formed a practice firm, comprised principally of people of color who were to specialize in mediating disputes in which race, gender, sexual orientation and other issues of our postmodern, multicultural conditions were at issue. She wanted to see if sensitive, caring and politically informed dialogue could work and could be used in service of justice.

2. I am a "European-American," one generation away from a position of complete "otherness" from the American laws I now teach and practice. *But cf.* Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287, 293-94 (1992) (reviewing PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991) and describing the difficulties of constructing identity solely through racial categories, especially when they are "hyphenated" ones).

3. I have been both repulsed by and obsessed with the efforts to accurately assess the numbers of deaths in World War II and in the African Diaspora. *See, e.g.*, JUDITH MILLER, *ONE BY ONE* (1988) (reporting the different ways that people and nations remember the Holocaust).

4. Lorraine Hansberry's *Raisin in the Sun* was one of the first plays and movies I saw as a young girl.

5. I was raised in Ethical Culture in the middle of the religious revival of the 1950s.

6. After the publication in 1962 of Michael Harrington's *The Other America*, many who were intent on legal reform were reminded to factor poverty, as well as race, into their analyses. Of course, for children of the Depression, children of Marxists, or poor children, class was always part of the struggle.

that lawsuits were only one way, and seldom the best way, to solve problems or to "reorient people to each other."⁷ For many of us in the New Left, the interpersonal and the psychological were also the political.⁸ As many in the women's movement were, I was interested in how oppressive social forces and institutions of exclusionary privilege constructed both the public spaces and private places that controlled, enforced and limited our lives.⁹ Lawsuits and courts were "public spaces," the everyday negotiations, interactions and "mediations" of social life were the more private places where people really did their work and lived their lives.

As I turned to other forms of dispute resolution, forms with more healing potential, few others seemed to be similarly engaged in searching for ways to use healing arts and interpersonal techniques to effect social justice on both individual and group levels.¹⁰ Unlike me, some of those people have put themselves at greater personal and political risk by talking about conciliation and mediation, and seeming to tolerate "compromise"¹¹ in a world of struggle for equity, justice, and equality, a struggle that demands little or no "concession" to the "oppres-

7. See Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) (describing mediation's capacity to reorient parties by changing the shared perceptions of their relationship).

8. See, e.g., Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (presenting a dialogue between the authors on the role of unalienated consciousness in political transformation); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1563-64 (1984) (arguing that a new appreciation for the details of everyday life is central to understanding how the law constitutes our social existence).

9. See, e.g., GLORIA STEINAM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* (1988) (collecting the author's feminist cultural observations and social critiques).

10. Sometimes in the shadowy evenings of "afterthoughts" or late-night gabfests at ADR conferences you can hear the whisper of people talking about how racial injustice, child or domestic abuse, divorce, alcoholism, the Holocaust, or religious intolerance in their past or families has motivated them to seek more productive ways to heal the flesh and hearts and minds torn by human cruelty. There is a story dwelling in the social and personal origins of those who labor in the dispute resolution field. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering*, in *CAUSE LAWYERS* (Austin Sarat & Stuart Sheingold eds., forthcoming 1997).

11. For me, mediation is not about compromise. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2619, 2672-78 (1995) (arguing that settlement does not necessarily mean that each party must sacrifice an important claim in order to secure another one).

sors." Mediation, conciliation, and ADR are considered by many to be the enemies of racial justice and equality and freedom for the subordinated.¹²

Trina Grillo was one of those people¹³ who believed that mediative processes might work to educate, transform, heal and persuade, as well as change behaviors at both individual and group levels, and that they could be used in a wide variety of contexts. Indeed, she practiced the art of mediation and was very, very good at it.¹⁴ Harlon Dalton has written, movingly, of the special openness and multi-racial consciousness Trina brought to identity politics—a "spiritual openness"¹⁵ that no doubt facilitated her work as a mediator. Mediators need to empathize with multiple parties. As a person of multiracial and mixed heritage, Trina knew how to see the "both/and" rather than the "either/or"¹⁶ nature of racial identity as well as legal problem-solving.

