

PIONEERING WOMEN LAWYERS WHO CHANGED THE LEGAL
PROFESSION AND INFLUENCED THE PRACTICE OF LAW,
INCLUDING MEDIATION PRACTICE: FROM BARKELOO AND
COUZINS TO THE PRESENT

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Throughout modern history, pioneering women lawyers have been breaking barriers and opening doors in the legal profession and in the practice of law. Most notably here at Washington University in St. Louis, Lemma Barkeloo from Brooklyn and Phoebe Couzins from St. Louis started law school in the fall 1869 entering class, only two years after Washington University's law school first opened its doors.¹ After only one semester of law school, Barkeloo took and passed the Missouri bar exam in March 1870, making her Missouri's first and the country's second licensed female attorney.² When Couzins finished law school in 1871, she was Washington University's first law graduate and among the first women law graduates in the country.³

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1. Karen Tokarz, *Lemma Barkeloo and Phoebe Couzins: Among the Nation's First Women Lawyers and Law School Graduates*, 6 WASH. U. J.L. & POL'Y 181 (2001); Karen Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89 (1990) [hereinafter Tokarz, *Tribute*]; Lelia J. Robinson, *Women Lawyers in the United States*, 2 GREEN BAG 10 (1890); see also Ephrat Livni, *Belva Lockwood is the Most Badass American Hero You Don't Know*, QUARTZ (Oct. 5, 2019), <https://qz.com/1719000/belva-lockwood-is-the-most-badass-american-hero-you-dont-know/> [https://perma.cc/ZR8C-RMZJ]; *Death of Miss Lemma Barkeloo*, 2 CHI. LEGAL NEWS 409 (1870).

2. Barkeloo was admitted to the Missouri bar in March 1870. *Death of Miss Lemma Barkeloo*, *supra* note 1, at 409. Nationally, she was second to Arabella Mansfield who was admitted to the Iowa bar in June 1869. Tokarz, *Tribute*, *supra* note 1, at 92; KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE Present* 11-12 (1986).

3. Tokarz, *Tribute*, *supra* note 1, at 95. Ada Kepley graduated from the old University of Chicago Law Department in June 1870, preceding Couzins by a year. *Id.* at 95 n.48. Sara Kilgore Wertman graduated from the Michigan University Law School in March 1871, a few months before Couzins's graduation. *Id.* Belva Lockwood graduated from National University Law School (now George Washington University) in 1871. Livni, *supra* note 1.

I learned about Lemma Barkeloo and Phoebe Couzins in the late 1980s, while I was finalizing my bid for tenure on the law school faculty of Washington University and researching women judges and judicial selection in Missouri.⁴ I was mesmerized and heartened by the courage and conviction of Barkeloo and Couzins. Before applying to law school, neither had ever known another woman law student or lawyer, yet each was driven by remarkable vision and yearning for equality.⁵

My admiration and respect for these two women led me to the Washington University archives and various collections in the Missouri Historical Society in St. Louis. I discovered that Barkeloo and Couzins had been admitted in 1868 after the dean and the law faculty forwarded a message to the board of trustees, which stated in part:

If the question were left to us to decide, [w]e see no reason why any young woman who in respect to character and appointments fulfilled the conditions applicable to male students, and who chose to attend the law lectures in good faith for the purpose of becoming acquainted with the law of her country, should be denied the privilege.⁶

I still recall the thrill the day I found the faculty minutes from December 1868 that contained the message quoted above. That message, sent by the then all-male law faculty to the then all-male board of trustees, led to opening the doors of the law school, the university, and the legal profession to women. I was deeply saddened when I learned that Lemma Barkeloo passed away from typhoid in September 1870, just one year after starting law school, and less than six months after reaching her goal of becoming a lawyer.⁷

Gradually, over time, the number of women law students, law faculty, and lawyers in the United States has grown. Today, at Washington University, over fifty percent of the students in the entering class⁸ and fifty

4. See Karen Tokarz, *Pioneers in the Legal Profession: The History of Women State Court Judges*, 35 ST. LOUIS B.J. 37 (1989); Karen Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 905 (1987).

5. Tokarz, *Tribute*, *supra* note 1, at 89.

6. *Id.* at 94.

7. *Death of Miss Lemma Barkeloo*, *supra* note 1.