Therefore, I remember the sinking, chilling feeling I had when Trina sent me a draft of her now famous article, *Mediation—Process Dangers for Women*,¹⁷ in which, despite an agreeable first footnote citation to some of my work, she criticized, indeed condemned, the use of some forms of mediation in di-

12. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-91 (arguing that alternative dispute resolution may disadvantage minority disputants). Like many professional organizations, the Society of Professionals in Dispute Resolution, an association of mediators and other neutral third parties, worries about the diversity of its membership and the profession. It also worries about the uses to which dispute resolution processes are sometimes put.

13. Among those who, like Trina, have been willing to use mediative or "healing" processes in their words and work in pursuit of racial justice, I count Chuck Lawrence, Hayward Burns (whom we have also lost this year), Mari Matsuda, Harlon Dalton, John Powell, Howard Gadlin, Wallace Warfield, Isabelle Gunning, Cornel West, Carol Izumi, Peter Gabel, Michael Lewis, and Linda Singer, to name a few. Although forceful "freedom fighters" in the struggle for racial equality, these people see the value of the "healing arts."

14. As a long time teacher of mediation, it is in my interest to believe that one can learn how to mediate, but it is also true that some mediators have a natural talent—a calmness, a groundedness—that allows parties to feel they are in safe hands, that someone with judgment and clear thinking and kindness will help them see their way to possible, if tentative and contingent, solutions. Trina was one of those people.

15. See HARLON DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 81-83 (1995) (describing his relationship with Trina).

16. *Id.* at 82.

17. 100 YALE L.J. 1545 (1991).

orce and child custody cases. She carefully and gracefully acknowledged the work of those of us who criticized the adversary system as patriarchal, polarizing, objectivist and unfeeling, as juxtaposed with a more relational, party-controlled and responsive process of choice.¹⁸ Trina then concluded that mediation, at least in its court-ordered mandatory forms, not only did not fulfill its promises, but was likely to be more dangerous for women, some men, and generally those who, in our society, are disadvantaged in one way or another.

Reading the article was like a splash of bone-chilling cold water. My friend, co-mediator, and co-teacher had joined the ranks of those who rejected alternative dispute resolution as an important tool in the project of achieving social justice, peace, and just results. Her work carefully explored empirical studies and more importantly, in the new vein of "narrative scholarship" among critical race scholars, Trina told "stories" pieced together from mediations she had done, observed, or heard about. Later, I learned that her own experience in divorce and family change informed parts of the piece. At the same time, in the felicitous and truly honest and forthright style that was hers, she disclosed, early in the article:

Although this Article cautions against mediation's dangers, I should emphasize at this juncture that mediation is the work I most like to do. Few professional experiences can compare to the moment when the world of possibilities seems to expand for a couple, and hope and optimism coexist, at least temporarily, with pain and anger. It is from my experiences mediating and listening to the stories of those who have been participants in the mediation process, and out of concern for the integrity of that process, that this Article has been written.¹⁹

I called Trina to talk about her article and learned that on the same day her article had been accepted for publication in the *Yale Law Journal* anniversary issue, she had been diagnosed with Hodgkin's disease. I was angry with the injustice of a world that would not allow her to savor an important moment in an academic's life but cruelly interrupted her hope and optimism and replaced it with pain, anger and, no doubt, fear. This moment was transforming for Trina, in ways I will return to below, because in a subsequent article²⁰ we all learned from

18. See *id.* at 1548 n.6.

19. *Id.* at 1150-51.

20. Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (and Other Isms)*, 1991 DUKE L.J. 397, 397-98, reprinted in STEPHANIE M.

Trina how being a cancer patient had, at least for awhile, trumped all her other identities, and reminded the rest of us of our most important commonality—our temporality. So instead of inflicting more pain by arguing with her, I put her in touch with a colleague of mine who had seemingly and optimistically recovered from Hodgkin's disease.²¹

Despite my concerns that Trina's important article and eloquent voice would stifle support of mediation, I, like so many in the field, began to teach the article. In a very short time it became the canonical text of a feminist critique of ADR that focused primarily on what happens in situations where people of unequal bargaining power directly confront each other, with either no or little formal legal protection.²²

First, the "informal law" of social relations in mediation constructs the "good" or "bad" woman, contrasting the compliant, child-caring, self-denying and self-denigrating wife with the demanding, angry, justice-seeking, assertive woman who could be controlled by the micro-sanctions of mediator interventions. The social control of mediation practice, in Trina's analysis, created a world which is not "neutral," as promised in

WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996). As Trina said, "[C]ancer has become the first filter through which I see the world. It used to be race, but now it is cancer." *Id.* at 397. Trina and her coauthor, Stephanie Wildman, observed, "Someone with cancer can think of nothing else. . . . The cancer patient does not have the privilege of forgetting about her cancer; even when it is not in the forefront of her thoughts, it remains in the background, coloring her world." *Id.* at 397-98.

21. That colleague was Julian Eule, a constitutional law scholar and teacher who worked tirelessly with cancer patients for many years after his own "cure." Even though he had been thought to be cancer-free for over 15 years, Julian died some months after Trina. This Essay is dedicated to his memory as well. To lose two good friends and colleagues in one year is almost too much to bear. To lose two people of the same age, in the same profession, and with many of the same goals, people who have contributed so much to the world and tried so hard to help others, seems too, too cruel. In his own efforts to consider the use of nonconfrontational methods of dealing with racial inequality, Julian recently served as a participant in a dialogue workshop on affirmative action at UCLA. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 34-35 (1996).

22. See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (arguing that divorce mediation denigrates the legal rights of wives, thereby perpetuating male dominance in divorce proceedings); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (studying the harmful impact mediation tends to have in cases of domestic abuse).

mediation ideology, but replete with normative constructions in which mediators subtly manipulate the process to produce the substantive results they prefer (such as joint custody).

Second, while eschewing the abstract and formalist legal rights of bright line rules, mediation is intended to focus on context and particularity. This, in Trina's view, disempowers the claims and appeals to externally created normative standards that have offered hope to some subordinated people.²³ In the divorce context in particular, no-fault and more fluid rules have arguably redounded to the detriment, not benefit, of women and mothers.²⁴ Unpredictability of rules, Trina argued, made power, not rights, the currency of mediative discourse.²⁵

Third, where law is supplanted by the psychological language of relationship and family systems theory, compromise and sharing, rather than moral accountability and responsibility, govern.

Fourth, the ideology of mediation, focusing on the "future" and drafting constitutional agreements for family governance, displaces discussions of past history, including hurts, anger, transgressions and sadness. In family mediation, one is just supposed to "move on" and think of the children. In one of her most trenchant criticisms of the divorce mediation process, Trina suggests that "by eliminating discussion of the past, context—in the sense of the relationship's history—is removed. The result is that we are left with neither principles nor context as a basis for decisionmaking."²⁶

23. Trina had joined the Critical Race Theory critique of Critical Legal Studies. See generally Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (presenting several perspectives on whether the conceptual deconstruction of legal rights undermines the position of minorities in society). She had also joined the feminist analysis of how legal rights were essential for women's claims to equality. See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (proposing a transition from mediation to a more formalized legal mode in child custody cases); Elizabeth M. Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (arguing that legal rights play a crucial role in advancing the feminist agenda).

24. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* at xi-xiv (1985) (arguing that gender-neutral rules deprive women of the legal and financial protections that old laws provided).

25. See Grillo, *supra* note 17, at 1559 (arguing that unpredictability of divorce rules hurts those with the least power).

26. *Id.* at 1564.

Similarly, to the extent that mediation ideology and practice treat parties as "equals" in the mediation, "equal" outcomes are molded to a falsely produced equality of discourse or air-time. If parties are equal, they can share, whether it be custody or property, regardless of need, performance, fault, and desert.