8. *Class Profile: Class of 2022 Info*, WASH. U. SCH. L., <https://law.wustl.edu/class-profile/> [<https://perma.cc/MV63-TCK7>].

percent of the full-time faculty, including the current dean, are women.⁹ Almost forty percent of the nation's lawyers are now women.¹⁰ Not surprisingly, the growth of women in the profession has greatly influenced the practice of law, including but not limited to the expanding growth of mediation as a principal form of legal dispute resolution.¹¹

But, that growth of women in the legal profession did not happen overnight. In fact, much of that growth started one hundred years after Barkeloo and Couzins, in the context of the civil rights movement and the second wave of feminism that embraced equal rights and opportunities for women.¹²

In 1982, Professor Carol Gilligan published her groundbreaking book, *In a Different Voice: Psychological Theory and Women's Development*, which investigated how men and women each make moral choices and solve moral dilemmas.¹³ Gilligan contrasted the male-derived model of moral reasoning and psychological development based on logic and universal abstract principles with the female-derived model based more on context and relationships, what some called "cultural feminism."¹⁴

Gilligan's research was pursued actively by feminist mediators and legal scholars.¹⁵ Janet Rifkin, an experienced mediator, ombudsperson, and teacher, urged early on that mediation had the potential to be feminist, but needed to be scrutinized as to whether it truly challenged the "patriarchal

9. *Faculty and Staff Directory*. WASH. U. SCH. L., <https://law.wustl.edu/faculty-and-research/faculty-staff-directory/> [<https://perma.cc/2CSC-GEUS>].

10. Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers Are Women*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html> (stating that thirty-eight percent of lawyers are women).

11. Jay Folberg, Dwight Golann, Thomas Stipanowich & Lisa Kloppenberg, *Resolving Disputes Theory, Practice, and Law* 270-71 (3rd ed. 2016).

12. SUSAN EHRLICH MARTIN & NANCY C. JURIK, DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND ADMINISTRATIVE JUSTICE POSITIONS 114-15 (2006). Betty Friedan is widely credited with sparking the second wave of feminism in the United States with her book, BETTY FRIEDAN, *THE FEMINIST MYSTIQUE* (1963).

13. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 6-23 (1982).

14. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 68 (3d ed. 2013). The first version of this leading text was published in 1999.

15. See, e.g., Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catherine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.*

11 (1985) (Isabel Marcus & Paul J. Spiegelman, moderators).

paradigm of law as hierarchy, combat, and adversarialness.”¹⁶ Professor Carrie Menkel-Meadow, a nationally recognized expert on alternative dispute resolution, highlighted both the impact of women on the practice of law and the feminist potential of mediation because it provides a more collaborative, less formal, contextual, non-coercive forum than trial where parties could have their voices heard and keep decisions in their own hands.¹⁷ According to Professor Martha Chamallas, an early feminist legal author, Menkel-Meadow used “cultural feminist theory to suggest how greater emphasis on cooperation, preservation of relationships, and attention to process might produce legal reforms that could benefit not only women lawyers and their clients but also the legal profession as a whole.”¹⁸

Menkel-Meadow was a role model for me as a feminist law-teacher and emerging dispute-resolution practitioner and scholar. Like Menkel-Meadow, I wanted to be optimistic about the feminist potential of mediation as a viable alternative to the adversarial, patriarchal, objectivist trial system. But, my initial experience with mediation didn’t wholly comport with that view.

When the state and federal courts in St. Louis and elsewhere in the country were exploring and expanding the use of mediation in the late 1980s and early 1990s, I was repeatedly approached to mediate cases, especially employment and civil rights cases, given my expertise as an employment discrimination professor. For quite a while, I resisted the call. I was hesitant for multiple reasons, including my concerns about the impact of mediation on the self-determination of parties, on parties’ ability to air their stories, and on public narrative about case outcomes. I wondered whether a mediation could be as just or fair as a trial would be. I also worried significantly about underdogs in mediation, particularly women plaintiffs.

I eventually agreed to undertake a voluntary, non-court ordered, employment mediation. Both parties were represented by counsel, which I assumed would balance the scales. The plaintiff in that case was a woman who claimed she was not hired for a job due to her disability. Unfortunately, her attorney was woefully unprepared and totally unaware of the employer’s

16. Janet Rifkin, *Mediation from A Feminist Perspective: Promise and Problems*, 2 L. & INEQ. 21, 22 (1984).

17. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 55 (1985).