While mediation promises the "venting" of feelings and the allowance of emotions that would be inadmissible in a formal court proceeding, the reality, as described by Trina, is a tightly controlled "permitted" discourse which constantly polices by reminding that "anger is counterproductive" to good solutions and long-term healthy relationships.²⁷ The mediation ideology of neutrality may also be problematic when the parties are not equal and need some "power balancing."²⁸ Finally, mediation which is ordered by the court can hardly be credited for encouraging "self-determination" if the time, place, manner, and mediator are chosen by someone other than the parties.

In short, Trina demonstrated, through argument, citation of empirical studies, and deconstruction and elucidation of the process, that the promise of mediation was not being met in the reality of a process turned coercive and manipulative by the constructs of an ideology and practice of what it is "right" to do within the mediation process. Though she credited the possibility that a woman's "ethic of care"²⁹ might inform the process, the reality was that if women were more relational, they were likely to be more harmed than helped in a process where there were no legal protections and the expectations would be to share (perhaps with an overpowering and wealthier spouse). Dependence, need for relationship, vulnerability, emotion, and anger could in fact hurt women in a process that promised to take those things seriously, but often in practice did not.

Trina did not conclude, at the end of the day, that mediation should be abandoned by women or subordinated people. She recognized that women, the poor, the abused, and racial minorities often go to court and lose or feel "raped" by the process. What she so powerfully suggested in her work was that if

27. See *id.* at 1572 (noting that expressions of anger are frequently discouraged in mediation).

28. A term of art and technique now used to convey the need for a mediator to counter power inequalities or correct for other imbalances between the parties.

29. See Grillo, *supra* note 17, at 1601-05 (discussing the application of Carol Gilligan's "ethic of care" in mediation).

mediation was to be a corrective for the flaws of the formal justice system,³⁰ it must do better than the justice system, and certainly no worse. What she offered was a standard by which to judge mediation and all forms of dispute resolution: that the disempowered should not be asked to consent to their own oppression.³¹ If law is violent³² then "consent" can also be coerced. Her work illuminated the arguments, made clear and rich the contours of the polemics, and helped inspire some of the first rigorous empirical tests of fairness in different modes of dispute resolution with different racial, ethnic and gender mixes of disputants.³³ She acknowledged and read carefully the claims of those who hoped that mediation could deliver more responsive and caring justice.³⁴ But when it didn't, she offered caution and suggested reforms to improve a process she found useful.³⁵

Some time later, after Trina's first and somewhat successful bout with cancer,³⁶ we finally did get to talk about her article at a meeting of dispute resolution theorists. While the talk

30. Trina relied most generously on my own critiques of the adversarial process. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (discussing how women's increased presence in the legal community may shape the law and the lawyering process by introducing more mediative, problem-solving approaches, rather than adversarial means); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794-821 (1984) (discussing the problem-solving model of negotiation).

31. See Grillo, *supra* note 17, at 1610 (stating that mediation promises to empower subordinates, but instead forces parties to acquiesce to their own oppression).

32. See NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992) (discussing the violent nature of the law).

33. See, e.g., GARY LAFREE ET AL., METRO COURT STUDY (1995); Gary LaFree and Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767 (1996) (studying the effects of litigants' gender and ethnicity on monetary outcomes in mediated and adjudicated cases).

34. Trina was one of the most careful readers of my own work. Rather than discrediting my reliance on Gilligan's "ethic of care," Trina carefully noted that I had argued that who the mediators were could have a significant impact and that some cases required authoritative rulings and precedents. See Grillo, *supra* note 17, at 1603 n.271.

35. See Trina Grillo, *Respecting the Struggle: Following the Parties' Lead*, 13 MED. Q. 279 (1996).

36. I want to acknowledge the incredible care and support that Trina received from a wonderfully devoted group of friends, particularly Stephanie Wildman, Catherine Wells, and Michele Hermann.

was of game theory, cognitive barriers to conflict resolution,³⁷ rationality, and utility maximization in dispute processes, Trina and I talked of negotiation, mediation, teaching, and our lives. I learned to see, through our conversations, the pulls on her of memberships in multiple communities: race, gender, mother, teacher, lawyer, mediator, and civil rights activist. We also shared some changes in our personal lives, her illness, my fertility problems, and how we would or would not use mediation for disputes or issues in our own personal lives, even as we continued to serve as third-party neutrals in other people's disputes and continued to teach others to do the same. I shared with Trina how her critique had at first made me angry—that she was attacking something I had come to see as a necessary corrective to the pain and draconian results of courts, with the promise of processes we could see as enriching, empowering, and dare I say, humanely transformative. Outside of the divorce context, I had used mediation in university disputes, group claims, race and ethnic conflict situations, employment disputes, mass torts, simple personal injury and had even had a major insurance company lawyer say he had been “educated and transformed” by mediation. Slowly, and employing a feminist Socratic method, we discussed and asked each other questions and realized that our own personal situations might dictate different choices of processes. I saw what made Trina skeptical of some forms of ADR, and I came to realize that in situations where I felt disempowered, or like a “bad and angry” woman, I would not want to mediate either.

The insight is obvious, if still profound: how we feel about our own disputes, contexts, experiences and situations should give us knowledge and remind us of the limits of what we promise, counsel and teach others.³⁸ We must avoid saying “do as I suggest, not as I would want.” Trina's own life experiences led to her research and arguments and produced, for her, a counterintuitive “friendly but critical” critique of a process she had wanted to trust but, when she saw what it was capable of

37. The wonderfully stimulating papers presented at that meeting are now collected in KENNETH J. ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (1995).

38. In another context, I have suggested that a modified “Golden Rule” should inform our lawyering practices: do unto others as you would like them to do unto you. See Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990) (proposing a moral standard for analyzing the conduct of lawyers who lie).

doing, could not. She made me realize that there were situations I wouldn't want to mediate either—some with my husband, many with my superiors and colleagues at the workplace, some with neighbors and certainly none with Hitler or the Ku Klux Klan. Principle, power, and politics all may matter more than process. Trina taught that context matters. Our academic efforts to generalize, describe, and predict must be tested in the real world. This is a lesson that I, as a socio-legal scholar and teacher, preached every day. Trina made me feel it again in the reality of my own "Durkheimian epiphany."³⁹ If mediation had promise, its reality had to be examined and its use analyzed from the perspective of those inside the process.

In her subsequent work on the false analogies of racism and sexism,⁴⁰ Trina continued to unpack the realities of academic generalities, focusing on how claims that racism and sexism are alike place whites, and white males in particular, in the center, essentializing both blacks and females and erasing the identity of women who are not white, as well as equalizing or leveling pains and hurts that are not equivalent.⁴¹ In that piece she argued poignantly, I am black, I am a woman and I have cancer: these are not the same in the pain, oppression, and lack of control they offer my life. In the words of that article:

When socially subordinated groups are lumped together, oppression begins to look like a uniform problem and one may neglect the varying and complex contexts of the different groups being addressed. If oppression is all the same, then we are all equally able to discuss

39. See Carrie Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. U. L. REV. 91, 93-102 (1990) (discussing the role of social science in legal studies).

40. Grillo & Wildman, *supra* note 20 (noting how comparison of oppressions perpetuate racism).

41. See *id.* at 401-10 (discussing how the sex/race analogy perpetuates white supremacy). In this work, Trina joined a growing group of critical race feminists who have been illuminating the intersections of race and gender and particularizing the experiences of the many. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of the Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (discussing the effects of single-axis discrimination laws on black women's experiences); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183 (1991) (discussing the use of coalition-building to advance the interests of women of color); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990) (reprinting the thoughts of a black woman who looks white).

each oppression, and there is no felt need for us to listen to and learn from other socially-subordinated groups.⁴²

These words are important for us all to remember—in my own teaching (and in mediation), I had often called upon empathy as a method of learning—to get those who were different from each other to understand each other by getting, not only into each other's shoes, but into each other's feet. Trina reminds us that the human tendency to analogize in the empathy process may produce only sympathy, both inaccurate and potentially patronizing. "I can share your pain," is not the same for a white Jewish woman who worries about, but does not have cancer, as for a black woman who does.⁴³ Our tendency is to experience the Other from our own position, from our own values, from our own experiences. Analogy helps us do that. How are we alike so I can feel your pain or understand you? How is your situation like mine? This is the work that mediators do with parties. Trina reminds us that not all oppression is the same, just as not all mediation fulfills its promise. We must examine that and question it and try to move on from there.