18. CHAMALLAS, *supra* note 14, at 70.

per se statutory violation in asking applicants on the company application form: “Do you have any handicaps?” Intimidated by threats in the opening session from the company’s human resources officer and attorney, both of whom were males, the plaintiff’s male attorney aggressively and repeatedly urged the plaintiff to accept the defendant’s minimal settlement offer because he mistakenly believed there was a great likelihood that defendant would get summary judgment.

Throughout the mediation, I felt greatly conflicted. It wasn’t just that I knew that plaintiff’s counsel was dead wrong on the law and on the likelihood of summary judgment for the defendant. I was conflicted about my role and the mediation process itself. I struggled with the disparate levels of attorney competency and competitiveness, the power imbalance between plaintiff and plaintiff’s counsel, and the plaintiff’s obvious deference to all of the men in the room. I must have asked myself a dozen times over a few hours: *What exactly is my role here? What does it mean to be impartial and neutral? Whose role is it to protect voluntariness and self-determination, and how? Is this process procedurally and substantively fair for the parties? Is this forum really a better process for resolution of social conflict than trial?*

That day confirmed my instinctive fears about the dangers of mediation. I came away with serious doubts about the role of the mediator and the mediation process, and about myself. As I sought to come to grips with my questions about mediation, I refrained from doing mediations for almost two years. I talked with mediators and participants about my concerns. I participated in panel discussions at the bar association on the privatization of justice and the potential unfairness of mediation, especially court-ordered mediation, including the informality and lack of procedural rules, the impact of directive and evaluative mediators, and the loss of a public narrative for the parties and the public.

Somewhere along the line, a colleague suggested that I read Professor Trina Grillo’s article, *The Mediation Alternative: Process Dangers for Women*, which raised concerns about whether mediation practice and policy was indeed feminist.¹⁹ Grillo, an experienced mediator, highlighted serious

19. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

risks of mediation, especially for women in divorce and custody cases—what she called “the betrayal of mediation’s promises.”²⁰

Much of Grillo’s thinking and, indeed, passion derived from divorce and child custody mediation, and from certain features specific to California’s family court system as it was in the late 1980s and early 1990s.²¹ I remember wondering how this article could be helpful to me, given that I never anticipated handling family mediations, and certainly not custody mediations. (My anticipation bore out to be true: over the years, I have handled over six hundred mediations, only one of which was a family mediation.)

But my colleague persisted that I read the piece, for which I am most grateful. The article provided a different feminist critique that “focused primarily on what happens in situations where people of unequal bargaining power directly confront each other, with either no or little legal protection.”²² The article was invaluable in raising questions crucial to mindful mediation and reflective practice that eventually gave me the insights and confidence to return to mediation. It has sustained me since.

Paradoxically, given Grillo’s thoughtful and harsh criticism of the risks of mediation, the article restored my hope and faith in the process. Her article outlined a rigorous path—what some would call a more mindful and feminist path—toward doing mediation more responsibly and intentionally.²³ It was a path that resonated with me and one that I could follow. Her article also inspired me to serve on local federal and state court alternative dispute resolution committees and, in doing so, allowed me to help in the development of policies for court-related mediation in my region. And, her article informed how I would later teach negotiation and mediation to law students, lawyers, and judges.

Over time, I learned that there are commonalities between family cases and cases involving discrimination, harassment, and abuse against women and other marginalized groups by employers, teachers, coaches, police, and others. There also are commonalities with cases involving emotional vulnerability, social group responsibility, financial inequality, power

20. *Id.* at 1555.

21. *Id.* at 1551-55.

22. Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching, and Life*, 81 MINN. L. REV. 1413, 1418 (1997).

23. Grillo, *supra* note 19.

imbalance, and emotional discomfort with the mediation process, especially court-ordered mediation in these cases. In short, the fundamental value of Grillo's article for family mediation readily transfers to mediation in every area of law.