So Trina suggests that we need time for recognition of our differences and dissimilarities, rather than assuming too quickly our pain is all the same and our experiences have been identical. Like other friends of Trina's who have labored in these fields, we are asked to "be" with that difference for some time. For Harlon Dalton, we must find struggle, return to the past wounds which we cannot deny, and engage with each other before we can heal.⁴⁴ This approach takes into account Trina's critique that the past cannot be erased in mediation's focus on the future. It is the claim for reparations, for apology, for acknowledgment, and for affirmative action.⁴⁵ In mediation, as in civil rights' struggles, we must look back before we can move forward. True resolution of conflicts requires us to deal with, bring forward and not suppress, conflicts and past, as well as current, pains. Mediation ideology and practice, if it

42. Grillo & Wildman, *supra* note 20, at 404.

43. *See id.* at 397-98 (noting the problem with comparing one's situation to another's dialog).

44. *See* DALTON, *supra* note 15, at 97-101 (arguing that the best method for racial healing is to candidly confront the past).

45. *See* CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997) (arguing for apology, reparation, and redress in race relations).

is to be of use in racial justice, must adapt and make room for acknowledgment of the past and of difference.

From those moments of acknowledging difference and inflicted pain, we can then move on to reconciliation and coalition. Individual insight can help us form collective consciousness. Even if oppression is differentially experienced, there are resonances and correspondences among those who feel the weight of oppression, subordination, and inequality.⁴⁶ For Mari Matsuda, we must ask "the other question," by asking what particular oppression would one group feel from the vantage point of another oppressed group.⁴⁷ Where is the patriarchy in racism? Where is the homophobia in sexism? Recognition of difference, engagement with it and then coalition across differences is the hope for antiracist, antioppression work. As a woman, Trina asked where the racism was in women's works; as a woman lawyer, Trina asked where the justice was in mediation; as a civil rights activist, she asked where the sexism and homophobia were located in anti-racist work; as a teacher, she asked what oppressed students in the unequal relationships of education. Trina almost always asked Mari's "other questions."⁴⁸

In this work of questioning, elements of the promise of mediation return. If we can really listen to each other and not essentialize, equalize, or analogize that which is not essential, equal, or the same, but instead deal fairly with difference, in experience, in material and psychological advantage and in privilege, then parties who choose to listen might learn from each other just how they experience the world. While some have labeled this new form of mediation "transformative me-

46. I do not think that oppression, subordination, and inequality are themselves all the same. I use these different words consciously to remind us of the different and, more or less, extreme forms of injustice that exist.

47. Matsuda, *supra* note 41, at 1189.

48. As Trina's friend Stephanie has suggested, one place to start in the work against oppression is for whites to acknowledge their privilege and to make a friend with a person of color. Grillo & Wildman, *supra* note 20, at 404. This is controversial advice because many people of color are tired of being "our" private educators. Yet for me, Trina was one of those friends, whose direct, honest, sincere, challenging, and pointed observations in conversations always made me ask the questions, question my assumptions, and reflect on how much I was taking for granted. This kind of conversation, loving but real, confrontational, and direct when necessary, is one of the ways to justice, equality and caring. See ROBIN WEST, *CARING FOR JUSTICE* (forthcoming 1997).

diation,⁴⁹ I prefer to keep it more modest,⁵⁰ by calling it conversation, dialogue, and “educative” mediation. I am now mindful of how the promise of mediation can easily be distorted by being institutionalized, formalized and concretized in ways that reflect current power and privilege structures. Trina reminds us that we must be ever vigilant.