Over the years, with the help of others, I have developed reflections, drawn from the issues Grillo and other feminist mediators and scholars have raised, in hopes of warding off the tendency to be a well-meaning but unmindful mediator. I try to reflect on these concerns about myself and the process before and after my mediations (and in my teaching), particularly as to key issues of voluntariness, self-determination, bias, and process.

Voluntariness is critical to the mediation process. Yet, Grillo reminds us that we cannot assume parties understand voluntariness in mediation, especially in mandatory mediations. She warns:

When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes like the patriarchal paradigm of law it is supposed to supplant.²⁴

She insists that, even in voluntary mediation, we as mindful mediators must ask ourselves whether we are making it clear to the parties that participation is voluntary and that we consider whether each party feels truly able to choose to go to trial.²⁵ She points out that the desire of some parties (and the mediator) to resolve the dispute sometimes overshadows the needs of individual parties.²⁶

Self-determination also is vital to the mediation process. As mindful mediators, we must ask ourselves whether we are providing the space necessary to enhance parties' self-determination at all stages of mediation, in first-phase pre-mediation sessions, in joint sessions, and in private caucuses.²⁷ Some parties may not feel free to speak in their authentic voice

24. *Id.* at 1610.

25. *Id.* at 1581.

26. *Id.* at 1572-74.

27. Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187 (2004).

for fear of making their situation worse, may feel particularly powerless, and may feel controlled in mediation. Grillo would take it one step further and ask if we, as mediators, are consciously incorporating an ethic of care, especially to protect the short- and long-term interests of the less powerful, subordinated parties, who may be more prone to cooperate and settle.²⁸

Attending to bias also is crucial in mediations. Professor Carol Izumi, another feminist dispute-resolution expert, urges that we acknowledge that implicit bias exists in all of us and confront the challenge that mediator neutrality is a myth.²⁹ Izumi and others demand that we scrutinize our biases and pursue deliberate and self-conscious practices to minimize “the dangers of unacknowledged perspective and unrecognized partiality,”³⁰ and “the risk of prejudice” in mediation.³¹

First and last, as mindful mediators, we must pay attention to process. Are we attending to and facilitating what the parties might achieve from a trial, win or lose, i.e., are we creating a framework that allows the parties to have the experience of telling their stories and claiming their rights, even if they do not prevail legally? Are we paying attention to unwritten norms in mediations, what some refer to as the “microlegal” system and the “microsanctions,” especially by the mediator, that may be present in the mediation process?³² For example, who talks when—even small talk—how much, and about what? In particular, we must ask if we are providing the space for the expression of the parties’ anger.

Grillo’s insistence that mediators “must learn to respect each client’s struggles, including timing, anger, and resistance to having certain issues mediated, and also learn to refrain to the degree [they are] capable, from imposing [their] own substantive agenda on the mediation”³³ remains relevant and challenging today, not just to mediators, but to all lawyers. The stakes are too high and people’s lives too precious to be ignorant of these concerns.

28. Grillo, *supra* note 19, at 1601-03.

29. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL’Y 71, 153 (2010).

30. Grillo, *supra* note 19, at 1586-93.

31. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-91.

32. Grillo, *supra* note 19, at 1556-57.

33. *Id.* at 1610.

The entry of women into the profession over the 150 years since Barkeloo and Couzins has impacted more than just diversity in the profession. Women have also greatly impacted the changing practice of law. In no small part due to the wake-up calls of thoughtful feminist scholars such as Trina Grillo, Martha Chamallas, Carol Izumi, Carrie Menkel-Meadow, Janet Rifkin, Andrea Kupfer Schneider, and others, the practice of law today, including but not limited to mediation practice, is more attuned to issues regarding societal norms, bias, and dominance, in relation to gender and other group relationships.³⁴

In my own lifetime as a law student, lawyer, law professor, and mediator, I have often relied upon my sister women lawyers in the profession who, like Barkeloo and Couzins, have broken barriers and opened doors for me and countless other women. Contemporary women lawyers such as the women cited above have heartened me and educated me with their vision, courage, and conviction. They have taught me lessons that have been invaluable to my teaching, scholarship, and practice, including my mediation practice. In their own ways, all of these women broke barriers and opened doors for women, both in the legal profession and in the practice of law.

All have my enduring gratitude, respect, and appreciation.

34. *See generally* CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & MICHAEL MOFFITT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (3d ed. 2018).