As Trina was becoming ill again, I met her at one last conference on gender and conflict resolution. I wanted to engage her in discussions about my latest project—an explicit effort to understand how conflict resolution processes could be put in service of antiracist, antidiscrimination values. In a sense following up on Mari Matsuda’s practice, we noticed that we were talking about race and ethnicity in a conference about gender and noticing that gender had once again been constructed as white (there were white men present but few women of color). Trina asked the hard questions and pushed the participants to see that the “truth” they might be creating about gender and conflict resolution would be partial and inadequate. From her work on mediation, Trina reminded us that within conflict resolution processes, women are different from each other as well as from men, and have different endowments, capacities and resources. Their needs, desires, and wants from a conflict resolution or negotiation process could vary enormously. To what extent would any theory of gender and conflict resolution take account of those differences? Trina probed and pushed with that spirit of open and critical helpfulness, once again taking up the banner of the women of color in a sea of well-meaning white faces.⁵¹ As one of the few women of color at a mostly white teachers conference, she was remembering and seeing who was absent: the students, the users of conflict resolution processes, the people of color, the women who questioned an essentialized “women’s” experience. Yet she was still a woman conflict resolver at this conference—she wanted to contribute her “friendly” critique from within, for if there is anything Trina continued to care about, it was engagement

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

50. For my critique of the sometimes ethnocentric, paternalistic or grandiose claims of “transformative” mediation, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices*, 11 *NEGOTIATION J.* 217 (1995) (book review).

51. That the setting was the Harvard Negotiation Project may be of some significance here.

with these problems through critique, gentle confrontation, and challenge.

Together, Trina and I explored new ground on the issues that confront mediation theory and practice. We discussed my concern that mediation is a potentially ethnocentric construct, privileging talk, emotions and the ability to articulate needs—cultural practices that were not necessarily acceptable in some cultures. We noted the irony when juxtaposing her work on the potential disempowering of women in mediation with the recent work of the linguist, Deborah Tannen, who posits that women, who use emotional language and articulate needs with ease, might actually be better at “mediation talk” than some men.⁵² We acknowledged the challenges of taking a task-oriented process originally intended to be used on the individual, interpersonal level and using that process in group conflict, with no necessary task beyond increasing human understanding. Finally, we agreed to reconstruct these conversations and new forms of problem solving within the groups they are intended to serve.⁵³ These challenges remain, and I shall miss Trina’s potential contributions.

For all her insights, critiques, and challenges to the mediation process, Trina continued to teach it and practice it. She didn’t give up on her hopes for a more just and fair world for herself, her students, her children, her friends. For me, she was the model of a socially committed mediator—she listened, she talked, she asserted and did not “consent” to oppression or injustice. When she found a process with some promise, like teaching or mediation, she tried to make it better—to better mold it to the higher aspirations she had for us as human beings. With her, I was always conscious of both our differences and our similarities—we had a “both/and,” not an “either/or” friendship. In her kindness and generosity, as well as in her insistence on justice, I always learned and never felt negatively

52. See DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION* (1990) (discussing the differences between men’s and women’s conversation styles); see also DEBORAH TANNEN, *TALKING FROM 9 TO 5: HOW WOMEN’S AND MEN’S CONVERSATION STYLES AFFECT WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK* 12 (1994) (noting the differences between private and public communication between the sexes).

53. For a brief time, Trina, Michele Hermann, Marguerite Millhauser and I worked on a feminist challenge to the “value-based” mediation of our sometimes colleague and fellow mediator-trainer, Gary Friedman, of the Center for Mediation in Law in Mill Valley, California, exploring the political dimensions of our interpersonal work.

judged. She just made me want to do the work we both cared about.

I continue to work on how to use mediation and conflict resolution theories, techniques and practices to try to make the world a fairer, better place. I am less convinced that "equality" will ever be achieved or that we will ever agree about what it means. I have other friends and teachers in this struggle, but we have all lost one of the most important contributors to this project. One way to keep her contributions alive is to ask the question, as I often do, "What would Trina think about this?" That helps me "recognize the other" in mediation practice, in teaching, and in life. Thank you, Trina. I miss you, but know that we continue to struggle, talk, laugh, and cry in your name.